Volume 6 (3) 2024 https://doi.org/10.5204/lthj.3567

Generative AI, Copyright and Emancipation: The Case of Digital Art

Célia F. Matias
Faculty of Law, University of Macau, Macau

Abstract

The emancipatory effect of copyright on the lives of creators has long been hindered by the concentration of rights by powerful entities that can hold creativity hostage through exclusive rights over countless cultural references. Exceptions to copyright have played an important counter-hegemonic role, supporting what we might call a public domain counterprinciple. The recent explosion of generative artificial intelligence (GenAI) upends this scenario, with creators bringing copyright infringement claims to the courts to determine, inter alia, the existence and relevance of copying in the training process and whether AI outputs qualify as derivative works. Using digital art as an example, this article assesses these dynamics from the perspective of emancipation, considering the interplay of copyright rules, exceptions, principles and counterprinciples, and seeks to devise pathways, within and outside copyright, to address the challenges posed to creators by GenAI.

Keywords: Copyright; digital art; fair use; generative AI; emancipation.

1. Introduction

In 2018, the portrait of Edmond de Bellamy[1] became familiar in scholarly conversations about AI and copyright law. The blurry figure of a vaguely aristocratic-looking man drew attention for its display of technological potential as a conventionally artful work created by a machine; artistic interest therein was situated precisely in this genesis. As in earlier computer art, AI art was considered notable because of how it was made – the process overshadowed the creation itself. Five years later, the situation is very different. With the mass deployment of generative AI (GenAI) models such as ChatGPT, Stable Diffusion and Midjourney, the trivialisation of the process is well underway, and a new normal in which AI-generated content coexists with human content seems inevitable.[2]

Concern has swept through creative communities globally,[3] and the immediate causes seem obvious: content creators face competition from machines that will almost certainly threaten their livelihoods. This technological overhaul follows another – the internet – that, for many, had the opposite effect. Creative professionals in the visual arts, music, cinema and writing have depended on gatekeepers to judge their work's worthiness and commercial potential.[4] As the Harvey Weinstein scandal demonstrates, these judgements may have been biased,[5] discriminatory or unethical (even criminal).[6] The internet has played an important role in mitigating this gatekeeping, by allowing users to create an online presence, gain exposure and participate in creative industries on their own terms.[7] This blessing has become a curse. For decades, creators have fed the internet with

[1] Obvious Art, "Portrait of Edmond de Bellamy."
[2] Harris, "'AI will Become the New Normal'."
[3] McKendrick, "Killer of Creative Jobs?"
[4] Bystryn, "Galleries as Gatekeepers."
[5] Allen, "The X Factor?"; Agnello, "Race and Art."
[6] BBC News, "Harvey Weinstein Timeline."
[7] Visone, "Instagram"; see also Gerlieb, "TikTok as a New Player."

content, contributing to a massive repository of human creativity that, in technical terms, is freely available. This mass of data is what made GenAI possible. [8]

However, while seeming freely available, much of that data represents items that qualify as 'work' for purposes of copyright protection. Thus, as GenAI began to impact human creators' livelihoods, they resorted to claiming copyright infringement to revindicate credit, consent and compensation.[9] However, copyright's emancipatory role has been ambivalent, as it may also bring constraints to creators, especially considering the extensive copyright portfolios held by some entities and the threat of enforcement whenever elements of protected works are used in third-party creations. Fair use and other copyright exceptions have been crucial in allowing creators to draw on such prior expressions during their creative process[10] and might be seen as emanations from a public domain counterprinciple. As suggested by Unger, [11] exceptions and other mechanisms could be used by legal practitioners to protect the public domain and pursue emancipation.

GenAI arguably upended these dynamics, calling for a reassessment of the relationship between copyright and emancipation. This article begins with an overview of this relationship. It proceeds to consider the role of copyright exceptions within it, distinguishing between open-ended and specific exceptions and giving examples from several jurisdictions. Next, it weighs GenAI's impact on the life of creators and assesses the arguments put forth by copyright holders in the ongoing copyright infringement cases against AI companies in the United States. It finds that some of these arguments could lead to further encroachment on the public domain and undermine the interests of creators. Finally, it considers the sense of betrayal that permeates these reactions and seeks to unveil pathways to balance interests at stake, both within and outside the limits of copyright law.

2. Principles and Counterprinciples in Copyright Law

2.1. Emancipation and Copyright

The term 'emancipation', broadly understood as liberation, carries political baggage. The tone is set by Marx's distinction between political and human emancipation,[12] which places men within a social community and relates emancipation to their ability to flourish through productive activity in that society.[13] Drawing from Marx, the Frankfurt School aspired to 'a future society as a community of free man'.[14] This understanding is embedded in a critique of modernity and capitalism.[15] Unfair labour relations, cemented by a so-called 'free contract', were seen as the antithesis of emancipation,[16] and the 'relative individual independence' of 'subjects who enter into contractual relationships' as 'a thing of the past'.[17]

There have been several other iterations of and challenges to the concept,[18] for example, from feminism[19] and decoloniality.[20] Others have noted that the appropriation of emancipation by contemporary right-wing populist movements betrays its purpose and puts the concept in crisis.[21] Nevertheless, emancipation is a worthy goal, as it remains instrumental to pursuing the good life.

At its inception, copyright was arguably an emancipatory project. Following the expiry of the UK Licensing of the Press Act of 1662, the Statute of Anne replaced the privileges of publishers and the censorship of the Stationer's Company. However, its emancipatory effect for individual authors cannot be assumed today. Over time, rights have been concentrated in a few entities, with large publishing, film or record companies becoming 'content holder oligopolies'.[22] This has been achieved through

[8] Roose, "Data that Powers AI."
[9] Knight, "Authors Call."
[10] Samuelson, "Justifications for Copyright."
[11] Unger, "Critical Legal Studies."
[12] Marx, "Early Writings," 226.
[13] Wartenberg "'Species-Being' and 'Human Nature' in Marx."
[14] Horkheimer, "Traditional and Critical Theory."
[15] Horkheimer, "Authority and the Family."
[16] Horkheimer, "Authority and the Family," 85–86.
[17] Horkheimer, "Traditional and Critical Theory."
[18] For a discussion of emancipation in critical social theory, see Gottardis, Reason and Utopia.
[19] Wright "Explanation and Emancipation."
[20] Allen, The End of Progress.
[21] Blüdorn, "Emancipatory Politics."
[22] Tang, "Copyright's Techno-Pessimist Creep."

licensing practices and, where available, work-for-hire rules,[23] and justified by creators' reliance on such actors to produce, distribute and promote their works. Supporters of work-for-hire doctrines make the economic argument that copyright should be held by the 'better exploiter', with the resources and ability to market and distribute the work.[24] This brings disadvantages to individual content creators, who must compete for the attention of these entities and, if successful, be relegated to the subordinated position of employees or service providers. The concentration of rights in powerful actors may also negatively impact independent creation, as they seek to 'hoard, defend and exploit intellectual property through legal instruments' to 'maximize the economic value of each product'.[25] In this scenario of hegemony, supported by copyright, the public domain is bound to become increasingly encroached upon. Acknowledging its role as a counterprinciple to copyright is thus instrumental to an emancipatory outcome.

2.2. Reimagining Copyright Law Through the Emancipation Lens: The Role of the Public Domain

Hegemony and emancipation are possible outcomes in any legal system, and written rules may yield varying results. For instance, as Unger claims, property rights may produce 'a power to reduce other people to dependence' despite these rights being understood as inexorably tied to ideals of freedom.[26] In this context, the practice of law can shape the outcomes of legal systems. Unger's deviationist doctrine thus appears as a corrective device that, through the engineering of principles and counterprinciples, can counter the hegemonic tendencies underpinning legal systems and '[prevent] the reinforcement of collective disadvantages'.[27] Following this doctrine, principles such as contractual freedom could, through legal practice, be relegated to a specialised role, and counterprinciples such as contractual fairness could become general principles. Values underlying contractual fairness, such as solidarity and community, can then be pursued over the individualism associated with contractual freedom, eventually generalising the counterprinciple and gradually displacing the dominant principle.[28] Parallel reasoning may be applied to the role of copyright.

