What Is a Source? In Search of Authorship: From Princess Diana's Trademark to Generative AI

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I. INTRODUCTION

There is a common trait that unites the serial lawsuits regarding Diana, Princess of Wales Princess Diana) trademarks, the controversial *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* (*AWF v. Goldsmith*), and the consistent denial of our intellectual property (IP) system to grant generative AI authorship.[1] Since the inception of Western culture, there has been an ancient combat to defy the nature of a source as a vehicle of social and cultural control. This Article argues that this conflict has many iterations: truth versus mimesis or simulacrum, as mere imitations attempting to be the source; source versus representations; or, origin versus copy, to mention but a few mutations of the same dilemma.

The classic Platonic model of metaphysics created a hierarchy, led by the "[world of] ideas" created by God as the only world that exists, followed by the concrete things we can perceive in our life as imitations of a second degree of this ideal type, thus leaving the artistic representation to be a "[third degree] removed from the truth."[2] Therefore, Plato's ultimate exclusive truth prevailed over any attempt for mimesis, as an absolute truth suffers no imitations.[3] "Mimesis" is the Greek word for imitation or representation.[4] The artist is the quintessence of mimesis, pretending to be what it is not. Consequently, the concept of human

1. For the lawsuits regarding Princess Diana's trademark and publicity rights *see* Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013 (C.D. Cal. 1998) [hereinafter *Cairns I*]; Diana Princess of Wales Memorial Fund v. Franklin Mint Co., Nos. 98-56722, 99-55157, 1999 WL 1278044 (9th Cir. Feb. 24, 2000); Cairns v. Franklin Mint Co., 120 F. Supp. 2d 880 (C. D. Cal. 2000) [hereinafter *Cairns II*]; Cairns v. Franklin Mint Co., 107 F. Supp. 2d 1212, 1223 (C. D. Cal. 2000) [hereinafter *Cairns III*]; Cairns v. Franklin Mint Co., 115 F. Supp. 2d 1185, 1190 (C. D. Cal. 2000) [hereinafter *Cairns IV* case]; Cairns v. Franklin Mint Co., 292 F. 3d 1139 (9th Cir. 2002) [hereinafter *Cairns* appeal]. Andy Warhol Foundation v. Goldsmith, 598 U.S. (2023). For the constant denial of our current system to grant generative AI authorship *see generally*, Mira Moldawer, *The Shadow of the Law Versus a Law with No Shadow: Pride and Prejudice in Exchange for Generative AI Authorship*, 14:2:5 SEATTLE J. OF TECH., ENV'T & INNOVATION L. (2024), https://digitalcommons.law.seattleu.edu/sjteil/vol14/iss2/5 [hereinafter Moldawer, *The Shadow of the Law*].

2. *See generally* PLATO, THE REPUBLIC BK. X, https://www.gutenberg.org/files/1497/1497-h/1497-h.htm [https://perma.cc/5AYD-TPJU]. For Plato's world of ideas, *see*, *id.* Introduction and Analysis to Book X ("Viewed objectively, the idea of good is a power or cause which makes the world without us correspond with the world within. Yet this world without us is still a world of ideas"). *See id.*, for Plato's vision of artists ("First, he says that the poet or painter is an imitator, and in the third degree removed from the truth.").

3. PLATO, SOPHIST, (Benjamin Jowett, trans.), THE PROJECT, (Nov. 7, 2008 [EBook #1735], updated: Jan. 15, 2013), http://www.gutenberg.org/1/7/3/1735/ (file 1735-h.htm or 1735-h.zip) [hereinafter PLATO (SOPHIST)].

4. *Mimesis*, ENCYCLOPEDIA BRITANNICA (Nov. 22, 2011), https://www.britannica.com/art/mimesis [hereinafter *Mimesis*].

authorship was out of the scope of Plato's thinking, as it is the quintessence of a false source.

The new constitution of authorship in the Enlightenment era was made possible because of the new concept of unprecedented originality of the agonizing author, being the legitimate source.[5] Georg Wilhelm Friedrich Hegel reconciled the dilemma of truth vis-à-vis its representations by creating a new dialectic. While adhering to the values of the Enlightenment era, headed by transcendental absolute truth and reason, as synonyms, Hegel solved Plato's fear of art as a great provocateur of feelings and desires by combining originality as a primary source with art as a vehicle of divine truth.[6]

The collapse of the "metanarratives" or "grand narratives" of the Enlightenment era of redeeming humanity through reason and absolute truth toward progress due to the catastrophes of fascism and totalitarianism created the "postmodern condition" that led to a new perception of the source versus its representations debate.[7] The old hierarchy between the superior source and its inferior representations was broken, as the one eternal source of an eternal truth no longer existed, thus creating a new semiotic code.[8]

The outcome of the postmodern challenge was the rejection of linking one particular cultural signifier to another particular signifier:

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5. For the author as the tormented genius as a vehicle of making human authorship the legitimate worth of property rights, *see generally* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994) [hereinafter THE CONSTRUCTION OF AUTHORSHIP]; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1019 (1990) [hereinafter Litman, *The Public Domain*]; Olufunmilayo B. Arewa, *The Freedom to Copy*: *Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007).

6. 1 G.W.F. HEGEL, AESTHETICS: LECTURES ON FINE ART 47 (T.M. Knox trans., 1975) [hereinafter HEGEL, AESTHETICS].

7. JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE XI, XVIII, XXIV-V. 60 (Geoff Bennington & Brian Massumi trans., 1984) [hereinafter LYOTARD, THE POSTMODERN CONDITION]:

> We no longer have recourse to the grand narratives—we can resort neither to the dialectic of Spirit nor even to the emancipation of humanity as a validation for postmodern scientific discourse. But as we have just seen, the little narrative [petit récit] remains the quintessential form of imaginative invention, most particularly in science.

8. *See* Mira Moldawer, C*assandra's Curse or Cassandra's Triumph: Three Tales of Intellectual Property Revised,* 43 LOY. L.A. ENT. L. REV. 111, 145-47 (2023) for a new arsenal of alternative postmodern vocabulary regarding authorship [hereinafter Moldawer, C*assandra's Curse*].

meaning.[9] Hence, the previous signifier that lost its source evolved into the concept of the "floating signifier," signifying whatever users mean it to signify.[10] This emancipation of the sign is what transforms our society into a society characterized by Jean Baudrillard as a simulacrum, in which the "real" is dead, as the signifier indicates nothing but itself.[11] Not just the real is dead, but the source as well. It follows that the simulacrum morphed into the current source.

The social and cultural dilemma of who controls the source reflects not only the ancient conflict between law and literature in a broad sense, but also the self-image of the law: Namely, is law part of science, descending from the superior philosophy, or the humanities?[12] In terms of the ancient rivalry between philosophy as the sole custodian of the source and art as its fraudulent and illusionary reflection, the discipline controlling the source will decide authorship. However, the "either/or" dichotomy between law and literature is not an everlasting axiom in Western culture, as proved by both the pre-Socratic philosopher Parmenides and Jorge Luis Borges ,who demonstrates that no judgement of Solomon is necessary to render images to great philosophical ideas.[13] Borges offers us a new approach to IP, considering authorship in terms of quotations instead of originality, by questioning authorship anew, meditating on the absurdity of an eternal source versus its inferior

9. Jeffrey Mehlman, *The "Floating Signifier": From Lévi-Strauss to Lacan*, 48 YALE FRENCH STUD. 10 (1972).

10. Jeanne Willette, *Postmodernism and The Trail of the Floating Signifier*, ARTHISTORYUNSTUFFED (Feb. 21, 2014), https://arthistoryunstuffed.com/postmodernism-floating-signifier. Willette defines the free-floating signifiers as "emancipated from the tyranny of the referent, both the sign and the signified," in rebellion "from the ideal, rational and to coherent ego, existing at the expense of the Other which it suppresses."

11. JEAN BAUDRILLARD, SYMBOLIC EXCHANGE AND DEATH 6 (Ian Hamilton Grant trans., 1993):

> . . . The emancipation of the sign: remove this archaic obligation to designate something and it finally becomes free, indifferent and totally indeterminate, in the structural or combinatory play which succeeds the previous rule of determinate equivalence . . . . The floatation of money and signs, the floatation of needs and ends of production, the floatation of labor itself[,] . . . the real has died of the shock of value acquiring this fantastic autonomy.

12. James Boyd White, *The Cultural Background of the Legal Imagination, in* TEACHING LAW AND LITERATURE 29, 30-31 (A. Sarat, C. Frank, and M. Anderson, eds., 2011).

13. *See generally*, A. H. COXON, THE FRAGMENTS OF PARMENIDES: A CRITICAL TEXT WITH INTRODUCTION AND TRANSLATION. THE ANCIENT TESTIMONIA AND A COMMENTARY (Richard D. McKirahan (ed., 2009); José Luis Fernández, *Philosophy and Literature in Jorge Luis Borges, in* FICTIONAL WORLDS AND PHILOSOPHICAL REFLECTION 79 (Garry L. Hagberg, ed., (2022) (for Borges as a philosopher, although using literature to convey his ideas).

duplicates once these duplicates perform better than their source in their cultural nexus.[14]

In practice, legal ideology always lags behind technological innovations and economic change, regarding the chameleonic evolution of the source and its simulacrum, even if bearing different names in trademark and copyright laws. Concerning the axis of trademark law, its classic triad model, composed of the signifier (the tangible form of the trademark), the referent (the specific goods in question), and the signified (the context of the trademark), was meant to identify goods and distinguish their source from others to prevent consumers' confusion.[15] Once trademarks morphed into commodities in their own right, working their way into our language and evolving into "expressive genericity," the triad model was rendered obsolete, as it was no longer serving its purpose of identifying the source of goods and distinguishing it from others.[16]

The same logic was followed in the *Rogers* case.[17] The *Rogers* test was initiated by Ginger Rogers' lawsuit, which attempted to forbid the distribution of the 1986 Federico Fellini film *Ginger and Fred*. The film is about two Italian cabaret dancers who build their careers on the impersonation of Fred Astaire and Ginger Rogers and reunite after thirty years of retirement for a vulgar television show. Rogers claimed that the film violated her Lanham Act trademark rights and right of publicity and was a "false light" defamation. The *Rogers*' test determined the loss of the source due to its transformation into a part of our language.[18] Thus, if the allegedly infringing work is classified as an "expressive work," what follows is to examine: (1) whether the use of the trademark in question is inherently related to the work, and (2) whether the respondent's work explicitly misleads as to its endorsement by the appellant.[19]

While the first prong of the triad model was rendered fictional, trademark law moved beyond its original aim to avoid consumer

14. BORGES, *The Aleph*, *in* COLLECTED FICTIONS 274 (Andrew Hurley trans., 1999) [hereinafter BORGES, COLLECTED FICTIONS]; JORGE LUIS BORGES, *Pierre Menard, Author of The Quixote*, *in* COLLECTED FICTIONS, *id.,* at 88 [hereinafter BORGES, *Pierre Menard*]. *Compare with* Johanna Gibson, *Let Me Tell You a Story . . . Intellectual Property, Character, Narration,* 1:2 QUEEN MARY J. INTELL. PROP., 112, 121 (2011), "The entire field of intellectual property is a story and system of quotation."

15. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 625 (2004) [hereinafter Beebe, *The Semiotic Analysis*].

16. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397-98, 400 (1990).

17. Rogers v. Grimaldi, 875 F. 2d 994 (2d Cir. 1989) [hereinafter *Rogers* (1989)].

18. *Id.* at 997.

19. *Id.* at 999.

confusion regarding the source, and focused on the prong of dilution, to avoid its blurring or tarnishment, as manifested in the Trademark Dilution Revision Act of 2006 (TDRA).[20] Thus, the distinction is more important than the source.[21] However, recently, in *Jack Daniel's Properties, Inc. v. VIP Products LLC ("Jack Daniel's"),* the Supreme Court of the United States reprised the supremacy of the triad model, i.e. the source.[22]

In *Jack Daniel's* the appellant sued for infringement of the Lanham Act, the cause of which was the Silly Squeakers line of dog chew toys, manufactured by the respondent. Notwithstanding that the packaging of the chew toy noted that it was not affiliated with the appellant, the latter claimed that the respondent was misleading customers and hurting the appellant's goodwill by associating his product with excrement, as the toy in question was labeled "The Old No. 2 on Your Tennessee Carpet," recalling the appellant's "Old No. 7 brand" and "Tennessee Sour Mash Whiskey." The respondent's chew toy was also labeled "43% Poo by Vol" and "100% Smelly," bringing to mind the appellant's bottle boasting 40% alcohol by volume. The Supreme Court held that the triad model is the first threshold of trademark law allegedly infringement, focusing on avoiding consumers' confusion.[23]

Princess Diana, "one of the most famous and photographed women in the world," is the ultimate candidate for the protection of trademark law, as her celebrityhood has only continued to grow since her death.[24] Yet, as proved by ample adjudications focusing on Princess Diana's trademark, once a celebrity morphs into a floating signifier, the dispute

20. Trademark Dilution Revision Act of 2006, 15 U.S.C. § 1051 (Pub. L. No. 109-312, 120 Stat. 1730) [hereinafter TDRA].

21. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 821-24 (1927).

22. Jack Daniel's Properties, Inc. v. VIP Products LLC, 599 U.S. 140 (2023) [hereinafter *Jack Daniel's*]; *See generally* Zachary Shufro, *Based on a True Story: The Ever-Expanding Progeny of* Rogers v. Grimaldi, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391, 410-15 (2022) (for the pre-*Jack Daniel's* adjudication).

23. *Jack Daniel's*, *supra* note 22; Shufro, *supra* note 22*,* at 410-15 (for the pre-*Jack Daniel's* adjudication).

24. Giselle Bastin, *Filming the Ineffable: Biopics of the British Royal Family*, 24:1 A/B: AUTO/BIOGRAPHY STUDIES 34, 40 (2009); for the posthumous appeal of Princess Diana, *see* Iain Hollingshead, *Will Kate Kick off a War of the Welles*?, THE TELEGRAPH (Jan. 3, 2012), https://www.telegraph.co.uk/news/uknews/kate-middleton/8988157/Will-Kate-Middleton-kick-off-a-war-of-the-wellies.html; Thomas Mackintosh, *Diana's Gowns and Royal Items Auctioned for Millions*, BBC (June 28, 2024), https://www.bbc.com/news/articles/c87rx4n3j46o; William Lee Adams, *Princess Diana*, *ALL-TIME 100 FASHION ICONS*, TIME (Apr. 2, 2012), https://content.time.com/time/specials/packages/article/0,28804,2110513_2110627_2110748,00.html.

between the two prongs regarding who controls the source or its quality is superfluous.[25]

The innovative holding of the cases in question was the application of the nominative fair use, according to which "the defendant has used the plaintiff's mark 'to describe the plaintiff's product' for the purpose of, for example, comparison to the defendant's product."[26] The nominative fair use analysis was developed by the same court to replace the classic fair use factors to determine the likelihood of customer confusion.[27] However, trademark adjudication was greatly influenced by the phenomenon of brands and celebrities' "expressive genericity" as coined by Rochelle Cooper Dreyfuss, long before these cases; thus, Princess Diana, as one of its most prominent examples, was already outside the bounds of trademark law due to her morphing into generic use.[28]

Concerning the axis of copyright law, the concept of the source has greatly enlarged since its inception in copyright law. Accordingly, copyright law enlarged the essence of copying beyond its gist as a mere verbatim copy in its most important vehicles that were meant to balance between encouraging creativity and the public domain: the idea/expression dichotomy and fair use.[29] Originality, while embodying the source, is the vehicle through which the source is enlarged directly to include derivative use, or indirectly by requesting the expression in the

25. For the concept of the "floating signifier," *see* Willette, *supra* note 10. *Cairns I* case, *supra* note 1; Diana Princess of Wales Memorial Fund v. Franklin Mint Co., Nos. 98-56722, 99-55157, 1999 WL 1278044 (9th Cir. Feb. 24, 2000); *Cairns II* , *supra* note 1; *Cairns III* , *supra* note 1; *Cairns IV* , *supra* note 1; *Cairns* appeal, *supra* note 1.

26. *Cairns* appeal, *supra* note 1, at 1150 (stating the requests of the nominative fair use, quoting New Kids on the Block v. New America Pub, 971 F.2d 302, 308 (9th Cir. 1992), in which it was developed):

> First, the [plaintiff's] product or service in question must be one not readily identifiable without the use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the [plaintiff's] product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

27. *Id.* at 1151.

