The New Art Forgers

Katrina Geddes*

The "substantial similarity" between a copyrighted work and an unauthorized derivative has formed the bedrock of copyright infringement jurisprudence since the mid-nineteenth century. Recent technological developments, however, are destabilizing these conceptual foundations. In May, the Copyright Office suggested that the use of copyrighted works to train AI models may constitute infringement even if model outputs are not "substantially similar" to model inputs if they nevertheless "dilute the market" for similar works. One month later, Judge Chhabria of the Northern District of California argued that AI outputs do not have to be "substantially similar" to copyrighted training data in order to be infringing. The plaintiff's incentives are sufficiently harmed, Judge Chhabria argued, when the market is flooded with "similar enough" AI-generated works.

These developments should be read as early warning signs of a disturbing doctrinal shift from "substantial similarity" to a new and dubious threshold for actionable infringement: "substitutive similarity," where the substitutability of the defendant's work, rather than the similarity of protected expression, provides the cause of action. This novel theory of harm, if widely adopted, would impose dangerous restrictions on downstream creativity. Any new work that was "similar enough" to existing works would be treated as potentially infringing, despite the absence of

---

* Assistant Professor, The Ohio State University, Moritz College of Law; Affiliated Fellow, Yale Law School, Information Society Project. I am extremely grateful to James Grimmelmann, Jeanne Fromer, Rebecca Tushnet, Ari Lipsitz, Kathy Strandburg, Oren Bracha, Bryan Choi, Jess Miers, Jessica Silbey, Daniel Susser, Jacob Noti-Victor, Xiyin Tang, Christopher Yoo, Gideon Parchomovsky, BJ Ard, Bob Brauneis, Julie Cohen, Barton Beebe, Matthew Sag, Christopher Buccafusco, Guy Rub, Andres Sawicki, Alex Roberts, Kara Swanson, Brian Frye, Stacey Lantagne, Zvi Rosen, Artur Pericles Lima Monteiro, Tim Hsieh, Deven Desai, Victoria Schwarz, Michael Goodyear, Ben Sobel, Nikola Datzov, Mark Verstraete, David Stein, and the participants at the Cornell Law Faculty Workshop, the 2025 AALS Conference, the 2025 WIPIP Conference, the 2025 Emory Law AI Conference, the Cornell AI and Human Values Workshop, the Tenth Copyright Scholarship Roundtable, the Temple IP Colloquium, the Summer JIPSA Workshop, the 2025 Intellectual Property Scholars Conference, the AI and IP Theory Seminar at UPenn, and the Information Law Institute Fellows at NYU Law for their helpful comments and suggestions. All errors are my own.

substantially similar expression. This would corrupt what is essentially a question of fact—whether the defendant copied "enough" of the plaintiff's work to constitute unlawful appropriation – with deontic considerations of the wrongfulness of free-riding.

At the same time, artists are understandably rattled by the speed and scale of AI generation. AI models can produce "new" works in the style of established artists in a matter of seconds, dramatically undercutting the market for their work. AI style mimicry makes it difficult for artists to control their personal brands and for consumers to locate authentic works by their favorite artists. Copyright is responsible for protecting artists' creative incentives, but its legal tests were not designed to handle the scale of imitation enabled by AI.

This Article offers a way out of this jurisprudential morass. Instead of lowering the burden of proof for infringement, Congress should strengthen the attribution rights of existing creators. Low-protectionists have long advocated for attribution rights as a way of protecting authors' interests without expanding the scope of their economic entitlements. Proper attribution allows creators to capture the full reputational benefits of their labor without stifling downstream creativity. For example, Congress could enact an AI-specific attribution right that requires the disclosure of copyrighted training data in output metadata. This would mitigate the labor-displacing effects of generative AI by directing consumers to the original creators of a popular style or aesthetic.

Generative AI places copyright jurisprudence at a critical crossroads. Indulging Judge Chhabria's novel theory of harm would effectively inaugurate a new standard for infringement—"substitutive similarity"—that would stifle not just AI innovation but human creativity more broadly. The stakes for protecting free expression through careful guardianship of longstanding doctrine could not be higher. This Article guides readers through this critical inflection point with new terminology for the jurisprudential lexicon as well as practical proposals for reform.