The traditional copyright justifications are the utilitarian and the Lockean, although others may be invoked.[29] Both purport to justify exclusive rights over intangible, non-rivalrous things, one based on the incentive to creation and the other on natural rights. However, both fall short if we aim to analyse copyright through the emancipation lens.

The utilitarian perspective is concerned not with emancipation but with maximising creative output, regardless of whether some might end up in a dominant position. From this perspective, maximising the production of creative works is possible even if individual creators remain subordinate to corporate content holders. Moreover, copyright protection has expanded following digitisation, further (and arguably unjustifiably) enclosing the 'informational commons'.[30] This may further limit individual creators' ability to work independently and expose them to legal risks, contrary to copyright as an emancipatory project.

The relationship between Lockean justifications and emancipation is more complex. Locke's two provisos of sufficiency and spoilage seem intended to prevent abuses in the appropriation of goods. However, intellectual property rights fit awkwardly into this scheme as, without the legal establishment of exclusive rights over intellectual creations, one individual's appropriation of ideas would not deprive others of their enjoyment. Thus, every person ought to be able to appropriate as many ideas as possible to multiply their positive outcomes – for instance, bringing culture to more people by reciting poetry or performing plays or musical compositions. As Drahos points out, though, outside the abundant state of nature, other policy goals (such as utilitarianism) are bound to determine the options taken by the legislature regarding exclusive rights.[31] Concerning the spoilage proviso, scholars have proposed that, 'Those who appropriate ideas with a view to doing nothing with them arguably infringe Locke's spoilage proviso.'[32] Patent trolls are a perfect illustration. Locke's theory of natural property rights has nevertheless been applied to the appropriation of ideas, and exclusive rights to the expression of those ideas have been attributed without the proviso's limiting effect, once again concentrating rights among a few.

The alternative to intellectual property rights has been referred to as the intellectual commons or the public domain. The concepts are closely related but may be distinguished. To Dusollier, the commons differs from the public domain in that it

[23] For instance, in the United States, in accordance with 17 U.S. Code, §201(b).

[24] Hardy, "Work-Made-for-Hire Doctrine."
[25] Currah, "Hollywood Versus the Internet."
[26] Unger, "Critical Legal Studies," 655
[27] Unger, "Critical Legal Studies," 603.
[28] Veitch, Jurisprudence, 194–198.
[29] See Bently, 35–40.
[30] Trosow, "The Illusive Search for Justificatory Theories."
[31] Drahos, A Philosophy, 53.
[32] Drahos, A Philosophy, 51.

'arise(s) from exclusive property'.[33] As the public domain simply means the absence of exclusive rights, works within it may be appropriated and enclosed. Differently, the commons may result from 'copyleft' or Creative Commons licences, which may protect the works against appropriation and preserve the public domain when subsequent appropriation is likely. Greenleaf argues that no-cost voluntary licences granted to the public in general (e.g. Creative Commons licences) result in a 'contractually constructed commons' and, under certain conditions, can be integrated into the public domain.[34] Thus, even though the commons may have advantages, the public domain appears as the ultimate goal and principle, of which creative commons and similar mechanisms are manifestations.

The exceptions to the exclusive rights constituted by copyright are another manifestation of the public domain.[35] Some exceptions are based on the non-commercial nature of the use of a copyrighted work. For instance, distributing copies of book excerpts for classroom teaching is often accepted. Others have a different rationale: exceptions for caricature, parody and pastiche, for example, are justified by freedom of speech, whereas those for text and data mining are a matter of public policy.[36] The problem of copyright infringement in AI training likely hinges on different jurisdictions' interpretations of these exceptions. Some jurisdictions, such as the European Union, Japan and Singapore, have already introduced exceptions that arguably include AI training in their scope. In the United States, fair use is likely to be invoked once the several ongoing lawsuits move past their initial stages – a process that is already underway. These exceptions have played an important role in making room for the public domain within copyright regimes. This is explored in the next section.

3. Copyright Exceptions and the Public Domain Counterprinciple

As copyright was strengthened over the years, the public domain was subordinated to the exclusive privileges of copyright holders and exceptions restricted by law, becoming a counterprinciple to copyright. This subordination is present in the Berne Convention, which limits member states' ability to incorporate copyright exceptions into their domestic laws through the three-step test: (1) the exception should not be too broad; (2) there should be no conflict with the work's normal exploitation; and (3) there should be no unreasonable prejudice to the author's legitimate interests.[37]

Countries have taken different approaches to copyright exceptions, from detailed lists and fair dealing clauses to a more open-ended fair use doctrine.[38] The latter's open character raises doubts about its compatibility with the three-step test.[39] Nevertheless, fair use remained in place after the United States joined the Berne Convention in 1988, leading to 'tacit acceptance' of the doctrine and the potential of influencing other jurisdictions.[40] Canadian case law offers an example, with circumstances not explicitly enumerated in the law having since been considered fair dealing.[41] This may be a judicial expansion of the rule, but Katz claims that despite seemingly restrictive language and restrictive interpretations, the legislature envisioned an 'open, flexible, and general fair dealing'.[42]

There is a similar tendency in Europe concerning the parody exception, an essential mechanism in artistic and literary creation that allows elements of an existing work to be integrated into a new (derivative) work.[43] The exception is framed as optional by the Infosoc Directive, as evidenced by the expression 'Member States may provide'.[44] However, Article 17.7 of the Copyright in the Digital Single Market (CDSM) Directive arguably made it (along with others) mandatory for online user-generated content.[45] Some EU member states had already contemplated these exceptions in domestic legislation; others opted to provide them in the context of online sharing or generally. Some states, such as Italy, took the former route. However, recent

[33] Dussolier, "The Commons as a Reverse Intellectual Property."
[34] Greenleaf, Public Rights, 475–476.
[35] Greenleaf, Public Rights, 475–476, considers works outside copyright protection, where copyright has expired, non-infringing uses of protected works, compulsory licensing and internet-enabled public rights.
[36] Karapapa, Defences.
[37] *Berne Convention*, art. 9(2).
[38] 17 U.S.C. § 107 (1976).
[39] See Goold, "The Interpretive Argument" for an overview of the debate regarding traditional and balanced interpretations of the three-step test and supporting the latter.
[40] Hughes, "Fair Use," 236.
[41] See *CCH v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (Can.).
[42] Katz, "Debunking."
[43] This article uses the expression "derivative works," used in US law (19 U.S.C. § 101) and across the literature.
[44] Directive 2001/29/EC, Art. 5.3(k).
[45] Directive (EU) 2019/790.

decisions of the Court of Justice of the European Union[46] suggest that these exceptions should be mandatory, as they support the fundamental right of freedom of expression.[47]

Others have proposed widening the scope of existing exceptions to give effect to freedom of artistic expression, a fundamental right protected by Article 10 of the European Convention on Human Rights. Geiger[48] has found evidence of this possible expansion in the May 2015 decision by the French Supreme Court (Cour de Cassation) in *Klasen v Malka*,[49] in which the court noted the need for a fair balance between copyright and freedom of expression, including artistic expression. He argues that this decision shows how balancing fundamental rights allows copyright infringement to be set aside in cases of 'creative appropriation', even when no existing exceptions apply; this creates a de facto fair use doctrine and, potentially, broader exceptions for creative use that consider the different interests at stake.[50] This might be overly optimistic. The *Klasen v Malka* case did not end well for the author of the purported transformative work, as the court of appeal's re-assessment concluded that there was indeed infringement.[51] In a subsequent decision concerning works by Jeff Koons, the Paris court of appeal once again ruled in favour of the copyright holder, considering the fair balance of copyright and freedom of expression unaffected.[52]

