

Digital Persona Emulation with AI: a Legal Conundrum

Dr. Adrian McCullagh & Dr. Alan Davidson¹

1. INTRODUCTION

A colleague of mine raised a thought-provoking issue on LinkedIn recently, on which I made several contributions. The principal issue raised by my colleague concerned the New York Times litigation dealing with the alleged use of the New York Times copyright material by an AI Engine to train a large language model. This discussion has led me to think about new areas of legal uncertainty in the use of AI engines and in particular ‘Technological Singularity’ where a massive amount of information about a person is analysed so that the AI machine can replicate a person’s thought process. For example, a recent Politico article discussed the use of AI to create emulated personas of real people.²

The Politico article centred upon a world-renowned Stanford University academic (Martin Seligman) who has written extensively for many years on the topic of psychology. One of the Seligman’s former Ph.D. students had developed an AI engine that had interrogated all (the article says “All” but let’s assume that it included a substantial amount of Seligman’s publications) of Seligman’s published papers and open lectures. As a result of the AI engine’s analysis, the AI engine was able to emulate the thought processes that would correspond to Seligman’s thinking. The article indicates that Seligman was flattered and even presented the AI engine’s analysis to his wife who commented that the AI engine appeared to be very accurate. The position is that the AI engine could continue the thinking of Seligman past his life span so that a form of immortality arises. The closing aspect of the Politico article is that Seligman was chuffed about the situation³:

It is enchanting to me,” he said, sitting in his study in Philadelphia, “that what I’ve written about and discovered over 60 years in psychology could be useful to people long after I was dead.”

Seligman leaned forward in his chair, as if divulging a secret. “That kind of legacy seems to me as close to immortality as a scientist can come.”

But this result may not always be the same when dealing with every person’s life work. The actions of Seligman’s student were to create an emulation platform that could continue to operate post

1 Dr. Alan Davidson Ph.D. Senior Lecturer, TC Beirne Law School, University of Queensland, Brisbane, Qld, Australia
Dr, Adrian McCullagh Ph.D. ODMOB Lawyers, Brisbane, Qld, AustraliaA

2 Phelim Kine ‘A New Kind of AI Copy Can Fully Replicate Famous People. The Law Is Powerless’. – (2022) POLITICO <https://www.politico.com/news/magazine/2023/12/30/ai-psychologist-chatbot-00132682?mc_cid=8b7c480e03&mc_eid=09d81f7e72>

3 See Ibid

death of Seligman but is based upon Seligman's thinking. Further, the article made it clear that Seligman's student did not obtain the consent of Seligman prior to developing the AI engine.

The issue concerning consent is very interesting. What if a commercial entity did the same thing in relation to other people like Warren Buffet or Jack Welch for instance and charged third parties for commercial advice delivered via the AI engine? Should Professor Seligman have been compensated for the actions undertaken by the former student? If he is to be compensated, then how should that compensation be formulated? Should the compensation cease on the death of Seligman even though the AI engine may still be operating and possibly being commercialised? These commercial issues are really outside the scope of this paper, but they are all the same very interesting.

This concept of persona emulation is different from a Moravec Transfer which occurs when a human's mind is transferred/uploaded (rather than imitated) to a machine so that the mind itself will reside in the repository machine for future advancement⁴; though it should be understood that this technology to actually upload a mind presently does not exist so persona emulation is presently the closest thing to technological singularity.

The persona emulation concept then raises the question of what legal development should occur. That is, the questions are: has technological singularity arrived and how should the law accommodate such technical advancement? The persona emulation result is really a process of imitating a person's thinking so that it is highly unlikely that without further information it is possible to know that a machine created the output. This corresponds to Turing's concept of an intelligent machine in his 1950's seminal paper "*Computing Machinery and Intelligence*"⁵. In Turing's paper he proposes an exercise which he labelled as the "imitation game". The fundamental issue raised by Turing was whether human's could distinguish between human thought and machine generated thought. If human's could not identify between the two, then the machine could be said to possess some sort of intelligence, even though artificial⁶.

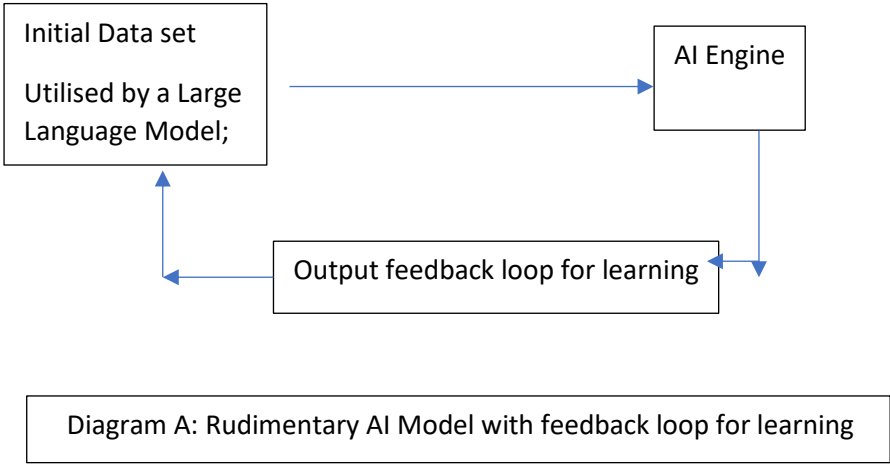
4 [Wikipedia](https://en.wikipedia.org/wiki/Mind_uploading) - Mind uploading - https://en.wikipedia.org/wiki/Mind_uploading

Much like the issue raised in the Brett Leonard 1992 movie "the Lawn Mower Man" where at the end of the movie there is an implication that the main character (Jobe Smith) is somehow meta-physically transported into cyber space so as to create a form of immortality.