INTRODUCTION

The developers of generative artificial intelligence ("AI") are widely perceived as plunderers of cultural property.[1] The most prominent publicly available generative AI models were trained on millions of copyrighted works, without authorization or compensation.[2] Human authors are, understandably, upset. Their works have effectively been used to train AI models to replace them.[3] The market substitution effects of AI generally take one of two forms: (1) consumers prompting AI models instead of

---

1. *See, e.g.*, Zoe Thomas, *Artists Worry About Survival as AI Changes the Game for Creative Work*, TECH NEWS BRIEFING, WALL ST. J. (Apr. 17, 2023), https://www.wsj.com/podcasts/tech-news-briefing/artists-worry-about-survival-as-ai-changes-the-game-for-creative-work/0d43687d-e9b8-4d8c-a275-08adbdc7422f; Chloe Veltman, *When You Realize Your Favorite New Song Was Written and Performed by ... AI*, NPR (Apr. 21, 2023), https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd [https://perma.cc/4DUA-UBNM]; Max Read, *Studio Ghibli in the Age of A.I. Reproduction*, READ MAX (Mar. 28, 2025), https://substack.com/home/post/p-160035560?utm_source=substack [https://perma.cc/3ZZ5-KQ4B]; Faith Branch, *The "Digital Blackface" Artist Competing for a Grammy*, NATION (Nov. 9, 2023), https://www.thenation.com/article/archive/digital-blackface-ghostwriter [https://perma.cc/LM6A-FDEB]; Andrew Deck, *AI-Generated Art Sparks Furious Backlash from Japan's Anime Community*, REST OF WORLD (Oct. 27, 2022), https://restofworld.org/2022/ai-backlash-anime-artists [https://perma.cc/9QP7-MD2H]; Andrew Limbong, *Authors Push Back on the Growing Number of AI 'Scam' Books on Amazon*, NPR (Mar. 13, 2024), https://www.npr.org/2024/03/13/1237888126/growing-number-ai-scam-books-amazon [https://perma.cc/2L4R-4LYE]; Brian Merchant, *OpenAI's Studio Ghibli Meme Factory Is an Insult to Art Itself*, BLOOD IN THE MACHINE (Mar. 27, 2025), https://www.bloodinthemachine.com/p/openais-studio-ghibli-meme-factory [https://perma.cc/B5V3-WK6H]; Sarah Andersen, Opinion, *The Alt-Right Manipulated My Comic. Then A.I. Claimed It.*, N.Y. TIMES (Dec. 31, 2022), https://www.nytimes.com/2022/12/31/opinion/sarah-andersen-how-algorithim-took-my-work.html [hereinafter Andersen, *The Alt-Right Manipulated My Comic*]; Ross Andersen, *What Happens When AI Has Read Everything?*, ATLANTIC (Jan. 18, 2023), https://www.theatlantic.com/technology/archive/2023/01/artificial-intelligence-ai-chatgpt-dall-e-2-learning/672754.

2. *See generally* Matthew Sag, *Copyright Safety for Generative AI*, 61 HOU. L. REV. 295 (2023) [hereinafter *Copyright Safety for Generative AI*] (discussing AI model memorization and training, and the copyright safety risks that generative models pose); Matthew Sag, *Fairness and Fair Use in Generative AI*, 92 FORDHAM L. REV. 1887 (2024) (exploring where copyright infringement begins and ends when it comes to generative AI, and how to make those assessments); Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. 1484 (2024) (discussing the impact of fair use defenses in AI copyright infringement cases); Carys J. Craig, *The AI-Copyright Trap*, 100 CHI.-KENT L. REV. 107 (2025) (discussing how copyright inadequately shapes generative AI debates).