The above considerations demonstrate how fair use remains a counterpoint to more restrictive approaches in other jurisdictions. In this context, the concept of transformative use is pivotal;[53] it has been relied on by communities of creators (not only, but significantly) in the digital environment to evade claims of infringement for publication of derivative user-generated content when those works add something new to the work that inspired them.[54]

Among these creators are communities dedicated to 'fan art' or 'fan fiction'. Despite having little negative (and perhaps some positive) impact on the commercial performance of the source material,[55] these works have been the target of legal action by copyright holders.[56] The landmark 1994 US Supreme Court decision in *Campbell v Acuff-Rose*[57] gave authors of derivative works confidence and was embraced by advocacy organisations[58] and some online platforms.[59] The case concerned a song by the rap group 2 Live Crew, named 'Pretty Woman', which allegedly infringed Acuff-Rose's copyright on the song 'Oh, Pretty Woman' by Roy Orbison. Despite the use of core elements of Orbison's song, the court found the use transformative, 'altering the original with new expression, meaning or message'.[60] This makes it less likely that the derivative work substitutes the original and causes market harm. Thus, according to the *Campbell* decision, 'the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use'.[61]

Transformative use seemingly suffered a setback in the recent *Warhol* decision by the US Supreme Court.[62] The works at stake are a silkscreen portrait of Prince, named 'Orange Prince', by the late artist Andy Warhol, licensed to Condé Nast for publication on a magazine cover, and a 1981 photo of Prince by photographer Lynn Goldsmith. Despite the potentially transformative character of Warhol's work, the court denied fair use and ruled for the right holder. This decision centred on substitution: the derivative work serving the same purpose and function as the original. The court reasoned that transformation was part of the definition of derivative work, which is subject to the exclusive right of the original work's copyright holder.[63] Therefore, not

[46] Among others, in the Pelham case, the court used the expression "may or even must be transposed by Member States" with respect to the exceptions in Arts 2–4 of the Infosoc Directive, Case C-476/17 *Pelham GmbH v Ralf Hütter* EU:C:2019:624 (29 July 2019). See also Rendas, "Sense of Humor?"
[47] Rendas, "Sense of Humor?"
[48] Geiger, "'Fair Use'."
[49] *Alix Malka v. Peter Klasen*, Cour de Cassation, Chambre Civile 1, no. 13-27.391, 15 May 2015.
[50] Geiger, "'Fair Use'."
[51] *Alix Malka v Peter Klasen.* See also Rosati, "Not Sufficiently 'Transformative'."
[52] *Koons v. Davidovici*, Cour d'appel de Paris, Pôle 5 – chambre 1, n° 19/09059, 23 February 2021.
[53] *Campbell v Acuff-Rose Music, Inc* 510 U.S. 569 (1994) is usually credited with having brought transformative use to the fore as a criterion of fair use. This has been contested by more recent case law (as discussed below).
[54] Organization for Transformative Works, "Welcome."
[55] Tan, "Harry Potter and the Transformation Wand."
[56] Anne Rice was known to strongly oppose all forms of fan fiction and to act against its authors. Jackson, "Anne Rice."
[57] *Campbell v Acuff-Rose*, 577–578.
[58] The *Campbell* case is cited as a legal basis for understanding transformative use going beyond parody and critique. See the answer to the question: Organization for Transformative Works, "Why Does the OTW Believe that Transformative Works are Legal?"
[59] For example, the fair use defence is considered in the DeviantArt Help Center where, under "Submission Policies," it is stated that "copyright allows for creative individuals to draw inspiration from other existing works through the concept of 'fair use'"; several cautions regarding the application of this defence are included. DeviantArt, "Fair Use and Your Submissions."
[60] *Campbell v Acuff-Rose*, 569.
[61] *Campbell v Acuff-Rose*, 569.
[62] *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith*, 598 U.S. __ (2023).
[63] 17 U.S.C. §106(2) (1976).

all transformative use gives rise to fair use and, to be considered fair, the degree of transformation by the third party must 'go beyond that required to qualify as a derivative'.[64] For instance, the transformation may constitute fair use if it qualifies as parody, as was arguably the case for 2 Live Crew's 'Pretty Woman'. This can be read as a reinterpretation of the *Campbell* decision, which makes parody, and not the fact that the work adds something new, the justification for fair use. The drawbacks of this position can be read in the amici curiae brief filed by the Electronic Frontier Foundation and the Organization for Transformative Works, which invoke the costs of licensing and litigation as difficulties faced by creators and reasons for the maintenance of a broader understanding of fair use.[65]

Thus, although continental law seems to aspire at times to a more open 'fair use' model, fair use itself (at least in the United States) might be regressing into a more confined catalogue of exceptions. The impact of such a shift is likely to extend beyond borders. Fair use has been perceived as an 'open-ended possibility of the negation of copyright protection'[66] and a stronger manifestation of the public domain counterprinciple. A reversal of this perception could have a chilling effect on creativity – extending the 'fear and doubt'[67] plaguing creators – and serve a hegemonic agenda.

In this context, as Unger argues, jurists can promote subordinated counterprinciples through an exercise of legal imagination,[68] in this case promoting a broader understanding of fair and transformative use and expanding existing exceptions in jurisdictions where these are not open-ended. However, this stance must be reassessed in the face of the challenges currently presented by GenAI.

4. GenAI and Copyright: The Case of Digital Art

Since its 2022 launch and rise to prominence, Chat GPT has provoked several legal questions and raised concerns about discrimination, privacy and data protection, labour exploitation, transparency and, importantly here, copyright infringement.[69] Since then, other models have followed suit, including text, image, video and music generators. In response to this boom, there has been a slew of lawsuits by copyright holders against AI companies,[70] with the training process and the lawfulness of the output of AI models the main issues under debate.[71]

4.1. Mining, Training, Learning, Copying: A War of Metaphors?

GenAI depends on large volumes of data to appropriately train models that can produce high-quality, reliable outputs. As a repository of large quantities of freely available data amassed over decades, the internet is an ideal source[72] as its architecture has allowed it to remain largely open despite increasing control being exercised more recently, as predicted by Lessig in Code 2.0.[73]

The terms referring to various AI processes suggest that, to some extent, data are free to take. 'Data mining', for instance, conveys the idea that data are akin to natural resources, and 'training' and 'learning' tap into a metaphoric affinity between these processes and human abilities. These linguistic connotations influence the perceptions of lawmakers, judges and the public.

Rights holders have resisted these associations, arguing that AI training involves copying. This is clear in the ongoing US class action *Andersen v Stability AI*, regarding the infringement of copyright in artworks in the development and deployment of AI image generators:

> Machine Learning' … is a type of AI process in which the behavior of the software program is derived from copying a corpus of material called training data. In this context, the term 'learning' is metaphorical. The process bears very little similarity to human learning.[74]

[64] *Andy Warhol Foundation v Goldsmith*.
[65] Brief for the Organization for Transformative Works as Amicus Curiae, *Andy Warhol Foundation v Goldsmith.*
[66] Hughes, "Fair Use," 235.
[67] Aufderheide, Reclaiming Fair Use, 1–5.
[68] Unger, What Should Legal Analysis Become?, 129–134.
[69] Sara Migliorini, "'More than Words'."
[70] For a regularly updated map of lawsuits in the United States, see Chat GPT is Eating the World, "Copyright Lawsuits."
[71] Samuelson, "Generative AI Meets Copyright."
[72] AI Agenda," Landscape of Generative AI."
[73] Lessig, Code 2.0.
[74] *Andersen v Stability AI Ltd*.

In their motion to dismiss, the defendants responded that:

> Stable Diffusion was trained on *billions* of images that were publicly available on the Internet. To be clear, training a model does not mean copying or memorizing images for later distribution. Indeed, *Stable Diffusion does not 'store' any images.* Rather, training involves development and refinement of millions of parameters that collectively define – in a learned sense—what things look like.[75]

The issue remains unsettled, as the court refused to dismiss the reproduction claim, which will be decided later. The question is both technical and linguistic and will influence public understanding of AI training. If, as is likely, training is determined to involve copying, there will be a further inquiry into the characteristics of the reproduction (temporary, transitory, necessary)[76] and the balance of interests underlying fair use and other exceptions.

