



ALAI Congress 2026 - Copyright and Free Expression in the Age of Algorithms

Submission deadline: 01 April 2026

Please submit via info@alai.nl in one of the conference languages English, French or Spanish

Questionnaire for national reports

Please note: the primary purpose of this questionnaire is to inform speakers at the 2026 conference about notable differences in national copyright laws, so they can take account of these when preparing their contributions. It follows the structure of the conference, with questions per session (total 12 questions). For context, the text includes a short description of the sessions.

Please insert your answer below each question. Answers may be kept short and need not repeat provisions of the Berne Convention and other WIPO instruments nor TRIPs.

The questionnaires as returned will be published on the conference website alai2026.org and subsequently on the ALAI.org website.

Country: United States of America

Authors: Philippa Loengard / Caitlin McGrail¹

Date: April 22, 2026

Theme: Legal mechanisms to safeguard freedom of expression

Conference Session 2

Following the keynote (session 1), short presentations introduce the most important ways in which copyright law safeguards freedom of expression. This includes the delineation of protected subject-matter (in relation also to copyright as a driver of creative production), scope of exclusive rights, limitations & exceptions, term of protection and through enforcement (remedies, including territorial scope). A panel discusses the increasing importance of balancing copyright and freedom of expression, drawing on national approaches. Central to the discussion is the question whether the current framework is appropriate to provide for this balance, for example as regards current ways of digital creation (digital building blocks of expression, generative AI, etc.).

Question 1:

¹ Thank you to Rachel Altemose, Lucía Bautista, and Victoria Hahm for their research assistance and editorial support.

Can you give us some striking examples (copyright law provisions, copyright infringement cases) from your own jurisdiction in which freedom of expression plays an important role? Think about statutory provisions or case law regarding the delineation of protected subject-matter (in relation also to copyright as a driver of creative production), the scope of exclusive rights, limitations & exceptions and/or the term of protection.

Your answer does not have to provide a complete description of your national law.

ANSWER

The founders of the United States “intended copyright itself to be the engine of free expression” through providing “economic incentive[s]” for authors.² Nevertheless, copyright “contains built-in First Amendment accommodations:” the idea/expression doctrine and fair use.³ Fair use will be discussed *infra* in questions 3 and 4.

Copyright protects only expressions, not ideas.⁴ Though articulating the boundary between ideas and expression requires often difficult case-by-case determinations,⁵ courts have developed doctrines to help parse the distinction between ideas and expression, such as the merger doctrine⁶ and the “scènes à faire” doctrine.⁷ The merger doctrine provides “that similarity of expression . . . which necessarily results from the fact that the common idea is

² *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression.”) (emphasis in original).

³ *Eldred*, 537 U.S. at 219; *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 526–27 (2023) (“This balancing act between creativity and availability (including for use in new works) is reflected in one such limitation, the defense of ‘fair use.’”). *Eldred* declined to delineate a separate First Amendment exception within copyright, determining that the existing copyright doctrines of fair use and idea/expression were sufficient. *Eldred*, 537 U.S. at 221 (“copyright’s built-in free speech safeguards are generally adequate to address [First Amendment concerns] . . . further First Amendment scrutiny is unnecessary.”).

⁴ *Eldred*, 537 U.S. at 219 (the “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” . . . every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication”) (quoting *Harper & Row*, 471 U.S. at 556) (alteration in original); 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

⁵ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc.”); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“Nobody has ever been able to fix that boundary [between ideas and expression], and nobody ever can.”).

⁶ *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967) (denying copyright protection for works where the idea and expression have ‘merged,’ i.e. “[w]hen the uncopyrightable subject matter is very narrow, so that ‘the topic necessarily requires, . . . if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.’”).

⁷ *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1251 (11th Cir. 2007) (“*scènes a faire*, which include “[i]ncidents, characters, or settings that are indispensable or standard in the treatment of a given topic[,] are not copyrightable.”).

only capable of expression in more or less stereotyped form, precludes a finding of actionable similarity.”⁸ The *scènes à faire* doctrine renders ‘stock’ characters, plots, or scenes uncopyrightable.⁹ In music, “building blocks” common to musical compositions, such as chromatic scales or arpeggios, are not protected.¹⁰ Additionally, copyright does not protect artistic style (although the line between “style” and “expression” defies clear tracing).¹¹

Copyright also does not protect facts.¹² In the First Amendment context, courts have rejected litigants’ attempts to wield copyright law to suppress factual information in light of the public’s interest in freedom of information.¹³ In *Rosemont v. Random House*, the Second Circuit vacated a preliminary injunction against a Howard Hughes biography.¹⁴ The famously private Hughes had purchased the copyrights in a magazine article that the biography briefly quoted in order to claim infringement as a pretext for stopping the book’s distribution.¹⁵ The Second Circuit found that the biography’s use of two quotes and an eight-line paraphrase of the article was a fair use, especially when considering the public’s “interest in the free

⁸ 4 Nimmer on Copyright § 13D.29 (2026).

⁹ *Corwin*, 475 F.3d at 1251. For example, copyright protection is not available for “common elements in police fiction, such as ‘drunks, prostitutes, vermin and derelict cars’ and ‘foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop.’” *Id.* (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.)).

¹⁰ *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) (“copyright *does* require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded . . . [n]or does copyright extend to ‘common or trite’ musical elements, or ‘commonplace elements that are firmly rooted in the genre’s tradition,’ . . . [t]hese building blocks belong in the public domain and cannot be exclusively appropriated by any particular author.”) (emphasis in original; cleaned up); see also *Gray v. Hudson*, 28 F.4th 87, 102 (9th Cir. 2022) (finding plaintiff’s musical ostinato was not infringed when neither individual elements nor combination of elements were protectible because they did not possess requisite originality); U.S. COPYRIGHT OFFICE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101 (3d ed. 2021) 313.4(c) (“short musical phrases consisting of only a few musical notes standing alone are not copyrightable”).

¹¹ *Hayuk v. Starbucks Corp.*, 157 F. Supp. 3d 285, 293 (S.D.N.Y. 2016) (though allegedly infringing work shared ideas with plaintiff’s style, namely “overlapping colored rays, and colors and shapes,” such ideas are “‘raw materials’ . . . in the public domain” and insufficient for finding copyright infringement); but see *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987) (finding infringement in part because “striking stylistic relationship between the posters” was “significant” as “style is one ingredient of ‘expression’”).

¹² See, e.g., *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) (“No one may claim originality as to facts . . . because facts do not owe their origin to an act of authorship.”) (cleaned up).

¹³ See, e.g., *Online Pol’y Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004) (finding voting machine company had suppressed email archive casting doubt on accuracy of voting machines using copyright law). The email archive at issue “was posted or hyperlinked to for the purpose of informing the public about the problems associated with [voting machine company]’s electronic voting machines. It is hard to imagine a subject the discussion of which could be more in the public interest. If [voting machine company]’s machines in fact do tabulate voters’ preferences incorrectly, the very legitimacy of elections would be suspect.” *Id.*

¹⁴ *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966).

¹⁵ *Id.* at 305; *id.* at 311 (Lumbard, J., concurring) (“[T]here was good reason to believe that [preliminary injunction] was the instrument of Howard Hughes, created principally for the purpose of suppressing the biography of Hughes which Random House had published.”).

dissemination of information,” particularly relevant when the subject of the biography was a public figure.¹⁶ Similarly, in *Swatch*, the Second Circuit found Bloomberg News’ publication of a recording of a corporation’s private earnings call was a fair use, as the recording included information highly relevant to the financial markets and “such public dissemination of financial information serves this public purpose in the nature of news reporting.”¹⁷ The Second Circuit noted that “such public dissemination of financial information serves this public purpose in the nature of news reporting,” and Bloomberg’s “overriding purpose . . . to deliver newsworthy financial information to investors and analysts” is a “kind of activity[] whose protection lies at the core of the First Amendment” and such activities “would be crippled if the news media and similar organizations were limited to sources of information that authorize disclosure.”¹⁸

Question 2:

When deciding on enforcement measures/remedies, do your courts take account of the impact on freedom of expression, if so, in what way (e.g. type and scope of injunctions, damage awards, mitigating extra-territorial effects through geo-blocking measures)?

ANSWER

Generally, copyright plaintiffs must demonstrate following factors for courts to grant a permanent injunction: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”¹⁹ Regarding freedom of expression, the Supreme Court has encouraged courts to consider that granting injunctions against parodists may not always be an appropriate remedy in light of copyright law’s goal of encouraging creative production, particularly when adjudicating ‘close calls.’²⁰

The Second Circuit has also analyzed the freedom of expression interests at issue for plaintiffs, defendants, and the public in granting injunctive relief. Assessing whether a preliminary injunction is appropriate requires the court to determine “whether the plaintiff will suffer irreparable harm” without a preliminary injunction as well as a “balance of hardships”

¹⁶ *Id.* at 307, 309; 5 Nimmer on Copyright § 19E.02 (2026) (“‘Free dissemination of information’ can be understood as a reference to the First Amendment, even though it is not expressly cited. . . [t]he court took the public interest as central to the internal sphere of copyright law, and also as an important external factor.”).

¹⁷ *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 82 (2d Cir. 2014) (first citing *Harper & Row*, 471 U.S. at 561, then citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

¹⁸ *Id.* at 82–84.

¹⁹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The Supreme Court further noted that “this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” *Id.* at 392–393.

²⁰ *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (“Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, “to stimulate the creation and publication of edifying matter,” . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.”).

of the plaintiff and defendant.²¹ Alongside the property interests in an infringement suit, the Second Circuit identified the copyright holder’s freedom of expression interest in “not speaking,” alongside the defendant’s “core” freedom of expression interest to “express him or herself” as long as the expression is not infringing.²² The “loss” of freedom of expression, including infringement of the right not to speak, is an irreparable injury under the preliminary injunction analysis.²³

Courts must also evaluate the public’s interest when determining whether a preliminary injunction is appropriate as the public’s free expression interest “is significant and is distinct from the parties’ speech interests.”²⁴ Thus, “every” injunction “risks enjoining speech protected by the First Amendment” though defendant’s uses that “patently infringe” without the cover of a plausible fair use defense erode the First Amendment justification for the use.²⁵

Theme: Copyright and freedom of artistic expression

Conference Sessions 3 and 4

Artists need to be able to reap the economic benefits from their creations so that they can continue creating. At the same time, the artistic process involves taking inspiration from the works of others, commenting on the works of others and using works of others as a component of or starting point for new creation. To foster culture, there is a societal interest in accommodating both aspects of artistic creation when defining the scope of copyright protection. Striking the right balance becomes increasingly difficult now that technologies for disseminating, accessing, copying, adapting and morphing of content are ever more available, affordable and easy to use.