5 Alan Turing 'Computing Machinery and Intelligence', (1950) Mind 40: 433-460
<<https://redirect.cs.umbc.edu/courses/471/papers/turing.pdf> >

6 John McCarthy, McCarthy is regarded as the founder/grand-father of AI in the modern era and was the person who coined the term "Artificial Intelligence", which he defined as "*the science and engineering of making intelligent machines*". He did so at the 1956 Dartmouth Summer Research Project where he together with Marvin Minsky, Nathaniel Rochester, and Claude Shannon, they formalized AI as a scientific discipline, proposing that machines could simulate any aspect of learning or intelligence.

The Seligman issue concerns the emulation of persona, with the added position of the AI engine continuing after the death of the relevant real person and could continue forever or for as long as the machine is supplied with an energy source to operate. If the persona emulation is ongoing then there must come a time where the AI emulation technology is relying more upon its own developed writings and less upon the original author’s writings and as such is relying upon new artificial information which could substantially deviate from the original authors thought process.



Over a period, this could then create an advancement in knowledge based upon the AI persona emulation output and thus solidify into Technological Singularity.

A. TECHNOLOGICAL SINGULARITY

In an episode of “The Big Bang Theory: The Cruciferous Vegetable Amplification”⁷ the character Sheldon Cooper raises the concept of *Technological Singularity*. The concept of Technological Singularity was first raised by Professor Vernor Vinge⁸ a retired San Diego State University professor of maths, and computer science in 1993 in his essay: “The Coming Technological Singularity”⁹ in which Vinge argues that the creation of superhuman artificial intelligence will mark the point at which “*the human era will be ended,*” such that no current models of reality are sufficient to predict beyond it.

< <https://home.dartmouth.edu/about/artificial-intelligence-ai-coined-dartmouth> >
7 <<https://the-big-bang-theory.com/episodeguide/episode/402/The-Cruciferous-Vegetable-Amplification/>>
8 It is with great sadness that Professor Vinge died on March 20, 2024, in La Jolla, California aged 79. Vernor Vinge, father of the technological singularity, died at age 79 | Ars Technica <<https://arstechnica.com/information-technology/2024/03/vernor-vinge-father-of-the-tech-singularity-has-died-at-age-79/>>
9 Vinge, V., “The Coming Technological Singularity”. <<https://edoras.sdsu.edu/~vinge/misc/singularity.html>>

In fact, the first line of the abstract to this essay states *“Within thirty years, we will have the technological means to create superhuman intelligence”*.

That is, technological singularity will occur when AI exceeds beyond human control and is able to rapidly transform society. Interestingly, 30 years from 1993 was 2023 during which ChatGPT 4o was released to the public. ChatGPT 4o has caused substantial consternation globally and has resulted in action from multiple jurisdictional legislative bodies concerning the rapid development of AI¹⁰ The issue identified in the Politico article is whether the concept of technological singularity has arrived and how will society, legislators and the law react.

The concept of Technological Singularity has in recent times been extensively discussed by Ray Kurzweil¹¹. Other futurists have also raised the concept of Singularity. In 1996, Yudkowsky in his paper “Staring into Singularity¹²” wrote

There are no hard problems, only problems that are hard to a certain level of intelligence. Move the smallest bit upwards, and some problems will suddenly move from "impossible" to "obvious". Move a substantial degree upwards, and all of them will become obvious. Move a huge distance upwards, and Lord knows what”.

As a closing thought Yudkowsky wrote:

“Our sole responsibility is to produce something smarter than we are; any problems beyond that are not ours to solve”.

With respect to Yudkowsky, as intelligent entities, it is beholden upon humans to try and anticipate the future development of Technological Singularity and ensure that any developed AI does not supplant the human species but can be utilised and be developed to assist the future existence of the humanity. That is, as Vinge in approving I. J. Good, noted:¹³

-
- 10 President Biden’s Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>
also see: EU AI Act: first regulation on artificial intelligence | News | European Parliament (europa.eu) <https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>
- 11 Ray Kurzweil, ‘The Singularity Is Near: When Humans Transcend Biology’ - Viking Penguin Publisher 2005 https://www.goodreads.com/book/show/83518.The_Singularity_is_Near
- 12 <http://www.textfiles.com/russian/cyberlib.narod.ru/lib/critica/sing/singstar.html>
- 13 Vinge (n 8).

...the first ultra-intelligent machine is the last invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control.

The present problem that has arisen is how should the law develop in addressing the concept of an AI machine interrogating a person's body of work and as a result being able to emulate new work based upon past knowledge of the subject person.

