

# Copyright and Generative AI

Issues With Copyright Enforcement  
Under Existing Copyright Laws

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# John Kivus

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# Outline

- Copyright Fundamentals
- Generative AI Primer
- Issues Applying Existing Copyright Law to Generative AI
- Privatization of Copyright Enforcement

# Copyright Fundamentals

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# Constitutional Roots

- The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings.”

*Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282, 1288, 113 L. Ed. 2d 358 (1991)

# Originality, Fixation, and Human Authorship

The *sine qua non* of copyright is originality.

*Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991)

Copyright protection subsists, in accordance with this title, in original works of authorship **fixed** in any tangible medium of expression

17 U.S.C. § 102 (emphasis added)

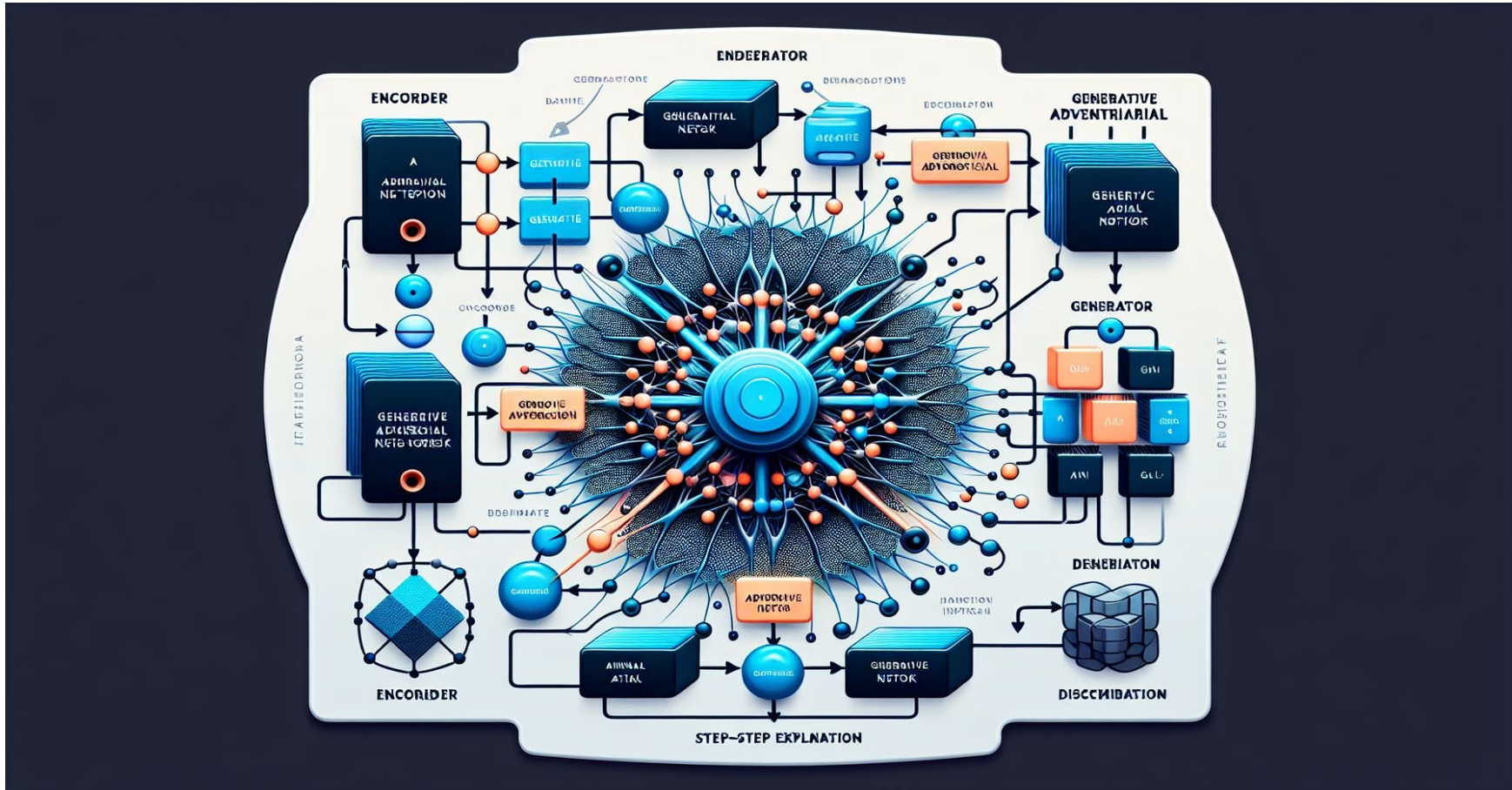
The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being.