Question 3:

In what way does the national law of your country enable artists to draw upon third party works for their own artistic creations (art, literature, music, film, graphics, etc.)? Please outline the copyright law provisions (such as exceptions for quotation, parody, pastiche, concepts of fair use or fair dealing, scope of the derivative work right) and rules outside of copyright law aimed at protecting freedom of artistic expression (e.g. constitutional rights), as well as the criteria for invoking such provisions as stated in the law and/or developed in case law.

ANSWER

Copyright owners have the “exclusive right[.]” to “prepare derivative works based upon [their] copyrighted work.”²⁶ Nevertheless, use of an author’s copyrighted work without authorization may be permitted under the doctrine of fair use. As described in Question 1, *supra*, fair use is one of the primary ways to relieve the tension between copyright and free expression.

²¹ *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010).

²² *Id.*

²³ *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

²⁴ *Id.* at 82.

²⁵ *Id.* at 83.

²⁶ 17 U.S.C. § 106(2).

First developed as a judge-made doctrine, fair use was codified in 17 U.S.C. § 107 as a four factor test: “(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.”²⁷ Fair-use “calls for case-by-case analysis” and the factors should be “weighed together, in light of the purposes of copyright.”²⁸ Even when an allegedly infringing work is found to be a fair use and is thus copyrightable,²⁹ the second work’s copyright only extends to the new material added and does not encompass the copyrightable expression in the original work.³⁰

Parodies may be a fair use.³¹ Under the first factor, parody “has an obvious claim to transformative value,” though the parody must “comment[] on” the original work.³² Parodists cannot lawfully use someone else’s work simply “to get attention or to avoid the drudgery in working up something fresh.”³³ Thus, the “threshold question” is “whether a parodic character may reasonably be perceived.”³⁴

The second factor is of less utility to the parodic fair use analysis because parodies “almost invariably copy publicly known, expressive works.”³⁵ The third factor requires a court to parse whether the parodist took more than was needed to achieve its parodic purpose as “parody necessarily springs from recognizable allusion to its object through distorted imitation . . . the parody must be able to ‘conjure up’ at least enough of the original to make the object of its critical wit recognizable.”³⁶ Parodists may copy the “heart” of a work in order to successfully ‘conjure’ the original because “it is the heart at which parody takes aim.”³⁷ But

²⁷ 17 U.S.C. § 107. The statute also provides a non-exhaustive list of potential examples of fair use: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . .” *Id.*

²⁸ *Campbell*, 510 U.S. at 577–78.

²⁹ 17 U.S.C. § 103(a) (“Protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).

³⁰ 17 U.S.C. § 103(b) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

³¹ *Campbell*, 510 U.S. at 581 (“[p]arody may or may not be fair use”).

³² *Id.* at 579–80.

³³ *Id.* at 580.

³⁴ *Id.* at 582.

³⁵ *Id.* at 586.

³⁶ *Id.* at 588–89 (“the question of fairness asks what else the parodist did besides go to the heart of the original.”).

³⁷ *Id.* at 588 (“Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart.”).

the parodist or commentator is not entitled to gild the lily by copying expression for its own sake, rather than to comment on it.³⁸

Parodies in and of themselves are not market substitutions and thus cannot demonstrate market harm as the fourth factor contemplates.³⁹ Parodies may harm the market for the original on the basis of their blistering critique but this is not a “harm cognizable under the Copyright Act” because “there is no protectible derivative market for criticism;” protected derivative works “include[] only those the creators of original works would in general develop or license others to develop.”⁴⁰ Should the allegedly infringing work encompass elements beyond parody, the court may still look to derivative work markets to assess the effects of market harm.⁴¹

Question 4:

Can you give a few examples of court decisions that are representative of the way in which your national courts deal with re-use of artistic content in new artistic content?

ANSWER

In addition to *Campbell* discussed *supra* in Question 3, the 2023 Supreme Court decision *Warhol v. Goldsmith* clarified that the first fair use factor, transformative use, must analyze whether the alleged infringer’s use “has a further purpose or different character,” not whether the work is transformative.⁴²

In *Warhol*, photographer Lynn Goldsmith licensed a photograph she took of the musician Prince as a one-time only artist reference to *Vanity Fair* in 1984.⁴³ The artist, Andy Warhol, used Goldsmith’s photo to create silkscreens of Prince.⁴⁴ One of these silkscreens was published alongside an article about Prince in the November 1984 issue of *Vanity Fair* pursuant to Goldsmith’s license.⁴⁵ Following Prince’s death, *Vanity Fair* published one of Andy Warhol’s other silkscreen images of Prince (“Orange Prince”) on the cover of a special edition

³⁸ See, e.g., *Kraft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987) (Leval, J.); *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (Harry Potter Lexicon case).

³⁹ *Campbell*, 510 U.S. at 591 (“Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor . . . by acting as a substitute for it . . . because the parody and the original usually serve different market functions.”).

⁴⁰ *Id.* at 591–92 (“the role of the courts is to distinguish between “[b]iting criticism [that merely] suppressed demand [and] copyright infringement [which] usurps it.”) (alterations in original) (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

⁴¹ *Id.* at 593–94 (finding that rap parody of original song encompassed both parody and rap and thus “the derivative market for rap music is a proper focus of enquiry”).

⁴² *Warhol*, 598 U.S. at 532–33; JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT LAW 245 (2nd ed. 2024). Thus, “the same copying may be fair when used for one purpose but not another.” *Id.* at 533.

⁴³ *Id.* at 516–17.

⁴⁴ *Id.* at 517–18.

⁴⁵ *Id.*

dedicated to Prince in 2016 using a license from the Andy Warhol Foundation but without permission from Goldsmith.⁴⁶

The Supreme Court clarified that the first factor “considers whether the *use* of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use.”⁴⁷ Similar or identical uses, alongside commercial use, will tip the balance against a finding of fair use.⁴⁸ The Supreme Court concluded that the use at issue here, the Andy Warhol Foundation’s licensing of Orange Prince to *Vanity Fair*, had the same use as Goldsmith’s photograph: “both are portraits of Prince used in magazines to illustrate stories about Prince.”⁴⁹ A transformative use may not simply “add[] some new expression, meaning, or message,” the use must “‘conjure[] up’ the original work to ‘she[d] light’ on the work itself, not just the subject of the work.”⁵⁰ Additionally, the Andy Warhol Foundation’s license to *Vanity Fair* was commercial, which also weighs against a finding of fair use.⁵¹ Following *Warhol*, when courts evaluate the first factor, courts consider whether the allegedly infringing use comments on the copyrighted work, the extent of the justification for use, and whether the works have a distinct purpose.⁵²

Theme: Informational freedoms in the interest of journalism and public interest research

Conference session 5.

From the perspective of freedom of expression and information, particular sectors and types of works have traditionally had a special place in copyright law because of the significant public interests involved. Copyright acknowledges for example the importance of journalism, but there are more forms of knowledge production in the public interest such as documentary (film) making and scientific research. An important concern is whether the law is effective, now that the media landscape has undergone major changes, roles of authors have shifted (e.g. journalists, photographers, audiovisual creators) and (quality) media face challenges today, as algorithmic content is created and disseminated at scale.

Question 5:

What are the (most) important provisions in the copyright law of your country that support news media and the authors who create news (whether as text, audio, visual or audio-visual) in their business, e.g. through specific permitted uses of works by the press or special rights for press publishers?

ANSWER

⁴⁶ *Id.* at 518–520.

⁴⁷ *Id.* at 533 (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.* at 535.

⁵⁰ *Id.* at 540–41 (citing *Campbell*, 510 U.S. at 579, 588) (first alteration mine, second alteration in original).

⁵¹ *Id.* at 537–38. The Supreme Court clarified, however, that “a uses’s transformiveness may outweigh its commercial character.” *Id.* at 528.

⁵² *See, e.g., Sedlik v. Drachenberg*, No. CV 21-1102 DSF (MRWX), 2023 WL 6787447, at *4 (C.D. Cal. Oct. 10, 2023) (reconsidering summary judgment order following *Warhol* and finding first factor was triable issue because alleged infringers did not provide evidence of transformative purpose or commentary, instead relying on “aesthetic” analysis which is “foreclosed” by *Warhol*).

Newspapers do not have a special exception to copy copyrighted material; if they copy another work’s expression, they must rely on fair use. The preamble to section 107 includes “news reporting” as an example of potential excused uses, but the defendant must still justify its use under the four factors, weighed together. On the other hand, because copyright does not protect facts or information as such, a newspaper may freely copy those elements, so long as it does not also appropriate the work’s expression, that is the way the source work marshals the facts to tell the story. However, despite copyright’s lack of protection for facts, the vestiges of a 1918 Supreme Court decision may preserve a state law action against “misappropriation” of “hot news,”⁵³ if that claim survives preemption under the 1976 Act. That Act provides that certain state law claims are preempted if they address the subject matter of copyright and protect “rights equivalent” to rights under copyright.⁵⁴ In light of preemption, the Second Circuit narrowed the scope of the “hot news” claim.⁵⁵ A state law misappropriation claim may survive preemption if “(i) the plaintiff generates or collects information at some cost or expense; (ii) the value of the information is highly time-sensitive; (iii) the defendant’s use of the information constitutes free-riding on the plaintiff’s costly efforts to generate or collect it; (iv) the defendant’s use of the information is in direct competition with a product or service offered by the plaintiff; [and] (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.”⁵⁶ The “time sensitivity” of the information (such as, arguably, real-time stock market numbers or live sports scores)⁵⁷ may supply an “extra

⁵³ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 241 (1918) (“[T]he view we adopt . . . postpones participation by [plaintiff newspaper] in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of [plaintiff newspaper]’s efforts and expenditure . . .”). This cause of action is commonly known as “hot news” claims. In *Int’l News Serv.* (“*INS*”), the Associated Press sued *INS* for using various methods to intercept the Associated Press’s newsgathering to distribute it to *INS* newspapers in competition with Associated Press newspapers, thereby ‘free riding’ off of the Associated Press’s newsgathering at a much lower cost, risking stifling the news market because no news source would be incentivized to invest in newsgathering should their work be scooped immediately by a competitor for no cost. *Id.* at 230–232, 241. *INS* arose under federal common law, a legal basis the Supreme Court subsequently abolished in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”).