28. For Rochelle Cooper Dreyfuss, who coined brands and celebrities as "expressive genericity," *See* Cooper Dreyfuss, *supra* note 16. *Compare with* Judge Kozinski in Mattel, Inc. v. MCA Records, Inc., 296 F. 3d 894, 898 (9th Cir. 2002) [hereinafter *Mattel* (2002)]: "Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law."

29. John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1233, 1245, 1249-50 (2012).

idea/expression dichotomy to be original. Hence, only originality is copyrightable as an ultimate and unprecedented source.[30]

However, the core of the matter is not only the artistic taste of the judiciary, contingent on its cultural nexus, but the commercial aspect of copyright law that decides originality, as recently proved by *AWF v. Goldsmith.*[31] Hence, the sovereignty of the source went through three phases:

1. The restraining facet was manifested by *Campbell v. Acuff-Rose Music, Inc*., in which the *Campbell's* Court held that "Pretty Woman," a commercial parody of Roy Orbison's rock ballad "Oh, Pretty Woman," was a transformative use, according to its interpretation of the purpose and character of the first fair use factor, despite a lawsuit brought by the respondent for using the heart of the allegedly infringing work.[32]

2. The retreating facet was manifested in *Cariou v. Prince* and *Blanch v. Koons*, in which the courts were willing to grant transformative use to artists who created their work not as a direct quote, depending on the allegedly infringed work, as requested by *Campbell,* but a general one, by using different artistic means.[33] Accordingly, independent sources were created.

3. The expanding facet was manifested in *AWF v. Goldsmith*, in which the U.S. Supreme Court's interpretation of the purpose and character of the first fair use factor expanded the dominance of the source, holding the unauthorized works of Andy Warhol created from Goldsmith's photograph of Prince to be infringing derivative works due to their commercial use.[34]

The Platonic nightmare of the disappearance of the source recurs in the current contested issue of generative AI authorship, the problem of which is the difficulty in ascertaining who or what should be considered its source in terms of authorship.[35] The current controversy of generative AI sheds light on the new focus of copyright law, shifting into a "prompt-

30. *See generally* Litman, *The Public Domain*, *supra* note 5.

31. *Goldsmith, supra* note 1.

32. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) [hereinafter *Campbell*]; §107(1): "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."

33. Cariou v. Prince, 714 F. 3d 694, 709 (2d Cir. 2013); Blanch v. Koons, 467 F. 3d 244 (2d Cir. 2006).

34. Goldsmith*, supra* note 1.

35. For further discussion of the failure of our legal system to ascertain the source of generative AI, *see generally* Mira Moldawer, *The Shadow of the Law, supra* note 1.

based creativity system," thus unable to decide who will be granted the coveted title of the source: the designer or trainer who made this process possible, or the user who finally produced the work.[36]

The problem of the source in terms of traditional copyright infringement is even greater when we consider AI-generated output. While trainers use massive quantities of work to train generative AI, judges refuse to regard those practices as infringing, as the final output is not "substantially similar" to the input, thus failing to cross the required threshold of copying in copyright law.[37] The source paradox of generative AI authorship regards the sine qua non of copyrightability: originality and fixation. Because of the vagueness of the source, authorship is denied to AI; we are, clinging solely to human authorship.[38]

In contrast to the famous dichotomy created by John Perry Barlow in his "Declaration of the Independence of Cyberspace," the fixation in a tangible form such as the bottle (i.e., the expression), that before the inception of the digital society was essential for selling the idea (i.e., the wine's obsolete bottles), is only enhanced in the new legislation regarding

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36. Mark A. Lemley, *How Generative AI Turns Copyright Law on Its Head*, 25 STANFORD LAW SCHOOL 15, 27 (July 26, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4517702 [https://perma.cc/NT79-YWQB] (arguing that the new form of authorship means "coming up with the right prompt.").

37. For the importance of the "substantially similar" test, *see also Lemley, How Generative AI Turns Copyright Law on its Head, supra* note 35, at 202 (footnotes omitted) (arguing that "[i]f the fact of copying is disputed, courts traditionally permit a factfinder to infer copying from proof of access coupled with substantial similarity between the works"), and *id.* at 203:

> Because access, at least to published works, is ubiquitous in the internet era, where copying is disputed the question of copying has come down in practice to evidence of similarity between the works. Indeed, when works are sufficiently similar, we often presume copying even in the absence of a good story for how it happened, deciding that it must have happened subconsciously.

See also, Andersen v. Stability AI Ltd., No. 23-CV-00201-WHO, 2023 WL 7132064, at *21 (N.D. Cal. Oct. 30, 2023) (J. William Orrick):

> Even if that clarity is provided and even if plaintiffs narrow their allegations to limit them to Output Images that draw upon Training Images based upon copyrighted images, I am not convinced that copyright claims based on a derivative theory can survive absent "substantial similarity" type allegations.

38. Thaler v. Perlmutter, No. 1:22-cv-01564, slip op. at 8, (D.D.C. Aug. 18, 2023) (quoting J. Beryl A. Howell: "Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled through new tools or into new media."); U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 306 (3rd ed. 2021), "[t]he U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being."

generative AI.[39] Thus, a mega-simulacrum, which is not only severed from a source, as argued by Baudrillard, but has no history of one, was created.

Part I of this Article discusses the evolution of the source into a simulacrum through the relevant stages of Western literature. First, Plato created the irreconcilable dichotomy between the superior truth as the ultimate source and the inferior art threatening the former by mimesis. Hence, human authorship is denied. Second, the Hegelian dialectics enabled authorship through the bridge created between truth and art by the constitution of unprecedented originality as an ultimate source, imitating nothing, while enhancing truth and reason. Third, the postmodern condition, due to the representation catastrophe and the abolishment of the cultural and semiotic code of the Enlightenment, created the simulacrum, devoid of its previous source.

Part II analyses the conflict of law versus literature, dwelling on the interdisciplinary category of law and literature that attempts to draw mutual lessons from each other. Underneath this conflict is the question of what approach will design the way law perceives itself: Is law the legitimate descendant of philosophy and truth, transformed into science, or a part of the humanities, akin to art? This part attempts to demonstrate that the either/or conflict between law and literature, descending from the philosophy versus art debate is redundant as an interdisciplinary approach drawing lessons from literature can benefit legal thinking.

Borges, who greatly influenced postmodern thinkers deciphered the constant conflict between the source and its representations in some of his major works, which are also discussed in this part. First, "The Aleph" mocks the idea of an ultimate source, as the Aleph in question is located in the basement of a lunatic, and the writer himself is far from convinced he has seen it.[40] Second, In "Pierre Menard, Author of The Quixote," Borges demonstrates the main outcome of negating an ultimate source,

39. John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, 18 DUKE L. & TECH. REV. 8 (2019) [hereinafter Barlow, *Selling Wine Without Bottles*]. For the legacy of Barlow, *see generally* Joseph A. Tomain, "*The Virus of Liberty": John Perry Barlow, Internet Law, and Grateful Dead Studies*, 5 GRATEFUL DEAD STUD. 14, 16-17 (2022/2021) (relating to the interface of both Barlow, *Selling Wine Without Bottles* and John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspaceindependence). For new legislation regarding generative AI, *see* Senate Legislative Counsel Draft Copy of EHF23968 GFW, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf [hereinafter NO FAKES ACT] and H.R.6943—118th Congress (2023-2024) https://www.congress.gov/bill/118th-congress/house-bill/6943/text [hereinafter NO AI FRAUD draft].

40. BORGES, *The Aleph*, *supra* note 14, at 68, 74.

by designing new concepts of authorship, appropriation, and interpretation.[41] Borges describes Menard's efforts to go beyond a mere "translation" of Don Quixote by merging himself with Miguel de Cervantes' work to such an extent that the final product is line-for-line identical with the latter. The narrator considers the chapters Menard completed more profound than the verbatim original because of the new context that this masterpiece had gained since it was written in the seventeenth century, long before Roland Barthes's famous declaration that the author is dead once the reader is born.[42]

Part III focuses on the rise, fall, and rise of the source in trademark law. First came its classic triad model, with its aim to identify goods and distinguish their source from others to prevent consumers' confusion, which demonstrated a clear dichotomy between the real source and its fake mimesis. Hence, when brands and trademarks morphed into the defended assets of trademark law, their source was no longer relevant. Their generic use by customers morphed into a new source, severed from the original. Consequently, the prong of dilution took over, blurring or tarnishing the trademark.

Lawsuits regarding the likelihood of confusion, especially concerning brands and celebrities were mostly unsuccessful if the allegedly infringing mark answered the *Rogers*' test. In short, the stronger the *Rogers*' test was in practice, the weaker the issue of the source in comparison with trademark law's initial ideology. However, recently, the legal pendulum revived the supremacy of the source in *Jack Daniel's Properties, Inc. v. VIP Products LLC ("Jack Daniel's"),* in which the U.S. Supreme Court held the triad model as the first threshold of trademark law to allege infringement, focusing on avoiding consumers' confusion.[43]

To demonstrate how the rivalry of the two prongs is no longer relevant when faced with the quintessence of celebrityhood, this part also analyses the serial cases in which the plaintiffs-appellants—the trustees of Princess Diana Memorial Fund and the executors of her estate—lost to the defendant-appellee Franklin Mint; they sued for infringing Princess Diana's false designation of origin and endorsement under § 43(a) of the

41. JORGE LUIS BORGES, *Pierre Menard, supra* note 14, at 88.

42. *See generally*, Marco Jimenez, *Towards a Borgean Theory of Constitutional Interpretation*, 40 PEPP. L. REV. 1 (2012); Roland Barthes, *The Death of the Author*, *in* ROLAND BARTHES, IMAGE MUSIC TEXT 142 (Stephen Heath trans., 1977).

43. *Jack Daniel's* , *supra* note 22; Shufro, *supra* note 22, at 410-15.

Lanham Act.[44] The plaintiffs lost due to the doctrine of nominative fair use. Yet, due to Princess Diana's metamorphosis into part of our cultural language, and thus into generic use, neither this outcome nor any of the prongs mattered, once the source was lost.

Part IV discusses the fall and the rise of the source in copyright law through the doctrinal vehicle of originality. The adjudication pre-*AWF v. Goldsmith* was willing to restrain the dominance of the source by a liberal interpretation of transformative use, but this trajectory was reversed in *AWF v. Goldsmith*.[45] Generative AI authorship enhances the paradox of the source in both crucial aspects of copyrightability. First, authorship is denied to generative AI no matter how original its work, as inhuman sources are not legally acknowledged. Second, the fixation factor, although obsolete since the inception of the Internet, is ignored by new legislation, which fights its consequences while negating the source. The creation of this new mega-simulacrum which never had a source demonstrates how Michel Foucault's seminal question "What is an [author]?" has been replaced by "What is a source?"—without a sufficient legal answer.

II. THE EVOLUTION OF THE SOURCE

The combat for supremacy between the source and its representations, reflected in copyright and trademark laws, is as ancient as Western history, although it goes by different titles. Plato's vision of human authorship as a threat to the real source of the truth placed the artist on the opposite axis of fraud.[46] To understand why Plato chose to expel the poets from his *Republic*, the following quote demonstrates the menace of artistic mimesis:

> And now we may fairly take him and place him by the side of the painter, for he is like him in two ways: first, inasmuch as his creations have an inferior degree of truth—in this, I say, he is like him; and he is also like him in being concerned with an inferior part of the soul; and therefore we shall be right in refusing to admit him into a well-ordered State, because he awakens and nourishes and strengthens the feelings and impairs the reason. As in a city when

44. The cases dealt with Princess Diana's publicity rights as well, but they were denied to the plaintiffs because publicity rights are not recognized under British law, which is the applicable law in Princess Diana's domicile.

45. *Campbell* , *supra* note 32.

46. PLATO, THE REPUBLIC BK. X, *supra* note 2: "All poetical imitations are ruinous to the understanding of the hearers, and that the knowledge of their true nature is the only antidote to them."

> the evil are permitted to have authority and the good are put out of the way, so in the soul of man, as we maintain, the imitative poet implants an evil constitution, for he indulges the irrational nature which has no discernment of greater and less, but thinks the same thing at one time great and at another small—he is a manufacturer of images and is very far removed from the truth.[47]

Plato fought with the same zeal against any alternative options for his metaphysics, as demonstrated in his *Sophist*.[48] The sophist in Plato is the master of illusion, the charlatan, and the opposite of the true teacher.[49] The sophist is characterized as the hater of truth and lover of appearance, whether a rhetorician, a lawyer, a statesman, a poet, or a fake philosopher.[50] Plato offers a theory of the nature of the negative embedded in the sophist phenomenon, as the sophist is only the image-maker of truth and knowledge.[51] The sophist threatens to ruin the Platonic arrangement of the stages of knowledge and existence because if the image is as good as the source, the Platonic grades from sense and the shadows of sense to the idea of beauty and good are annulled by the sophist's imitative art of reasoning.[52]

By denying the possibility of false opinion, "for falsehood is that which is not, and therefore has no existence," the sophist mocks the metaphorical language of Plato, and exposes its hubris as "the tyrant of the mind, the dominant idea, which would allow no other to have a share in the throne."[53] In the hierarchy of production, the sophist's is the lowest, yet it is the most dangerous product, as it is a similitude with no source, a falsehood attempting to be reality.[54]

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47. *Id.*

48. PLATO (SOPHIST), *supra* note 3.

49. *Id.*, *Introduction, and Analysis*: *(I) The Character Attributed to the Sophist:* "And the Sophist is not merely a teacher of rhetoric for a fee of one or fifty drachmae (Crat.), but an ideal of Plato's in which the falsehood of all mankind is reflected."

50. *Id.*

51. *Id.*, at III ("the nature of the puzzle about 'Not-being'").

52. PLATO (SOPHIST), *supra* note 3:

> STRANGER: Then, clearly, we ought as soon as possible to divide the image-making art, and go down into the net, and, if the Sophist does not run away from us, to seize him according to orders and deliver him over to reason, who is the lord of the hunt, and proclaim the capture of him; and if he creeps into the recesses of the imitative art, and secretes himself in one of them, to divide again and follow him up until in some sub-section of imitation he is caught. For our method of tackling each and all is one which neither he nor any other creature will ever escape in triumph.

53. PLATO (SOPHIST), *Introduction, and Analysis, supra* note 3.

54. PLATO (Sophist), *supra* note 3 at 67:

The new constitution of authorship in the Enlightenment era was made possible because of the new concept of art as a legitimate source due to the constituted myth of unprecedented originality.[55] Johann Gottlieb Fichte and Hegel, who wanted to live by their pens, transformed the source into the author's unique originality, deserving of property rights.[56] In addition, Hegel regarded art as a manifestation of truth and reason, thus clearing the former of Plato's accusation that it risked limiting the latter's exclusivity regarding the source.[57]

Hegel's dialectic, according to which art is both the vehicle of divine truth and a primary source due to its unprecedented originality, attempted

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> STRANGER: And other products of human creation are also twofold and go in pairs; there is the thing, with which the art of making the thing is concerned, and the image, with which imitation is concerned.
>
> THEAETETUS: Now I begin to understand, and am ready to acknowledge that there are two kinds of production, and each of them twofold; in the lateral division there is both a divine and a human production; in the vertical there are realities and a creation of a kind of similitudes.
>
> STRANGER: And let us not forget that of the imitative class the one part was to have been likeness-making, and the other phantastic, if it could be shown that falsehood is a reality and belongs to the class of real being.

55. *See generally* Woodmansee, *supra* note 5 at 427-428; THE CONSTRUCTION OF AUTHORSHIP, *supra* note 5; Litman, *The Public Domain, supra* note 5 at 399; Arewa, *supra* note 5 at 4.

56. JOHANN G. FICHTE, PROOF OF THE ILLEGALITY OF REPRINTING: A RATIONALE AND A PARABLE (M. Woodmansee trans., 1793) (retrieved from Woodmansee, *supra* note 5, at 445):

> Hence, each writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property.