B. TECHNOLOGICAL EMULATION OF PERSONA

In 1982, Margaret Jane Radin published "*Property and Personhood*" in the Stanford Law Review¹⁴, proposing that the concept of property¹⁵ should extend to protect those external objects that become constitutive of personhood. Radin argues that "to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment."¹⁶ This personhood perspective distinguished between "personal property"—objects bound up with one's sense of self—and "fungible property"—objects held purely for instrumental or exchange purposes.¹⁷

Aligned with Radin's concept of personhood is the concept of identity. When society identifies a particular person, such identity comprises various attributes so that it is possible to distinguish one person from another. This distinction becomes especially important in non-face-to-face transactions where authentication is required, such as when a person desires remote access to a computer system. How is it possible to distinguish Elton John from Ed Sheeran, or from any other person where remote identification for access is required? Physical attributes clearly play a part in face-to-face transactions, but what about identical twins whose genetic components are virtually the same? The Winklevoss twins—Cameron and Tyler—are a prime example of two people who are remarkably similar in appearance (they are "mirror-image" twins, meaning Cameron is left-handed while Tyler is right-handed),¹⁸ yet each possesses distinctive attributes that distinguish one from the other.

14 Margaret Radin, 'Property and Personhood', (1982) 34 Stanford Law Review. 957

15 Wesley Hohfeld, 'Some Fundamental Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal. 16, 28-59. In 1961. the Hohfeldian view of property and rights attaching to the concept of property was extrapolated by Anthony Honoré., 'Ownership' which was included as an essay in Oxford essays in jurisprudence. edited by Guest, A., New York: Oxford University Press. (1961) pp. 107–47

16 Ibid. at 957.

17 Id. at 959-960

18 Ben Mezrich, 'Everything You've Read About The Winklevoss Twins Is Wrong', BOSTON MAGAZINE (19 February, 2021), <https://www.bostonmagazine.com/arts-entertainment/2019/05/29/winklevoss-twins/> .

Despite their nearly identical physical characteristics, both standing six feet five inches tall with similar facial features¹⁹—the Winklevoss twins are readily distinguishable through non-physical attributes. Cameron has been described as having “a thinner face and richer voice,” and notes that when he calls friends from Tyler’s phone, “they’ll know it’s me, even though the number showing up is his.”²⁰ Tyler has been characterized as “more left-brained and analytical,” while Cameron is “more empathetic and goofier.”²¹ Beyond vocal characteristics and personality traits, their distinct histories of creative expression, business decisions, and written communications create unique identity markers that distinguish them as individuals.

This paper explores a fundamental question: if personhood requires distinguishing attributes to establish identity, and if many of these attributes consist of prior expressions—writings, creative works, communications, and other manifestations of thought—can personhood itself, or at least these constitutive elements of personhood, be classified as property?²²

This inquiry inverts Radin’s original proposition. Rather than asking which external objects merit property protection because they are bound up with personhood, the question should be whether personhood—or more precisely, the distinguishing attributes that constitute personal identity—should itself be understood as a form of property deserving protection.

C. Scope and Structure of the Inquiry

This paper proceeds in five parts following this Introduction. *Part 2* examines the philosophical foundations of personhood and personal identity, distinguishing between personhood as a general human attribute and personal identity as the unique combination of characteristics that distinguishes one individual from another. *Part 3* analyses identity in the context of modern authentication

19 Horacio Silva, ‘Winklevoss Brothers.’, FANTASTIC MAN No 22 (2015), <https://www.fantasticman.com/articles/winklevoss-brothers/>

20 Ibid.

21 Mezrich (n. 17)

22 In the UK Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 stated that for a right or interest to be recognized as property, it must possess four specific characteristics:

1. **Definable:** It must be capable of being clearly defined.
2. **Identifiable by Third Parties:** It must be recognizable to others.
3. **Capable of Assumption by Third Parties:** It must be capable of being assumed or transferred by others.
4. **Stability/Permanence:** It must have some degree of permanence or stability.

In addition to Lord Wilberforce’s characteristics, it is suggested that there needs one further element which is that the subject matter must have one or more jurisdictions of residency. That is, the subject matter must not only be recognised as property, but the rights attached to the subject matter must be enforceable in at least one jurisdiction.

requirements, exploring how individuals are distinguished in remote, non-face-to-face contexts. *Part 4* examines the role of prior writing/publications and creative expressions as constitutive elements of identity, drawing on intellectual property doctrine and the philosophy of authorship. *Part 5* synthesizes this analyses to propose a framework for understanding aspects of personhood as property in itself. *Part 6* concludes with implications for legal doctrine and policy.

2. PHILOSOPHICAL FOUNDATIONS: PERSONHOOD AND PERSONAL IDENTITY

To evaluate whether personhood can be classified as property, it is important to first distinguish between two related but distinct concepts: “personhood” and “personal identity.”

A. Personhood as Universal Capacity

Personhood refers to those ontological features by virtue of which an entity qualifies as a person rather than merely a thing²³. Classical philosophical accounts vary in their criteria for personhood. Immanuel Kant conceived of the person as “a free and rational agent whose existence is an end in itself.”²⁴ This Kantian view focuses on universal abstract rationality, that is the capacity for autonomous choice and moral agency which, by definition, is the same for all persons and excludes the particular tastes, talents, and histories that differentiate individuals from one another.²⁵

John Locke offered a different formulation, defining a person as “a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places.”²⁶ For Locke, self-consciousness and memory constitute the essential attributes of personhood,²⁷ connecting past experiences to present awareness and future anticipation.