As to the claim’s vestigial nature, see, *Barclays Cap. Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 894 (2d Cir. 2011) (“Some seventy-five years after its death under *Erie*, *INS* thus maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action.”).

⁵⁴ 17 U.S.C. § 301 (“[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . and come within the subject matter of copyright . . . are governed exclusively by this title.”).

⁵⁵ *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 848 (2d Cir. 1997) (“Our conclusion, therefore, is that only a narrow ‘hot-news’ misappropriation claim survives preemption for actions concerning material within the realm of copyright.”).

⁵⁶ *Id.* at 852–53 (cleaned up). In *NBA*, the Second Circuit found that the defendant, a company selling a pager providing buyers near-live statistics of NBA games, had not met the elements of the narrower misappropriation claim because the defendant’s pager was not competing with the NBA’s games or broadcasts themselves nor was the pager company free-riding on the NBA’s own statistics transmission because the pager company was “expend[ing] their own resources to collect purely factual information” and using “their own network” to “assemble and transmit data themselves.” *Id.* at 853–54.

⁵⁷ See, e.g., *NBA*, 105 F.3d at 853.

element” rendering the state law claim non “equivalent” to a copyright action. An action alleging non attribution of the source of the copied information, however, may not suffice to render the claim non “equivalent.”⁵⁸

Question 6:

Which informational freedoms do research organisations and documentary (film) makers enjoy under the copyright law in your country and do these freedoms depend on the commercial or non-commercial nature of their activities? If so, does the law delineate this through specific conditions, limited scope of beneficiaries (e.g. only public interest research), or otherwise?

ANSWER

United States copyright law does not specifically provide exceptions for research organizations or documentary filmmakers. Research organizations and documentary filmmakers rely on the doctrines described *supra*, namely fair use.⁵⁹ In light of this, documentary filmmakers proposed their own fair use best practices because they believed their “ability to communicate effectively [was] being restricted by an overly rigid approach to copyright compliance, and that the public suffers as a result.”⁶⁰

The Documentary Filmmakers’ Statement of Best Practices in Fair Use (“Best Practices in Fair Use”) describes certain examples of when fair use is appropriate such as “employing copyrighted material as the object of social, political, or cultural critique,” “quoting copyrighted works of popular culture to illustrate an argument or point,” “capturing copyrighted media content in the process of filming something else,” and “using copyright material in a historical sequence” alongside corresponding limitations.⁶¹ The Best Practices in Fair Use has been credited with establishing fair use norms for documentary filmmaking and influencing insurance carriers to insure copyrighted material used without clearance if the filmmakers complied with the Best Practices in Fair Use and obtained a letter from counsel.⁶²

⁵⁸ *New York Times v. Microsoft*, 777 F.Supp.3d 283, 298 (S.D.N.Y. 2025).

⁵⁹ See, e.g., *Whyte Monkee Prods., LLC v. Netflix, Inc.*, No. 22-6086, 2026 WL 1179632 at 16, 23, 26, 31 (10th Cir. Apr. 30, 2026) (finding Netflix’s use in *Tiger King* documentary of sixty six seconds of plaintiffs’ recording of a funeral was fair use when clip was transformative because of distinct purpose to educate which was not the purpose of the funeral recording and clip was not a legitimate substitution, funeral recording was “more factual than creative,” recording was excerpted as necessary for Netflix’s transformative purpose, and plaintiffs did not demonstrate derivative markets nor did evidence suggest markets would be harmed.) The Tenth Circuit also noted how the documentary use was in line with the examples of fair use in the statute: “criticism, comment, news reporting, teaching . . . scholarship, or research;” such uses may be known as “preamble” uses. *Id.* at 9 (quoting 17 U.S.C. § 107). However, documentaries are not “categorically favored,” “[r]ather, insofar as the scales often have tilted in favor of fair use in the area of documentaries, it likely is a function of the fact that documentaries frequently reflect preamble purposes—by commenting on social ills, criticizing industrial developments, or educating viewers regarding notable personalities and world events.” *Id.* at 14.

⁶⁰ *Documentary Filmmakers’ Statement of Best Practices in Fair Use* 1 (2005), hdl.handle.net/1961/socialmediapubs:9.

⁶¹ *Id.* at 2–6.

⁶² 4 Nimmer on Copyright § 13F.04 (2026) (citing Peter Decherney, *Hollywood’s Copyright Wars* 199 (2012)); Decherney at 199; see also Thomas Plotkin & Tarae Howell, “*Fair is Foul and Foul is Fair: Have Insurers*

Theme: Informational freedoms and the status of official records

Conference session 6

The public sector including the legislative, judicial and executive branches in all their manifestations produces and collects vast amounts of information. Often this is subject to copyright but the Berne Convention also gives states significant leeway in limiting protection. Also, right to information laws are increasingly viewed as part and parcel of the right to freedom of expression. Such laws bring obligations for public sector bodies to publish information and to provide information on requests of e.g. citizens. Where the information is subject to copyright, there is potential conflict between the public interest in access and right holders interest in controlling dissemination. This tension becomes more acute in this age where technologies enable wide access to public sector information (e.g. as part of open government programmes).

Question 7:

Article 2(4) Berne Convention provides that: ‘4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.’

Article 2bis (a) provides: ‘1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.’

How does your copyright law reflect articles 2(4) and 2bis(a)? Notably, how does it treat works that are created by or for public sector bodies in the course of their tasks, e.g. legislative (national, state, local), administrative/executive (government bodies, agencies) and adjudication (courts, tribunals)? Please also consider neighbouring rights including database law where relevant.

ANSWER

Regarding article 2(4) of the Berne Convention, US copyright law excludes protection for “Works of the United States Government” under 17 U.S.C. 105.⁶³ Common law principles deny protection to state law, regulations and judicial decisions. In *Georgia v. Public.Resource.org, Inc.*, the Supreme Court held that state official codes and accompanying annotations (when created by a legislator) are not copyrightable.⁶⁴ The Supreme Court relied on the historical “government edicts doctrine” that bars copyright protection for works judges “produce in the course of their official duties” because they are not “authors” within the

Loosened the Chokepoint of Copyright and Permitted Fair Use’s Breathing Space in Documentary Films?, 15 CONN. INS. L.J. 407 (2009).

⁶³ 17 U.S.C § 105(a) (“Copyright protection under this title is not available for any work of the United States Government . . .”). United States government created works include “work[s] prepared by an officer or employee of the United States Government as part of that person’s official duties.” 17 U.S.C. § 101.

⁶⁴ *Georgia v. Public.Resource.org, Inc.*, 590 U.S. 255 (2020) (finding that annotations to Georgia’s Official Code were not copyrightable). Judges cannot be authors because “no one can own the law.” *Id* at 265. The Supreme Court expanded the doctrine to cover legislators and confirmed that the “rule applies regardless of whether a given material carries the force of law” as long as the works are created by a judge or a legislator “in the course of [their] official duties.” *Id.* at 263.

meaning of the Constitution.⁶⁵ The Supreme Court extended the doctrine to legislators, reasoning that, like judges, legislators cannot be authors because “no one can own the law.”⁶⁶

Regarding article 2(bis) of the Berne Convention, whether political speeches and speeches delivered in the course of legal proceedings are entitled to copyright protection is unclear. Legislator-given political speeches may fall within the scope 17 U.S.C. § 105 or the government edicts doctrine. In *Georgia*, the Supreme Court noted in dicta that “in the same way judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their *floor statements*, committee reports, and proposed bills.”⁶⁷ Should legislator-given political speeches not fall within the ambit of 17 U.S.C. § 105, political speeches, legislator-given or otherwise, would likely merit a fair use defense and permit unlicensed use.

Regarding “speeches delivered in the course of legal proceedings,” speeches delivered by a judge during the course of legal proceedings would presumably fall within the government edicts doctrine (and 17 U.S.C. § 105 if delivered by a federal judge), while other speeches given during the course of legal proceedings would, similarly to political speeches, warrant a colorable fair use defense.

The United States does not have neighbouring rights such as protections for databases.

Question 8:

In many countries laws that provide rights to access information held by the public sector (e.g. under freedom of information law, public records acts) and copyright exist side by side. In your country, is there a hierarchy among these laws, e.g. do rights to access information take precedence over copyright or vice versa, or is it not regulated?

ANSWER

The United States has freedom of information acts at both the federal and state levels.⁶⁸ At the federal level, the Freedom of Information Act (“FOIA”) governs the disclosure of agency records.⁶⁹ The United States Copyright Office (“Copyright Office”) is generally subject to FOIA,⁷⁰ though “copies or reproductions of deposited articles” under the

⁶⁵ *Id.* at 263.

⁶⁶ *Id.* at 265.

⁶⁷ *Id.* at 266 (emphasis added). The Court explained that such “materials are part of the ‘whole work done by [legislators],’ so they must be ‘free for publication to all.’” *Id.* (citing *Banks v. Manchester*, 128 U.S. 244, 253 (1888)) (alteration in original).

⁶⁸ At the state level, the interaction between copyright and state open records law is varied. 4 Nimmer on Copyright § 13F.16 (2026) (reviewing case law). The conflict between copyright and state open records law is complicated by federal law’s exclusive jurisdiction over copyright claims which preempts state copyright actions. 17 U.S.C. § 301(a) (“all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title.”).

⁶⁹ 5 U.S.C. § 552.

⁷⁰ 17 U.S.C. § 701(e) (“Except as provided by section 706(b) and the regulations issued thereunder, all actions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act [the Administrative Procedures Act includes FOIA] . . .”) (emphasis added).

control of the Copyright Office are not subject to FOIA and may be released only as authorized under Copyright Office regulations.⁷¹ Additionally, information regarding the Copyright Claims Board, a small claims copyright court administered by the Copyright Office, is not subject to FOIA.⁷²

Regarding copyrighted materials generally, “the mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records.”⁷³ However, copyrighted materials may also fall within FOIA’s own exceptions that bar release, though there is limited case law assessing how FOIA applies to copyrighted works.⁷⁴ Additionally, courts may also consider the fair use doctrine, described *supra* in Questions 3 and 4, in determining the applicability of FOIA.⁷⁵

⁷¹ 17 U.S.C. § 706(b) (“Copies or reproductions of deposited articles retained under the control of the Copyright Office shall be authorized or furnished only under the conditions specified by the Copyright Office regulations.”); 37 C.F.R. § 203.1 (“Section 706(b) of the Copyright Act and the regulations issued under section 706(b) are not subject to FOIA.”); H.R. Rep. No. 94-1476 (1976), <https://uscode.house.gov/view.xhtml?path=/prelim@title17/chapter7&edition=prelim> (“Under an amendment to section 701 adopted by the Committee, the Copyright Office is made fully subject to the Administrative Procedure Act [5 U.S.C. 551 et seq. and 701 et seq.] with one exception: under section 706(b), reproduction and distribution of copyright deposit copies would be made under the Freedom of Information Act [5 U.S.C. 552] only to the extent permitted by the Copyright Office regulations”).