For Hegel's contribution to the construction of authorship, *see* G.W.F. HEGEL PHILOSOPHY OF RIGHT 58-61 (S.W Dyde trans., 2001); *see generally* Paul Redding, *Georg Wilhelm Friedrich Hegel*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 13, 1997), https://plato.stanford.edu/entries/hegel (for claiming private property as a necessary vehicle for cultivating the individual, as it materializes her inner will. Hence, the creator has a given right to control her creation and exploit it solely). As indicated by Friedemann Kawohl, *Commentary on Kant's Essay On the Injustice of Reprinting Books* (1785), *in* PRIMARY SOURCES ON COPYRIGHT 1450-1900 (L. Bently & M. Kretschmer eds., 2008), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_d_1785, while the Kantian act of speech may not create a distinction between writing and speaking in its gist as an authorial address to an audience, Fichte and Hegel need this dichotomy to establish property rights for writing as an emerging profession. It follows, that for his contemporary colleagues, the Kantian "authorial ownership of one's thoughts" was not sufficient to justify property rights in terms of a coherent copyright system.

57. HEGEL, AESTHETICS, *supra* note 6: "Against this we must maintain that art's vocation is to unveil the truth in the form of sensuous artistic configuration, to set forth the reconciled opposition just mentioned, and so to have its end and aim in itself, in this very setting forth and unveiling."

to overcome the Platonic fear of artistic mimesis as the enemy of truth. Accordingly, art "[h]as the capacity and the vocation to mitigate the ferocity of desires" through unique inspiration, being a mere aspect of the divine and, thus, a facet of absolute reason.[58] Hence, the ancient dichotomy between the superior source and its inferior mimesis was no longer relevant. The concept of the agonizing genius creating out of the abyss traded mimesis for originality as the ultimate source.[59] Consequently, one is either a god-like creator from the abyss or a mere thief, pretending his copy or imitation is an authentic source. The fact that creativity never worked that way has not changed this false narrative, which is still dominant in copyright law.[60]

Ironically, the sophist phenomenon of a simulacrum with no real source, pretending to replace it altogether, is the prophet of the postmodern era, which abolished the "metanarratives" or "grand narratives" of the Enlightenment era—which held that reason and the ultimate truth lead humanity to progress—and dismantled the cultural hierarchy between a source and its representations.[61] As demonstrated by many prominent postmodern thinkers, this dichotomy was perceived as having been created by and preserved for those in power, followed by a hierarchy between the cherished source and its inferior representations.[62]

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58. *Id.*, at 47.

59. *Id.*, at 296 (regarding a true work of art):

> . . . evinces its genuine originality only by appearing as the one personal creation of one spirit which gathers and compiles nothing from without, but produces the whole topic from its own resources by a single cast, in one tone, with strict interconnection of its parts, just as the thing itself has united them in itself.

60. *See generally* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 5, for establishing the authorial constructionism approach, which criticizes the romantic notion of "the author." The "authorship project" demonstrated the collaborative essence of authorship, and exposed the fictional idea of a solitary genius, so that other creators were deprived of their fair share in authorship. *See* Woodmansee, *supra* note 5 at 427-428; Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 288-98 (2006) (illustrating how even giants like Shakespeare, Mozart, or Picasso were not entirely original in their oeuvres and borrowed, to varying degrees, either from their predecessors or their contemporaries).

61. *See generally* LYOTARD, THE POSTMODERN CONDITION, *supra* note 7 at XVII.

62. *See generally* Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 85 (Ben Brewster trans., 1971); ROLAND BARTHES, MYTHOLOGIES (Annette Lavers trans., 1972); MICHEL FOUCAULT, ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE (A.M. Sheridan Smith trans., 1972); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Pantheon Books 1970); Michel Foucault, *What Is Enlightenment?*, *in* MICHEL FOUCAULT, THE FOUCAULT READER 32 (Paul Rabinow ed., Pantheon Books 1984).

Therefore, critically, culture was perceived as a mechanism that manufactures power and representations.[63]

Thus, a new semiotics was caused by the great catastrophes of fascism and totalitarianism, which created the "postmodern condition" as coined by Jean-François Lyotard.[64] No more could humanity console herself with the metanarratives or grand narratives of scientific progress and rationalism, hand in hand with political freedom, human solidarity, or aesthetic redemption through art. Those narratives were abolished with the fall of the great illusions that begot them, thus rendering the narrative of an exclusive source obsolete. It follows that once the great Enlightenment axiom of eternal absolute truth was challenged, the semiotic code of an illusionary heterogeneous culture was broken.

The outcome of the postmodern challenge was the representation catastrophe as the rejection of linking one particular cultural signifier to another particular signifier meant that the representation counted more than its source, once the previous source evolved into the concept of the "floating signifier" or the "empty signifier," signifying utterly new contents.[65] Thus, if the source is gone, mimesis is the only thing left. In

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63. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 217 (Harry Zohn trans., Hannah Arendt ed., 1968) (the politicization of the aesthetic); Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 106 (2009):

> It would be a dangerous undertaking for one trained only in the law to venture a definition of a term as protean as "postmodernism." Nevertheless, I suggest below that several related elements, characteristic of what might be termed a postmodern cultural attitude, are beginning to seep into copyright theory and jurisprudence:
>
> • Rejection of claims based on "authority" and "expertise," including claims relating to interpretation;
>
> • Suspicion of "grand narratives" designed to justify eternal verities;
>
> • Skepticism about hierarchical claims about art and culture, especially those couched in terms of distinctions between "high" and "low," coupled with a preference for ironic juxtaposition of unlike materials;
>
> • Turning away from values of stability toward an embrace of flux and change;
>
> • Recognition that discussions of information access and regulation are inherently and profoundly political in nature.

64. LYOTARD, THE POSTMODERN CONDITION, *supra* note 7, at XI, XVIII, XXIV-V. *Id.* at 60:

> We no longer have recourse to the grand narratives—we can resort neither to the dialectic of Spirit nor even to the emancipation of humanity as a validation for postmodern scientific discourse. But as we have just seen, the little narrative [petit récit] remains the quintessential form of imaginative invention, most particularly in science.

65. Mehlman, *supra* note 9 at 14-15; Willette, *supra* note 10 at 3.

this new phase, the signifier indicates nothing but itself, morphing into a simulacrum devoid of any source.[66]

Baudrillard reflects Plato's nightmare by demonstrating how reality mediated through language evolved into a game of signs, thus omitting all distinctions between the real and the fictional, between a copy and the original.[67] In a world of simulations, composed of endless simulacra replacing reality, all is composed of references with no referents, a hyperreality.[68] If, for Plato, hierarchy and distinctions were "sine qua non" for his philosophical infrastructure, for Baudrillard, "postmodern societies are characterized by dedifferentiation, the "collapse" of (the power of) distinctions."[69]

The implication of the end of the subject-object dialectics in which the subject, identified with the supreme truth, was supposed to represent and control the object, is the end of the supremacy of the source in terms of knowledge and control of the object. Consequently, "thought and discourse could no longer be securely anchored in a priori or privileged structures of 'the real.'"[70] If reality is destroyed and we live in a world conquered by appearances and images devoid of a source, then the ultimate conclusion is that "[i]llusion is the fundamental rule."[71] In terms

66. BAUDRILLARD, *supra* note 11, at 6.

67. JEAN BAUDRILLARD, THE MIRROR OF PRODUCTION 7, 127-28 (Mark Poster trans, 1975):

> The form-sign describes an entirely different organization: the signified and the referent are now abolished to the sole profit of the play of signifiers, of a generalized formalization in which the code no longer refers back to any subjective or objective "reality," but to its own logic . . . . The sign no longer designates anything at all. It approaches its true structural limit which is to refer back only to other signs. All reality then becomes the place of a semiurgical manipulation, of a structural simulation.

68. *See generally* JEAN BAUDRILLARD, SIMULACRA AND SIMULATIONS: *I. The Precession of Simulacra* (Sheila Faria Glaser, trans., 1981). Douglas Kellner, *Jean Baudrillard*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2020 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/win2020/entries/baudrillard/) [hereinafter Kellner, *Baudrillard*] explains the historical evolution of the simulacra in Baudrillard's theory of simulacra and simulations:

> In the mode of classical social theory, he systematically develops distinctions between premodern societies organized around symbolic exchange, modern societies organized around production, and postmodern societies organized around "simulation" by which he means the cultural modes of representation that "simulate" reality as in television, computer cyberspace, and virtual reality.

69. Kellner, *Baudrillard*, *supra* note 68.

70. *Id.* "He identifies this dichotomy with the duality of good and evil in which the cultivation of the subject and its domination of the object is taken as the good within Western thought, while the sovereignty and side of the object is interwoven with the principle of evil."

71. JEAN BAUDRILLARD, IMPOSSIBLE EXCHANGE 6 (2001).

of evolution, the simulacrum morphed into the source. However, the unsolved issue of what is considered a source and who will decide it illustrates the ancient combat for supremacy between law and literature, as discussed in the next part.

III. LAW VERSUS LITERATURE: WHO DECIDES THE SOURCE?

A. The Duality of the Law: Science Versus Humanities

The dilemma of who decides the source as a vehicle of cultural and social control is reflected through the problematic relation between law and literature, as a starting point.[72] By saying law and literature we can easily identify these concepts in their wider meaning and ancient rivalry, namely, philosophy and art, as juxtapositioned by Plato. Current scholarship attributes the genesis of the law and literature movement in the United States to James Boyd White and his seminal book, *The Legal Imagination*, in which White connected the law with the literary humanities, thus rendering the former "an art of thought and language, with its own characteristic concerns and methods" operating "as a system of meaning and social construction."[73]

At present, law and literature, an interdisciplinary study that examines the complicated relationship between the two fields, is divided into three subdisciplines.[74] The first subdiscipline is law *in* literature, which owes its inception to John H. Wigmore and focuses on the legal themes depicted in literature.[75] The second subdiscipline is law *as* literature, deriving from the Justice Benjamin Cardozo's seminal article

72. For the problematic relation between law and literature *see* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (hereinafter: POSNER) versus James Boyd White, *What Can a Lawyer Learn from Literature? (Book Review)*, 102 HARV. L. REV. 2014 (1989) (criticizing POSNER'S book as misguided); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Richard A. Posner, *The Ethical Significance of Free Choice. A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

73. *See generally*, JAMES BOYD WHITE, THE LEGAL IMAGINATION (1973). For what White attempted to do, as summed up in his own words, *see* White, *supra* note 12, at 31, 37. For the key role of White's book as founding the law and literature movement, *see also* POSNER, *supra* note 71, at 12; Marijane Camilleri, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury,* 39 CATH. U. L. REV. 557, 557 (1990).

74. For the development of law and iterature, *see Law and Literature*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW. Encyclopedia.com. (July 25, 2023) https://www.encyclopedia.com. For useful introductions to the field, *see generally* LAW AND LITERATURE, TEXT AND THEORY, (Lenora Ledwon, ed., 2015) (1996); Richard Weisberg & Jean-Pierre Barricelli, *Literature and Law*, *in* INTERRELATIONS OF LITERATURE 150 (Jean-Pierre Barricelli & Joseph Gibaldi eds. 1982).

75. John H. Wigmore, *A List of Legal Novels*, ILL. L. REV. 574 (1908).

"Law and Literature," which examined the literary styles and rhetoric of judicial opinions and claimed, "The form is no mere epidermis. It is the very bone and tissue."[76] The third subdiscipline is law *and* literature, in which each discipline compares and contrasts the analytical tool its counterpart employs vis-à-vis any text, be it the Constitution, statutes, judicial precedents, or a work of literature.[77] Zealous advocates of law and literature, such as Ronald Dworkin, believe that legal text should be regarded as any literal text. They benefit greatly from literature in terms of creative interpretations.[78] Opposing scholarship, led by Judge Richard Posner, regards law as an initially governmental mechanism, far too narrow in its scope and goal to apply literature's techniques and interpretations to the Constitution or statutes.[79]

The gist of the matter is the combat for supremacy between two perceptions of law: Namely, should law be perceived as science, descending from philosophical perceptions that regard reason as the utmost value that can lead humanity to the absolute truth, or as part of the humanities? The conflict is thus demonstrated by White:

> In my view, this blindness to the obvious was produced by a convergence of a set of influences: in philosophy, the kind of logical positivism that wanted to reduce meaning to the empirically testable;

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76. Benjamin N. Cardozo, *Law and Literature*, 14 YALE REV. 699, 711 (1925). For Richard H. Weisberg as a prominent follower of Justice Cardozo's legacy, *see* Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 320-41 (1979); Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor* with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 42-58 (1982) (relating to Judge Rehnquist's opinion in Paul v. Davis, 424 U.S. 693 (1976).

77. *See generally* RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984); *Compare* with Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1351 (1986):

> I shall argue, among other things, that the study of literature has little to contribute to the interpretation of statutes and constitutions but that it has something, perhaps a great deal, to contribute to the understanding and the improvement of judicial opinions.

No wonder, Posner *Law and Literature: A Relation Reargued*, at 1359, 1385-86 treats Weisberg and White alike, although acknowledging their different fields of expertise and critical nuances.

78. RONALD DWORKIN, LAW'S EMPIRE, 228 (1986).

79. Posner, *supra* note 77, at 1351. Likewise, Posner criticizes Dworkin's theory about tracing the best intention that the judge or interpreter can find in the law. *Id.*, at 1361. An exaggerated power of interpretation might benefit literature, but harm the law. *Id.*, at 1371. The attitude of Posner and others who insisted on law as sui generis led White*, supra* note 12, at 2, 30-1, to his inquiries, culminating in the founding of the law and literature movement in the United States.

> the more general view that science simply eclipses the value of other forms of thought (and with it the desire to claim the status of "science" for the study of social, political, and economic phenomena); a widespread desire at a time of international peril to affirm the masculinity of science against the perceived femininity of the humanities; and the self-conscious turn to what is called social science in the law, first in the form of sociology and psychology, then of economics. The assumptions here were that these fields could produce knowledge of a sort that the humanities could not; that this knowledge was testable; and that it could be the foundation of law based upon social realities that were accurately represented by disciplines that shared the name, and hoped to share the prestige, of science.[80]

Consequently, Plato chose philosophy over art when he expelled poets from his state in *The Republic*.[81] Being a zealous believer in one ultimate truth, best served only by the true philosopher, Plato regards artists to be mere imitators "in the third degree removed from the truth," as poetry leads to the triumph of imagination or feeling over truth and reason.[82] In *Sophist,* the conflict between the Idea—that is, the ultimate truth and its opposition, i.e., falsehood—is not only one between truth and its mimesis, but also one between truth and falsehood as a simulacrum.[83] The simulacrum personified by the sophist is not merely a bad imitation, it also threatens to blur any distinction between the copy and the model, as, unlike an imitation which might be acceptable even as the second-best truth, the simulacrum lacks the resemblance that relates a copy to reality.[84] Hence, the sophist's simulacrum, which is devoid of any real contact with the Idea, threatens the whole Platonic hierarchy between a source and a copy, between reality and its representation.[85]

Plato was not the only one to regard eternal truth as both the synonym and justification of coercive power. Immanuel Kant, who framed the Enlightenment ideology, not only went further in his perception of the human will as subordinate to rationalism, but also followed the Platonic path with the decree: "Argue as much as you please,

80. White*, supra* note 12, at 30-1.

81. PLATO, THE REPUBLIC BK. X *supra* note 2.

82. *Id.*

83. *See generally*, PLATO, SOPHIST, *supra* note 3; *See also* GILLES DELEUZE, THE LOGIC OF SENSE 253-63 (Mark Lester and Charles Sitvale, trans., Constantin V. Boundas, ed. 1990) (1969) (referring to Platonic philosophy concerning the simulacrum).

84. DELEUZE, *supra* note 83, at 257.

85. *Id.* at 262.

but obey!," while attempting to explain the Enlightenment.[86] Hence, so far, the philosophy of reason renders all mimetic art inferior in value, transforming any possibility of a relation between law (as the legitimate descendant of the former) and literature (as one of the representatives of the latter), into an Aporia,[87] an eternally unsolved paradox.[88]

The rift between law as science and literature as part of the humanities that calls for such an ample scholarship would seem superfluous by some of the most prominent philosophers and playwrights of the Classic era, especially regarding pre-Socratic Greek philosophy. Parmenides, whom Plato highly revered, presented his philosophy in the form of poetry.[89] No wonder scholars analyze his philosophical innovation and his debt to Homeric poetry, thus proving Justice Cardozo's point.[90] Hence, the either/or dichotomy between law as the "legitimate" descendant of philosophy as a science of reason and literature as an inferior menace is not an everlasting axiom in Western culture.