23 Daniel Sheffler, ‘Personhood, Personal Identity, and Personality’, where the Sheffler opens his discussion with the following:

It is helpful to draw a distinction between three things. (i) “personhood,” referring to those ontological features in virtue of which someone is a someone rather than merely something, e.g. rationality or the capacity for moral agency, (ii) “personal identity,” referring to those features of someone that distinguish him from all other persons as a unique someone in an incommunicable manner, and (iii) “personality,” referring to the full development of the features in both (i) and (ii) into the maturity that we experience now to a degree, but ultimately, is only brought to full perfection in the eschaton

<<https://www.dtsheffler.com/notebook/2023-06-09-personhood-personal-identity-and-personality/>>

24 Radin (n 13), at 962.

25 Radin (n13), at 962.

26 John Locke, ‘An Essay Concerning Human Understanding’ bk. II, ch. XXVII, ‘Of Identity and Diversity’. Para 11, ‘Personal Identity’. <https://www.gutenberg.org/files/10615/10615-h/10615-h.htm#chap2.27>

27 Radin (n 13), at 963

A third conception emphasizes embodiment. On this view continuous bodily existence is a necessary, though not sufficient, condition of personhood.²⁸ Physical continuity provides the foundation upon which mental and experiential continuity is built.

While these accounts differ in emphasis, they share a common feature: they describe capacities or attributes that, while manifested differently in each individual, are fundamentally similar across all humans. Rationality, self-consciousness, and embodiment are features that all humans possess by virtue of being humans.

B. Personal Identity as Distinguishing Characteristics

Personal identity, in contrast, “refers to those features of someone that distinguish him from all other humans as a unique someone in an incommunicable manner.”²⁹ Personal identity answers not the question “What am I?” but rather “Who am I?”—not what makes me a person among persons, but what makes me this particular person distinct from all others.³⁰

The Stanford Encyclopedia of Philosophy explains: “Outside of philosophy, the term ‘personal identity’ commonly refers to properties to which we feel a special sense of attachment or ownership. My personal identity in this sense consists of those properties I take to ‘define me as a person’ or to ‘make me the person I am.’”³¹ These properties include one’s character, beliefs, commitments, relationships, experiences, memories, talents, creative works, and the accumulation of choices made throughout life.

Personal identity emerges from and is constituted by one’s history. That is, we are who we are based on our past experiences that will influence our future actions. As philosophers have noted, persons are “what they are in virtue of their past and future integrated by their character.”³² The trajectory of one’s life—the experiences one has had, the relationships one has formed, the works one has created, the communications one has engaged in—becomes constitutive of who one is as a particular individual.

28 Radin (n 13) at 963 where Radin in n.18 cites. Strawson P.F, ‘Individuals: An Essay In Descriptive Metaphysics’ 87-116 (1959).

29 Sheffler (n 22)

30 Eric Olson, ‘Personal Identity’, *The Stanford Encyclopedia of Philosophy* (Winter 2024 Edition), Edward N. Zalta & Uri Nodelman (eds), <<https://plato.stanford.edu/archives/win2024/entries/identity-personal/>>

31 Ibid

32 Radin, (n 12) , at 963 where Radin discusses Williams, B., ‘Persons, Character and Morality’, in *THE IDENTITIES OF PERSONS* 197 (A. Rorty ed. 1976).

C. The Lockean Foundation: Memory and Personal Identity

Locke's emphasis on memory as central to personal identity provides a crucial foundation for this inquiry. Locke argued that personal identity consists in "sameness of a rational being" and that "as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person."³³ On this view, I am the same person I was ten years ago insofar as I can remember being that person and recognize those past experiences as mine.

But memory is not merely a passive recollection; it is actively constructed through various forms of expression and experiences gathered over time. Everyone remembers by telling stories, by writing accounts of their experiences, by creating artistic works that embody their perceptions and emotions. Ludwig Wittgenstein observed that the best picture of the human soul is the human body³⁴; it might similarly be observed that the best picture of personal identity is the accumulated record of a person's expressions—the writings, communications, creative works, and other externalized manifestations of consciousness that collectively constitute the distinguishable self.

D. Distinguishing Personhood from Personal Identity in Property Analysis

This distinction between personhood and personal identity is critical for the present inquiry. Radin's property theory focused primarily on how external objects relate to personhood—how ownership of certain things enables self-development and self-constitution.³⁵ She was concerned with the question: What things in the external world must a person be able to control in order to achieve proper self-development?

This paper focuses instead on personal identity: What are the distinguishing features that make each person identifiably unique, and can these features themselves be understood as property? If personal identity consists significantly of one's expressions—one's writings, communications, creative works, and other manifestations of thought and personality—then protecting personal identity may require recognizing these expressions as a form of property belonging inherently to the expressing individual.

3. IDENTITY AND AUTHENTICATION IN NON-FACE-TO-FACE CONTEXTS

The practical importance of distinguishing individuals becomes apparent in contexts where physical presence is impossible, particularly in remote authentication scenarios that pervade modern life.

33 Locke (n 25)

34 Radin (n 13), where Radin cites Ludwig Wittgenstein, 'Philosophical Investigations' 178 (G. Anscombe trans. 3d ed. 1958).

35 Radin (n 13)

A. The Authentication Challenge

Authentication is the process of verifying that an entity is who or what it claims to be.³⁶ In face-to-face contexts, authentication relies heavily on physical attributes: facial features, voice, gait, and other bodily characteristics that allow recognition. However, the digital age has created innumerable contexts in which individuals must be authenticated remotely, without physical presence.