The Copyright Office provides a webpage listing the procedure for FOIA requests and provides annual reports on the status of FOIA requests. *See generally* <https://www.copyright.gov/foia/>.

⁷² 37 C.F.R. § 203.1 (“all information relating to proceedings of the Copyright Claims Board under chapter 15 of the Copyright Act is exempt from disclosure under FOIA, except for Copyright Claims Board determinations published on the Copyright Office website and related records and information published on that website.”).

⁷³ *Weisberg v. U.S. Dep’t of Just.*, 631 F.2d 824, 825 (D.C. Cir. 1980); *St. Paul’s Benev. Educ. & Missionary Inst. v. United States*, 506 F. Supp. 822, 830 (N.D. Ga. 1980) (“FOIA does not provide any specific exemption for copyrighted materials”); *but see Caner v. Autry*, 16 F. Supp. 3d 689, 715 & n.20 (W.D. Va. 2014) (“courts . . . sometimes account for Copyright Act protections in determining whether releasing material might affect the market in question or constitute fair use”) (citing *Hooker v. U.S. Dep’t of Health & Hum. Servs.*, 887 F. Supp. 2d 40, 61 & n.18 for proposition that *Hooker* “plaintiff conceded that defendants properly withheld FOIA-requested documents due to Copyright Act protections.”); *FoiaConsciousness.com LLC v. Nat’l Archives & Recs. Admin.*, 789 F. Supp. 3d 756, 759 (N.D. Cal. 2025) (No FOIA violation when National Archives & Records Administration refused to provide FOIA requester copies of Zapruder film of John F. Kennedy assassination absent proof of permission from copyright holder because film is not “readily reproducible” as required by FOIA statute if provided without permission when requester “did not identify anything in FOIA or the caselaw to indicate that Congress intended a records designation to trump copyrights held by third parties . . . [and] did not say why FOIA would require agencies to produce copies in a manner that would open them up to liability under the copyright laws.”).

⁷⁴ *Hooker v. U.S. Dep’t of Health & Hum. Servs.*, 887 F. Supp. 2d 40, 61 & n.18, *aff’d*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014) (“Case law analyzing the interaction between the Copyright Act and FOIA exemptions is sparse”).

⁷⁵ *Caner*, 16 F. Supp. 3d at 715 & n.20 (declining to address copyright infringement defendant’s argument regarding FOIA because use at issue was a fair use); *see Weisberg*, 631 F.2d at 827 & n.16, 829 & n. 28 (declining to decide applicability of FOIA arguments to disclosure of copyrighted material because copyright owner attempting to bar disclosure under FOIA was not party to suit at bar which could give rise to “duplicative litigation” regarding the federal government’s obligations to the copyright holder when district court addressed fair use arguments and government stated only party with interest in fair use arguments was the copyright holder); *Cody Zeigler, Inc. v. U.S. Dep’t of Lab., Occupational Safety & Health Admin.*, No. C2-00-134, 2002 WL 31159309, at *3 (S.D. Ohio Sept. 3, 2002) (after failing to raise copyright issue originally, publisher of reports subject to FOIA request conceded that fair use doctrine “might be implicated” and indicated willingness to enter

Courts have generally considered the fourth FOIA exemption, “trade secrets and commercial or financial information obtained from a person and privileged or confidential,”⁷⁶ to be the appropriate exemption to determine whether copyrighted material can be exempted from disclosure.⁷⁷

In *Weisberg v. U.S. Dep’t of Justice*, the D.C. Circuit found that photos taken at the scene of the Martin Luther King, Jr. assassination that were in the FBI’s possession for purposes of the investigation but that were also copyrighted by TIME Magazine were agency records within the scope of FOIA because the photos “reflect the . . . operation, or decision-

into agreement with requester to access copyrighted material) (internal quotation marks removed); *but see Naumes v. Dep’t of the Army*, No. CV 21-1670 (JEB), 2022 WL 17752206, at *6 (D.D.C. Dec. 19, 2022) (finding that “Exemption 4 leaves no room for consideration of how the recipient of FOIA-requested information will use the allegedly confidential information” and fair use arguments not applicable because fair use is a defense against infringement and FOIA requester cannot have infringed when basis for suit is lack of access to copyrighted material).

⁷⁶ 5 U.S.C. § 552(b)(4).

⁷⁷ *See, e.g., St. Paul’s Benev. Educ. & Missionary Inst.*, 506 F. Supp. at 830 (finding “possibly applicable” exemption is the fourth FOIA exemption, 5 U.S.C. § 552(b)(4) and finding third FOIA exemption, 5 U.S.C. § 552(b)(3), which prevents disclosure of materials that are explicitly prohibited from disclosure by statute is not applicable because the Copyright Act does not meet (b)(3)’s standards).

Two cases that have considered whether copyrighted material can fall within the fourth FOIA exemption relied on interpreting the meaning of “confidential” in the exception under the test set out in *National Parks and Conservation Association v. Morton*: whether the confidentiality of the information will “(1) impair the government’s ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.” *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). This test has since been abrogated by *Food Mktg. Inst. v. Argus Leader Media*, which now defines “confidential” as “at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is “confidential” within the meaning of Exemption 4.” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 440 (2019).

In *St. Paul’s*, the court found that the fourth exception did not apply because the purportedly copyrighted information at issue, “computer tape and computer print-outs or tabulations of the data on the computer,” was not “confidential, commercial, or financial information” when the information at issue was not financial, the copyright holder did not have a commercial enterprise, and the information was “intended for disclosure and would normally be disclosed.” *St. Paul’s Benev. Educ. & Missionary Inst.*, 506 F. Supp. at 830 (“There is no exemption for non-commercial or non-financial information which is privileged or confidential.”).

In *Gilmore*, the court found that the Department of Energy was correct to deny a FOIA request for a software program because the program was not an agency record and, in the alternative, was exempt under the fourth exception. *Gilmore v. U.S. Dep’t of Energy*, 4 F. Supp. 2d 912, 917–924 (N.D. Cal. 1998). The software program was not an agency record because a. a third party company owned the copyright in the program that the federal government used pursuant to a license and thus the program was not under the government’s control because it did not have unrestricted use of the program and b. disclosure of the program would not shed light on agency processes (unlike the photos in *Weisberg*, discussed *infra*). *Id.* at 918–922. Furthermore, even if the software program were an agency record, the software program would nevertheless fall within the fourth FOIA exemption because the National Parks confidentiality test was satisfied. *Id.* at 922. The first prong, impairment of the government’s ability to obtain information in the future, is met because “corporations will be less likely to enter into joint ventures with the government to develop technology if that technology can be distributed freely though the FOIA, irrespective of any intellectual property rights retained by the corporations.” *Id.* The second prong, substantial competitive harm, is met because public disclosure of the program would “cause substantial commercial harm” to the third party as the copyright interest “will have been reduced to zero.” *Id.*

making functions of the agency,' because they will permit evaluation of the FBI's performance in investigating the King assassination."⁷⁸ Nevertheless, the court declined to determine whether the photos at issue should be disclosed or exempted pursuant to a FOIA exemption because the copyright holder, TIME, was not a party to the litigation and thus the court "intimate[d] no view with respect to these contentions concerning the proper relationship between FOIA and the copyright laws."⁷⁹

In *Naumes v. Department of the Army*, a PhD student filed a FOIA request to access an Army well-being survey administered to military members, their families, and employees.⁸⁰ The Army had released some of the questions but declined to release questions that were under copyright.⁸¹ The District of Columbia evaluated whether the material requested fell within the Exception 4 by separately evaluating the three prongs ("commercial or financial information," "obtained from a person," and "privileged and confidential.")⁸²

The court determined that the first prong was satisfied because "FOIA requests would undermine the market for the creator's work in much the same way that the release of other types of commercial information could inflict competitive harm."⁸³ The second prong is met if the material at issue has few, if any, modifications from a third party, but is not met when the agency at issue has significantly adapted the material.⁸⁴ The court declined to rule on whether the second prong was satisfied as the record was unclear as to the scope of the Army's modifications to survey questions from third party sources and the court requested supplemental briefing on this issue.⁸⁵ Considering the "privileged or confidential" prong, the court evaluated whether the information at issue was "both customarily and actually treated as private by its owner."⁸⁶ The court found that though publicly available survey questions were

⁷⁸ *Weisberg*, 631 F.2d at 828 (quoting *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116, 1120 (9th Cir. 1976)). The court found that the government cannot "'mask its processes or functions from public scrutiny' simply by asserting a third party's copyright because "FOIA was designed to provide public access to materials such as the photos requested here." *Id.* (quoting *SCD Dev. Corp.* at 1120).

⁷⁹ *Id.* at 828. The court found that the action "vitally affect[s] the value of TIME's alleged copyright" and the federal government could be bound to "conflicting legal obligations" should TIME sue in a separate action to prevent the disclosure of the photos as TIME was not adequately represented in the case at bar. *Id.* at 829–830.

⁸⁰ *Naumes v. Dep't of the Army*, 588 F. Supp. 3d 23, 31 (D.D.C. 2022).

⁸¹ *Id.* at 32.

⁸² *Id.* at 37 ("For the questions to remain redacted, they must satisfy each prong of the exemption") (citing *Public Citizen Health Resource Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir 1983)).

⁸³ *Id.* at 37.

⁸⁴ *Id.* at 38 ("[T]he key distinction — which will obviously be blurry in many instances — is between information that is either repeated verbatim or slightly modified by the agency, and information that is substantially reformulated by the agency, such that it is no longer a 'person's' information but the agency's information.") (citing *Southern Alliance for Clean Energy v. Dep't of Energy*, 853 F. Supp. 2d 60, 68 (D.D.C. 2012)).

⁸⁵ *Id.* ("Did the Army directly copy questions from various copyrighted books or articles and place them unchanged into the GAT, or did it analyze these sources and modify the ideas they contain into questions that appear on the survey? If the former, the questions were obtained from a person and the Exemption 4 analysis can proceed.").