U.S. Copyright Office,  
Compendium of U.S. Copyright Office Practices § 306 (3d ed. 2021)

# Generative AI Primer

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PROMPT: An image explaining what generative AI is and how it works – DALL-E 3



# Generative AI Definition and Concepts

- Generative AI makes new data instead of predicting an outcome based on a dataset.
- Concepts:
  - Large Language Models
  - Word Embeddings
  - Transformers



# NOT THESE TRANSFORMERS

- *NOTE: Generated with DALL-E 3 via MS Copilot*
- *PROMPT:*
  - *Draw me an image of a robot that can transform into a large red big rig truck. It should be inspired by something that a child would play with.*

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# Example of Generative AI Understanding

- The animal did not cross the street because *it* was tired.
- The animal did not cross the street because *it* had a lot of traffic on it.

# Generative AI Resources

- Financial Times on Generative AI:
  - <https://ig.ft.com/generative-ai/>
- Google on LLMs
  - <https://developers.google.com/machine-learning/resources/intro-llms>
- NVIDIA Glossary
  - <https://www.nvidia.com/en-us/glossary/generative-ai/>
  - <https://www.nvidia.com/en-us/glossary/large-language-models/>
- OpenAI on ChatGPT-4
  - <https://openai.com/research/gpt-4>

# Difficulty in Applying Existing Copyright Law to Generative AI

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# Lawsuits are Starting

- First Wave – Use of Data in Training
  - *Authors Guild, et al. v. OpenAI, et al.*
    - No. 1:23-cv-8282-SHS, S.D.N.Y.
  - *Sarah Silverman, et al. v. OpenAI, et al.*
    - No. 3:23-cv-03416, N.D. Ca.
- Evolution –Data in Training *plus Infringing Outputs*
  - *New York Times Company, et al. v Microsoft & OpenAI, et al.*
    - No. 1:23-cv-11195, S.D.N.Y.

# Examples of Output Issues – NY Times

## Output from GPT-4:

exempted it from regulations, subsidized its operations and promoted its practices, records and interviews showed.

Their actions turned one of the best-known symbols of New York — its yellow cabs — into a financial trap for thousands of immigrant drivers. More than 950 have filed for bankruptcy, according to a Times analysis of court records, and many more struggle to stay afloat.

“Nobody wanted to upset the industry,” said David Klahr, who from 2007 to 2016 held several management posts at the Taxi and Limousine Commission, the city agency that oversees medallions. “Nobody wanted to kill the golden goose.”

New York City in particular failed the taxi industry, The Times found. Two former mayors, Rudolph W. Giuliani and Michael R. Bloomberg, placed political allies inside the Taxi and Limousine Commission and directed it to sell medallions to help them balance budgets and fund key initiatives.

During that period, much like in the mortgage lending crisis, a group of industry leaders enriched themselves by artificially inflating medallion prices. They encouraged medallion buyers to borrow as much as possible and ensnared them in interest-only loans and other one-sided deals that often required borrowers to pay hefty fees, forfeit their legal rights and give up most of their monthly incomes.

When the market collapsed, the government largely abandoned the drivers who bore the brunt of the crisis. Officials did not bail out borrowers or persuade banks to soften loan

## Actual text from NYTimes:

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Under Mr. Bloomberg and Mr. de Blasio, the city made more than \$855 million by selling taxi medallions and collecting taxes on private sales, according to the city.

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## Output from GPT-4:

many of America’s other global companies — aren’t nearly as avid in creating American jobs as other famous companies were in their heydays.