Modern authentication systems typically rely on three categories of credentials:

1. **Something you know** (knowledge-based authentication): passwords, PINs, answers to security questions
2. **Something you have** (possession-based authentication): security tokens, smartcards, mobile devices
3. **Something you are** (biometric authentication): fingerprints, iris scans, facial recognition, voice patterns³⁷

Each category attempts to identify unique attributes that distinguish one individual from another. Knowledge-based authentication assumes that certain information is known only to the legitimate person such as a password for accessing a system. Possession-based authentication assumes that certain objects are held only by the legitimate person, such as a Lokblok physical access device/dongle. Biometric authentication measures physical characteristics that are unique to each individual such as retina scanning or fingerprint recognition or facial recognition.

B. The Inadequacy of Physical Attributes Alone

The case of identical twins illustrates the insufficiency of purely physical attributes for establishing unique identity. As noted, Cameron and Tyler Winklevoss share virtually identical genetic profiles and remarkably similar physical characteristics. Sophisticated facial recognition systems might struggle to distinguish them, particularly in photographs or static images.

Yet despite their physical similarity, it appears that no one who personally knows them would confuse one twin for the other. Their friends can identify them by voice, even when calling from each other's phones.³⁸ Their colleagues distinguish them by behavioral patterns, communication styles, decision-

36 Identity Management Institute 'Proof of Personhood Protocols', (Apr. 17, 2025), <https://identitymanagementinstitute.org/proof-of-personhood-protocols/>.

37 NIST Glossary of Terms https://csrc.nist.gov/glossary/term/authentication_factor

38 Silva (n. 18).

making approaches, and personal histories³⁹. These non-physical distinguishing attributes are not merely secondary markers; they are fundamental to identity.

C. Identity as Composite Attributes

Social identity theory, developed by Henri Tajfel and John Turner, provides a framework for understanding how identity emerges from multiple layers of attributes⁴⁰. Identity can be conceptualized as comprising three levels:

1. **Core attributes:** Elemental traits, behaviors, and attitudes that make one unique as an individual (values, beliefs, fundamental personality characteristics)
2. **Chosen attributes:** Characteristics that individuals select to describe their status, traits, and skills (occupation, political affiliation, hobbies, residence)
3. **Given attributes:** Characteristics over which individuals have no control (age, place of birth, genetic heritage)⁴¹.

What distinguishes one person from another is not any single attribute but rather the unique combination of attributes across all three levels. For the Winklevoss twins, given attributes are virtually identical—same birth date, same genetic heritage, same height, similar appearance. Chosen attributes overlap substantially—both studied economics at Harvard, both were Olympic rowers, both became cryptocurrency entrepreneurs. Yet the specific combination of choices, the manner of their expression, the individual creative decisions each has made creates distinguishing patterns.

D. Proof of Personhood for Remote Access

Increasingly, what distinguishes individuals is not what they are (physical attributes or general capacities) but what they have done and expressed. In remote authentication contexts it is not unusual for individuals to be identified through the concept of “Proof of Personhood”. Proof of Personhood is a technological framework that verifies a human identity in digital environments, distinguishing real humans from AI agents and bots.⁴² That is, the remote access environment will

39 Mezrich, (n. 17).

40 Naomi Ellemers, and Alexander Haslam, ‘Social Identity Theory’, Chpt 45 in ‘Handbook of Theories of Social Psychology’. Vol 2, edited by Paul Van Lang, Aria Kruglanski, and Tory Higgins, <https://psikologi.unmuha.ac.id/wp-content/uploads/2020/02/SAGE-Social-Psychology-Program-Paul-A.-M.-Van-Lange-Arie-W.-Kruglanski-E-Tory-Higgins-Handbook-of-Theories-of-Social-Psychology - Volume-Two-SAGE-Publications-Ltd-2011.pdf#page=400> .

41 Y STUDIOS ‘What Factors Really Influence Identity?’, (Mar. 26, 2024), <https://ystudios.com/insights-people/influence-on-identity>

42 COINMARKETCAP ‘Proof of Personhood (PoP) Definition’, (Feb. 7, 2025), <https://coinmarketcap.com/academy/glossary/proof-of-personhood> .

rely upon some attributes which when combined will identify who the person is and distinguish the person from some AI bot and from any third party who desires to gain access (fraudulently) to some IT environment.

These expression-based markers raise a fundamental question: If identity increasingly consists of one's history of expressions, and if these expressions are what make one identifiably unique, do these expressions constitute a form of property inherent to the expressing individual? That is, should these markers as a whole be recognised at law as being classified as a form of property.

4. PRIOR WRITINGS AND EXPRESSIONS AS PROPERTY

The relationship between creative expression and property has long been recognized in intellectual property law. However, the traditional framework treats expression as property primarily for economic and utilitarian purposes. This part examines whether a deeper, personhood-based justification exists for treating expressions as property.

A. Copyright and the Expression-Idea Dichotomy

United States copyright law protects "original works of authorship fixed in any tangible medium of expression."⁴³ Protected works include "literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture."⁴⁴ Critically, copyright protects an expression of an idea but not ideas per se. That is, "Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed."⁴⁵

This expression-idea dichotomy reflects a fundamental insight. It is not the abstract concept that merits protection, but rather the particular manifestation of thought. The way an individual chooses to express an idea will in general be unique. No two people, when asked to write an essay on the same topic, will produce identical expressions (absent copying). The particular choices of word, syntax, structure, metaphor, and emphasis reflect the individual personality and perspective of the author.

Bradley, J. (delivering the opinion of the US Supreme Court in the case of *Baker v. Selden*)⁴⁶, noted that copyright simply protects the same ideas clothed in the same words but that the same idea or subject-matter may be written using different expressions or words.⁴⁷ A specific idea can be

43 17 U.S.C. § 102(a) (2018).