There are rules on these matters in several jurisdictions, including the EU, where the CDSM Directive contains a mandatory exception for text and data mining ('TDM') for purposes of scientific research and an exception or limitation for other types, including commercial TDM, allowing right holders to 'opt out'.[77] Singapore's *Copyright Act* provides an exception for copies for computational data analysis, including training of 'a computer program'.[78] The EU and Singaporean exceptions depend on lawful access to the work.[79]

In the United States, machine copying has 'traditionally been granted broad latitude'.[80] However, there are doubts about whether the existing copyright framework, including fair use, can withstand the challenge of GenAI, which has begun to be deployed commercially and is no longer seen as benevolent. As Lemley and Casey note, 'the companies training ML models tend to be giant multinationals, and the owners of individual photographs and books are often small, sympathetic plaintiffs', which may change the attitude towards machine copying in the future. Lemley and Casey call for incorporating the principle of 'fair learning' into the fair use analysis, allowing 'use of databases for training, whether or not [their] contents … are copyrighted'.[81] This would encourage innovation, be in line with the transformative character of many instances of machine learning and avoid the hurdle of licensing every copyrighted work in training datasets. However, Lemley and Casey do not believe this permission should be unlimited: 'systems [that] copy expression for expression's sake' and produce creative works as their output, which would function as substitutes for the originals, will not benefit from this 'fair learning' principle.[82] This would include image generators trained on images and generating other images that may substitute those in the training dataset.

This is a significant limitation on a theory that apparently legitimises machine learning even when it uses copyrighted elements. It would exclude most of GenAI from fair learning, regardless of whether such systems are being used to produce infringing output. This could lead to the puzzling conclusion that a system producing lawful output is unlawful due to the potential for producing unlawful output. AI companies could employ filters to block certain prompts based on their likelihood of producing infringing output.[83] The accuracy of these filters might be questioned though, especially in identifying fair uses such as parody. While these uses might impact the market for the original works, suppressing them through automatic filters may unjustifiably limit freedom of expression.[84]

The three jurisdictions reveal a mixed (and incomplete) position on the lawfulness of GenAI training *vis-à-vis* copyright. While TDM exceptions offer legal certainty, their beneficiaries – namely AI companies – may be (or be in the process of becoming) hegemonic entities. Some restrictions on TDM exceptions and equivalent mechanisms, such as opt-out clauses, appear reasonable for balancing innovation and copyright. The issue regarding outputs is more complex.

---

[75] Notice of Motion and Motion of Defendants Stability AI Ltd and Stability AI, Inc.'s Notice of Motion, Motion to Dismiss, and Memorandum of Points and Authorities in Support of Motion to Dismiss., filed 04/18/2023 (11 of 36). *Andersen v Stability AI Ltd*.
[76] Directive 2001/29/EC, Art. 5.1. *Cartoon Network, LP v. CSC Holdings, Inc*, 536 F.3d 121 (2nd Cir., 2008).
[77] Directive EU 2019/790, Arts. 3 and 4.
[78] *Singapore Copyright Act 2021*, § 243.
[79] Directive EU 2019/790, Art. 4.1. *Singapore Copyright Act 2021*, § 244(2)(d).
[80] Lemley, "Fair Learning," 743–785, 745.
[81] Lemley, "Fair Learning," 748.
[82] Lemley, "Fair Learning," 748.
[83] Samuelson, "Generative AI Meets Copyright" argues that this practice should be followed.
[84] Regarding the implementation of art. 17 of the CDSM Directive and the risk of overenforcement, Quintais, "Copyright Content Moderation in the EU," 110.

4.2. Output

In addition to claiming their work has been 'scraped' and copied to train these systems (input), authors claim that GenAI models allow users to produce works that infringe their rights (output) and affect their works' market value. In *Andersen v Stability AI*, the plaintiffs claimed that the 'seemingly new images' produced were all derivative works infringing the exclusive rights of the input creators, regardless of whether that input had any role in creating the output.[85] The plaintiffs also claimed that the systems could be (and were) used to generate 'fakes', including works 'in the style of' real human artists, thus 'syphoning commissions from the artists'.[86]

4.2.1. Derivative Works by Design

Copyright infringement is generally based on output – for instance, physical copies of a book for sale, the streaming of a movie, and the sale of a replica of a painting. Determining whether a restricted action (e.g. reproduction, communication to the public or distribution) was performed is based on observation of these facts. Infringement through making derivative works (an exclusive right of the copyright holder) depends on considerations such as the substantiality (in quantitative or qualitative terms) of the elements of the original incorporated into the derivative. Some jurisdictions, such as the United States, assess the transformative character of the derivative work.

The plaintiffs in *Andersen v Stability AI* dispensed with this analysis, claiming that all putative artworks created by AI are derivative. This claim is not based on observation of a particular AI work; rather, it considers the circumstance of the system being trained on previous works. This would create a category that we might call 'derivative work by design', which dispenses with individual analysis of each output. All such outputs would simultaneously infringe the copyright of authors whose works were 'fed' into the AI system.

The court's decision on the motion to dismiss pointed out that not all works used for AI training are copyrighted. Further, even if it could be ascertained that a certain input was involved in generating a certain output, an analysis of substantial similarity should still be required.[87] A decision dismissing a similar claim[88] signalled a reluctance to accept a possible concept of derivative work by design, which would extend the right to make derivative works beyond its intended scope.

This orientation should be maintained to avoid subverting analyses of copyright infringement, which should be based on the expressive content of both works. Admitting the idea of output being derivative by design would expand the scope of copyright, as the mere possibility of a fragment of the DNA of a work being incorporated into an AI output would constitute an infringement. The spillover effects of this interpretative shift could affect not only AI, but also human works made through technologies such as digital painting or photo editing. This is undesirable, as it further encroaches on creative freedom, turning privilege into a norm and, ultimately, significantly contracting the public domain and negatively impacting knowledge and creativity.[89]

4.2.2. Fakes

The plaintiffs in *Andersen v Stability AI* also claimed that the defendants were vicariously liable for the making of 'fakes' by users of AI products by incorporating artists' names in prompts to produce output 'passed off' as their work.

A work that copies the expressive content of another, including elements such as characters, architecture or music, is a potential infringement.[90] Style is more contentious, as without the incorporation of identifiable expressive elements, the mere emulation of an artist's style does not constitute infringement.[91] However, the plaintiffs did not identify concrete cases of 'fakes' or seek redress from the users who prompted their production and commercialised them. Their claim remained directed at the AI companies enabling these outcomes. Murray criticised this, arguing that end users are 'the true and proper defendants' in output-related lawsuits.[92] Moreover, vicarious infringement presupposes that the defendant has the right and ability to supervise the infringing conduct and a direct financial interest in the infringing activity.[93]

---

[85] Complaint, 1 to 5. *Andersen v Stability AI*.
[86] Complaint, 8. *Andersen v Stability AI*.
[87] Order on Motion to Dismiss and Strike, *Andersen v Stability AI*.
[88] Order Granting Motion to Dismiss, *Richard Kadrey et al v Meta Platforms, Inc*.
[89] Drahos, A Philosophy, 60–64.
[90] Murray, Information Technology Law, 258.
[91] Henderson, "Foundation Models and Fair Use," 27.
[92] Murray, "Generative AI Art."
[93] *Perfect 10, Inc v Visa Serv Ass'n,* 494 F.3d 788, 802 (9th Cir. 2007), cited by defendants.

It is plausible that AI companies are or will be able to embed technical filters to automate this task. Some systems, such as Midjourney, block prompts with words suggesting adult content or gore.[94] However, as noted, filters for copyrighted elements would introduce potential 'overblocking' as they would be unlikely to appropriately and qualitatively assess substantial similarity or apply defences such as fair use and parody. Protecting freedom of expression requires avoiding such filters in AI content generators and other platforms that host human-user-generated content.