⁸⁶ *Id.* (quoting *WP Company LLC v. SBA*, 502 F. Supp. 3d 1, 12 (D.D.C. 2020)).

not confidential and the Army must release these questions, copyrighted questions not available to the public were a thornier issue because “there is no reason . . . that a party should be able to use FOIA as an end run around protections afford by copyright to access information it would otherwise have to pay for, nor should [FOIA] be read to be place agencies in the position of having to disclose information that could later lead to infringement suits.”⁸⁷ Finding that “[t]here must be some circumstances in which Exemption 4 may provide a basis for withholding copyrighted materials because they are commercial, confidential information obtained from a person,” the court ordered the Army to confer with the copyright holders to determine whether the copyright holders treated the survey questions as confidential.⁸⁸

All but one of the copyright holders consented to the release of their material and the Army filed a renewed motion for summary judgment on the basis that the Army had complied with FOIA’s requirements and the remaining material belonging to the non-consenting copyright owner was properly withheld under Exemption 4.⁸⁹ The court agreed that the remaining copyrighted material fell under Exemption 4 because the copyright owner had a commercial interest in her copyrighted material, the material was obtained from a person because the Army only minimally modified her copyrighted material, and that the material was confidential because the copyright owner did not customarily release this material to the public per her declaration.⁹⁰ Furthermore, exempting the copyrighted material at issue was in line with the purpose underlying Exemption 4 because unwanted disclosure may deter future sharing of information with the government⁹¹ and protects the copyright owner’s interest in exploiting her copyright in the future.⁹²

Theme: Idea v. expression in the age of algorithms: Mining & AI training

Conference Session 7.

⁸⁷ *Id.*

⁸⁸ *Id.* at 41 (“This information is particularly valuable to the court, where, as here, it is unclear whether there was a specific license or assurance of confidentiality that revealed an expectation by the copyright holder that their material would remain private.”). In determining the best course of action was to consult the copyright holders, the court noted that other courts had considered the viewpoint of the copyright holder in determining the applicability of FOIA exceptions. *Id.* at 40. (first citing *Ruston v. Dep’t of Justice*, 521 F.Supp. 2d 18, 19 (D.D.C. 2007), then citing *Weisberg*, 631 F.2d at 829).

⁸⁹ *Naumes*, 2022 WL 17752206, at *3.

⁹⁰ *Id.* at 4–5.

⁹¹ *Id.* at 5 (“Were the Army to release Park’s scales in defiance of her insistence that they remain confidential, researchers like her who seek to do business with the Government will be less likely to trust [it] with copyrighted information in the future. That would interfere with the Government’s access to data and could have ripple effects for military readiness and national security.”) (cleaned up).

⁹² *Id.* (“[Copyright owner] is particularly concerned about the effect of disclosure on the market for her work because she wishes to publish the scales herself in the future. She explains that release of the scales via FOIA would render them publicly available and thus decimate the value of her copyrights. Indeed, were this Court to order the Army to disclose [copyright owner]’s scales to [PhD student making FOIA request] in this action, anyone could get their hands on the scales by submitting a FOIA request. . . . That would create a near–costless alternative to paying for access to [copyright owner]’s work if it is ever published, which would almost certainly affect the market for it.”) (cleaned up).

Text and data mining (TDM) for AI training is the starting point of a development process that can lead to powerful generative AI systems (GenAI). As these systems have the potential to replace human creativity and change human creative practice, the question is how copyright law could be used as a regulatory tool to support human free expression. With regard to the TDM process itself, the evolving ‘right to research’ under freedom of expression law has become an important factor in the policy debate. Moreover, the question arises how copyright can ensure fair remuneration for the use of human works in AI training – for both authors and rightsholders, including small repertoire owners. Finally, the quality and cultural diversity of TDM resources must be considered. The future generation of ‘GenAI natives’ (not knowing a world without GenAI) may use GenAI routinely as a tool to obtain templates for their own creativity and free expression. If AI training resources are not sufficiently diverse, the risk arises that certain human expressions are no longer visible in GenAI output – and simply forgotten and lost when human acts of expression are based on GenAI templates.

Question 9:

Regulatory framework and licensing practice for AI training

How does your national copyright law regulate text and data mining (TDM) and other use of protected human literary and artistic works for the purpose of developing generative AI systems? Please address applicable exclusive rights, in particular whether the right of reproduction is deemed applicable, exceptions and limitations, and issues of territoriality. Please add relevant case law.

If applicable, please give examples of licensing arrangements between rightholders in the creative industries (including collective management organizations) and AI developers?

ANSWER

In order for AI programs to create an effective algorithm they must gather training data. Training data necessarily comes from the ingestion of existing material. Most often this comes from images and text gathered from the internet, and ingesting these works requires that they be copied to create a dataset which is then fed into the large language model’s program.⁹³

The United States does not currently have specific laws governing text and data mining or the gathering of data in any manner for generative AI systems. General principles of copyright law continue to apply. The training of large language models on scanned materials could implicate an author’s reproduction right, and possibly their distribution right, according

⁹³ U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 3: GENERATIVE AI TRAINING at 27 (2025) (pre-publication version) [hereinafter USCO REPORT: PART 3] (citing Pamela Samuelson, Christopher Jon Sprigman & Matthew Sag, Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright (Nov. 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4976391) (“... the process of training Generative AI models is generally preceded by massive amounts of web scraping that results in the creation of locally stored copies of millions or billions of copyrighted works”). Though AI developers vigorously denied that the model itself copied the data, computer science studies show otherwise. See, e.g., Ahmed Ahmed et al., *Extracting Books From Production Language Models*, ARXIV:2601.02671 (Jan. 6, 2026) (preprint), <https://arxiv.org/abs/2601.02671>; see, e.g., A. Feder Cooper et al. *Extracting Memorized Pieces of (Copy-righted) Books From Open-weight Language Models*, ARXIV:2505.12546 (Nov. 30, 2025) (preprint), <https://arxiv.org/abs/2505.12546>; see, e.g., A. Feder Cooper & James Grimmelmann, *The Files Are in the Computer: On Copyright, Memorization, and Generative AI*, 100 CHI.-KENT L. REV. 141 (2025); see, e.g., Xinyue Liu, Niloofer Mirehghallah, Jane C. Ginsburg, & Tuhin Chakrabarty, *Alignment Whack-a-Mole: Finetuning Activates Verbatim Recall of Copyrighted Books in Large Language Models* (Columbia L. Sch. Pub. L. Working Paper, 2026), <https://ssrn.com/abstract=6449179.6>.

to a report issued by the Copyright Office in May, 2025.⁹⁴ The fair use defense may, however, excuse *prima facie* violations of those rights.

What guidance there has been on this topic has come through American common law. Two courts in the Northern District of California have awarded partial or full summary judgment to AI companies Anthropic and Meta in infringement actions involving the copying of fiction and nonfiction books into training data sets and the creation of large language models for these companies' respective generative AI systems.⁹⁵ Both defendants asserted the defense of fair use and prevailed, in part.⁹⁶ The courts' fair use analyses follow.

On the first fair use factor, both courts ruled that copying for the purpose of statistical analysis of the source material in order to generate a great variety of noninfringing outputs was “transformative.”⁹⁷ The *Bartz* court, however, expressed great doubt that Anthropic's sourcing of copied from pirate libraries of illegally scanned books to create a general research library that it did not use to train its LLM to be fair use, and the case subsequently settled as a result.⁹⁸ The *Kadrey* court was much more willing to diminish the significance of Meta downloading copies from pirated sites, ruling that the downloads “must still be considered in light of its ultimate, highly transformative purpose” which was training its LLM, Llama.⁹⁹

On the third factor, the courts in the *Kadrey* and *Bartz* cases held that copying entire works was reasonably necessary for the transformative purpose of training LLMs.¹⁰⁰

On the fourth factor, both courts discounted the relevance of plaintiffs' lost opportunities to license their works specifically for AI data training.¹⁰¹ The courts reasoned that if the copying was a transformative use, plaintiffs had no exclusive right to license the use; loss of revenue to which the plaintiffs were not entitled thus did not weigh the fourth factor

⁹⁴ USCO REPORT: PART 3, *supra* note 92, at 26–27 (“The steps required to produce a training dataset containing copyrighted works clearly implicate the right of reproduction The training process also implicates the right of reproduction.”).

⁹⁵ *Bartz v. PBC*, 787 F. Supp. 3d 1007, 1019 (N.D. Cal. 2025); *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026, 1036–37 (N.D. Cal. 2025). In both cases, the developers did not dispute that they copied the plaintiffs' work for the high quality of their writing, and the plaintiffs in neither case alleged that the AI-generated outputs infringed their copyrights in the source materials.

⁹⁶ *Bartz*, 787 F. Supp. 3d at 1018–19; *Kadrey*, 788 F. Supp. 3d at 1036.

⁹⁷ *Bartz*, 787 F. Supp. 3d at 1019, 1022; *Kadrey*, 788 F. Supp. 3d at 1044.

⁹⁸ By contrast, the court found copies made by scanning lawfully purchased books to be transformative, *Bartz*, 787 F. Supp. 3d at 1022–23. The landmark case *Sony Corp. of Am. v. Universal City Studios, Inc.* ruled that format-shifting for convenience, albeit not a use “productive” of new works, could nonetheless be fair use. 464 U.S. 417, 443–47 (1984).

This portion of the court's analysis may clash with the Second Circuit's decision in *Hachette Book Group, Inc. v. Internet Archive*, 115 F.4th 163, 173–74 (2d Cir. 2026). In that case, the court rejected Internet Archive's fair use defense of controlled-digital lending based on its one-to-one analog to digital copying, although in *Hachette*, there was distribution (and often multiple distributions) of the digital copy, while *Bartz* involved only making a digital copy and discarding the print copy, 787 F. Supp. 3d at 1022–24.

⁹⁹ *Kadrey*, 788 F. Supp. 3d at 1047.

¹⁰⁰ *Bartz*, 787 F. Supp. 3d at 1029–31; *Kadrey*, 788 F. Supp. 3d at 1050.

¹⁰¹ *Bartz*, 787 F. Supp. 3d at 1031–33; *Kadrey*, 788 F. Supp. 3d at 1050–59. As shown below, however, licensing deals are becoming more and more common in the United States.

against the defendants. (This analysis appears to conflate transformative use with an ultimate finding of fair use on all the factors.) The *Bartz* court did not take into account the indirect effects of market dilution – when AI-generated works compete in the same market as the original works,¹⁰² despite the Copyright Office’s concerns that market dilution was a serious threat to human authors.¹⁰³ The *Kadrey* court, however, did take this into account in its determination of fair use, noting its importance in analyzing fair use in generative AI cases and criticizing Judge Alsup’s analysis.¹⁰⁴ Unfortunately for the *Kadrey* plaintiffs, the court held that they fumbled a “potentially winning argument” by failing to present “enough evidence to raise a genuine dispute of material fact sufficient to give the question of market dilution to a jury.”¹⁰⁵

The *Kadrey* then gave a roadmap of sorts for how authors may be able to show market dilution:¹⁰⁶

1. Prove that the LLM is capable of generating books or other materials that might be in competition with existing work product.