3. Thomas, *supra* note 1.

commissioning human artists or purchasing their work;[4] or (2) well-intentioned consumers are prevented from financially supporting "human-authored" work by their inability to distinguish it from AI-generated expression.[5]

Today, almost anyone can use an AI model to create a "new" work in the style of an established artist. In 2023, New York-based artist Tomer Hanuka discovered 400 images generated in his distinctive style, listed for sale under his name on an NFT marketplace.[6] The same year, recording artists Drake and The Weeknd discovered that their vocals had been appropriated for an AI-generated song called "Heart On My Sleeve."[7] In March, the Internet was flooded with disturbing images that looked as though they had been illustrated by beloved animation house, Studio Ghibli,[8] but had, in fact, been generated by ChatGPT.[9]

For a long time, creators have survived without attribution rights under law because they have been able to rely on the extra-legal protection provided by community attribution norms[10] and technical barriers to style imitation.[11] Prior to the advent of generative AI, few people had the

---

4. Samuel Goldberg & H. Tai Lam, *Generative AI in Equilibrium: Evidence from a Creative Goods Marketplace* 5, 12 (Stanford Graduate Sch. of Bus., Working Paper No. 4265, 2025), https://www.gsb.stanford.edu/faculty-research/working-papers/generative-ai-equilibrium-evidence-creative-goods-marketplace [https://perma.cc/UN8X-YU4E]; SoA Policy Team, *SoA Survey Reveals a Third of Translators and Quarter of Illustrators Losing Work to AI*, SOC'Y AUTHORS (Apr. 11, 2024), https://societyofauthors.org/2024/04/11/soa-survey-reveals-a-third-of-translators-and-quarter-of-illustrators-losing-work-to-ai [https://perma.cc/TC98-C76J].

5. *See* Lucas Bellaiche et al., *Humans Versus AI: Whether and Why We Prefer Human-Created Compared to AI-Created Artwork*, COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS, July 4, 2023, at 17–20; *see also* Brian Porter & Edouard Machery, *AI-Generated Poetry Is Indistinguishable from Human-Written Poetry and Is Rated More Favorably*, SCI. REPS., Nov. 14, 2024, at 1.

6. Thomas, *supra* note 1. Hanuka said, "Here is an entire process of creation, and marketing, and sale that has nothing to do with me. It's a direct threat on what I do, and it uses my identity in a way that I just can't control." *Id.*

7. *See* Veltman, *supra* note 1.

8. Read, *supra* note 1.

9. *Id.*; Madison Malone Kircher, *People Love Studio Ghibli. But Should They Be Able to Recreate It?*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/style/ai-chatgpt-studio-ghibli.html?searchResultPosition=1.

10. Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 51 (2006); *see* Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 190–91 (2008).

11. For a discussion of the extra-legal protection afforded by latent structural constraints, including technological barriers to antisocial behavior, see, e.g., Harry Surden, *Structural Rights in Privacy*, 60 SMU L. REV. 1605 (2007).

technical skills to replicate an artist's distinctive aesthetic, or the dulcet tones of Drake.[12] Artists were protected from convincing "dupes" by the technical difficulty of replicating their distinctive aesthetic. Today, those technical barriers have been almost completely eroded by AI models.

Public concern over the market-substitution effects of generative AI is already making its way into judicial opinions and government reports. In May, the Copyright Office released its final report on copyright and artificial intelligence.[13] Under the heading "Market Dilution", the Office emphasized the harm to a plaintiff's market caused by AI style imitation:

> The speed and scale at which AI systems generate content pose a serious risk of diluting markets for works of the same kind as in their training data. That means more competition for sales of an author's works and more difficulty for audiences in finding them. If thousands of AI-generated romance novels are put on the market, fewer of the human-authored romance novels that the AI was trained on are likely to be sold.[14]

The Office cited a response it had received to its Notice of Inquiry, which argued that:

> Focusing on specific copyrighted works neglect[s] stylistic elements that recur throughout a body of work, which through publicity become how an artist creates market value for their style. AI art generators instead allow an artist's own body of work to face competition from a too similar body of work—driving the monetary value of their uniqueness downward.[15]

The Copyright Office concluded that "[e]ven where a model's outputs are not substantially similar to any specific copyrighted work, they can dilute the market for works similar to those found in its training data, including by generating material stylistically similar to those works."[16]

---

12. *See* Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html; *see also* Branch, *supra* note 1.

13. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 3: GENERATIVE AI TRAINING PRE-PUBLICATION VERSION (2025).

14. *Id.* at 65 (footnote omitted).