Whereas Justice Posner deems the law versus literature controversy as a misunderstood relationship, other scholars hold his theoretical infrastructure as misguided.[91] Hence, the question is posed: Should we abandon the pretense of understanding law better by applying the insights and methods of literal analysis to its interpretation and understanding?[92] Eager advocates of law and literature believe that a legal text should be regarded as any literal text, and benefit greatly from literature in terms of creative interpretations.[93] So, Dworkin's "law as integrity," which crowns the law as true if it follows from the principles of justice, fairness, and

86. *See generally*, Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (Jan. 21, 2022), https://plato.stanford.edu/archives/fall2022/entries/kant-moral/ [https://perma.cc/89MB-4ZAQ]. For the favored value of obedience to the authorities in the Enlightenment vocabulary, *see* IMMANUEL KANT, *What Is Enlightenment*? (Mary C. Smith trans., 1784) http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html [https://perma.cc/6UJ6-4AML] (hereinafter *What Is Enlightenment?*).

87. For the inception and demonstration of the aporetic Socratic dialogues*, see* PLATO, *Meno's Paradox in* MENO (G.M.A. Grube, trans., 1976), line 80e:

> [A] man cannot search either for what he knows or for what he does not know; He cannot search for what he knows—since he knows it, there is no need to search—nor for what he does not know, for he does not know what to look for.

88. *See also*, Jacques Derrida, *Structure, Sign, Play, in* WRITING AND DIFFERENCE, 278-296 (A. Bass, trans., 1978); JACQUES DERRIDA, APORIAS (T. Dutoit, trans., 1993).

89. *See generally*, COXON, *supra* note 13.

90. *Id.* at XIV; Cardozo, *supra* note 76, at 711.

91. POSNER, *supra* note 72; West *supra* note 72.

92. Posner, *supra* note 72, at 1392: "I myself do not think law is a humanity. It is a technique of government."

93. DWORKIN, *supra* note 78, at 228.

procedural due process, must employ the best constructive legal interpretation.[94] Dworkin's chain novel metaphor compares law to a novel written by a collective author. Thus:

> In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.[95]

However, Dworkin's vision of judges as both narrators and interpreters of the law—thus creating a new school of thinking which offers a new alternative between conservatism and skepticism regarding the American Constitution—is a far cry from Justice Posner's approach, which regards the law as an initially governmental mechanism far too narrow in its scope and goal to apply the techniques and interpretations of literature to the Constitution or statutes.[96] Posner's approach, termed by one of his zealous critiques, Robin West, as the embodiment of "liberal legalism," is thus described by her as being based on two premises:

> (1) that our present law is, for the most part, as it should be, and (2) that our present law is, for the most part, as it must be. Legal authority, as it is presently constituted, Posner teaches, is generally both necessary and desirable; neither can we, nor should we, make fundamental changes in our law.[97]

Socratic eudaimonism, which maintains that happiness (*eudaimonia*) is reached through virtue (*aretê*), may look naïve in the postmodern era that saw the collapse of the "big stories" of the Enlightenment, but the supremacy of philosophy ever since is still with

94. *Id.* at 225.

95. *Id.* at 229. As Julie Allard, *Ronald Dworkin: Law as Novel Writing*, BOOKS AND IDEAS, (Feb. 5, 2015), https://booksandideas.net/Ronald-Dworkin-Law-as-Novel-Writing, summarizes, "Wanting to emphasize the dual task of the judge—creating and interpretin—Dworkin invented a literary genre in which critics are also narrators of the stories that they critique."

96. Posner, *supra* note 72, at 1351. Likewise, Posner criticizes Dworkin's theory about tracing the best intention that the judge or interpreter can find in the law. Allard, *supra* note 95, at 1361. Exaggerated power of interpretation might benefit literature, but harm the law. Allard, *supra* note 95, at 1371.

97. Robin West, *Law, Literature, and the Celebration of Authority* 83 NW. U. L. REV. 977, 978 (1989) (hereinafter "West's criticism"). Hence, West demonstrates how Posner criticizes any attempt to doubt authority. West, *Law, Literature, and the Celebration of Authority* at 982 (relating to an enormous spectrum, ranging from Rousseau's politics to modern critics of legalism, and from the deconstruction movement to Dworkin's jurisprudential theory regarding interpreting the law to give it the best normative meaning possible).

us.[98] Even Hegel, the great advocate of authorship, whose legacy still dominates copyright law's paradigms, regarded art as inferior to philosophy and religion.[99] Art was pardoned for its sins, as crystallized by Plato's view that it was only a vehicle serving the eternal truth.[100] Hence, the dilemma of contradictory approaches to law and literature encompasses the basic conflict of Western culture, namely, an appeal for the judgement of Solomon while contesting the concept of truth vis-à-vis its representations.

Without assuming Solomon's role, this part attempts to demonstrate how an interdisciplinary approach can benefit legal thinking when drawing lessons from literature. Long before the great thinkers of postmodernism suggested revolutionary approaches to authorship and originality, well established in legal scholarship, Jorge Luis Borges deciphered the constant conflict between the source and its representations in his "imaginary essays," stories disguised as academic research.[101] To borrow from the famous Arthur Schopenhauer's title, *The World as Will and Representation*, the power of Borges's images is as strong as a philosophic dogma, as illustrated in the next section.[102]

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98. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 103 (Walter Kaufmann, trans., 1966):

> This type of inference smells of the rabble that sees nothing in bad actions but the unpleasant consequences and really judges, 'it is stupid to do what is bad,' while 'good' is taken without further ado to be identical with 'useful and agreeable.' In the case of every moral utilitarianism one may immediately infer the same origin and follow one's nose: one will rarely go astray.

99. Stephen Houlgate, *Hegel's Aesthetics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY at 6.2.4, 6.3.5.2 (Edward N. Zalta ed., Winter 2020) (first published Jan. 20, 2009; substantive revision Feb. 27, 2020), https://plato.stanford.edu/archives/win2021/entries/hegel-aesthetics/ [hereinafter Houlgate].

100. HEGEL, AESTHETICS, *supra* note 6, at 47. *Id.* at 294, Hegel relates to the artistic product as "its external form both in the essence and conception of a definite species of art and also appropriately to the general nature of the Ideal."

101. *See generally*, Fernández, *supra* note 13 (for Borges as a philosopher, although using literature to convey his ideas). For the influence of postmodern thinkers on legal scholarship, *see generally* MARK ROSE, AUTHORS, AND OWNERS: THE INVENTION OF COPYRIGHT 1 (1993); JOSEPH LOEWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT 10 (2002); Woodmansee, *supra* note 5; Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 395 (1992); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 65 (1998) [hereinafter COOMBE, THE CULTURAL LIFE] (to mention but a few).

102. ARTHUR SCHOPENHAUER, THE WORLD AS WILL AND REPRESENTATION (E. F. J. Payne, trans., 1969). BRYAN MAGEE, CONFESSIONS OF A PHILOSOPHER 413 (1997): "Jorge Luis Borges remarked that the reason he had never attempted to write a systematic account of his worldview,

B. What Can We Learn from Borges About the Source?

This section claims that Borges's talent and legacy demonstrate how the combat for supremacy between the superior philosophy and the inferior art, i.e. source and mimesis, that caused such a severe consequence in Plato's *The Republic*, is superfluous. Some of his most famous imaginary essays that greatly influenced prominent postmodern thinkers render the claim of philosophy's superiority arbitrary, as it is almost impossible to distinguish his art from his thinking.[103] Consequently, his work returns us to pre-Socratic thinking which did not differentiate between the miscellaneous branches of human creativity, whether expressed in poetry or logical arguments.[104] As summed up by Borges in his "Tlön, Uqbar, Orbis Tertius," mocking Plato's metaphysics:

> The metaphysicians of Tlon seek not truth, or even plausibility—they seek to amaze, astound. In their view, metaphysics is a branch of the literature of fantasy. They know that a system is naught but the subordination of all the aspects of the universe to one of those aspects—any one of them.[105]

While it is well established that the starting point of postmodernism was the death of the big stories of the Enlightenment, Borges demonstrates the absurdity of an exclusive source in charge of the ultimate truth in his story "*The Aleph*."[106] The story starts with the mourning of the narrator, a fictionalized version of the author, and the recent death of a woman he loved, Beatriz Viterbo. In his annual visits to her family, the narrator befriends the deceased's first cousin, Carlos Argentino Daneri, whom he regards as a pretentious and terrible poet on

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despite his penchant for philosophy and metaphysics in particular, was because Schopenhauer had already written it for him."

103. Fernández, *supra* note 13, at 84, "Philosophy, wrote Plato and Aristotle, begins in wonder, puzzlement, and perplexity (thaumazein), not in certainty, which is its presumptive goal. Borges's fictions accept the premise of the antecedent without any conviction of arriving at the consequent aim."

104. ERROL MORRIS, THE ASHTRAY (OR THE MAN WHO DENIED REALITY) 33 (2018) compares Borges to Thomas Kuhn's theory of paradigmatic incommensurability while preferring the former. "Kuhn resembles an addled version of Borges—without the irony, without the humor, without the playfulness."

105. JORGE LUIS BORGES, *Tlön, Uqbar, Orbis Tertius*, *in* COLLECTED FICTIONS, *supra* note 14, at 68, 74.

106. For the collapse and criticism of the major stories of the Enlightenment *see generally* Max Horkheimer & Theodor W. Adorno, *The Culture Industry: Enlightenment as Mass Deception,* DIALECTICS OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 98 (Gunzelin Schmid Noerr, ed., Edmund Jephcott, trans., 2002); LYOTARD, THE POSTMODERN CONDITION, *supra* note 7; BORGES, *The Aleph, supra* note 14, at 274.

the verge of madness. Answering an urgent call from Daneri who fears that his landlord is going to ruin his house due to business extensions, the narrator discovers the real cause of his host's agony.

The cellar of the house contains the Aleph, essential for Daneri's poetic inspiration, which he defines as "one of the points in space that contain all points."[107] The narrator, willing to mock his host's absurd vision, pays a visit to the cellar to see the Aleph for himself. While lying in the dark, obeying Daneri's instructions that seemed as mad as the man himself, the narrator sees the Aleph. The Aleph is beyond description, as it shows all the visions of the inconceivable universe simultaneously, beyond limitations of time, space, or causation (whereas "language is successive").[108] Borges' descriptions of the Aleph resemble the prophets' visions of infinite deities, coated with a subtle criticism of Plato, as "perhaps the gods would not deny me the discovery of an equivalent image, but then this report would be polluted with literature, with falseness."[109] In short, the Aleph in a madman's cellar is Borges's answer to Plato's accusations that art pollutes the truth with imitations. Yet, Borges insists on his vision as an equivalent image: "My eyes had seen that secret, hypothetical object whose name has been usurped by men but which no man has ever truly looked upon: the inconceivable universe."[110]

Borges himself does not pretend that he is a conclusive source of his revelation and observation, as it is Daneri who wins second place in the national prize for literature, while the narrator receives none. In the end, Borges dismisses the Aleph as he questions not only if he had seen the real Aleph, but also whether his poor human memory is capable of remembering well enough to distinguish the fake Aleph from the true one to begin with, since he is already forgetting the features of his beloved Beatriz.[111]

Borges debunks the false myth of unprecedented originality as a substitute for the ultimate source, because a communication that is too

107. BORGES, *The Aleph, supra* note 14, at 280.

108. *Id.* at 283.

109. *Id.* at 282. *Compare with* JORGE LUIS BORGES, *The Lottery in Babylon*, *supra* note 14, at 101, "I have known that thing the Greeks knew not—uncertainty."

110. BORGES, *The Aleph, supra* note 14, at 284.

111. *Id.* at 286:

> Does that Aleph exist, within the heart of a stone? Did I see it when I saw all things, and then forget it? Our minds are permeable to forgetfulness; I myself am distorting and losing, through the tragic erosion of the years, the features of Beatriz.

unique can never be understood.[112] This is why he could never describe the Aleph properly.

> I come now to the ineffable center of my tale; it is here that a writer's hopelessness begins. Every language is an alphabet of symbols the employment of which assumes a past shared by its interlocutors. How can one transmit to others the infinite Aleph, which my timorous memory can scarcely contain?[113]

In "Pierre Menard, Author of The Quixote," the implications of destroying the dichotomy between the source and its mimesis, evolving into a new source because of the new context of its cultural and historical nexus, deal with the postmodern dilemma: "Is the same thing (idea, object, situation) in a different time and place the same as itself or is it different?"[114] The answer is that Borges reshapes the reader who renders the text with new meaning and defies its closeness. Borges stretches the contextual dilemma to its point of no return when he compares Menard's text with Cervantes':

> It is a revelation to compare the Don Quixote of Pierre Menard with that of Miguel de Cervantes. Cervantes, for example, wrote the following (Part I, Chapter IX):
>
> . . . truth, whose mother is history, rival of time, depository of deeds, witness of the past, exemplar and adviser to the present, and the future's counselor.
>
> This catalog of attributes, written in the seventeenth century, and written by the "ingenious layman" Miguel de Cervantes, is mere rhetorical praise of history. Menard, on the other hand, writes:
>
> . . . truth, whose mother is history, rival of time, depository of deeds, witness of the past, exemplar and adviser to the present, and the future's counselor.[115]

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112. JORGE LUIS BORGES, *Averroes' Search*, *supra* note 14, at 235, 240, "The image that only a single man can shape is an image that interests no man."

113. BORGES, *The Aleph*, *supra* note 14, at 282.

114. Howard Giskin, *Borges' Revisioning of Reading in "Pierre Menard, Author of the Quixote,*" 19 VARIACIONES BORGES, 103, 108 (2005), http://www.jstor.org/stable/24880555.

115. BORGES, *Pierre Menard, supra* note 14, at 94. *Id.* (advocating for the supremacy of Menard's text, although identical to Cervantes):

> History, the mother of truth!—the idea is staggering. Menard, a contemporary of William James, defines history not as a delving into reality but as the very fount of reality. Historical truth, for Menard, is not "what happened"; it is what we believe happened. The final phrases—exemplar and adviser to the present, and the future's counselor—are brazenly pragmatic. The contrast in styles is equally striking. The

As summed up by Borges himself: "The concept of the definitive text corresponds only to religion or fatigue."[116] Thus, the text's deconstruction, as the main doctrinal vehicle challenging the monolithic perception of authorship in charge of an exclusive source, is already foreseen by Borges before the post-structuralist approach to de-centering of the author arose.[117] Although differently nuanced in arguments ranging from Roland Barthes' "death of the author" following the birth of the reader to the view of the author as a social vehicle as portrayed by Michel Foucault, the text's deconstruction such as that of Borges refuses the text a "closeness" that does not permit other voices.[118]

As one source of originality is no longer the sole custodian of the text or its exclusive interpretation, the voices of the others, manifested by the multifaceted remolding of the text, can be heard. Applying Jacques Derrida's idea of "trace," the author is an entity discovering what was already created by different users' perspectives.[119] Thus, postmodernism replaces originality with "trace." In Borges's words: "A famous poet is less an inventor than a discoverer."[120]

> archaic style of Menard who is, in addition, not a native speaker of the language in which he writes—is somewhat affected. Not so the style of his precursor, who employs the Spanish of his time with complete naturalness.

116. SERGIO WAISMAN, BORGES, AND TRANSLATION 51 (2005) (quoting and translating 1 JORGE LUIS BORGES, OBRAS COMPLETAS 239) (1996)).

117. *See generally* Jacques Derrida, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press, Corrected, ed., 1997); A.W. Moore, THE EVOLUTION OF MODERN METAPHYSICS: MAKING SENSE OF THINGS (2012) (summing up what deconstruction means):

> Roughly, deconstruction involves focusing on some prioritization in how sense has been made of things, whether on a large scale or on a small scale, and then, with the help of forces at work in the very sense-making concerned, to ask questions of the prioritization: to challenge it, to unsettle it, to consider what goes unsaid as a result of it, if appropriate to reverse or reject it, at the very least to toy with its reversal or rejection, and to see what new or renewed ways of making sense of things may emerge from the process.

118. Barthes, *supra* note 42; Michel Foucault, LANGUAGE, COUNTER-MEMORY, PRACTICE 130-31 (Donald F. Bouchard, ed., Donald F. Bouchard & Sherry Simon, trans., 1977) [hereinafter Foucault, *Language*]. For Foucault's and Barthes's influence on theories of authorship, including writing in a digital age, *see* Jakob Stougaard-Nielsen, *The Author in Literary Theory and Theories of Literature*, *in* THE CAMBRIDGE HANDBOOK OF LITERARY AUTHORSHIP 270, 284 (Ingo Berensmeyer, Gert Buelens & Marysa Demoor, eds., 2019).