44 "What is Copyright?", U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/what-is-copyright/>.
45 Ibid

46 *Baker v. Selden*, 101 U.S. 99 (1879) <https://supreme.justia.com/cases/federal/us/101/99/#top>

47 Ibid

expressed in many ways as a particular manifestation of thought. It is that specific manifestation of thought that will be unique to the individual creating it. Consequently, copyright protects the expression of an idea but does not provide protection for the idea itself. To protect an idea the patenting regime may be available.

B. The Personality Theory of Intellectual Property

Continental European legal traditions have long recognized a stronger connection between creative expression and personhood than Anglo-American copyright law. Under French *droit d'auteur* and German *Urheberrecht* (“author’s right”) systems, creative works are understood not merely as economic assets but as extensions of the author’s personality⁴⁸. There is a traditional cultural distinction between Anglo-American copyright law to that of the European position regarding copyright law.

This “personality theory” of intellectual property traces to Hegelian philosophy⁴⁹. Hegel argued that persons achieve actualization by embodying their will in external objects.⁵⁰ Through creative expression, the author externalizes thought, impressing personality onto the created work. The work becomes an extension of the author’s personality, and thus merits protection not merely for economic incentive but in respect of personhood itself.

Radin explicitly built upon Hegelian foundations in developing her property for personhood theory. She noted that Hegel’s concept of embodied will suggests “that the entity we know as a person cannot come to exist without both differentiating itself from the physical environment and yet maintaining relationships with portions of that environment.”⁵¹ Creative expression represents perhaps the most direct form of such embodiment—the author literally externalizes thought and personality into a tangible medium.

C. Personality Rights: Privacy and Publicity

Alongside intellectual property doctrine, Anglo-American law recognizes “personality rights”—the right to privacy and the right of publicity—which protect individuals’ control over aspects of their identity.

48 Adam Mossoff, ‘Is Copyright Property’, San Diego Law Review, (2005) V. 42, 29.
< <https://digital.sandiego.edu/cgi/viewcontent.cgi?article=2885&context=sdlr> >

49 Maurizio Borghi, ‘Hegel’s theory of personality in copyright law: questioning the dominant (Anglo-American) paradigm’, , AIDA - Annali Italiani del Diritto d'Autore, vol. 32 (2023), 463.
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4771323>

50 Radin, (n. 13), at 971-977 (discussing Hegel’s theory).

51 Radin, (n. 13) at 966

Samuel D. Warren and Louis D. Brandeis's landmark 1890 Harvard Law Review article argued for recognizing a right to privacy protecting "personal writings and any other productions of the intellect or of the emotions."⁵² They contended that:

*The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, says, acts, and to personal relation, domestic or otherwise.*⁵³

Warren and Brandeis recognized that intellectual productions are intrinsically connected to personhood—that forcing disclosure or publication violates the integrity of the person in a way analogous to physical invasion.

The right of publicity, recognized in most American jurisdictions, protects "an individual's right to control and profit from the commercial use of his or her name, image, likeness, or other indicia of identity."⁵⁴ This right acknowledges that one's identity—including not just physical appearance but name, voice, distinctive characteristics, and even signature phrases—has property-like attributes that the individual should control.

D. Writings as Constitutive of Identity

The foregoing doctrinal overview argues that legal systems already treat certain aspects of expression as property-like. But the personhood inquiry goes deeper: Are writings and expressions merely protectable as property, or are they actually constitutive of property in the sense that they are inseparable from the identity of the person?

Consider the case of an author's collected works. A novelist who has written twenty books over a career has not merely produced twenty commercial products. Those novels represent twenty manifestations of the author's consciousness—twenty distinct expressions of how that particular mind perceives the world, constructs narratives, develops characters, uses language. The collected works constitute a portrait of the author's evolving thought, values, obsessions, and worldview far more comprehensive than any physical description could provide.

52 Samuel Warren and Louis Brandeis, 'The Right to Privacy', 4 HARV. L. REV. 193, 213 (1890).
<https://personal.utdallas.edu/~mleaf/warrenbrandeisprivacy.pdf>

53 Ibid

54 Rosina Zapparoni, 'Propertising Identity: Understanding The United States Right Of Publicity And Its Implications — Some Lessons For Australia' (2004), Melbourne University Law Review, 690-723
<https://law.unimelb.edu.au/_data/assets/pdf_file/0011/1708094/28_3_5.pdf>

If personal identity consists significantly of one's history—of who one has been and has become through accumulated experience—then the record of one's expressions is not merely evidence of that identity but actually constitutive of it. The writings are not external objects that happen to belong to the author; they are externalizations of the author's self, frozen in tangible form.

E. The Special Case of Prior Writings

While copyright law protects many forms of expression, written works merit particular consideration for identity purposes. Writing is inherently reflective; it requires translating thought into language, making choices about how to express ideas, creating structure and argument. The act of writing is an act of self-definition—of determining what one thinks by articulating it in words.

Moreover, writing creates a permanent, verifiable record. A person's accumulated writings—letters, emails, articles, books, blog posts, social media communications—constitute a comprehensive historical record of that person's thoughts, concerns, values, and evolution over time. This record is arguably more definitive of personal identity than fleeting verbal utterances or behavioral observations.

In the digital age, the volume of written expressions has exploded. Most educated individuals now produce vast quantities of written communications such as emails, text messages, social media posts, online comments, work documents, and creative projects. This accumulated body of expression creates a detailed portrait of the individual's mind and personality.