Then look at the following questions:

1. Do the AI generated works compete with the authors’ existing works?
2. What is the impact on the sales of the non-AI authors?
3. Is any damage incurred likely to increase in the future?
4. Does the copying of books create a threat to the market for the non-AI works?

It will be interesting to see if future plaintiffs follow this strategy.

There has been a large increase in the number of licensing deals between content creators and LLM platform designers in the past three years, although some licenses we found are even older. While most of the terms of these agreements are private, some are publicly available. Perhaps the largest contract was the \$1 billion deal between Disney and the video-generating site Sora¹⁰⁷, but Disney withdrew from that deal just prior to Open AI’s termination of the Sora service in March, 2026.¹⁰⁸ *The New York Times* made an agreement with web giant Amazon in May, 2025, to license their editorial content for at least \$20 million.¹⁰⁹ Some others

¹⁰² *Bartz*, 787 F. Supp. 3d at 1031–33.

¹⁰³ USCO REPORT: PART 3, *supra* note 75, at 65.

¹⁰⁴ *Kadrey*, 788 F. Supp. 3d at 1035–36.

¹⁰⁵ *Id.* at 1036, 1055.

¹⁰⁶ See *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026, 1052–57 (N.D. Cal. 2025).

¹⁰⁷ See Press Release, Walt Disney Company, The Walt Disney Company and OpenAI Reach Landmark Agreement to Bring Beloved Characters from Across Disney’s Brands to Sora (Dec. 11, 2025), <https://thewaltdisneycompany.com/news/disney-openai-sora-agreement/>; see Alex Weprin, *Disney Exits OpenAI Deal After AI Giant Shuttles Sora*, HOLLYWOOD REP., <https://www.hollywoodreporter.com/business/digital/openai-shutting-down-sora-ai-video-app-1236546187/>.

¹⁰⁸ Osmond Chia and Emma Calder, *OpenAI closes Sora video-making app and cancels \$1bn Disney deal*, BBC (March 25, 2026) <https://www.bbc.com/news/articles/c3w3e467ewqo>.

¹⁰⁹ Alexandra Bruell, *Amazon to Pay New York Times at Least \$20 Million a Year in AI Deal*, WALL ST. J. (July 30, 2025), <https://www.wsj.com/business/media/amazon-to-pay-new-york-times-at-least-20-million-a-year-in->

who began licensing agreements in the past year include *Adweek*, *The Boston Globe*, and the Copyright Clearance Center.¹¹⁰ Shutterstock photo library was a pioneer in collaborating with Open AI to assist in the creation of their LLM DALL-E. They entered into an agreement in 2021¹¹¹ and extended that to a six-year agreement in July, 2023.¹¹² In October 2022, Shutterstock began selling images generated by DALL-E to the displeasure of some photographers.¹¹³ As the practice of licensing works for training data becomes increasingly prevalent, so, too, may the fourth fair use factor (market substitution) increasingly weigh against a successful defense.

Question 10:

Competition between human and AI productions

Is there evidence in your jurisdiction that AI is used to substitute human creativity and, if so, in respect of which areas of creation (industries, work areas) is this the case?

If there is survey evidence you are aware of, please add.

ANSWER

There is survey evidence and other indications that AI can replace or reduce works of human creativity in the marketplace. Computer scientists Tuhin Chakrabarty (SUNY Stonybrook) and Paramveer Dhillon's (University of Michigan) article, with Jane Ginsburg, "Readers Prefer Outputs of AI Trained on Copyrighted Books Over Expert Human Writers" surveyed readers regarding their preferences for human-authored content compared to AI-generated content.¹¹⁴ Both human authors and LLMs (ChatGPT, Claude, and Gemini) prepared short excerpts in the style of famous authors for both MFA-trained readers and college-educated readers to evaluate on both stylistic fidelity and writing quality. The AI-generated excerpts were generated twice: first through prompting alone and then after fine-tuning on an author's complete works. Though only the college-educated readers preferred the prompt-only AI-generated excerpts on the writing quality metric, after fine-tuning the LLMs on an author's

ai-deal-66db8503?gaa_at=eafs&gaa_n=AWetsqfjHLgbTUssOHUqAp0jycIZAp55sTpcIflvPxFH3ccW-mzDYMfU9btpvyER6z0%3D&gaa_ts=69cd8185&gaa_sig=huDG0upX0ubXulQJ131xgzxjguLpTITATIIPvepHU6yMMglGUJqnQcok8sijS9Xat0lQe3kFrt1-cTBE1EAA%3D%3D.

¹¹⁰ See *ADWEEK and ProRata Bring AI-Powered Answers to ADWEEK.com*, BUSINESS WIRE, <https://www.businesswire.com/news/home/20250616388492/en/ADWEEK-and-ProRata-Bring-AI-Powered-Answers-to-ADWEEK.com>; see Sarah Guaglione, *Boston Globe, Future, Vox Media Join ProRata's Generative AI Licensing Model*, DIGIDAY, <https://digiday.com/media/boston-globe-future-vox-media-join-proratas-generative-ai-licensing-model/>; see Press Release, Copyright Clearance Center, CCC Launching New AI Content Re-Use Rights for U.S. Academic Customers and Transactional Licensing Capabilities for AI (Mar. 3, 2026), <https://www.copyright.com/wp-content/uploads/2026/03/ACLHE-AI-and-LBF-2026-press-release.pdf>; see also Press Release, Getty Images, Getty Images and Perplexity Strike Multi-Year Image Partnership (Oct. 31, 2025), <https://investors.gettyimages.com/node/15211/pdf>.

¹¹¹ Richard Whiddington, *Shutterstock Has Inked a Deal With DALL-E's Creator to Offer A.I.-Generated Stock Images. Not All Artists Are Rejoicing*, ARTNET (Oct. 26, 2022), <https://news.artnet.com/art-world/shutterstock-openai-dall-e-ai-stock-images-2199155>.

¹¹² Press Release, Shutterstock, Shutterstock Expands Partnership with OpenAI, Signs New Six-Year Agreement to Provide High Quality Training Data (July 11, 2023), <https://investor.shutterstock.com/news-releases/news-release-details/shutterstock-expands-partnership-openai-signs-new-six-year>.

¹¹³ See Whiddington, *supra* note 110.

¹¹⁴ Tuhin Chakrabarty, Jane C. Ginsburg, & Paramveer Dhillon, *Readers Prefer Outputs of AI Trained on Copyrighted Books Over Expert Human Writers* (Columbia L. Sch. Pub. L. Working Paper No. 5606570, 2026), <https://arxiv.org/abs/2510.13939>.

complete works, both the MFA trained readers and college educated readers preferred the AI-generated excerpts for both stylistic fidelity and writing quality.¹¹⁵

The Copyright Office’s *Copyright and Artificial Intelligence Report Part 3: Generative AI Training* referenced a comment from the Copyright Alliance (an association of copyright owners) that “the widespread unauthorized ingestion of copyrighted works would certainly appear to cause immeasurable harm to creators and copyright owners—both by destroying existing, nascent, and to-be-developed licensing markets and by flooding the market with low-quality substitutional material.”¹¹⁶ A visual artist wrote, “[t]he unregulated use of AI tools by companies and individuals is actively threatening my ability to get jobs in my field.”¹¹⁷ It has been noted that the average cost of creating a literary work is approximately \$81, 99.7% cheaper than producing a work of human authorship.¹¹⁸

The Chakrabarty, Ginsburg and Dhillon article shows that there is the potential for market dilution in the publishing industry, disputing the conclusion of Judge Chhabria that the distinctiveness of an author’s style renders works by well-known authors less susceptible to substitution and that market dilution will vary by the prominence of the author. Chakrabarty, Ginsburg and Dhillon wrote, “Our work suggests otherwise. If readers in fact prefer AI-generated emulations of authors whose market value lies in their distinctive voices, then the prospect of competition, especially from outputs of fine-tuned datasets, appears to be considerable. The comparatively low production costs of AI-generated texts relative to paying human authors further enhances the likelihood that AI platforms will in fact dilute the market for human-authored work.”¹¹⁹

While that study examined substitution effects in the literary book market, other sectors of the copyright industry also are at risk. AI-generated songs performed by AI-generated performers have hit the top of the charts in the past year.¹²⁰ In the past weeks, an artist named Eddie Dalton, believed to have been created by an AI company called Crusty Tunes, has had three songs in the top ten on iTunes charts in several countries.¹²¹

In 2024, to combat potential competition from AI-generated music, many of the major music publishers in the US sued two AI platforms, Suno, Inc. and Uncharted Labs, Inc. (whose platform is called Udio), that produced AI-generated songs, some of which had met with commercial success.¹²² The plaintiffs hold rights to sound recordings allegedly infringed by

¹¹⁵ *Id.* at 3–5.

¹¹⁶ USCO REPORT: PART 3, *supra* note 75, at 33 (citing Copyright Alliance, Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright (Nov. 1, 2023), <https://www.regulations.gov/comment/COLC-2023-0006-8935>).

¹¹⁷ USCO REPORT: PART 3, *supra* note 75, at 33 (citing Bonnie Smith, Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright (Nov. 1, 2023), <https://www.regulations.gov/comment/COLC-2023-0006-6693>).

¹¹⁸ Chakrabarty et. al, *supra* note 113, at 10-11.

¹¹⁹ Chakrabarty et al., *supra* note 113, at 10.

¹²⁰ Xander Zellner, *How Many AI Artists Have Debuted on Billboard’s Charts?*, BILLBOARD: CHART BEAT (Nov. 4, 2025), <https://www.billboard.com/lists/ai-artists-on-billboard-charts/childpets-galore/>.

¹²¹ *See AI singer “Eddie Dalton” Behind “Another Day Old” Holds iTunes No. 1: But He Doesn’t Exist*, WASH. TIMES AI NEWS DESK (Apr. 1, 2026), <https://www.washingtontimes.com/news/2026/apr/1/ai-singer-eddie-dalton-behind-another-day-old-holds-itunes-no-1/>.