However, excluding the vicarious liability of AI companies would leave rights holders with the burden of locating infringing works and acting against those who used AI to produce them. This is onerous, if not unfeasible, for individual creators, although less so for large rights holders. Although third-party AI tools could detect or prevent these cases, policy-makers should consider this inequality.

Possibly infringing output should be assessed in terms similar to those for human-created content. Once an output is available, the training dataset that enabled its creation[95] would, like circumstantial knowledge regarding whether the author of the derivative work had access to the original, have some weight but would not be decisive. More important is the potential substantial similarity between the works. Henderson reasoned that the fair use defence would most likely fail in cases of 'verbatim generation of images', a likelihood that decreases as images used in training become less recognisable or more diluted.[96] However, those similarities might be more extensive in some cases, such as parody.

Whether AI is capable of the critical reasoning that underpins exceptions such as caricature, parody or pastiche exceptions is relevant. Satire and criticism have a social function that grounds them in freedom of speech and justifies their recognition. In a prompt-based model, this critical dimension may be present in user prompts, which largely determine the output of AI systems, although this may be debated.[97] In any case, this should not disqualify AI works from such exceptions.

By targeting fan art and memes, the CDSM Directive's 'upload filter' rules were seen as attacking freedom of speech.[98] However, social perceptions of AI art, especially among digital artists and netizens, are significantly different, with protests and legal action now targeting AI art and those enabling it.[99] Fair use and other copyright exceptions are central to these debates, but their desired outcomes seem opposed from the creators' perspective. Can they be reconciled in the pursuit of emancipation?

5. Digital Art and AI: Emancipation and Betrayal

5.1. The Online Environment and the Massification of Digital Art

Digital art, or art made through digital means, has its origins not only in the use of technology for aesthetic purposes, but also – and perhaps more interestingly – as an exploration of the character and significance of those technologies. A famous example is the 2002 artwork 'Super Mario: Clouds' by Cory Archangel, which involved the physical hacking of a game cartridge and the replacement of the original with a version consisting only of its background: white clouds against a blue sky. The artist also made available the source code of his modified version, which was exhibited as a video installation.[100]

Nowadays, digital art evokes a far different reality. With the increased affordability and availability of technological tools such as computers and tablets, computer programs and drawing apparatuses, the barriers for digital artists have largely dissipated. Concomitantly, internet platforms, such as social media and blogging services, have allowed broad sharing of digital images. Selling physical art remains an essential source of remuneration for artists. Still, engagement with art on digital platforms through 'likes', 'comments' or 'shares' has complemented, and in some cases replaced, other rewards.[101]

Artists who live off their craft and depend, to a certain extent, on the curation of third parties for sales may now coexist online with artists who, in a non-mediated fashion, make their work visible to potential clients and those who create and share art for little or no monetary reward. The latter might do so to make themselves known (possibly because of intended professionalisation) or for gratification, which may derive from simple sharing but is most likely to result from engagement by

[94] Community Guidelines, at https://docs.midjourney.com/docs/community-guidelines.
[95] Keller, "A First Look."
[96] Henderson, "Foundation Models and Fair Use."
[97] See, for example, Lemley, "Generative AI."
[98] Schulze, "Thousands Protest."
[99] Xiang, "Artists are Revolting."
[100] Arcangel, "Super Mario Clouds."
[101] Fleming, "Instragram"; Kang, "Art in the Age of Social Media."

others (again, through likes, comments, and shares). Participation in online cultures is also a potential incentive to produce and share art.

Although participatory cultures did not begin online, the internet has led to exponential growth in interactions among media consumers, and the participatory ethos has become widespread, immediate and visible.[102] In this context, 'fandom' appears to be a strong aggregator, prompting people to create and engage in discussions on the source material and fan works, such as 'fan art'. It is not uncommon for members of these communities to provide mutual support – even monetary support – through crowdfunding platforms such as Ko-Fi or Patreon and commissioning other members. Since 2000, websites such as DeviantArt have formed the backbone of these communities, providing an online space for sharing art and allowing young creators to eventually forge their own identity as authors through acts such as 'posting and sharing, modding, and remixing'.[103]

The internet has been emancipatory for the art market, reducing entry barriers and allowing less-privileged groups to share art for acknowledgement and exposure, and offering access to online communities for support. Platforms are central to these dynamics. Perceptions of these entities have changed over time: Twitter (now X) is a pointed example, going from being an instrument of democracy and resistance[104] to one associated with disinformation, lack of transparency and hate speech.[105] GenAI has raised further questions about the role of platforms. New actors, such as AI developers, are now part of an equation in which individual creators and large intellectual property holders coexist.

5.2. Betrayal

Traditionally, individual creators have been the primary beneficiaries of copyright protection, and the Statute of Anne may have been an emancipatory event, given the subordination and censorship that preceded it. However, as argued above, the concentration of rights in media oligopolies[106] may have reversed this effect.

The internet was initially an alternative to the media oligopoly, providing space for 'new voices' through its 'decentralized, interactive, many-to-many architecture', allowing anyone to 'get the word out – via text, audio or video'.[107] Benkler coined the term 'networked public sphere' to refer to the resulting melting pot of ideas.[108] However, as Lessig points out, the internet's architecture is not a fact of nature and can change.[109] The decentralisation that technically still characterises the internet has, in practice, yielded to centralisation through large online platforms, such as Facebook and YouTube. According to some, we are faced with a new oligopoly: that of internet companies.[110]

Regarding copyright, many creators depend on platforms for their emancipatory effect on art and other areas of creation. Although platforms do not generally acquire copyright in the works hosted, their terms and conditions grant them licences over that content, often including the power to retain copies of deleted accounts and user comments.[111] They can determine what content remains online or is removed and how it is ranked on users' feeds. These actions may follow legal requirements for copyright in the digital age, such as the European Union's CDSM. According to Article 17, platforms offering public access to copyrighted materials uploaded by users must obtain a licence from the copyright holders or take measures to: (1) obtain the licence; (2) ensure the unavailability of certain works when informed by rights holders; and (3) disable access or remove works upon notice from rights holders and prevent future uploads.[112] This might benefit creators, who can monetise their copyright. However, this possibility is more easily accessible to large right holders, allowing 'independent users-creator lesser control over their content, and fewer opportunities to monetise it'.[113] Therefore, individual creators are likely to be limited by the restrictions imposed by these rules without enjoying the corresponding rewards.

GenAI has added complexity, introducing new actors and assigning new roles to existing actors. Henderson maps these, listing data creators, curators, and hosts, as well as model creators, deployers and users, with copyright holders typically being data

[102] Jenkins, Fans, Bloggers, and Gamers, 134ff.
[103] Thevenin, "Authorship and Participatory Culture."
[104] Tufekci, Twitter and Tear Gas.
[105] O'Carroll, "X to be Investigated."
[106] Tang, "Copyright's Techno-Pessimist Creep."
[107] Shapiro, "New Voices in Cyberspace."
[108] Benkler, The Wealth of Networks, 212.
[109] Lessig, Code 2.0.
[110] Smyrnaios, Internet Oligopoly.
[111] Quintais, "How Platforms Govern."
[112] Directive (EU) 2019/790, art 17.4.
[113] Quintais, "How Platforms Govern."

creators. [114] This map is useful but fails to capture some important nuances. First, rights are often concentrated in entities that administer rather than create works. Second, data creators may also be model users, with many artists embracing AI as a creative tool.[115] Third, as argued by several authors, such as Geiger, the rights of users of copyrighted works must also be considered.[116] Finally, internet platforms and other service providers are de facto gatekeepers of data and their role cannot be ignored. Their relationship with AI companies (including model creators and deployers) is bound to produce consequences, namely in terms of liability,[117] as the current infringement cases show.