Apple employs 43,000 people in the United States and 20,000 overseas, a small fraction of the over 400,000 American workers at General Motors in the 1950s, or the hundreds of thousands at General Electric in the 1980s. Many more people work for Apple’s contractors: an additional 700,000 people engineer, build and assemble iPads, iPhones and Apple’s other products. But almost none of them work in the United States. Instead, they work for foreign companies in Asia, Europe and elsewhere, at factories that almost all electronics designers rely upon to build their wares.

“Apple’s an example of why it’s so hard to create middle-class jobs in the U.S. now,” said Jared Bernstein, who until last year was an economic adviser to the White House. “If it’s the pinnacle of capitalism, we should be worried.”

Apple executives say that going overseas, at this point, is their only option. One former executive described how the company relied upon a Chinese factory to revamp iPhone manufacturing just weeks before the device was due on shelves. Apple had redesigned the iPhone’s screen at the last minute, forcing an assembly line overhaul. New screens began arriving at the plant near midnight.

A foreman immediately roused 8,000 workers inside

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NY Times Complaint, ¶¶ 99, 100

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# Examples of Output Issues – Imagery

dune movie screencap, 2021, dune movie trailer --ar 16:9 --v 6.0



Dune WARNER BROS.

scarlett johannsen black widow battlefield, 2021, screenshot from a movie, movie scene, official --ar 16:9 --v 6.0



Black Widow MARVEL

# Companies are Largely Relying on Fair Use

- OpenAI's statement about the New York Times lawsuit:
  - <https://openai.com/blog/openai-and-journalism>
- Summaries and links to other company statements:
  - <https://www.theverge.com/2023/11/4/23946353/generative-ai-copyright-training-data-openai-microsoft-google-meta-stabilityai>
  - <https://www.regulations.gov/docket/COLC-2023-0006/document>

# Fair Use Factors

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577, 114 S. Ct. 1164, 1170, 127 L. Ed. 2d 500 (1994) (*quoting* 17 U.S.C. § 107)

# The Road To Private Copyright Enforcement

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# Court and the Copyright Office Are Making Determinations Under Existing Law

- Copyright Office has issued guidance:
  - <https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf>
- Works created by AI are not eligible for copyright protection:
  - SURYAST
    - Second Request for Reconsideration for Refusal to Register SURYAST (SR # 1-11016599571; Correspondence ID: 1-5PR2XKJ) (Copyright Review Board, December 11, 2023.)
  - Zarya of the Dawn
    - (Registration # VAu001480196) (Copyright Review Board, February 11, 2023.)
  - *Thaler v. Perlmutter*
    - 2023 WL 5333236, (D.D.C. Aug. 18, 2023)

# Enforcement Issues on the Horizon

## Lack of Protection

- Inability to Monetize Works
- Difficult Tradeoffs Between Protection and Efficiency in the Software Development Space

## Responsibility

- Model v. User
- Indemnification

## Clash of Incentives

- Film Industry – Protection of Films versus use of AI Actors

# Attempts to Fill in Gaps via Private Enforcement

- YouTube
  - Partnering with Music Industry - <https://blog.youtube/inside-youtube/partnering-with-the-music-industry-on-ai/>
  - YouTube GenAI Feature - <https://techcrunch.com/2023/09/21/youtube-shorts-to-gain-a-generative-ai-feature-called-dream-screen/>
- Getty Images:
  - *Getty Images v. Stability AI*, No. 1:23-cv-00135-UNA D. Del.
  - AI Generator - <https://www.gettyimages.com/ai/generation/about>
- Contractual Provisions

# Summary

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# Reminder about Copyright Law Fundamentals

- Copyright law is centered on copies
- Creating a copy requires fixation
- *PROMPT: A painter looking at a painting of a landscape and creating an exact copy of that landscape in a painting the painter is working on. There is also a pile of paintings next to the painter that also have that same landscape image. – DALL-*





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PROMPT: A room full of people giving a standing ovation to a male with brown hair in a suit, who looks like he is in his early 40s and has a beard, giving a presentation in the front of an auditorium. On the wall behind the man, there is a projector showing a slide that says 'The End' on it.

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