¹²² Complaint, UMG Recordings, Capitol Records, Sony Music, Atlantic Recording, Rhino Entertainment, All Black USA, Warner Music International and Warner Records v. Suno, Inc. No. 1:24-cv-11611 (D. Mass. June 24, 2024), <https://storage.courtlistener.com/recap/gov.uscourts.mad.272063/gov.uscourts.mad.272063.1.0.pdf>, and Complaint, UMG Recordings, Capitol Records, Sony Music, Atlantic Recording, Rhino Entertainment, All Black USA, Warner Music International and Warner Records, Inc., Warner Records LLC, and Warner Records/Sire Ventures v. Uncharted Labs, Inc. d/b/a Udio, No. 24-04777 (S.D.N.Y. June 24, 2024), <https://www.riaa.com/wp->

Suno and Udio – and include Sony Music Entertainment (SME), UMG Recordings, Inc. (UMG), Warner Music Group (WMG) and Warner Records, Inc. The claims cover recordings by artists of multiple genres, styles, and eras. The Chairman and CEO of the Recording Industry Association of America (RIAA), a trade association representing American record labels, said the industry is not opposed to artificial intelligence but wants to ensure that creators remain central to the creation of music. He said, “The music community has embraced AI and we are already partnering and collaborating with responsible developers to build sustainable AI tools centred [sic] on human creativity that put artists and songwriters in charge. . . . But we can only succeed if developers are willing to work together with us. Unlicensed services like Suno and Udio that claim it’s ‘fair’ to copy an artist’s life’s work and exploit it for their own profit without consent or pay set back the promise of genuinely innovative AI for us all.”¹²³ RIAA’s Chief Legal Officer, Ken Doroshov, added, “These are straightforward cases of copyright infringement involving unlicensed copying of sound recordings on a massive scale. Suno and Udio are attempting to hide the full scope of their infringement rather than putting their services on a sound and lawful footing. These lawsuits are necessary to reinforce the most basic rules of the road for the responsible, ethical, and lawful development of generative AI systems and to bring Suno’s and Udio’s blatant infringement to an end.”¹²⁴ In September 2025, the plaintiffs amended their complaints to allege that Suno did not just train on public data, but specifically used “stream-ripping” to illicitly download copyrighted songs from YouTube by bypassing anti-piracy encryption.¹²⁵ In November, 2025, WMG settled with Suno for an undisclosed sum saying the agreement “would be ‘compensating and protecting artists, songwriters, and the wider creative community.’”¹²⁶ UMG has not yet settled with Suno, but has reached an agreement with Suno rival Udio (as has WMG).¹²⁷ SME has settled with neither company as of this writing, and there are several class action lawsuits by independent artists and labels that are also continuing.¹²⁸

The television and film industries have also resorted to litigation in an effort to stem AI’s unauthorized use of their works for the training of LLMs as proven by infringing outputs that clearly reflect the ingestion of the plaintiff’s copyrighted works.¹²⁹ The concern is that the program is producing almost exact replicas of copyrighted material even if the user’s prompt is very general, allowing users to substitute AI for paying for the licensed use of copyrighted

content/uploads/2024/06/Udio-Complaint-6.24.241.pdf

¹²³ Andre Paine, *RIAA Files Legal Claim Against AI-based Music Generative Services Suno and Udio*, MUSIC WEEK (June 24, 2024), <https://www.musicweek.com/labels/read/riaa-files-legal-claim-against-ai-based-music-generative-services-suno-and-udio/090031>.

¹²⁴ *Id.*

¹²⁵ Amended Complaint at 2, 7, 44, 47, 61, *UMG Recordings, Inc. v. Suno, Inc.*, No. 1:25-cv-11739-FDS (D. Mass. Sep. 22, 2025).

¹²⁶ Ethan Millman, *Warner Music Settles Legal War With Suno In Landmark AI Partnership*, HOLLYWOOD REP. (Nov. 25, 2025), <https://www.hollywoodreporter.com/music/music-industry-news/warner-music-group-settles-ai-infringement-suit-with-suno-1236435516/>.

¹²⁷ Ethan Millman, *Universal Music Groups Settles Major AI Lawsuit with Udio After Song Theft Claims*, HOLLYWOOD REP (OCTOBER 30, 2025) <https://www.hollywoodreporter.com/music/music-industry-news/universal-music-group-announces-settlement-with-udio-1236414023/>

¹²⁸ Dylan Smith, “Universal Music, Sony Music and Suno Reportedly Hit Hard Impasse in Settlement Discussions as Warner Music’s Suno Partnership Takes Shape.” DIGITAL MUSIC NEWS (April 9, 2026) <https://www.digitalmusicnews.com/2026/04/09/suno-universal-music-lawsuit-settlement-impasse/>

¹²⁹ *See, e.g.*, Complaint, *Disney Enters., Inc. v. Midjourney, Inc.*, No. 2:25-cv-05275 (C.D. Cal. June 11, 2025); *see, e.g.*, Complaint, *Disney Enters., Inc. v. MiniMax*, No. 2:25-cv-08768 (C.D. Cal. Sep. 16, 2025), <https://www.courtlistener.com/docket/71357247/disney-enterprises-inc-v-minimax/>

characters. In June, 2025, several studios sued Midjourney, Inc., a major image-generation company.¹³⁰ Later that year, Disney teamed with Universal Studios and Warner Brothers Discovery sued Chinese AI company Minimax on the same grounds.¹³¹ Both cases are slowly winding their way through the court system.¹³²

While studios see economic damage from infringing AI platforms, screenwriters are less concerned about the current uses of AI after successful contract negotiations in 2023 and are working towards preserving human authorship in the writers' room.¹³³ John August, co-chair of the Negotiating Committee of the Writers Guild of America (WGA) recently said the following, "As we have our required meetings with the studios where we ask them questions about how they are using AI, we don't find them using AI in ways that are a direct threat to our employment."¹³⁴ Writers are now seeking to receive revenue from any licensing deals production companies are making with AI companies which allow creators' material to be used to train LLMs.¹³⁵

Actors have been concerned about replacement by artificial intelligence for years and this was a major factor in the 2023 Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) strike.¹³⁶ The contract they signed in November of that year contained provisions that the union hopes will protect actors as AI develops.¹³⁷ But two years out from this agreement, the union is looking to taking more proactive steps against the loss of employment for human actors. Concerned that actors will not be able to stop companies from using AI-generated avatars instead of humans, SAG-AFTRA is looking into whether they should seek financial compensation for any such use.¹³⁸ This portends a future "if you can't beat it, monetize it" mindset.

Theme: Idea v. expression in the age of algorithms: AI-generated content

¹³⁰ See *Disney Enters.*, No. 2:25-cv-05275.

¹³¹ *Disney Enters., Inc. v. MiniMax*, *supra* note 128.

¹³² For a comprehensive list of copyright infringement suits against generative AI companies, visit *Federal Court AI Cases Involving Copyright Claims*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/artificial-intelligence-copyright/court-cases/>.

¹³³ Dani Anguiano and Lois Beckett, "How Hollywood writers triumphed over AI – and why it matters", THE GUARDIAN (Oct. 1, 2023). <https://www.theguardian.com/culture/2023/oct/01/hollywood-writers-strike-artificial-intelligence>

¹³⁴ Gene Maddaus, *WGA to Seek Payment for AI Training on Scripts as Talks with Studios Set to Begin*, VARIETY (Mar. 10, 2026), <https://variety.com/2026/film/news/wga-ai-training-amtp-talks-1236684012/>.

¹³⁵ *Id.*

¹³⁶ Lois Beckett and Kari Paul, "'Bargaining for our very existence': why the battle over AI is being fought in Hollywood", THE GUARDIAN, July 22, 2023, <https://www.theguardian.com/technology/2023/jul/22/sag-aftra-wga-strike-artificial-intelligence#:~:text=The%20dual%20strike%20by%20the,to%20drag%20on%20for%20months.&text=On%20the%20picket%20lines%20outside,'re%20speaking%20for%20everyone.%E2%80%9D>

¹³⁷ SAG-AFTRA, *Members Approve 2023 TV/Theatrical Concepts* (Dec. 5, 2023) <https://www.sagaftra.org/contracts-industry-resources/contracts/2023-tvtheatrical-contracts>; Gene Maddaus, *SAG-AFTRA Approves Deal to End Historic Strike*, VARIETY, Nov. 8, 2023. <https://variety.com/2023/biz/news/sag-aftra-tentative-deal-historic-strike-1235771894/>.

¹³⁸ Gene Maddaus, *Unable to Stop AI, SAG-AFTRA Mulls a Studio Tax on Digital Performers*, VARIETY (Jan. 29, 2026), <https://variety.com/2026/film/news/sag-aftra-ai-tilly-norwood-tax-digital-performers-1236644931/>.

Conference Session 8: Capabilities of generative AI systems to produce all manner of outputs are improving incredibly fast. We will discuss what this means for copyright and freedom of expression: will the human literary and artistic discourse be enriched or impoverished if copyright protection were available for 100% machine-made AI output. Will the grant of copyright enrich the literary and artistic landscape or would it hinder productive remix and re-use? We will also discuss the more common instances of human-machine collaboration, where human authors engage in prompt writing or modifications of AI output. When will the originality threshold be met and what transparency measures are necessary to identify original human expression? Finally, the session will turn to infringement risks. We will discuss whether AI output goes beyond unprotected style imitations and general concepts and how copyright holders can take measures against the unauthorised copying of their protected expression. And how the burden of proof should be distributed.

Question 11:

Under your national law

In cases where there is no doubt that generative AI systems were involved in the creation process:

- a) what degree of human expression or involvement (through prompting, revision, uploading content, etc.) is required for the originality threshold to be met?
- b) where lies the burden of proof regarding this degree of human expression or involvement?

If there are any examples in case law, please add.

ANSWER

The Constitution empowers Congress to provide for exclusive rights to “authors” in their “writings.”¹³⁹ The advent of photography called upon US courts to determine whether a machine-aided output was the “writing” of an “author.” In *Burrow Giles Lithographic Co. v. Sarony* (1884), the Supreme Court ruled that a photographic portrait of Oscar Wilde was an “intellectual creation” because the photographer staged the image by determining the lighting, décor, camera angle, and other compositional aspects.¹⁴⁰ The Court declined to rule whether “the ordinary production of a photograph,” lacking Sarony’s elaborate compositional contributions, would also be an “intellectual creation,” but subsequent decisions focus on the ways in which the “ideas in the mind of the author are given visible expression.”¹⁴¹ Courts find authorship to the extent that the author gives form to the ideas in his mind by controlling the machine’s processes (or other external forces).