Given the respective interests within the copyright ecosystem, we may distinguish the following: (1) artists whose interests include protecting their works through copyright, reasonably broad copyright exceptions that protect them from liability, and technological tools to aid in producing, promoting and commercialising their works; (2) AI companies, which rely on ambiguities and exceptions in offering products; (3) large copyright holders, who may seek a compromise between the availability of AI technology and remuneration for using their copyright portfolios; and (4) AI users, who might seek copyright protection for output and rely on exceptions if that output is found to infringe copyright.

As mentioned, platforms have assumed new roles with respect to AI. As stewards of massive amounts of data, they are crucial to this ecosystem and have been perceived as traitors. A particularly relevant case is DeviantArt, which in 2022 launched DreamUp, an AI image generator powered by Stable Diffusion, a diffusion model created by Stability AI.[118] DeviantArt became the target of user anger and legal action. In *Andersen v Stability AI*, the plaintiffs referred to their loss of trust:

> [By explicitly permitting machine learning and data scraping in certain circumstances] DeviantArt has reneged on its promises. It plainly switched its loyalties from its artist members to the AI companies, like Stability, infringing Plaintiffs' and the Class's intellectual property rights in [their] work.[119]

Other social media platforms have blocked data scraping by third parties[120] but continue scraping for their own purposes.[121] Thus, despite early action from individual copyright holders, AI training has stirred the interest of more powerful players and the main battle may well be fought among those entities, to the detriment of creators. In this context, the role of copyright and its exceptions is a thorny issue.

6. Copyright and Emancipation: A New Balance?

The internet has allowed many artists to make their work visible, even without resources to join established circles, like art schools and galleries. This undoubtedly had emancipatory results but left creators vulnerable to those stewarding the resulting data. AI training relies on large volumes of data obtained through, inter alia, scraping the internet. Platforms that have teamed up with AI companies have been viewed as traitors who switched their loyalty from artists to AI.

It is thus crucial to consider emancipation. Without copyright, the works of individual creators may be exploited by more resourced entities. However, with the concentration of rights in a small group of powerful entities, individuals engaging in creative activities face legal risk, as their works might incorporate elements of previously copyrighted works. As several authors have noted,[122] creativity does not exist in a void but builds on all that exists and can be perceived by the artist. Therefore, blocking access to that acquis and the possibility of its incorporation into one's work stifles creativity. More often than not, our shared cultural references are held hostage by a restricted group with ample resources to protect that privilege.

Therefore, it is problematic to mischaracterise the concept of a derivative work as any work generated by AI (what I call derivative work by design). Generally, the concept of derivative work delimits an exclusive right in the copyright universe, carving a space from the public domain. In turn, fair use and other exceptions claim back that part of the public domain removed by the right. With GenAI, two sets of defences may apply. First, there are exceptions to the right of reproduction concerning input as an amorphous mass of data. TDM and similar exceptions do not take into account the derivative character of the output (simply because their application pertains to reproductions in the training phase). Second, defences applicable to derivative

[114] Henderson, "Foundation Models and Fair Use."
[115] Handley, "Part Scary, Part Exciting."
[116] Geiger, "Copyright as an Access Right."
[117] Murray, "Generative AI Art."
[118] Robertson, "DeviantArt."
[119] Complaint, para 130, at 26–27. *Andersen v Stability AI*.
[120] Claburn, "Meta."
[121] Brandon, "Meta is Scraping Photos."
[122] Lessig, Free Culture; Rachum-Twaig, Regulating Creativity.

works are inapplicable to derivative works by design because they rely on an analysis of the derivative work itself as well as its use. It is impossible, ex ante, to know whether AI works will be similar to, or able to function as substitutes for, any particular work included in the training dataset. Accepting derivative works by design and admitting that they infringe copyright would lead to the fallacy that all such works are potential substitutes for all input works, leaving no room for an ex ante or ex post defence.[123] Accepting the concept of derivative works by design would result in a new encroachment on the public domain, to which no available exceptions apply.

Only an ex post analysis of similarities between particular inputs and outputs allows the latter to be classified as derivative. In that case, available exceptions should be applied according to the parameters for human works and in a technologically neutral way, according to well-established principles of good law, including laws being general in their application.[124] However, even if we admit that the principle is limited, we should question the favouring of humans through stricter application of copyright rules in the context of GenAI. Copyright laws are not generally tolerant of derivative works created without authorisation, and the interests of copyright holders – including those with resources and influence – remain, regardless of whether the infringer is a generative AI system or an individual human artist. Therefore, a shift towards a narrower application of the fair use doctrine and other exceptions might leave creators vulnerable to legal action if their works incorporate elements of others, even if those works are transformative or critical.

Regarding the infringement of the right of reproduction during AI training, while some jurisdictions have already made policy options in this area – such as TDM and computational data analysis exceptions and the corresponding opt-out rights – many will continue to rely on existing laws and doctrines. In these cases, existing exceptions, other than those of an open nature such as fair use, will be of little help. However, there may be room for discretion in the concept of reproduction within the teleological framework of copyright law. In this context, the orientation of the interpreter in debates on emancipation and the public domain might prove decisive.

Although, as posited here, openness yields emancipation, more nuance is required. We must ask whether a permissive approach to data scraping for AI training, in pursuit of the public domain counterprinciple, would benefit or hinder emancipation. To the extent that it supports widely available, free or affordable GenAI, openness may promote emancipation by reducing costs and eliminating barriers to entry. However, creators should not carry the burden of maintaining an open online environment alone. All actors – including platforms, large IP rights holders and AI companies – should contribute to promoting openness and, indirectly, emancipation. There are two caveats in supporting a permissive copyright system: first, there must be a commitment by those entities to keep services open and affordable and not engage in bait-and-switch techniques; and (2) policy must consider author interests – namely, their requests for credit, consent and compensation.[125]

This calls for a regulatory strategy that extends beyond copyright to include matters such as competition, corporate governance and consumer protection. More fundamentally, it prompts us to reflect on the use, monetisation and possible appropriation of data. The internet has given rise to new economic relationships that have found their balance over time. Among these is the exchange of data for services, a transactional form that has even been acknowledged by EU consumer protection law.[126]

This balance has been challenged by the monetisation of data by big data analytics and machine learning, which has added value for some actors but left individuals with the same services, in some cases, downgraded or no longer provided free of charge. Some have proposed the idea of a 'data dividend';[127] while not widely accepted, this merits further attention.

In the case of GenAI, copyright appeared as a natural response to the imbalance. However, adjustments that expand copyright law to previously unprotected areas further encroach on the public domain and run counter to the ideal of an open society. Therefore, compensation should hinge on justice, not appropriation, and copyright should not have to address all issues arising from the deployment of GenAI. By keeping copyright in check, practitioners of law might prompt lawmakers to develop more innovative and holistic solutions that better address the injustices and risks of hegemony posed by GenAI.

[123] Lemley and Casey fall into this fallacy when they exclude (or seem inclined to exclude) AI image generators from their "fair learning" defence. Lemley, "Fair Learning."
[124] Fuller, The Morality of Law, 49; Raz, "The Rule of Law."
[125] Knight, "Authors Call."
[126] Directive (EU) 2019/770, Recital 24.
[127] Feygin, A Data Dividend That Works.

Bibliography

Agnello, Richard. "Race and Art: Prices for African American Painters and Their Contemporaries." *Journal of Black Studies* 41, no 1 (2010): 56–70. https://doi.org/10.1177/0021934708328444.

AI Agenda. "The Landscape of Generative AI and its Reliance on Public Data." *Medium*, October 31, 2023. https://medium.com/@ai.agenda/the-landscape-of-generative-ai-and-its-reliance-on-public-data-6829579a7c32.

Allen, Amy. *The End of Progress: Decolonizing the Normative Foundations of Critical Theory*. New York: Columbia University Press, 2016.

Allen, Greg. "The X factor: Is the Art Market Rational or Biased?" *New York Times*, May 1, 2005. https://www.nytimes.com/2005/05/01/arts/design/the-x-factor-is-the-art-market-rational-or-biased.html.