F. Expression and the Lockean Conception of Identity

Recall, Locke's account of personal identity as consisting in continuity of consciousness, with memory extending identity backward through time.⁵⁵ Written expressions serve as external markers of that continuous consciousness. A person can re-read their own prior writings and recognize them as expressions of their former self, even while recognizing how they have over time changed.

In this sense, writing functions as what computer scientists might call "serialized states" of consciousness—snapshots of the self at particular moments in time. The accumulated collection of these snapshots, properly integrated, constitutes the historical record of who the person has been and therefore who they are.

55 LOCKE, (n. 25).

5. PERSONHOOD AS PROPERTY: A PROPOSED FRAMEWORK

This Part 5 synthesizes the foregoing analysis to propose a framework for understanding certain aspects of personhood—particularly prior writings and expressions—as property.

A. The Nature of the Property Claim

To say that personhood, or aspects thereof, constitutes property is not to say that personhood can be commodified or that individuals can be bought and sold. Rather, it is to say that individuals have exclusive rights to control certain attributes that constitute their identity, and that these rights should be recognized and enforced in law in the same manner as other property rights.

The property claim consists of several components:

- 1. Exclusivity:** The individual has the exclusive right to claim authorship of their own expressions. No one else can legitimately claim to have written what I have written or to be the source of my creative works.
- 2. Control:** The individual has the right to control how their expressions are used, particularly in contexts that affect their identity. This includes control over authentication uses, attribution, and contexts that might misrepresent the individual's identity or views.
- 3. Transferability (limited):** While some economic rights in expressions can be transferred (as copyright doctrine recognizes), certain identity-based rights may be inalienable. A clear example of this is the concept of moral rights which must remain with the specific author of a work though it is possible for the author to agree to abandon their moral rights. One cannot transfer the fact of having been the creator, the historical reality of having expressed particular thoughts.
- 4. Protection against misappropriation:** Others should be prohibited from using an individual's expressions in ways that misrepresent identity, create confusion about authorship, or appropriate the individual's identity for others' purposes.

B. Distinguishing Personal and Fungible Expression

Echoing Radin's distinction between personal and fungible property,⁵⁶ it should be possible to distinguish between expressions that are bound up with identity (personal expressions) and expressions produced primarily for commercial exchange (fungible expressions).

Personal expressions include:

- Private communications (letters, diaries, personal emails)

56 Radin, (n. 13)

- Creative works reflecting individual artistic vision
- Scholarly or professional writing reflecting expertise and viewpoint
- Communications establishing relationships and reputation
- Any expression where the connection to the particular expressing individual is important

Fungible expressions might include:

- Purely commercial writing-for-hire where authorship is irrelevant
- Generic technical documentation
- Expressions specifically created for anonymous distribution
- Works where the expression's value is entirely separable from the expressing individual's identity

This distinction matters because personal expressions merit stronger protection precisely because they are constitutive of identity. To misappropriate personal expression is not merely to take economic value; it is to misappropriate identity itself.

C. The Property Right in Identity Attributes

Extending beyond writing, it is suggested that it is possible to identify a broader property right in those attributes that, in combination, constitute personal identity:

1. Physical attributes (to the extent unique): While basic human features are common, particular combinations of features, distinctive characteristics, and especially biometric data unique to the individual constitute a form of property in one's identity.

2. Behavioral patterns: Characteristic ways of moving, speaking, making decisions—patterns that distinguish the individual from others.

3. Experiential history: The particular combination of experiences that shapes the individual. While experiences themselves cannot be owned, the right to control the narrative of one's own experience—to be the authentic source of one's own story—is an identity-based property right.

4. Creative and intellectual expressions: As discussed extensively above, the accumulated body of one's expressions constitutes a definitive record of identity.

5. Relational identity: The network of relationships one has formed, the reputation one has established, the roles one occupies in various communities.

The combination of these attributes, in their particular configuration, constitutes the unique identity of the individual. This combination is property in the sense that it belongs exclusively to that individual, and others should not be permitted to appropriate it.

D. Radin's Theory Applied to Identity Itself

Radin argued that certain external objects become so bound up with personhood that they merit special protection as “personal property” rather than merely “fungible property.”⁵⁷ It is now possible to invert Radin's analysis: certain aspects of the self—particularly expressions and the identity attributes they constitute—are so fundamentally constitutive of personhood that they should be recognized at law as property inherent to the person.

Radin noted that “the personhood perspective can help decide specific disputes between rival claimants” by recognizing that property claims relating to personhood are stronger than purely economic claims.⁵⁸ Similarly, identity-based property claims should take precedence over purely economic claims when they conflict.

For example, if an individual's prior writings are being used to create a false impression of their views or to impersonate them for commercial purposes, the individual's identity-based property claim should override the economic interests of the appropriator. The writings are personal property in Radin's sense—they are bound up with the individual's personhood in a way that makes their misappropriation a violation of personhood itself.

E. Policy Implications

Recognizing aspects of personhood as property has several policy implications:

- 1. Authentication and privacy:** In an age of pervasive surveillance and data collection, individuals should have enhanced control over how their identity-constituting expressions and attributes are used for authentication, profiling, or surveillance purposes.
- 2. AI and identity misappropriation:** As artificial intelligence systems become capable of generating text “in the style of” particular authors or creating deepfake videos using individuals' likenesses, the property right in one's identity expressions becomes increasingly important. Legal systems should recognize that such appropriations violate property rights in identity.
- 3. Post-mortem rights:** If expressions are constitutive of identity, questions arise about how long identity-based property rights should persist after death. While economic copyright rights are time-

57 Ibid at 957-960

58 Ibid at 978-960

limited, identity-based rights might warrant longer or even perpetual protection in certain contexts (such as preventing misrepresentation of a deceased person's views).