119. DERRIDA, *supra* note 117, at 61, "The trace is not only the disappearance of origin . . . it means that the origin did not even disappear, that it was never constituted except reciprocally by a non-origin, the trace, which thus becomes the origin of the origin."

120. BORGES, *Averroes' Search*, *supra* note 14, at 240.

Finally, Borges best demonstrates postmodern approaches in his "Borges and I."[121] Not only does Borges differentiate between Borges the writer and Borges the man, who are drifting apart from each other—thus the latter has very little to do with the former—he also determines that Borges's writing belongs to none of them. In Borges's words, discussing the text presumably written by Borges the writer[122]: "I willingly admit that he has written a number of sound pages, but those pages will not save me, perhaps because the good in them no longer belongs to any individual, not even to that other man, but rather to language itself, or to tradition."[123]

In short, Borges offers us a new approach to IP, thinking in terms of quotations instead of originality.[124] Resurrecting pre-Socratic thinking, transferring an image into an idea should lead to neither the inferiority of the former nor the superiority of the latter, in case they are distinct, to begin with. The question of whether Borges's vision can be reconciled with the copyright and trademark law governing our IP system, thus offering a better balance between the source and its representations, is discussed in the following parts.

IV. THE EVOLUTION OF THE SOURCE IN TRADEMARK LAW

As summed up by Oren Bracha, regarding the emergence and development of the United States IP Law: ". . . causation producing IP rights ran from technological innovation to economic change, to political economy, and finally to ideology."[125] While the evolution of the source took different trajectories in trademark and copyright laws concerning authorship, Bracha's analysis proved right. The legal ideology is the last in the list, always lagging behind technological innovations to economic changes, as demonstrated in a straight line from the ample litigation regarding Princess Diana's trademarks to the controversial question of generative AI authorship. Therefore, the first axis of IP rights to be examined is trademark law, focusing on the chameleonic evolution of the source versus its simulacrum debate.

121. JORGE LUIS BORGES, *Borges and I*, *supra* note 14, at 324.

122. *Id.* "I am not sure which of us it is that's writing this page."

123. *Id.*

124. *Compare with* Gibson, *supra* note 14, "The entire field of intellectual property is a story and system of quotation."

125. Oren Bracha, *The Emergence and Development of United States Intellectual Property Law*, *in* THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 237 (Rochelle Dreyfuss & Justine Pila eds., 2018) [hereinafter "Bracha, *The Emergence of IP*"].

A. The Rise, Fall, and Rise of the Source

Since its inception, the common law concept of trademark, which unifies tort and property law, has been embedded in American trademark law.[126] However, each facet of this duality has a different focus. On the one hand, a trademark was meant to protect the mark's owner in terms of a property right. On the other hand, the trademark's goal was to avoid confusion and deceit among its consumers, thus correlating with tort law. Hence, "The protected interest was that of the mark owner in preventing illegitimate diversion of his trade. But it was the deceit of consumers that made the diversion illegitimate."[127]

The outcome of this duality was that arbitrary or meaningless trademarks were considered property protected by the tort of trademark infringement, whereas descriptive trademarks were not considered property, and therefore, plaintiffs had to seek relief under the tort of passing off.[128] Strangely enough, the seemingly weaker branch of passing off focused on unfair competition and the likelihood of customers' confusion.[129] Notwithstanding, the classic triad model of trademark law was meant to identify goods and distinguish their source from others to prevent consumers' confusion.[130]

To achieve this goal, the first prong of trademark law—the triadic model—was created. The triadic model included the signifier (the tangible form of the trademark), the referent (the specific goods in question), and the signified (the context of the trademark).[131] The

126. *Id.* at 257.

127. *Id.*

128. *Id.* at 259:

> At the heart of this body of law was a sharp distinction, based on the period's highly conceptualist dominant theory of natural property rights. Technical trademarks—meaning fanciful terms having no meaning and terms whose meaning was arbitrary in relation to the product—were classified as property and protected by the tort of trademark infringement. Trade names, such as marks describing the product or its geographic origin, were not seen as property, but were protected under a distinct tort of passing off, now seen in a more technical and limiting sense as part of unfair competition law. This tort was based on the idea of fraud, and as a result, it required the showing of secondary meaning, which meant that a plaintiff had to show that consumers actually came to understand the mark as designating the source of his goods. It also required an intention by a defendant to deceive, although in practice this often meant showing the effect of confusion by consumers.

129. *Id.*

130. Beebe, *The Semiotic Analysis, supra* note 15, at 625.

131. *Id.:* "Traditionally, trademark commentators have conceived of the trademark as a three-legged stool, a relational system Consisting of a 'signifier' (the tangible form of the mark),

justification for the triadic model was to reduce the search costs of consumers and to incentivize trademark owners to invest in their trademarks.[132] The rationale was a clear concept of the source—hence, its mimesis is a fraudulent one, an imposter.

In practice, this triad is almost obsolete.[133] Trademarks morphed into commodities in their own right, working their way into our language and evolving into "expressive genericity," distinct from their competitive and commercial aims, such as identifying the source of goods and distinguishing it from others.[134] As Judge Alex Kozinski concluded, trademarks have "begun to leap out of their role as source-identifiers and, in certain instances have effectively become goods in their own right."[135] Therefore, the referent that was to be identified with a specific source is fiction.[136]

The collapse of the triadic model means that the users morphed the trademarks into their language. Once a brand loses its primary meaning as a source identifier, its trademark is lost. In terms of authorship, the users—not the trademark owner—morphed the brand into a generic term.[137] The *Rogers* test, which evolved into an enormously influential doctrine in trademark law, followed the same path. What the plaintiff failed to grasp was the trademark paradox, according to which, once a brand is so successful, when use of the brand becomes generic use, it loses the protection of trademark law together with the loss of its identified source. The *Rogers* test determined the loss of the source due to its transformation into a part of our language, as the court held:

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a 'signified' (the semantic content of the mark, its meaning), and a 'referent' (the product to which the mark is affixed)."

132. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 265-66 (1987).

133. Cooper Dreyfuss, *supra* note 16, at 397-98, 400.

> [I]deograms that once functioned solely as signals denoting the source, origin, and quality of goods, have become products in their own right, valued as indicators of the status, preferences, and aspirations of those who use them. Some trademarks have worked their way into the English language; others provide bases for vibrant, evocative metaphors. In a sense, trademarks are the emerging lingua franca: with a sufficient command of these terms, one can make oneself understood the world over, and in the process, enjoy the comforts of home.

134. *Id.*

135. Plasticolor Molded Products v. Ford Motor Co., 713 F. Supp. 1329, 1332 (C.D. Cal. 1989). *See also* Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 974 (1993).

136. Beebe, *The Semiotic Analysis*, *supra* note 15, at 656.

137. COOMBE, THE CULTURAL LIFE, *supra* note 101, at 89.

> In the context of allegedly misleading titles using a celebrity's name, [the] balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.[138]

Our society, enslaved to the "simulacra" in exchange for the real, found its match in trademark law transformation.[139] Devoid of their source due to the merger of the signified and the referent, trademarks morphed into "hypermarks." Hypermarks are free-floating signifiers, signifying nothing but themselves. However, while the first prong was rendered fictional, the "propertization" of trademarks took over, moving beyond their original aim of avoiding consumer confusion over the source and creating the prong of dilution.[140]

It should be noted that the dilution doctrine, culminating in the Trademark Dilution Revision Act of 2006 (TDRA) is a legal mutation that abandoned protecting the source, because its designer, Frank Schechter, meant to defend goods' distinction, understanding that avoiding consumers' confusion alone is not sufficient.[141] Although an integral part of trademark law, the dilution doctrine deals not with consumers' confusion about the source of a famous mark, but with the weakening or degrading of the mark to distinguish only one source. This might occur in the two dimensions of dilution: "blurring" and "tarnishment."[142] Thus, the ideology of "copying" the trademark anchored in the dilution prong caused the prong of the triad model to be devoured by the former.[143]

Recently, in *Jack Daniel's*, the Supreme Court reevaluated the *Rogers* test. The United States Court of Appeals for the Ninth Circuit held the parodied appellant's trademark and trade dress to be attached to an "expressive work," answering *Rogers* test. Thus, accordingly, once an allegedly infringing work is classified as such, what follows is to examine: (1) whether the use of the trademark in question is inherently related to the work, and (2) whether the respondent's work explicitly misleads as to

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138. *Rogers* (1989) case, *supra* note 17, at 999.

139. For the simulacra phenomenon, *see* BAUDRILLARD, SIMULACRA AND SIMULATION, *supra* note 68, at Ch. I.

140. Bracha*, The Emergence of IP*, *supra* note 125, at 262-63.

141. Schechter, *supra* note 21, at 821-24); the TDRA, *supra* note 20; *see generally* Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 846-48 (2010) [hereinafter Beebe, *Intellectual Property Law*].

142. *See generally* Benjamin H. Wohlford*, What Is Trademark Dilution?* BC, BERLINER COHEN LLP, (June 5, 2024), https://www.berliner.com/articles/trademark-dilution.

143. Beebe, *Intellectual Property Law*, *supra* note 141, at 848.

its endorsement by the appellant.[144] The absence of anything explicitly misleading was sufficient for the Ninth Circuit Court to conclude that VIP's use of Jack Daniel's trademarks is protected by the First Amendment, without referring to the first prong of consumer confusion.[145]

Justice Kagan's premise restored trademark law to its original aim of dealing with what counts as source and whether the allegedly infringing products are likely to cause consumers' confusion in their identification of the right source.[146] Considering the core aim of the Lanham Act as one primarily focused on identifying a product's source and distinguishing that source from others changes the hierarchy. Consequently, an "expressive work" is not automatically immune to infringement lawsuits, and the dilution doctrine is subordinated to the first prong of trademark law, i.e. the triadic model. Neither the First Amendment nor the fair use exclusion for parody can nullify the protection of the designated source.[147]

The majority of the adjudications following *Jack Daniel's* strengthens the first prong of the triadic model and diminishes the *Rogers* test, so the latter does not apply to trademark use likely to cause consumers' confusion.[148] This is not to say that the *Rogers* test is annulled, but rather that the source as the principal factor of trademark law is back.[149] However, perhaps the dispute between the two prongs regarding who controls the source or its quality in terms of social and cultural control is superfluous, as demonstrated by the ample adjudications focusing on Princess Diana's trademark versus its source, discussed in the next section.

144. *Rogers* (1989) case, *supra* note 17, at 999. *See* Shufro, *supra* note 22, at 410-15 (for the detailed analysis of VIP Prods. LLC v. Jack Daniel's Props. Inc., 953 F. 3d 1170 (9th Cir. 2020) [hereinafter *VIP Prods*.].

145. *VIP Prods*., *supra* note 144, at 1175-76.

146. *Jack Daniel's*, *supra* note 22.

147. *Id.* at 10-17, 19-20.

148. Diece-Lisa Indus., Inc. v. Disney Store USA, LLC, No. 21-55816, 2023 WL 5541556 (9th Cir., Aug. 25, 2023); Activision Publ'g, Inc. v. Warzone.com, LLC, No. 22-55831, 2023 WL 7118756 (9th Cir. Oct. 25, 2023); Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F. 4th 125, 137 (2d Cir. 2023); Punchbowl, Inc. v. AJ Press, LLC, No. 21-55881, 2024 WL 134696 (9th Cir., Jan. 12, 2024).

149. Amy (Salomon) McFarland, *The Last Dance? The Future of the "Rogers Test" After the* Jack Daniel's *Decision,* (Mar. 28, 2024), ARENTFOX SCHIFF, https://www.afslaw.com/perspectives/alerts/the-last-dance-the-future-the-rogers-test-after-the-jack-daniels-decision (for analysis of the adjudications following *Jack Daniel's*).

B. The Chronology of Princess Diana's Adjudication

The premature death of Princess Diana on August 31, 1997 ended the short life of one of the world's most beloved and multi-faceted celebrities. Princess Diana was famous for her roles as a member of British royalty—former consort (1981-96) of Charles, prince of Wales (later Charles III), a fashion icon, a leader of charitable and humanitarian causes outside the scope of traditional royal involvement, and a devoted mother.[150] The late Princess Diana brought unprecedented warmth, glamour, and vulnerability to each role.[151] As summed up by Tina Brown, the former editor of *Vanity Fair* and *The New Yorker*, who wrote *The Diana Chronicles*:[152]

> Diana gave the stiff upper lip, uptight, emotion-denying old Establishment face of England a way to be modern, caring, and less

150. *See generally*, *Diana, Princess of Wales*, ENCYCLOPEDIA BRITANNICA, (June 30, 2024), https://www.britannica.com/biography/Diana-princess-of-Wales. Accessed July 21, 2024 [hereinafter *Diana, Princess of Wales*]; Jeffrey L. Eichen, *Too Famous to Trademark: Diana Case Proves Point*, THE NAT'L L.J., (Oct. 16, 2000), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.venable.com/files/Publication/7cb72097-72a6-4faa-bfe6-dd21f7999a21/Presentation/PublicationAttachment/ba8a1668-81ec-4559-b739-35bf0e866f61/1105.pdf; for Princess Diana as a fashion icon, *see* Victoria Lautman, *Tina Brown on Princess Di,* ENCYCLOPEDIA BRITANNICA, (Jan. 2, 2014), https://www.britannica.com/topic/Tina-Brown-on-Princess-Di-1958497 [hereinafter *Brown on Princess Di*]. Tina Brown credited Princess Diana for paving the path for "celebrity humanitarians" by visiting AIDS patients, holding hands with lepers, and traipsing through fields of land mines, *id.* Monica Ali, *Royal Rebel: The Legacy of Diana*, THE GUARDIAN, (Mar. 30, 2011), https://www.theguardian.com/uk/2011/mar/30/diana-princess-wales-royal-rebel-legacy, Ali quotes Stephen Lee, director of the UK Institute of Charity Fundraising Managers, regarding Princess Diana's overall effect on charity as "probably more significant than any other person's in the 20th century," Princess Diana's legacy as a mother different from royal predecessors is portrayed in *'Rebel Royal Mum': Diana's Legacy as Parent*, ABC NEWS, (May 23, 2013), https://abcnews.go.com/International/rebel-royal-mum-dianas-legacy-parent/story?id=19241646.

151. For Princess Diana's vulnerability as a main factor in her enhanced posthumous allure *see* Sarah Laing, *Why Are We Still Obsessed with Princess Diana*? ELLE CANADA, (Aug. 11, 2017), https://www.ellecanada.com/culture/society/why-are-we-still-obsessed-with-princess-diana. The paradox of the greatest celebrity in the world transforming her vulnerability to help those rejected by society is summed up in a moving obituary by Barbara Kantrowitz, *The Woman We Loved*, NEWSWEEK, (published Sept. 7, 1997, updated Mar. 13, 2010), https://www.newsweek.com/woman-we-loved-172640:

> She was the most celebrated woman in the world and yet achingly lonely. Movie stars and factory workers lined up to meet her, but she felt so unloved that she repeatedly tried to harm herself. The higher her rating in the popularity polls, the more her husband seemed to keep his distance. She suffered from bulimia and depression, but she found the strength to comfort people whom she said were "rejected by society": AIDS patients, battered women, drug addicts.

152. TINA BROWN, THE DIANA CHRONICLES (2007).

> locked in outworn class judgments. She was the most well-born girl imaginable, and very good at putting a brave face on things when she was sad, but she also made people who had problems they had always felt were shameful feel better about themselves. She did that by sharing her own. When she talked in public about her bulimia, she let a generation of young girls out of the closet on that issue.[153]

Hence, when Prime Minister Tony Blair was asked whether Diana's legacy and significance are her teaching the monarchy a new way to be royal, he answered, "No. Diana taught us a new way to be British."[154] Royalty members are expected to take part in charity work. Still, Princess Diana used her charisma and position as a media goddess to counter the prevailing stigmatization against AIDS and leprosy patients, the homeless, and the mentally ill.[155] Crowned as the "the people's princess" due to her charity work, Princess Diana, with her sons, participated in her patronages to ensure they had "an understanding of people's emotions, their insecurities, people's distress, and their hopes and dreams."[156]

Princess Diana evolved into a media phenomenon, which caused media frenzies beginning immediately after her engagement to Prince Charles and continuing throughout her life, and which became one of the factors leading to her tragic death, caused by both grossly negligent driving and the evasion of the paparazzi.[157] Prima facie, Princess Diana, "the consummate celebrity of the 1980s and '90s," seemed to make the most of her fame for enhancing her causes, yet fame, her most valuable

153. *Brown on Princess Di*, *supra* note 150.