Arcangel, Cory. "Super Mario Clouds. Things I Made." https://coryarcangel.com/things-i-made/2002-001-super-mario-clouds.

Aufderheide, Patricia, and Peter Jaszi. *Reclaiming Fair Use: How to Put Balance Back in Copyright*. Chicago: Chicago University Press, 2011.

BBC News. "Harvey Weinstein Timeline: How the Scandal has Unfolded." February 24, 2023. https://www.bbc.com/news/entertainment-arts-41594672.

Benkler, Yochai. *The Wealth of Networks; How Social Production Transforms Markets and Freedom*. New Haven, CT: Yale University Press, 2006.

Bently, Lionel and Brad Sherman. *Intellectual Property Law*, 4th ed. Oxford: Oxford University Press, 2014.

Blühdorn, Ingolfur, Felix Butzlaff, and Margaret Haderer. "Emancipatory Politics at its Limits? An Introduction." *European Journal of Social Theory* 25, no 1 (2022): 3–25. https://doi.org/10.1177/13684310211048116.

Brandon, John. "Meta is Scraping Photos from Facebook and Instagram to Create AI Images." *Forbes*, December 12, 2023. https://www.forbes.com/sites/johnbbrandon/2023/12/12/meta-is-scraping-our-photos-from-facebook-and-instagram-to-create-ai-images/?sh=58a03a3732ce.

Bystryn, Marcia. "Art Galleries as Gatekeepers; The Case of the Abstract Expressionists." *Social Research* 45 (1978): 390–408.

Chat GPT is Eating the World, "Copyright Lawsuits v AI Companies." 2024. https://chatgptiseatingtheworld.com/2024/08/25/map-of-all-29-copyright-lawsuits-v-ai-includes-bartz-v-anthropic.

Claburn, Thomas. "Meta, Which Pays for Web Scraping, Sues to Stop Web Scraping." *The Register*, February 2, 2023. https://www.theregister.com/2023/02/02/meta_web_scraping.

Currah, Andrew. "Hollywood versus the Internet: The Media and Entertainment Industries in a Digital and Networked Economy." *Journal of Economic Geography* 6, no 4 (2006): 439–468. https://doi.org/10.1093/jeg/lbl006.

Drahos, Peter. *A Philosophy of Intellectual Property*. London: Routledge, 1996.

Dussolier, Séverine. "The Commons as a Reverse Intellectual Property – from Exclusivity to Inclusivity." In *Concepts of Property in Intellectual Property Law*, edited by Helena Howe and Jonathan Griffiths, 258–281. Cambridge: Cambridge University Press, 2013.

Feygin, Yakov, Hanlin Li, Chirag Lala, Brent Hecht, Nicholas Vincent, Luisa Scarcella, and Matthew Prewitt. *A Data Dividend That Works: Steps Toward Building an Equitable Data Economy*. Los Angeles: Berggruen Institute, 2021.

Fleming, Olivia. "Why the World's Most Talked About Art Dealer is Instagram." *Vogue*, May 13, 2014. https://www.vogue.com/article/buying-and-selling-art-on-instagram.

Fuller, Lon L. *The Morality of Law*. New Haven, CT: Yale University Press, 1963.

Geiger, Christophe. "Copyright as an Access Right, Securing Cultural Participation Through the Protection of Creators' Interests." In *What if We Could Reimagine Copyright*?, edited by Rebecca Giblin and Kimberly Weatherall, 73–109. Canberra: ANU Press, 2017.

Geiger, Christophe. "'Fair Use' Through Fundamental Rights: When Freedom of Artistic Expression Allows Creative Appropriations and Opens Up Statutory Copyright Limitations." In *The Cambridge Handbook of Copyright Limitations and Exceptions*, edited by Shyamkrishna Balganesh, Wee Loon Ng-Loy, and Haochen Sun, 174–194. Cambridge: Cambridge University Press, 2021.

Gerlieb, Anne. "TikTok as a New Player in the Contemporary Arts Market: A Study With Special Consideration of Feminist Artists and a New Generation of Art Collectors." *Arts* 10 (2021): 52. https://doi.org/10.3390/arts10030052.

Gottardis, Andreas. *Reason and Utopia: Reconsidering the Concept of Emancipation in Critical Theory*. Stockholm: Department of Political Science, Stockholm University, 2014.

Goold, Patrick R. "The Interpretive Argument for a Balanced Three-Step Test?" *American University International Law Review* 33 (2017): Art. 4. https://digitalcommons.wcl.american.edu/auilr/vol33/iss1/4.

Greenleaf, Graham. *Public Rights: Copyrights Public Domains.* Cambridge: Cambridge University Press, 2018.

Handley, Lucy. "Part Scary, Part Exciting: How Artists are Using AI in Their Work." *CNBC*, April 1, 2024. https://www.cnbc.com/2024/04/01/generative-ai-in-art-how-artists-are-using-it-or-not.html.

Hardy, I. Trotter. "An Economic Understanding of Copyright Law's Work-Made-for-Hire Doctrine." *Columbia-VLA Journal of Law & the Arts* 12 (1988): 181–227.
Harris, Gareth. "'AI will Become the New Normal': How the Art World's Technological Boom is Changing the Industry." *The Art Newspaper*, 28 February 2023. https://www.theartnewspaper.com/2023/02/28/ai-will-become-the-new-normal-how-the-art-worlds-technological-boom-is-changing-the-industry.
Henderson, Peter, Xuechen Li, Dan Jurafsky, Tatsunori Hashimoto, Mark A. Lemley, and Percy Liang. "Foundation Models and Fair Use." Stanford Law and Economics Olin Working Paper No. 584, 2023. https://doi.org/10.2139/ssrn.4404340.
Horkheimer, Max. "Traditional and Critical Theory." In *Critical Theory: Selected Essays.* Translated by Matthew J O'Connel, 188–243. New York: Continuum, 2002.
Horkheimer, Max. "Authority and the Family" In *Critical Theory: Selected Essays.* Translated by Matthew J O'Connel, 47–128. New York: Continuum, 2002.
Hughes, Justin. "Fair Use and its Politics – at Home and Abroad." In *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, 234–274. Cambridge: Cambridge University Press, 2017.
Jackson, Gita. "Anne Rice Really Hated When People Made Her Characters Bone." *Vice*, December 14, 2021. https://www.vice.com/en/article/88gqjz/anne-rice-really-hated-when-people-made-her-characters-bone.
Jenkins, Henry. *Fans, Bloggers, and Gamers: Exploring Participatory Culture*. New York: New York University Press, 2006.
Kang, Xin, Wenyin Chen and Jian Kang. "Art in the Age of Social Media: Interaction Behavior Analysis of Instagram Art Accounts." *Informatics* 6 (2019): 52. https://doi.org/10.3390/informatics6040052.
Karapapa, Stavroula. *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet*. Oxford: Oxford University Press, 2020.
Katz, Ariel. "Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?" In *The Cambridge Handbook of Copyright Limitations and Exceptions*, edited by Shyamkrishna Balganesh, Wee Loon Ng-Loy and Haochen Sun, 111–139. Cambridge: Cambridge University Press, 2021.
Keller, Paul. "A First Look at the Copyright Relevant Parts in the Final AI Act Compromise." *Kluwer Copyright Blog* (blog), December 11, 2023. https://copyrightblog.kluweriplaw.com/2023/12/11/a-first-look-at-the-copyright-relevant-parts-in-the-final-ai-act-compromise.
Knight, Lucy. "Authors Call for AI Companies to Stop Using their Work Without Consent." *The Guardian*, July 20, 2023. https://www.theguardian.com/books/2023/jul/20/authors-call-for-ai-companies-to-stop-using-their-work-without-consent.
Lemley, Mark A. and Brian Casey. "Fair Learning." *Texas Law Review* 99 (2021): 743–785.
Lemley, Mark A. "How Generative AI Turns Copyright Upside Down" *Science and Technology Law Review* 25 (2024): 21–44. https://doi.org/10.2139/ssrn.4517702.
Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin, 2004.
Lessig, Lawrence. *Code: Version 2.0*. New York: Basic Books, 2006.
Marx, Karl. *Early Writings.* Translated by Rodney Livingstone and Gregory Benton. Harmondsworth: Penguin, 1992.
McKendrick, Joe. "Generative AI as a Killer of Creative Jobs? Hold That Thought". *Forbes*, June 23, 2024. https://www.forbes.com/sites/joemckendrick/2024/06/23/generative-ai-as-a-killer-of-creative-jobs-hold-that-thought.
Midjourney. "Community Guidelines." https://docs.midjourney.com/docs/community-guidelines.
Migliorini, Sara. "'More than Words': A Legal Approach to the Risks of Commercial Chatbots Powered by Generative Artificial Intelligence." *European Journal of Risk Regulation*, (2024): 1–18. https://doi.org/10.1017/err.2024.4.
Murray, Andrew. *Information Technology Law: The Law and Society*, 4th ed. Oxford: Oxford University Press, 2016.
Murray, Michael D. "Generative AI Art: Copyright Infringement and Fair Use." *SMU Science & Technology Law Review* 26 (2023): 259–315.
Obvious Art, Portrait of Edmond de Bellamy. Christie's closed 25 October 2018.
O'Carroll, Lisa. "X to Be Investigated for Allegedly Breaking EU Laws on Hate Speech and Fake News." *The Guardian*, December 18, 2023. https://www.theguardian.com/technology/2023/dec/18/x-to-be-investigated-for-allegedly-breaking-eu-laws-on-hate-speech-and-fake-news.
Quintais, João Pedro, Giovanni De Gregorio and João C. Magalhães. "How Platforms Govern Users' Copyright-Protected Content: Exploring the Power of Private Ordering and its Implications." *Computer Law & Security Review* 48 (2023): 105792. https://doi.org/10.1016/j.clsr.2023.105792.
Quintais, João Pedro, Péter Mezei, István Harkai, João Carlos Magalhães, Christian Katzenbach, Sebastian Felix Schwemer and Thomas Riis, "Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis." *reCreating Europe Report*, August 2022: 110.
Rachum-Twaig, Omri. *Copyright Law and Derivative Works: Regulating Creativity*. London: Routledge, 2019.
Raz, Joseph. "The Rule of Law and its Virtue." In *The Authority of Law: Essays on Law and Morality*, edited by Joseph Raz, 210–229. Oxford: Oxford University Press, 1979.