4. Digital inheritance: The massive volume of digital expressions (emails, social media posts, online writings) creates new questions about inheritance and estate planning. These expressions constitute a substantial portion of modern identity and merit consideration in inheritance law.

5. Employee writings and identity: Current law often assigns copyright in employee-created works to employers. But to the extent such works constitute part of the employee's professional identity, the employee may retain identity-based property rights even when economic rights are assigned.

F. Limitations and Counterarguments

Several important limitations must be acknowledged:

1. The publicity/privacy balance: Treating identity attributes as property must be balanced against free speech rights and the legitimate public interest in information about public figures. Not every reference to an individual or use of their expressions constitutes actionable appropriation.

2. The merger doctrine concern: If ideas and their expression become too closely merged—if there is only one way to express a particular idea—then protecting the expression might effectively monopolize the idea, which copyright law prohibits. Similarly, some identity attributes may be too general to merit exclusive property protection.

3. Independent creation: Traditional property gives exclusive rights regardless of whether others might independently create the same thing. Copyright requires originality but allows independent creation of similar works. Identity-based property rights must similarly respect independent creation while prohibiting actual appropriation.

4. Community and collaborative identity: Not all identities are purely individual. We exist in communities, and our identities are partly constituted by relationships and social contexts. Property rights in identity must not undermine the communal aspects of identity formation.

5. Economic incentive theories: Traditional intellectual property law emphasizes economic incentives for creation. Identity-based property rights rest on different foundations (personhood protection) and thus require different doctrinal structures.

G. The Winklevoss Example Revisited

Return to the Winklevoss twins. Their physical similarity demonstrates that identity cannot be reduced to bodily characteristics. Their distinguishability rests on accumulated attributes:

- Their distinct voices and speech patterns
- Their individual personalities (Tyler more analytical, Cameron more empathetic)
- Their separate though overlapping business decisions and investments
- Their individual communications and expressions
- Their distinct though parallel life histories

If we asked a sophisticated AI system to impersonate Tyler Winklevoss by generating emails or articles in his style, that impersonation would violate Tyler's property right in his identity, even if no economic harm occurred. The impersonation appropriates Tyler's identity attributes—his characteristic ways of expressing thought, the accumulated record of his distinctive voice and perspective—for purposes other than Tyler's own.

Similarly, if someone attempted to authenticate themselves as Tyler by presenting samples of his prior writings, that person would be misappropriating Tyler's identity property—using Tyler's constitutive expressions to falsely claim Tyler's identity.

6. CONCLUSION

This paper has examined whether personhood, as conceptualized by Radin, can itself be classified as property. While Radin's original theory asked which external objects merit protection because they are bound up with personhood, we have inverted the inquiry: Are the attributes that constitute personhood—particularly prior writings and expressions—themselves a form of property? Moving back to the original issue involving Professor Seligman and the collective output of his extensive writings; should he or anyone else for that matter be compensated for the use of their material in the training of an AI engine that will emulate their persona. It is proposed that the analysis detailed in this paper yields affirmative answers on several grounds:

Philosophically, personal identity consists significantly of one's history of thoughts, expressions, choices, and relationships. Prior writings constitute a definitive record of that history—a serialization of consciousness over time that is uniquely identifiable with the particular individual.

Practically, in a digital age characterized by remote authentication and massive data collection, individuals are increasingly identified and distinguished by their expression patterns rather than physical attributes. Protecting identity requires protecting the constitutive expressions.

Legally, existing doctrine in intellectual property, privacy, and publicity rights already recognizes property-like rights in various aspects of identity. These doctrines can be understood as applications

of a more fundamental principle: that individuals have property rights in the attributes that constitute their identity.

Normatively, recognizing identity-constitutive attributes as property protects human dignity and autonomy. It prevents the appropriation of identity for others' purposes and preserves individuals' control over how they are represented and known in the world.

The framework proposed here is not a call for unlimited property classification of identity. Rather, it recognizes that property protection is appropriate for those aspects of identity that are:

1. Distinctive to the particular individual
2. Actually constitutive of that individual's identity rather than generic attributes
3. Expressed or manifested in tangible form
4. Used or at risk of being appropriated in ways that affect identity

Prior writings meet all these criteria. They are distinctive expressions of individual consciousness, constitutive of personal identity, fixed in tangible media, and increasingly subject to appropriation through AI generation, deepfakes, and unauthorized use in authentication contexts.

As we navigate an increasingly digital existence where identity is mediated through expressions rather than embodied presence, the property dimension of personhood becomes ever more salient. Recognizing that we have property rights in who we are—in the distinguishing attributes that make each of us identifiably unique—is essential to preserving human dignity and autonomy in the digital age.

In conclusion, personhood from a philosophical perspective can indeed be classified as property, particularly those aspects of personhood consisting of prior writings and expressions. These are not external objects that happen to belong to persons; they are externalizations of personhood itself, and as such, they merit recognition and protection as a fundamental form of personal property—property not merely for personhood, as Radin argued, but property of personhood, inherent and inalienable attributes of the unique individual.