Copyright in the US requires human authorship; the Copyright Office will not register a completely machine-generated output (nor one made by an animal or by other random forces). The Copyright Office asks authors who wish to register a work containing any non *de minimis* AI-generated content to indicate which portions of the work are the result of human authorship and disclaim any non *de minimis* parts of the work that are not the product of human authorship.¹⁴² If the author does not do so and the Copyright Office registers a work that has undisclosed AI components and later learns that the applicant misstated the steps used to create

¹³⁹ U.S. Const. art. I, § 8, cl. 8.

¹⁴⁰ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884).

¹⁴¹ *Id.* at 58–59.

¹⁴² U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION GUIDANCE: WORKS CONTAINING MATERIAL GENERATED BY ARTIFICIAL INTELLIGENCE (2023), https://www.copyright.gov/ai/ai_policy_guidance.pdf.

the work, the Copyright Office will revise the registration to reflect only those elements with human authorship.¹⁴³ If an author purposefully does not disclose the use of AI in the creation of the work, a court may disregard a registration in an infringement action pursuant to section 411(b) of the Copyright Act if it concludes that the applicant knowingly provided the Copyright Office with inaccurate information, and the accurate information would have resulted in the refusal of the registration.¹⁴⁴ There are also possible criminal penalties levied on those who submit fraudulent information to the copyright in the process of registering a work. 17 U.S.C. 506(e) provides that those who knowingly make a false representation of a material fact in their application (or any written statement filed in connection with same) will be fined a maximum of \$2,500.

The D.C. Circuit upheld the Copyright Office’s refusal to register “A Recent Entrance to Paradise,” a pictorial work whose applicant asserted that it had been autonomously generated by an AI platform that he designed.¹⁴⁵ The Copyright Office based its rejection on the human-authorship requirement.¹⁴⁶ The appellate court noted that “[t]he Copyright Act does not define the word ‘author.’ But traditional tools of statutory interpretation show that, within the meaning of the Copyright Act, ‘author’ refers only to human beings. . . . In addition, the Copyright Office consistently interpreted the word author to mean a human prior to the Copyright Act’s passage, and we infer that Congress adopted the agency’s longstanding interpretation of the word ‘author’ when it re-enacted that term.”¹⁴⁷ Unlike the district court,¹⁴⁸ the appellate court did not address whether the constitutional terms “writings” or “authors” also mandated human authorship.¹⁴⁹ The text of the statute provides sufficient direction to restrict authorship to human beings, the court held, pointing to multiple provisions in the statute explicitly or implicitly referencing human beings:

Machines do not have property, traditional human lifespans, family members, domiciles, nationalities, *mentes reae*, or signatures. By contrast, reading the Copyright Act to require human authorship comports with the statute’s text, structure, and design because humans have all the attributes the Copyright Act treats authors as possessing. The human-authorship requirement, in short, eliminates the need to pound a square peg into a textual round hole by attributing unprecedented and mismatched meanings to common words in the Copyright Act.¹⁵⁰

By contrast, when the statute employs the term “machine,” it does so in conjunction with “device” and “process,” terms that are “consistently used in the statute as mechanisms that assist authors, rather than as authors themselves.”¹⁵¹

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 948 (2022) (requiring that the applicant “was actually aware of, or willfully blind to” the inaccurate information)).

¹⁴⁵ See *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025).

¹⁴⁶ See Brief for Appellant, *Thaler v. Perlmutter*, No. 1:22-cv-01564-BAH (D.C. Cir. Jan. 22, 2024), App. 59–60, <https://patentlyo.com/media/2024/04/Thaler-Appendix-to-Appeal.pdf> (denial letter from U.S. Copyright Office for “A Recent Entrance to Paradise”).

¹⁴⁷ *Thaler*, 130 F.4th at 1045.

¹⁴⁸ *Thaler v. Perlmutter*, 687 F. Supp. 3d 140 (D.D.C. 2023).

¹⁴⁹ *Thaler*, 130 F.4th at 1042.

¹⁵⁰ *Id.* at 1046.

¹⁵¹ *Id.*

In two subsequent disputes over refusals to register, digital artist Kristina Kashtanova submitted two different applications, each of which presented different challenges to the Copyright Office.¹⁵² Whereas Thaler asserted that the image he submitted for registration had been completely generated by AI, Kashtanova had in one instance combined images generated by the AI program Midjourney with original text to create a graphic novel, and, in the other, had submitted an original drawing as a prompt for generating a modified version of the image.¹⁵³

With respect to the graphic novel, *Zarya of the Dawn* (the “Work”), the Copyright Office concluded that “Ms. Kashtanova is the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements.”¹⁵⁴ However, the Copyright Office ruled that the images in the work generated by the Midjourney technology were not the product of human authorship. Although Kashtanova had edited some of the images, the Copyright Office deemed these edits too minimal to change the fact that the images were primarily authored by a computer.¹⁵⁵ This controversy exemplifies the rule that, in cases where a work includes both human and AI-generated components, only those portions manifesting human authorship are eligible for copyright protection.¹⁵⁶

In their second application, Kashtanova submitted a picture entitled “Rose Enigma,” an AI-generated image based on a series of detailed hand drawings that she had fed into ControlNet Depth and Stable Diffusion 1.5 as prompts. In a detailed letter accompanying their registration application, Kashtanova described the exacting directions they included in their prompt as well as the controls they exercised over the Stable Diffusion program.¹⁵⁷ The Copyright Office noted that the input work was copyrightable as a drawing, and its expressive elements were recognizable in the program’s output. Thus, the Copyright Office registered the work with an annotation reading, “Registration is limited to unaltered human pictorial authorship that is clearly perceptible in the deposit and separable from the non-human expression that is excluded from the claim.”¹⁵⁸ Despite the partial rejection, Kashtanova did not pursue the matter further.

In the second part of a recent three-part study on copyright and AI, the Copyright Office cited *Thaler* as support for its conclusion that works completely produced by generative AI were not copyrightable: “The Office concludes that, given current generally available technology, prompts alone do not provide sufficient human control to make users of an AI system the authors of the output.”¹⁵⁹ The Copyright Office wrote that “prompts themselves, if

¹⁵² See Letter from U.S. Copyright Off. to Val Lindberg (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf> (letter to Kashtanova’s lawyer detailing the case and granting authorship over the text of a graphic novel but not the AI-generated images); see Kris Kashtanova, *Portfolio: AI Rose Enigma*, <https://www.kris.art/portfolio-2/rose-enigma>.

¹⁵³ *Id.*

¹⁵⁴ Letter from U.S. Copyright Off. to Val Lindberg, at 1.

¹⁵⁵ *Id.* at 10–12.

¹⁵⁶ *Id.*

¹⁵⁷ See Kris Kashtanova, *Portfolio: AI Rose Enigma*, <https://www.kris.art/portfolio-2/rose-enigma> (linking to the letter from Morrison Foerster that accompanied the registration application for “Rose Enigma”).

¹⁵⁸ *Rose Enigma*, VAU001528922 (Mar. 21, 2023). Kashtanova had disclaimed any non-human expression in the work (such as the 3-D presentation only creatable by the AI program as well as the final output’s lighting and shading).

¹⁵⁹ U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY at 18 (2025) [hereinafter USCO REPORT: PART 2]. <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf>.

sufficiently creative, may be copyrightable,”¹⁶⁰ but “prompts alone do not provide sufficient human control to make users of an AI system the authors of the output.”¹⁶¹ Because, as discussed above, machines cannot be authors of works, there can also be no joint authorship in the work.¹⁶²

Question 12:

Under your national law

If an allegedly infringing work shows substantial similarity to a pre-existing protected work that is publicly available online, it is likely that the model was trained on that work. Who bears the burden of proving whether this similarity is the result of actual copying? Does the fact that a generative AI model was used in the creation of the allegedly infringing work affect this allocation? If there are any examples in case law, please add.

ANSWER

To make out a *prima facie* case of violation of the reproduction right, the plaintiff must prove that the defendant copied the work, and that the works are substantially similar in their expression (not merely in their “ideas”). To prove copying, a plaintiff generally shows access to her work, i.e., that the defendant had the opportunity to have copied it, and “probative similarity,” i.e. that the similarities are of a kind that would permit a judge or jury to infer that copying occurred, rather than resulting from happenstance. Probative similarities need not be limited to expressive elements: for example, a plaintiff’s watermark or digital fingerprint might not be “expressive,” but its appearance in the defendant’s work is highly probative of copying.

There are occasions where the two works at issue in a case are so “strikingly similar” that access can be presumed, but this is not uniformly the case, and a plaintiff cannot rely upon a judge so ruling. The Court of Appeals for the Seventh Circuit held that “[S]triking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access. As a threshold matter, therefore, it would appear that there must be at least some other evidence which would establish a reasonable possibility that the complaining work was *available* to the alleged infringer.”¹⁶³ When the source work was available on the internet, however, and the defendant engaged in massive “scraping” of the Internet (as AI developers allegedly have done), showing access may not be an insuperable burden. Similarly, close similarity of outputs, or the appearance of a watermark in an output, can serve as evidence that the inputs copied protected works.

Pending legislation could assist creators in discovering whether a generative AI model had ingested their works. The “Transparency and Responsibility for Artificial Intelligence Networks (TRAIN) Act” allows a beneficial owner of a copyright (i.e., an author who assigned rights but retains a royalty interest in the work), acting in good faith, to request the clerk of any district court to issue a subpoena to a developer for disclosure of records that would identify with certainty any materials “likely owned or controlled by the beneficial owner” in the training

¹⁶⁰ *Id.* at 13. Note that what would make a prompt “sufficiently creative” was not explained.

¹⁶¹ *Id.* at 18.

¹⁶² *Id.* at 19 (citing Kernochan Center for Law, Media and the Arts, Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright (Nov. 1, 2023)), <https://www.regulations.gov/comment/COLC-2023-0006-9090>.

¹⁶³ *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).



of the generative AI model.¹⁶⁴ The developer must then act “expeditiously” to provide the information to the beneficial owner, and, if they fail to comply with the subpoena, “that failure will provide a rebuttable presumption that the developer made copies of the copyrighted work”. While the bill had bipartisan support when introduced, Congress has made little progress on any AI-related legislation over the past year.

*** End ***

¹⁶⁴ Transparency and Responsibility for Artificial Intelligence Networks Act [TRAIN Act], S. 2455, 119th Cong. (2025).