154. *Id.*

155. Josie Clarke, *Mandela Tells World to Learn from Diana*, THE TELEGRAPH, (Nov. 3, 2002), https://www.telegraph.co.uk/news/uknews/1412050/Mandela-tells-world-to-learn-from-Diana.html, quotes Nelson Mandela paying tributes to Princess Diana: "When she stroked the limbs of someone with leprosy or sat on the bed of a man with HIV/AIDS and held his hand, she transformed public attitudes and improved the life chances of such people." In her 1990 speech for *Turning Point*, Princess Diana said, "It takes professionalism to convince a doubting public that it should accept back into its midst many of those diagnosed as psychotics, neurotics, and other sufferers who Victorian communities decided should be kept out of sight in the safety of mental institutions" (quote taken from Diana's obituary, *Diana, Princess of Wales*, THE TELEGRAPH, (Aug. 31, 1997), https://web.archive.org/web/20150925102324/http://www.telegraph.co.uk/news/obituaries/5871774/Diana-Princess-of-Wales.html).

156. *Diana, Princess of Wales*, *supra* note 150.

157. As finally concluded by the Scotland Yard investigation of 2006, *id.* For the inception of the media's "Diana-Mania" beginning with the royal wedding, *see* John Jurgensen, '*The First Signs of Diana-Mania': A BBC Producer Remembers 1981's Royal Wedding*, WALL STREET J., (Apr. 24, 2018), https://www.wsj.com/articles/the-first-signs-of-diana-mania-a-bbc-producer-remembers-1981s-royal-wedding-1524575103. "Frankly, it was Diana they were cheering and Diana they wanted to see." This only increased throughout Princess Diana's marriage, divorce, life, and death.

possession, morphed into her lethal curse.[158] Princess Diana's celebrityhood is as strong posthumously as it was in her lifetime. During her life, her style was emulated by women around the world to such an extent that Iain Hollingshead of *The Telegraph* wrote, "[Diana] had an ability to sell clothes just by looking at them." Just recently, her gowns were auctioned for more than £4 million at an auction in California.[159] In 2012, *Time* included Princess Diana on its "All-Time 100 Fashion Icons" list, observing that "Diana wore the clothes, but they never wore Diana."[160]

Numerous books and articles have been written about her, including media and fan studies.[161] Her story is constantly told in the media.[162] Princess Diana's legacy, from challenging the relevance of the British monarchy to her preferred charities as interpreted by her sons, or her position as a fashion icon, is still with us. In short, in American law, Princess Diana, "one of the most famous and photographed women in the world," is the ultimate candidate for examining IP rights like publicity rights and trademark law.[163] Especially, as "the consummate celebrity of

158. Kantrowitz, *supra* note 151.

159. Hollingshead, *supra* note 24; Mackintosh, *supra* note 24.

160. Adams, *supra* note 24.

161. ANDREW MORTON, DIANA: HER TRUE STORY (1993); JONATHAN DIMBLEBY, THE PRINCE OF WALES: A BIOGRAPHY (1994); SALLY BEDELL SMITH, DIANA IN SEARCH OF HERSELF: PORTRAIT OF A TROUBLED PRINCESS (1999); ANNA PASTERNAK, PRINCESS IN LOVE (1994); DIANA, THE MAKING OF A MEDIA SAINT (Jeffrey Richards, Scott Wilson, Linda Woodhead, eds., 1999); Judith Woolf, *Not the Girl but the Legend: Mythology, Photography and the Posthumous Cult of Diana*. 3(1) LIFE WRITING, 103 (2006), https://doi.org/10.1080/10408340308518307; ELLEN LABRECQUE, WHO WAS PRINCESS DIANA? (2017); TINA BROWN, REMEMBERING DIANA: A LIFE IN PHOTOGRAPHS (2017); BRIAN HOEY, DIANA: THE LIFE AND LEGACY OF THE PEOPLE'S PRINCESS (2023) (to mention but a few).

162. *See* for example: CHARLES AND DIANA: A ROYAL LOVE STORY. Dir. James Goldstone. Perf. David Robb, Caroline Bliss, Christopher Lee. (Edward S. Feldman Company 1982.) (Television. YouTube. 12 Parts. N.P., 4 Apr. 2008. WEB. May 12, 2010; THE ROYAL ROMANCE OF CHARLES AND DIANA (Dir. Peter Levin. Perf. Catherine Oxenberg, Christopher Baines, Olivia de Havilland. Chrysalis-Yellen Productions, 1982). TELEVISION; CHARLES AND DIANA: UNHAPPILY EVER AFTER. Dir. John Power. Perf. Roger Rees, Catherine Oxenberg, Benedict Taylor, Tracy Brabin, Amanda Walker. 1992). FREMANTLE MEDIA, 2004. DVD: DIANA: HER TRUE STORY Dir. Kevin Connor. Perf. Serena Scott Thomas, David Threlfall, Elizabeth Garvie, Donald Douglas, Jemma Redgrave, Jeremy Child. 1993. IMAGE ENTERTAINMENT INC., 2005. DVD: LAST DAYS OF A PRINCESS. Dir. Richard Dale. Perf. Genevieve O'Reilly, Patrick Baladi, Shaun Dooley, James Barriscale. 2007. (Dangerous Films 2007). DVD: PRINCESS IN LOVE. Dir. David Greene. Perf. Julie Cox, Christopher Villiers, Christopher Bowen, Julia St. John. 1996. TANGO ENTERTAINMENT, 2005. DVD: THE CROWN, (TV series) (fourth, fifth, and sixth seasons) (created by Peter Morgan and produced by Left Bank Pictures and Sony Pictures Television for Netflix).

163. Bastin, *supra* note 24, at 40.

the 1980s and '90s," Princess Diana should have been the quintessence of publicity rights.[164]

The primary function of the right of publicity is to prevent the unauthorized commercial exploitation of celebrity personae. It is a relatively new IP right, created by state courts, which grew out of the tort of appropriation when the courts acknowledged it as a privacy tort and transformed it into a property right.[165] The right of publicity is often summarized as the right to prevent unauthorized commercial uses of one's name, image, or likeness (NIL) or other aspects of one's identity (such as one's voice).[166] Thus, it makes sense, that her executors registered in California as the successor-in-interest to Princess Diana's "right of publicity" under California Civil Code § 990.[167] In addition, the executors filed federal trademark registrations for the marks "Diana Princess of Wales" and "Diana Princess of Wales Memorial Fund."[168]

However, all adjudications concerning the late princess tell a different story. In all cases, plaintiffs-appellants—the trustees of Princess Diana Memorial Fund and the executors of her estate—lost to the defendant-appellee, Franklin Mint, having sued for infringing Princess Diana's California statutory publicity rights and for false designation of origin and endorsement under § 43(a) of the Lanham Act. The plaintiffs denied permission to the defendant to use the name and likeness of Princess Diana on several commemorative products such as dolls, jewelry, and plates.[169] Likewise, the U.S. Patent and Trademark Office rejected the defendant's trademark applications for various marks relating to Princess Diana.[170] Notwithstanding, the defendant sold various Princess Diana-branded items with a "certificate of authenticity," bearing labels such as "Diana, Princess of Wales Porcelain Portrait Doll," "Diana, Queen of Hearts Jeweled Tribute Ring," "Diana, England's Rose

164. Kantrowitz, *supra* note 151.

165. For the development of publicity right from fame to commodification, *see* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 148-78 (1993); Hap Murphy, *The Right of Publicity: Worth a Closer Look in the Classroom*, 36 J. LEGAL STUD. EDUC. 240 (2019). For the current legal status of the right of publicity in each state, *see Right of Publicity, Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes; *Right of Publicity State-by-State*, ROTHMAN'S ROADMAP TO RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com.

166. *Client Alert, Commentary*, *The ELVIS Act: Tennessee Shakes Up Its Right of Publicity Law and Takes on Generative AI*, LATHAM & WATKINS, April 8, 2024 | Number 3244, file:///C:/Users/97252/Downloads/452e02f0-2d0b-4672-93c7-4c6b43c42191.pdf.

167. Eichen, *supra* note 150.

168. *Id.*

169. *Id.*

170. *Id.*

Diamond Pendant," and "Diana, Forever Sparkling Classic Drop Earrings."[171]

First, in *Cairns v. Franklin Mint Co.* (*Cairns I*) three holdings were made by the U.S. District Court for the Central District of California: (1) the denial of the plaintiffs' post-mortem right of publicity claim under California Civil Code § 3344.1(a)(1),[172] (2) the grant of summary judgment in favor of the defendant concerning the Lanham Act claim for false endorsement under 15 U.S. Code § 1125(a)(1), and (3) the award of attorney's fees to the defendant.[173]

While, prima facie, the publicity rights claim seemed to be the strongest, it was dismissed by Judge Richard Paez as a matter of law. The reason for this holding was California's default personal property choice of law provision, according to California Civil Code § 946, requiring application of the law of Great Britain, as Princess Diana's domicile at the time of her death, which did not recognize a post-mortem right of publicity.[174]

Regarding § 43(a) of the Lanham Act, the *Cairns I* Court refused to see the plaintiffs as the source of the trademark of Princess Diana's persona. The defendant's use of Princess Diana's name and likeness was regarded as an aesthetic or commercial appeal of their products, and not as a false endorsement.[175] Adding a ninth factor to the usual legal analysis of the likelihood of confusion required by trademark law, the court held that there was not a strong association or mental link between the mark and the plaintiffs. Hence, no likelihood of confusing customers was bound to follow. As Princess Diana was so famous, her fame made any distinction between her and a particular source impossible.[176] Thus, without the court explicitly admitting the phenomenon, Princess Diana morphed into generic use, causing an over-popular trademark to lose the protection of trademark law.[177]

The United States Court of Appeals for the 9th Circuit affirmed the District Court's dismissal of the plaintiffs' post-mortem right of publicity claim and the denial of a preliminary injunction on the Lanham Act

171. *Cairns I* at 1022.

172. *Id.* at 1022.

173. *Cairns* appeal at 1143.

174. *Cairns I* at 1023-29.

175. Eichen, *supra* note 150.

176. *Id.* "When a celebrity's persona becomes this ubiquitous, any mental association between the celebrity's persona and a particular source or endorsement of goods is dulled to the point of meaninglessness."

177. *See generally* Xiyin Tang, *Against Fair Use: The Case for a Genericness Defense in Expressive Trademark Uses*, 101 IOWA L. REV. 2021(2016).

claims.[178] In the meantime, after *Cairns I*, the California Legislature renumbered the post-mortem right of publicity statute from § 990 to § 3344.1, amending it to "apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state."[179]

This amendment was the cause of *Cairns v. Franklin Mint Co.* ("*Cairns II*"), claiming that § 3344.1(n) is a choice of law provision that requires the application of California law, which recognizes a post-mortem right of publicity.[180] However, *Cairns II* fared no better for the plaintiffs. The District Court denied the plaintiffs' motion to reinstate its post-mortem right of publicity claim and the motion for a preliminary injunction,[181] thus refusing to interpret § 3344.1(n) as changing the California Civil Code § 946 default personal property choice of law provision.[182] Consequently, California Civil Code § 946 requires the application of the law of Great Britain, which does not recognize a post-mortem right of publicity.[183]

Cairns v. Franklin Mint Co. ("*Cairns III*") dealt with the motion for summary judgment granted to the defendant regarding the plaintiffs' Lanham Act false endorsement claim.[184] The District Court concluded that the defendant's use of Princess Diana's name and likeness did not implicate the source identification purpose of trademark protection.[185] In addition, the District Court held that there was no likelihood of consumer confusion as to the origin of the defendant's Diana-related products.[186]

Finally, in *Cairns v. Franklin Mint Co.* ("*Cairns IV*"), the District Court granted the defendant's motion for attorney's fees, awarding $2,308,000 fees out of the $3,124,121.85 requested.[187] The plaintiffs appealed before the United States Court of Appeals for the Ninth Circuit, contesting all the aforementioned holdings of the District Court.[188] The appellant court affirmed *Cairns II*, holding that "Section 3344.1(n) does

178. Diana Princess of Wales Memorial Fund v. Franklin Mint Co., Nos. 98-56722, 99-55157, 1999 WL 1278044 (9th Cir. Feb. 24, 2000).

179. Calif. Civ. Code § 3344.1(n).

180. *Cairns II* at 882.

181. *Id.* at 887.

182. *Id.*

183. *Id.* at 881-82.

184. *Cairns III* at 1223.

185. *Id.* at 1214-16.

186. *Id.* at 1216-21.

187. *Cairns IV* at 1190.

188. *Cairns* appeal, *supra* note 1.

not state that California's post-mortem right of publicity statute applies to such cases regardless of the domicile of the owner of the right."[189] Therefore, following the same reasoning, the publicity rights claim was bound to fail as the British law of Princess Diana's domicile did not recognize a post-mortem right of publicity.[190]

The innovative holding of the appellate court was that the sale of collectibles bearing the name and likeness of Princess Diana was a nominative fair use.[191] The appellate court distinguished between the classic fair use and nominative fair use defenses regarding the main issues of trademark law: source differentiation and the likelihood of confusion as to the origin of the allegedly infringing goods. Whereas in classic fair use, "the defendant has used the plaintiff's mark to describe the defendant's own product," in nominative fair use "the defendant has used the plaintiff's mark 'to describe the plaintiff's product' for the purpose of, for example, comparison to the defendant's product."[192]

The appellate court indicated that the elements required for proving a classic fair use defense are not sufficient if there is a likelihood of customer confusion as to the origin of the product.[193] Hence, the classic fair use "only complements the likelihood of customer confusion."[194] The classic nonexclusive list of the eight relevant factors in determining whether customer confusion is likely are:

> 1. strength of the mark; 2. proximity of the goods; 3. similarity of the marks; 4. evidence of actual confusion; 5. marketing channels used; 6. type of goods and the degree of care likely to be exercised by the purchaser; 7. defendant's intent in selecting the mark; and 8. likelihood of expansion of the product lines.[195]

However, the nominative fair use analysis was developed by the same court to replace the former factors to determine the likelihood of

189. *Id.* at 1147. "Section 946 provides that personal property is governed by the law of the domicile of its owner unless there is law to the contrary in the place where the personal property is situated, i.e., California." *Id.*

190. *Id.* at 1149.

191. *Id.* at 1150.

192. *Id.*

193. *Id.* at 1151:"To establish a classic fair use defense, a defendant must prove the following three elements: '1. Defendant's use of the term is not as a trademark or service mark; 2. Defendant uses the term "fairly and in good faith"; and 3. [Defendant uses the term] "[o]nly to describe" its goods or services.' In our Circuit, the classic fair use defense is not available if there is a likelihood of customer confusion as to the origin of the product," (quotes and references omitted).

194. *Id.* at 1150.

195. *Id.* at 1150, n.7.

customer confusion.[196] Consequently, to decide whether the claim regarding false endorsement under the Lanham Act had any ground, the court stated its guidelines: first, analyzing the nominative fair use requirements; second, classifying the nominative fair use as relevant to the current case; and third, applying the nominative fair use on the current circumstances. As to the first threshold, three factors are needed:

> First, the [plaintiff's] product or service in question must be one not readily identifiable without the use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the [plaintiff's] product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.[197]

The appellate court regarded the defendant's use of Princess Diana's name and likeness as fitting the nominative fair use analysis rather than the classic fair use analysis, as they refer to the plaintiff's first attempt to draw attention to the defendant's use only as the second stage of reference, and notwithstanding that, this was its ultimate goal.[198]

Applying the first factor of nominative fair use meant that the plaintiffs' product "must be one not readily identifiable without use of the trademark."[199] The appellate court held that Princess Diana's person is not readily identifiable without the use of her name, allowing the nominative fair use to proceed to the second factor[200]: that "only so much of the mark or marks may be used as is reasonably necessary to identify the [Fund's] product or service."[201] As the appellate court held that the defendant's products depended on the plaintiff's product to ensure that its customers understood the references to Princess Diana, more use of the plaintiff's

196. *Id.* at 1151.

197. *Id.* (quoting the nominative fair use developed in New Kids on the Block v. New America Pub, 971 F.2d 302, 308 (9th Cir. 1992)).