Rendas, Tito. "Are EU Member States Required to Have a Sense of Humor?" *International Review of Intellectual Property and Competition Law* 54 (2022): 1–4. https://doi.org/10.2139/ssrn.4236866.
Robertson, Adi. "How Deviantart is Navigating the AI Art Minefield." *The Verge*, November 16, 2022. https://www.theverge.com/2022/11/15/23449036/deviantart-ai-art-dreamup-training-data-controversy.
Roose, Kevin. "The Data that Powers AI is Disappearing Fast." *New York Times*, July 19, 2024. https://www.nytimes.com/2024/07/19/technology/ai-data-restrictions.html.
Rosati, Eleanora. "Not Sufficiently 'Transformative' Appropriation of a Photograph Held Infringing by French Court." *Journal of Intellectual Property Law & Practice* 13 (2018): 525–526. https://doi.org/10.1093/jiplp/jpy076.
Samuelson, Pamela. "Justifications for Copyright Limitations & Exceptions." In *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, 12–59. Cambridge: Cambridge University Press, 2017.
Samuelson, Pamela. "Generative AI Meets Copyright." *Science* 381 (2023):158–161. https://doi.org/10.1126/science.adi0656.
Schulze, Elizabeth. "Thousands Protest Against Controversial EU Internet Law Claiming It Will Enable Online Censorship." *CNBC*, March 25, 2019. https://www.cnbc.com/2019/03/25/protesters-in-germany-say-new-eu-law-will-enable-online-censorship.html.
Shapiro, Andrew. "New Voices in Cyberspace." *The Nation* 266 (1998): 36–37.
Smyrnaios, Nikos. *Internet Oligopoly: The Corporate Takeover of our Digital World*. Bingley: Emerald, 2018.
Tan, David. "Harry Potter and the Transformation Wand: Fair Use, Canonicity and Fan Activity." In *Amateur Media: Social, Cultural and Legal Perspectives*, edited by Dan Hunter, Ramon Lobato, Meghan Richardson and Julian Thomas, 94–103. London: Routledge, 2012.
Tang, Xiyin. "Copyright's Techno-Pessimist Creep." *Fordham Law Review* 90 (2021): 1151–1195.
Thevenin, Benjamin. "Authorship and Participatory Culture." In *The International Encyclopedia of Media Literacy*, edited by Renee Hobbs, Paul Mihailidi, Gianna Cappello, Maria Ranieri and Benjamin Thevenin, 1–8. Chichester: John Wiley & Sons, 2019.
Trosow, Samuel E. "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital." *Canadian Journal of Law and Jurisprudence* 16 (2003): 217–241.
Tufekci, Zeynep. *Twitter and Tear Gas: The Power and Fragility of Networked Protest*. New Haven, CT: Yale University Press, 2018.
Unger, Roberto Mangabeira. "The Critical Legal Studies Movement." *Harvard Law Review* 96 (1983): 561–675. https://doi.org/10.2307/1341032.
Unger, Roberto Mangabeira. *What Should Legal Analysis Become?* New York: Verso, 1996.
Veitch, Scott, Christodoulidis Emilios and Goldoni Marco. *Jurisprudence: Themes and Concepts*, 3rd ed. London: Routledge, 2018.
Visone, Alexio. "The Impact of Online and Social Media Platforms in the Art Market: A Case Study on Instagram" (2016) Master's thesis, Sotheby's Institute of Art. https://www.proquest.com/dissertations-theses/impact-online-social-media-platforms-art-market/docview/1848287250/se-2.
Wartenberg, Thomas E. "'Species-Being' and 'Human Nature' in Marx." *Human Studies*, 5 (1982): 77–95. https://doi.org/10.1007/BF02127669.
Wright, Erik Olin. "Explanation and Emancipation in Marxism and Feminism." *Sociological Theory* 11 (1993): 39–54.
Xiang, Chloe. *Artists are Revolting*. New York: Vice, 2022.

Primary Sources (by jurisdiction)

Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries).

European Union

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services
Case C-476/17 Pelham GmbH v Ralf Hütter EU:C:2019:624 (29 July 2019).

United States

17 U.S.C. (1976).

19 U.S.C. (2011))
Andy Warhol Found. for the Visual Arts, Inc v Goldsmith, 598 U.S. __ (2023).
Campbell v Acuff-Rose Music, Inc, 510 U.S. 569 (1994)
Andersen v Stability AI Ltd, 23-cv-00201-WHO (N.D. Cal. Oct. 30, 2023)
Cartoon Network, LP v CSC Holdings, Inc, 536 F.3d 121 (2nd Cir., 2008).
Perfect 10, Inc v Visa Serv Ass'n, 494 F.3d 788, 802 (9th Cir. 2007)

Canada
CCH Canadian Ltd v Law Society of Upper Canada [2004] 1 S.C.R. 339, 2004 SCC 13 (Can.)

France
Alix Malka v Peter Klasen, Cour de Cassation [CAS] [supreme court for judicial matters], Chambre Civile 1, no. 13-27.391, 15 May 2015 (Fr.)
Alix Malka v Peter Klasen, Cour d'appel [CA] [regional court of appeal] Versailles, 1ère chamber 1ère section, RG No 15/06029, 16 March 2018 (Fr.)
Koons v Davidovici, Cour d'appel [CA] [regional court of appeal] Paris, Pôle 5 – chambre 1, n° 19/09059, 23 February 2021 (Fr.)

Singapore
Copyright Act 2021 (No. 22 of 2021)