198. *Id.* at 1152-53:

> In the present case, Princess Diana is the Fund's "product" and Princess Diana's name and likeness are the Fund's marks. Franklin Mint used Princess Diana's name and likeness to describe Princess Diana, although Franklin Mint's ultimate goal was to describe its own Diana-related products. Because Franklin Mint used the Fund's mark to describe the Fund's product, we apply the New Kids nominative fair use analysis, even though Franklin Mint's ultimate goal was to describe its own products.

199. *Id.* at 1153.

200. *Id.* "There is no substitute for Franklin Mint's use of Princess Diana's likeness on its Diana-related products. Nor is there a substitute for Franklin Mint's use of Princess Diana's likeness in its advertisements for these products."

201. *Id.*

trademark was considered "reasonably necessary to identify the plaintiff's product" in terms of the nominative fair use.[202]

The third and final element of the nominative fair use test is that "the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder."[203] The appellate court found no claim of sponsorship or endorsement regarding the defendant's Diana-related products, although it is still an unsolved question if, after being so generous with the interpretation of the second factor, the appellate court rendered the third one almost meaningless. While noting that none of the defendant's advertisements bear a disclaimer that the products are not sponsored or endorsed by the plaintiffs, it was sufficient for the court to draw the desired conclusion answering the third factor of the nominative fair use by referring to other celebrity-related products of the defendant in whose catalog an authorization by the mark holder was stated.[204]

The aforementioned adjudications left the defendants, or anyone else carefully following their steps, free to continue selling Princess Diana memorabilia without worrying that they infringed Princess Diana's publicity rights or trademarks. Some scholars regard this conclusion as illustrating the paradox of trademark law, namely that "when a name and image can become too well-known and too widely used to serve as a trademark."[205] This paradox leads to the question of whether the nominative fair use analysis was necessary for all of Princess Diana's adjudications, as discussed in the following section.

C. Is Nominative Fair Use Necessary in Cases of Extra Fame?

The original triad of trademark law, which Barton Beebe called "a three-legged stool," is summed up by Beebe as "a relational system consisting of a 'signifier' (the tangible form of the mark), a 'signified' (the semantic content of the mark, its meaning), and a 'referent' (the product to which the mark is affixed)."[206] As Rochelle Cooper Dreyfuss and Beebe have observed, the original triad of trademark law is practically obsolete. While trademarks were initially meant to identify the source of goods and to distinguish them from other goods, they morphed into

202. *Id.* at 1154.

203. *Id.* at 1154-55.

204. *Id.* "The absence of similar statements in Franklin Mint's advertisements for its Diana-related products suggests that they are not sponsored or endorsed by the Fund."

205. Eichen, *supra* note 150.

206. Beebe, *The Semiotic Analysis, supra* note 15, at 625.

commodities in their own right.[207] Thus, trademarks worked their way into our language, evolving into "expressive genericity," as distinct from their competitive and commercial aims. Once trademarks are distinct from their competitive and commercial aims—i.e., identifying the source of goods and distinguishing them from others—expressive genericity loses the protection of trademark law.

Reflecting postmodern vocabulary, expressive genericity correlates with the "empty/floating signifier" (or the hyper-mark) that is loaded by its users, regardless of its original aim. Judge Kozinski, who was influenced by this terminology, concluded that trademarks have "begun to leap out of their role as source-identifiers and, in certain instances have effectively become goods in their own right."[208] In terms of authorship and cultural control, the question is who authorizes the "empty signifier," once brands are part of our language, and, consequently, who decides their manner of use.

The shift from theory to practice is demonstrated by Judge Kozinski in *Mattel, Inc. v. MCA Records, Inc.*[209] This case was a series of lawsuits between the appellant—the manufacturer of the cultural icon Barbie—and the respondent, arising from the 1997 hit single "Barbie Girl" by Danish group Aqua. The single, which referred to Barbie as a "blonde bimbo," made it onto the Top 40 music charts.[210] In the song, a female

207. Beebe, *The Semiotic Analysis, supra* note 15 at 625, 656-57; Cooper Dreyfuss, *supra* note 16, at 397-98, 400 (1990):

> [I]deograms that once functioned solely as signals denoting the source, origin, and quality of goods, have become products in their own right, valued as indicators of the status, preferences, and aspirations of those who use them. Some trademarks have worked their way into the English language; others provide bases for vibrant, evocative metaphors. In a sense, trademarks are the emerging lingua franca: with a sufficient command of these terms, one can make oneself understood the world over, and in the process, enjoy the comforts of home.

208. Plasticolor Molded Products v. Ford Motor Co., 713 F. Supp. 1329, 1332 (C.D. Cal. 1989). Judge Kozinsky was influenced by Dreyfuss's "expressive genericity" perception that some trademarks should be acknowledged as Saussure's "langue." *See* Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 974 (1993).

209. *Mattel, Inc.*, 296 F.3d at 898.

210. *Id.* at 898 (Kozinsky, C.J.):

> Barbie was born in Germany in the 1950s as an adult collector's item. Over the years, Mattel transformed her from a doll that resembled a "German streetwalker," as she originally appeared, into a glamorous, long-legged blonde. Barbie has been labeled both the ideal American woman and a bimbo. She has survived attacks both psychic (from feminists critical of her fictitious figure) and physical (more than 500 professional makeovers). She remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon.

singer who calls herself Barbie sings to her counterpart (named Ken): "Life in plastic, it's fantastic. You can brush my hair, undress me everywhere/Imagination, life is your creation." The song mocked Barbie and the values that the appellant claims she represents.

Judge Kozinski noted that Barbie is not just a toy but a cultural icon and thus the word "Barbie" transcends its source-identifying purpose, stating that "[o]nce imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law."[211] Therefore, Judge Kozinski refused to let the plaintiff control public discourse as it was the public that gave the mark its new meaning.[212] Once a brand is part of our language due to its genericide, authorship shifts to the users who have imbued it with new meaning. "The generic use that caused a trademark to lose trademark law protection is construed by the users. In other words, once the public authorship is the real cause for genericide, the trademark loses its ground."[213]

Although in Princess Diana's adjudications her domicile's residence in Great Britain, because of British law, barred her estate's access to publicity rights, some scholars offer a test for applying genericide to the right of publicity, when it is in force.[214] While analyzed through the lenses of trademark law, it can be applied to determine whether the persona evolved into generic use, "[w]hether the aspect of the celebrity's persona at issue has been used in the public dialogue with a clearly separate meaning over a long period of time."[215]

The extra fame of Princess Diana opened her name, image, and likeness to generic use. Genericide does not need to distinguish between classic and nominative fair use. Even when applying the second factor of nominative fair use, in practice, the appellate court almost annulled it by admitting to the unusually great fame of Princess Diana, thus allowing concession for more drawing from her trademark. However, if Princess Diana is too famous for a trademark, evolving into an empty or floating signifier (or the hyper-mark) rewritten by her fans, the real argument

211. *Id.*

212. *Id.*, at 900.

213. THE CULTURAL LIFE, *supra* note 101, at 65.

214. Zoe Argento, *Applying Genericide to the Right of Publicity*, 10 VAND. J. ENT. & TECH. L. 321, 348 (2008).

215. *Id.*:

> The intent of this test is to show that the primary significance to the public of a celebrity's persona has an autonomous meaning, separate from its function of identifying the individual. The test does so by requiring that the public has not only appropriated and invested the celebrity's persona with independent meaning, but that the particular use of the celebrity's persona has become embedded in the culture.

should have been her genericide and not nominative fair use stretched to the point of absurdity. The question is: How much more can you borrow if all the relevant titles, names, images, and looks are allowed under the second factor of the nominative fair use?

The first important outcome of Princess Diana's adjudication is that publicity rights are not needed to incentivize celebrityhood. The appellate court stressed the fact that although Princess Diana was one of the greatest celebrities of her time, she did nothing to enjoin the enormous use of her name, image, and likeness.[216] Second, the people made her their queen of hearts, as unprecedently demonstrated after her death. Thus, the question of private property given through publicity rights for authorship composed by the public is properly answered when these rights are not implemented, as demonstrated in Princess Diana's adjudication.[217] Third, who benefits from Princess Diana's adjudication? Is the public's interest harmed because manufacturers can freely create plates in her image?! Lessons drawn from Princess Diana's adjudications lead us to the real leitmotivs underneath the construction of authorship in IP law: the constant battle between the source and the evolution of its reflections. This is the core of copyright law, as discussed in the following part.

V. THE EVOLUTION OF THE SOURCE IN COPYRIGHT LAW

As demonstrated by Bracha, while the goal of copyright law is to encourage creativity, the main point is to avoid copying, regardless of the original's quality.[218] Since its inception copyright law's utmost value was the source, a.k.a. "originality," in its new Enlightenment title, whose new crown enabled the concept of authorship as a real origin in contrast to a

216. Cairns v. Franklin Mint Co., 292 F. 3d 1139, 1149-50 (9th Cir. 2002) (although the appellate court used this argument in the context of false endorsement and the likelihood of confusion, and not within the frame of publicity rights' claim).

217. Madow, *supra* note 165, at 195:

> The meanings a star image comes to have, and hence the "publicity values" that attach to it, are determined by what different groups and individuals, with different needs and interests, make of it and from it, as they use it to make sense of and construct themselves and the world.

Id., at 194 (retrieved from RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 5 (2d ed. 2004):

> As Richard Dyer demonstrated, In the case, for example, of feminist readings of Monroe (or of John Wayne) or gay male readings of Garland (or Montgomery Clift), what those particular audiences are making of those stars is tantamount to sabotage of what the media industries thought they were doing.

218. Bracha, *supra* note 125, at 244-46 (for the development of the concept of "copying" in copyright law).

deceitful imitation of the truth, as preached by Plato.[219] However, whereas the same verbatim reproduction of reality that was condemned by Plato was the starting point of copyright, "generally seen as restricted to verbatim reproduction in print of the protected text or such reproduction with only trivial changes," throughout its history, the concept of a copy is as blurry as the concept it contradicts.[220]

Copyright law enlarged the source beyond its gist in its most important vehicles that were meant to find balance between encouraging creativity and the public domain: the idea/expression dichotomy and fair use. Originality, their common trait and new disguise, has a direct and indirect narrative. Direct originality flourished in direct legal relation to the dynamic evolution of derivative work in copyright law, thus creating a new, comprehensive idea of originality and authorship.[221] The indirect originality links together the moral right and the idea/expression dichotomy. Moral rights, the most important of which are attribution and integrity, make no sense unless they defend an original author.[222] The idea/expression dichotomy is based on the originality concept as well. The expression is copyrightable because it is original, unlike the idea, which is meant to be free for future creation.[223] More so, it is the idea/expression dichotomy that makes copyright law constitutional by denying copyrightability to concepts or genres to preserve them as the future quarry for creativity, free speech, and communication.[224]

No matter how lenient is the law towards the quality of the work in question, the false myth of unprecedented originality as the Enlightenment legacy is still with us, albeit with much criticism.[225] However, the core of the matter is not only the artistic taste of the judiciary, contingent on its cultural nexus, but also the commercial aspect

219. For the evolution of the source, *see infra* Part I.

220. Bracha, *supra* note 125, at 243.

221. Tehranian, *supra* note 29, at 1245, 1249-50.

222. *See generally* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 363-64 (2006).

223. Litman, *The Public Domain*, *supra* note 5, at 1019.

224. Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 395 (1989) (for the importance of the idea/expression dichotomy in copyright law since its inception in the common law).

225. Litman, *The Public Domain*, *supra* note 5. For the originality fiction, *see* Arewa, *supra* note 5, at 520; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 11 (n.51-52), 49-50 (2002) (for the history of copyright law as ever diminishing the public domain). *Id.* at 5, (regarding copyright's prohibition of unauthorized derivative works to be unconstitutional).

of copyright law that decides originality.[226] While the evolution of the source in copyright law has gone through different phases regarding the question of source, the starting point in the *Bleistein* case was already flawed.[227] As demonstrated by Beebe—although Judge Oliver Holmes granted copyrightability to posters promoting a traveling circus, thus creating the myth of artistic neutrality regarding the quality of the work in question—the focus was on the source as a property right and not as an incentive for progress.[228] The crucial phases of the source as hereby detailed prove Beebe right, as discussed in the following section.

A. The Fall and the Rise of the Source

This section attempts to survey three facets of the evolution of the source. The first, titled "the restraining facet," was manifested in *Campbell v. Acuff-Rose Music, Inc*. ("*Campbell*").[229] In *Campbell*, the appellant was sued by the respondent, who claimed that the appellant's "*Pretty Woman*" commercial parody infringed Roy Orbison's rock ballad "*Oh, Pretty Woman,*" to which the respondent held the copyright. While the U.S. Supreme Court found the first statutory factor of fair use, namely, the purpose and character of the use, to be the dominant criterion of the fair use doctrine, the parody/satire dichotomy was created.

Accordingly, whereas "the heart of any parodist's claim [is] to quote from existing material," and thus the parodist is bound to use "some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works," a satire "can stand on its own two feet and so requires justification for the very act of borrowing."[230] Even in *Campbell*, as the ambassador of the restraining facet, the court cited Samuel Johnson, claiming that "[n]o man but a blockhead ever wrote, except for money."[231] The innovative ruling of *Campbell* was the court's conclusion of sufficient transformative use to render the unauthorized use of the appellant an independent source, although sued by the respondent for using the heart of the allegedly infringing work. Thus, the *Cambell* court used a restraining approach regarding the source

226. Mira Moldawer, *Myths and Clichés: The Doctrinal Myopia of Publicity Right*, 22 UIC REV. INTELL. PROP. L. 50 (2022) (for the false myth of artistic neutrality in the judiciary's interpretations of direct and indirect originality).

227. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249-51 (1903).

228. Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 375 (2017).

229. *Campbell*, 510 U.S. at 569 .

230. *Id.* at 580-81.

231. *Id.* at 584.

in its interpretation of the "purpose and character" of the first fair use factor.[232]

The second facet, titled "the retreating facet," was manifested in *Cariou v. Prince* and *Blanch v. Koons*.[233] In both cases, the courts were willing to grant transformative use to artists who created their work not as a direct quote, depending on the allegedly infringed work as requested by *Campbell*, but a general one using different artistic means, thus transferring their work into an independent source. In *Cariou v. Prince*, the defendant painted the plaintiff's black-and-white photographs of the Rastafarian community in Jamaica and used collage techniques that earned the altered works both a new classification as fine artworks and a new market, distinguished from those of the original works. In *Blanch v. Koons*, the defendant painted a collage-like composition, into which the plaintiff's photograph was incorporated. The court held that the allegedly infringing work had a different function and purpose from the plaintiff's as it was destined for a higher market than he had ever attempted to conquer.

While retreating the source to a humbler concept than that of its representations, one cannot escape the condescending attitude that allowed the already well connected and rich to get richer. The third facet, titled "the expanding facet," took a contradictory trajectory regarding a famous artist's liberties towards a less famous colleague. In *AWF v. Goldsmith*, the Supreme Court of the United States' interpretation of the "purpose and character" of the first fair use factor expanded the dominance of the source, rendering the practice that had granted Prince and Koons transformative use as derivative use, thus infringing copyright law.[234]

In *AWF v. Goldsmith*, the respondent agreed to license one of her Prince photographs for use as an "artist reference" for "one time" only to Andy Warhol, to be published in Vanity Fair. Warhol not only made a silkscreen using the respondent's photo for this request but created fifteen additional works from the same photo without the respondent's knowledge. One of these was licensed by the appellant to Condé Nast to

232. 17 U.S.C.A §107, noting "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." *See* Michael D. Murray, *The Transformative Fair Use Test After* Andy Warhol Foundation v. Goldsmith, UPDATE TO ART LAW: CASES AND MATERIALS (Aspen 3d 2023) (June 26, 2023), https://ssrn.com/abstract=4491860 (for cases in which transformative use is not part of fair use analysis).

233. Cariou v. Prince, 714 F. 3d 694, 709 (2d Cir. 2013); Blanch v. Koons, 467 F. 3d 244 (2d Cir. 2006); Jaszi, *supra* note 63 (for an over-optimistic analysis of these cases as importing postmodern thinking to copyright law).

234. *Goldsmith*, *supra* note 1.

illustrate a magazine story about Prince for a hefty sum of $10,000, without crediting or paying the respondent. This time, in contrast to the retreating facet, the Court refused to hold the change in media from conventional photographic portraiture to unconventional museum- and art gallery-quality pop art portraiture as transformative use. The Court interpreted the "purpose and character" of the first fair use factor as a matter of degree, in which commercial use should be assessed, and regarded the two works involved as the same.[235] The dominance of the source should lead to the conclusion that if a recognizable source is absent, copying is irrelevant. This is not the case of generative AI, as discussed in the next section.

B. The Source Paradox of Generative AI Authorship

The current U.S. Copyright Act requires originality and fixation as the sine qua non for copyrightability.[236] Replacing the source with originality is not only evasive but also paradoxical. As demonstrated above, the different phases of adjudication regarding originality are constantly changing, hardly disguising the economic factor as its be-all and end-all. While desperately trying to distinguish transformative from derivative use in copyright law—which thinks in terms of either/or, i.e., either the work in question is an unprecedented original or a mere theft—culture as a system of quotations is left behind.

Again, Borges best illustrates this paradox in his "Averroes' Search."[237] The story is an anatomy of the bound failure of pure originality. Averroes is one of the greatest minds of his time but cannot understand Aristoteles' *Poetics* because he had never seen a theatrical performance. Hence, the concepts of a comedy or a tragedy cannot mean anything to him. Consequently, we cannot interpret originality when it is

235. *Id.,* at 19-20:

> In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.

236. COPYRIGHT.GOV. U.S. COPYRIGHT OFFICE, *What is Copyright*?, https://www.copyright.gov/help/faq/faq-general.html: "Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression."

237. BORGES, *Averroes' Search*, *supra* note 14, at 235.

too original, bare of any previous context.[238] Yet, the recent *AWF v. Goldsmith* refuses to let a cultural citation in a new context be considered a transformative work.

The source/originality paradox is enhanced regarding generative AI. Now we have to deal not only with the originality paradox but the fixation paradox as well, as both factors are essential to copyrightability. The idea/expression dichotomy embedded in copyright law since its inception illustrates both facets. First, the idea/expression dichotomy serves as the moral ground for allocating authorship to the artist solely, as he is rewarded for original expressions that benefit the common good, whereas the ideas that are not original are left to the public domain for future creators.[239] Quoting Judge Brandeis's words that knowledge and ideas are "free as the air to common use," it is the idea/expression dichotomy that makes copyright law constitutional.[240] In terms of what is a source, an idea is not original, hence it is not a source.

Second, to borrow the famous dichotomy created by John Perry Barlow in his *Declaration of the Independence of Cyberspace*: The fixation in a tangible form as the legal sine qua non for copyrightability is the bottle, i.e., the expression, that before the inception of the digital society was essential for selling the idea, i.e., the wine.[241] Accordingly, the "obsolete bottles" of fixation are not needed in a society whose

238. *Id.*, at 241: "In the preceding tale, I have tried to narrate the process of failure, the process of defeat . . . . I recalled Averroes, who, bounded within the circle of Islam, could never know the meaning of the words tragedy and comedy."

239. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 56-58 (1996). *Id.*, at 56:

> If one makes originality of spirit the assumed feature of authorship and the touchstone Copyright and the Invention of Authorship for property rights, one can see the author as creating something entirely new—not recombining the resources of the commons. Thus we reassure ourselves both that the grant to the author is justifiable and that it will not have the effect of diminishing the commons for future creators. After all, if a work of authorship is original—by definition—we believe that it only adds to our cultural supply. With originality first defended and then routinely assumed, intellectual property no longer looks like a zero sum game. There is always "enough and as good" left over—by definition.

240. Int'l News Serv. v. Asso. Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("[T]he general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."); Sid Marty Krofft Tele. v. McDonald's Corp, 562 F. 2d 1157, 1170 (9th Cir. 1977) ("Similarly, to the extent that copyright permits the borrowing of ideas, it leaves ample room to authors whose works do not merely repeat the expression of others, but rather add to the "marketplace of ideas.").

241. Barlow, *supra* note 39. For the legacy of Barlow, Barlow, *Selling Wine Without Bottles*, *see generally* Tomain, *supra* note 39.

technology can transmit intellectual property regardless of fixation on a material object. What marked the borderline between uncopyrightable ideas and copyrightable expression in the pre-Internet era is the evolution of the work in question from the mind that created it into the physical world through fixation. If technology frees us from fixation to transform an idea into an expression, the pure wine of creativity should be classified as an uncopyrightable idea, thus releasing us from copyright law altogether.

The old regime based on construed scarcity to incentivize creativity despite its costs loses its justifications once creativity is not dependent on costly manufacturing and distribution expenditures due to new technologies.[242] As predicted by prominent scholars, in a post-scarcity society, those who profit from scarcity that keeps them in power will not relinquish it.[243] In contrast to Barlow's vision, artificial scarcity will be enhanced.[244]

The obsolete Barlow bottles evolved into imaginary bottles that are far stronger than the original ones, first through the enactment of the DMCA.[245] Contrary to Barlow's perception of digital files, which, because they lack the element of tangibility allow society to sell intellectual property (wine) without copyright law (bottles), copyright law still insists on fixation as the threshold for copyrightability.[246] Although framed by scholars as "imaginary bottles," the "copy" in copyright law is interpreted to include temporary and ephemeral instantiations, as new technologies enable a different reading of fixation.[247]

The public domain starting point is already greatly diminished, although the crucial fixation threshold for authorship is not fulfilled vis-à-vis current technology. It follows that authorship lost its justification based on an exclusive source, as ideas were never meant to be considered

242. Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 462 (2015) (referring to "the Internet, 3D printing, robotics, and synthetic biology.").

243. *Id.* at 465 ("IP has allowed us to cling to scarcity as an organizing principle in a world that no longer demands it.").

244. Barton Beebe, *Intellectual Property Law and Post-Scarcity Society*, 2019 SING. J. LEGAL STUD. 377, 385 ("My intuition is that the world will always demand scarcity. If through our technology we eradicate the scarcities that beset us, we will no doubt seek to invent new ones, and we will do so very much to maintain an 'organizing principle.'").

245. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of the U.S. Copyright Act of 1976); Jessica Litman, *Imaginary Bottles*, 18 DUKE L. & TECH. REV. 127, 131-32 (2019) [hereinafter Litman, *Imaginary Bottles*]. For the development of the DMCA and its European counterpart, *see* Moldawer, *Cassandra's Curse, supra* note 8, at 118-129.

246. Barlow, *Selling Wine Without Bottles*, *supra* note 39.

247. Litman, *Imaginary Bottles*, *supra* note 245, at 131-32.

as such. Yet the concept of authorship based on old obsolete perceptions of originality and fixation that contradict their new mutations is intact and enhanced.[248] In Barlow's opinion: We still base copyright law on uncopyrightable ideas.

While copyright law did not change either its demand for fixation or its adaptation to new technologies, the Web in all its stages maintains the mutation of uncopyrightable ideas into the category of copyrightable expressions, in contrast to copyright law since its perception. Barlow's *Declaration of Independence of Cyberspace* was published online on February 8, 1996, in a period classified as Web 1.0.[249] This paradox is further enhanced regarding generative AI in the Web 3A era characterized by advanced, automated, and autonomous digital tools.[250] While technology is advancing to Web 4 and Web 5, the legal infrastructure is going backward.[251]

Generative AI, because it is a prompt-based system (as argued by Mark Lemley), locates creativity "[n]ot in the generation of outputs from

248. As to the development of the "paracopyright," created by the DRM/DMCA, *see* Moldawer, C*assandra's Curse*, *supra* note 8, at 118-129. For the development of the paracopyright created by the DSM, *see* Maria Lillà Montagnani & Alina Yordavona Trapova, *Safe Harbours in Deep Waters: A New Emerging Liability Regime for Internet Intermediaries in the Digital Single Market*, 26 INT'L J.L. & INFO. TECH. 294 (2018); Caterina Del Federico, *Intermediary Liability, The "Achilles' Heel" of the Current Legislation: The Courts. A Comparative Analysis with the U.S., Focusing on Copyright Infringement*, 1(V) DIRITTO MERCATO E TECHNOLOGIA 111 (2015).

249. Shruti G, *Web5: What Is It, Evolution of Web, Advantages and Disadvantages, Applications,* MEDIUM, (Nov. 27, 2023), https://medium.com/@shruti.qualitycontentwriter, "Web1 had begun in 1993, which was merely a static Web. It stored information, records, products, and such things digitally over the internet. Firms even showcased their services online through this medium. However, it was a read-only technology." Scholars regard the Napster case as a turning point that started Web 2.0, from which Internet passivity was absent. *See* A&M Records, Inc. v. Napster, Inc., 239 F. 3d 1004 (9th Cir. 2001) (explaining that Napster, a peer-to-peer file-sharing service, was held liable for contributory infringement of copyright. The court held that Napster had both actual and constructive knowledge of direct infringement regarding its users, and consequently, not only could Napster control the infringing behavior of the service's users, but it had a duty to do so. Consequently, neither Napster nor its users had a valid fair use defense); Oreste Pollicino & Giovanni De Gregorio, *A Constitutional-Driven Change of Heart: ISP Liability and Artificial Intelligence in the Digital Single Market*, 18(1) THE GLOB. CMTY. Y.B. OF INT'L L. & JURIS. 234, 238 (2019).

250. For coining the future form of AI "the 3A Era, characterized by Advanced, Automated, and Autonomous digital tools," *see* Shlomit Yanisky-Ravid, *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era—The Human-Like Authors Are Already Here—A New Model*, 2017 MICH. ST. L. REV. 659, 670 (2017).

251. Shruti G, *supra* note 249 (for Web 4, and Web 5).

AI but in the structuring of the prompts that produce those outputs."[252] As generative AI proceeds to transfer input into creative output unimagined even by its creator, trainer, or user, prompt-based creativity becomes the creativity of ideas, as their evolution into expressions is beyond us.[253] However, while the old idea/expression dichotomy, regarding both originality and fixation as the sine qua non of copyrightability, is at odds with new technologies, generative AI legislation sides with the old conception of authorship regardless of its fierce negation of a source.

Legislators, authorities, judges, and scholars are unanimous in their negation of generative AI authorship.[254] The ample arguments against generative AI authorship center around creativity perceived only as a human skill, or a market failure.[255] Regarding the source as the main point of reference, while generative AI authorship lacks the essential factor required for authorship, massive legislation fights its outcome.[256] The Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES ACT) Act of 2023 and the No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024 (No AI FRAUD Act) stress the negative impact of generative AI authorship without acknowledging it as

252. Lemley, *supra* note 36. *Id.*, at n.2 (for more sources regarding IP in a world without scarcity):From a vast perspective, no incentives are needed at all as the whole idea of scarcity is an artificial construction that current generative AI renders obsolete due to "a literally endless array of new content available for essentially no cost." thus turning the economics of creativity on its head.

253. *Id.*

254. Thaler v. Perlmutter, No. 1:22-cv-01564, slip op. at 8, (D.D.C. Aug. 18, 2023) (quoting Judge Beryl A. Howell, "Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled through new tools or into new media."); U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 306 (3d ed. 2021), "[t]he U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being"; for the inability to justify the opposition to generative AI authorship on current law, *see generally*, Moldawer, *The Shadow of the Law, supra* note 1.

255. *See generally* Ryan Benjamin Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence,* 75 FLA. L. REV. 1141, 1155 (2023); Carys J. Craig & Ian R. Kerr, *The Death of the AI Author*, 52 OTTAWA L. REV. 31, 42 (2019) (arguing against AI-generated works, particularly focusing on moral considerations); Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1185-1200 (1986) (discussing economic arguments against AI-generated works and the lack of incentives); Daniel J. Gervais, *The Machine as Author,* 105 IOWA L. REV. 2053, 2062 (2020) (arguing that machines need no economic incentive).

256. *See* Senate, *supra* note 39; 118th Congress, *supra* note 39.

a source, thus creating a mega-simulacrum which is not only severed from a source, as argued by Baudrillard, but has no history of any.[257]

In this new phase, the simulacra of generative AI resemble nothing but themselves. Ironically, it is the narrative of originality reversed. If the pillars of the Enlightenment era created the myth of unprecedented originality that merits authorship and property rights, generative AI is refused authorship when its source cannot be attributed to human creativity. However, not only did human creativity deserving authorship gain the coveted recognition as a legitimate source relatively late in Western history, but originality itself was never unprecedented. It follows that it is not the exclusive source that counts, but the ever-changing balance of social and cultural control that decides what is considered to be a source. Consequently, the question of generative AI rephrases Foucault's question, "What is an author?" by asking "What is a source?" To borrow Borges' image: The Aleph is either missing or a temporary and unreliable vision.[258] Yet, this is all we legally get regarding authorship as a chronicle of a failure foretold.

VI. CONCLUSION

This article analyses authorship in trademark and copyright law as a chronicle of a failure foretold in a straight line from the serial lawsuits regarding Princess Diana's trademarks, the controversial *AWF v. Goldsmith*, and the consistent denial of our IP system to grant generative AI authorship. The common trait of all these failures is due to both laws' incapacity to deal with their core question: What is a source? Since the inception of Western culture, there has been a battle to defy the source as a vehicle of social and cultural control, although it has borne changing titles, such as truth versus mimesis/simulacrum or origin versus copy.

The Enlightenment's legacy, which centered on authorship, revolutionized the Platonic decree of art as a third-rate truth, with the concept of unprecedented originality, as the gist of the source, serving the goal of reason and progress. Postmodern thinking, negating the grand narratives of the Enlightenment era, broke the old hierarchy between the superior source and its inferior representations by creating a new semiotic code, culminating with the concept of the floating signifier or the empty signifier, which signifies whatever users meant it to signify. Thus, it created a new concept of authorship by shifting the source. This emancipation of the sign is what transforms our society into a society

257. *See generally* Baudrillard, *supra* note 68.

258. BORGES, *The Aleph*, *supra* note 14, at 68, 74.

characterized as a simulacrum, a representation severed from its source that replaces it altogether.

While we could draw lessons from Borges' vision of culture as a phenomenon of stories and citations, ever-changing according to their historical nexus, in practice, the chameleonic evolution of the source and its simulacrum, even if bearing different names in trademark and copyright laws, is what decides authorship. In trademark law, the rise, the fall, and the rise of the source start and end with the classic triad model, which aims to identify goods and distinguish their source from others to prevent consumers' confusion.

Once brands and trademarks became the protected assets of trademark law, their source became irrelevant. Their generic use by customers evolved into a new source, disconnected from the original one. Consequently, the concept of dilution took precedence, emphasizing the blurring or tarnishment of the trademark, thanks to the *Rogers* test. Recently, the importance of the source was reinstated in *Jack Daniel's*, where the Supreme Court of the United States recognized the triad model as the initial threshold of alleged trademark infringement, a model aimed at preventing consumer confusion. However, neither aspect mattered, as demonstrated by the series of cases regarding Princess Diana's trademark, where the essence of celebrity status transformed into generic use. Thus, the source of the trademark is lost.

The fall and rise of the source in copyright law through the doctrinal vehicle of originality have undergone various contradictory phases. The history of copyright law can be summed up as a narrative of expanding the essence of copying beyond its simple definition as a mere verbatim reproduction in its key frameworks, while attempting to balance the incentives given to creativity with the public domain, by applying the restraining vehicles of the idea/expression dichotomy and fair use. Originality, while embodying the source, serves as the means through which the source is expanded directly to include derivative use or, indirectly by requiring the expression in the idea/expression dichotomy to be original.

Seminal stages regarding what constitutes a source can be classified into three facets. First, "the restraining facet," manifested by *Campbell* in its interpretation of the "purpose and character" of the first fair use factor, includes even the heart of the allegedly infringing work, provided the allegedly infringing work is a parody. Thus, the source is restrained according to the involved genre. Second, "the retreating facet" was illustrated in *Cariou v. Prince* and *Blanch v. Koons*, where the courts were willing to grant transformative use to artists who created their work not as

a direct quote, depending on the allegedly infringed work, as requested by *Campbell,* but rather in a general sense, by using different artistic means. Consequently, direct quotations from the allegedly infringed work are not necessary to establish a source. Third, "the expanding facet" was demonstrated in *AWF v. Goldsmith*, where the Supreme Court of the United States interpreted the "purpose and character" of the first fair use factor to include a degree of commercial use.

Generative AI authorship complicates the paradox of the source in both key aspects of copyrightability: originality and fixation. First, authorship is denied to generative AI, regardless of its originality, since an inhuman source is not recognized. Second, the fixation factor, although outdated since the advent of the Internet, is overlooked by new legislation. Thus, while rejecting the source, the law attempts to address its consequences, creating a new mega-simulacrum that never had a source to start with.