15. *Id.* at 65 n.374.

16. *Id.* at 73.

Copyright plaintiffs have made similar arguments in the context of infringement litigation.[17]

In June, Judge Chhabria of the Northern District of California issued the first judicial opinion to meaningfully embrace the "market dilution" theory of harm.[18] Judge Chhabria argued that even if an AI model does not "regurgitate" the plaintiff's copyrighted works, or generate "substantially similar" output, it can nevertheless produce works that are "*similar enough* (in subject matter or genre) that they will compete with the originals and indirectly substitute for them."[19]

Judge Chhabria acknowledged that competition from a *single* non-infringing-but-similar-enough secondary work was unlikely to matter because it would only have a "*small* indirect effect on the market for the original work."[20] However, he argued:

> This is not a case where an original work is being compared to one secondary work . . . . This case . . . involves a technology that can generate literally *millions of secondary works*, with a miniscule fraction of the time and creativity used to create the original works it was trained on. No other use . . . has anything near the potential to flood the market with competing works the way that [large language model] training does. And so the concept of market dilution becomes highly relevant.[21]

With these remarks, Judge Chhabria appears to suggest that there is an inverse relationship between the *quantity* of unauthorized derivatives competing with the original and the *degree of similarity* required to prove infringement. In other words, if a defendant has produced only one derivative work, it must be "substantially similar" to the plaintiff's work in order to be infringing.[22] In contrast, if a defendant has produced "literally

---

17. *See, e.g.*, First Amended Complaint at 10, Andersen v. Stability AI Ltd., No. 3:23-cv-00201-WHO (N.D. Cal. Nov. 29, 2023) (alleging trade dress infringement based on appropriation of artists' distinctive styles).

18. Order Denying the Plaintiff's Motion for Partial Summary Judgment and Granting Meta's Cross-Motion for Partial Summary Judgment, Kadrey v. Meta Platforms, Inc., No. 23-cv-03417-VC (N.D. Cal. June 25, 2025).

19. *Id.* at 26 (emphasis added).

20. *Id.* at 31 (emphasis added).

21. *Id.* at 32 (emphasis added).

22. *See id.* at 26.

millions" of competing derivative works, then the standard of similarity required to prove harm is lower.[23]

Although Judge Chhabria made these observations in the context of Meta's fair use defense, his approach (because it downplays the necessity of substantially similar expression) effectively inaugurates a new standard for infringement – one that I term "*substitutive similarity*" because it focuses on the degree to which a secondary work competes with, or *substitutes for*, the original work, without regard to the degree of similarity between protectable expression.[24] Judge Chhabria acknowledged that Meta's large language model, Llama, does not regurgitate more than fifty words of any of the plaintiffs' books, even in response to adversarial prompting.[25] And yet he advocated for a theory of market harm based on "the rapid generation of countless works that *compete with* the originals, even if those works aren't themselves infringing."[26]

In response to claims that market harm is only relevant if model outputs are *substantially similar* to copyrighted training data, Judge Chhabria argued:

> But that can't be right. To be sure, it would be easier to conclude that the market for copied books would be harmed by [a large language model] that is capable of regurgitating those books or generating substantially similar text. But *less similar* outputs, such as books on the same topics or in the same genres, can still *compete for sales* with the books in the training data. And by taking sales from those books . . . those outputs would reduce the incentive for authors to create . . . .[27]

Judge Chhabria's approach represents a radical departure from existing doctrine. Since the mid-nineteenth century, the degree of similarity between protected expression has represented the fulcrum of copyright infringement.[28] The "substantial similarity" doctrine recognizes that not all

---

23. *Id.* at 32. *Compare* Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 238, 250 (2004) (discussing the importance of facilitating market entry by close substitutes) *with* Jiarui Liu, *The Predatory Effects of Copyright Piracy*, 24 GEO. MASON L. REV. 961, 961, 969 n.47 (2016) (comparing copyright piracy to market dumping).

24. Order Denying the Plaintiff's Motion for Partial Summary Judgment and Granting Meta's Cross-Motion for Partial Summary Judgment, *supra* note 18, at 32.

25. *Id.* at 18.

26. *Id.* at 28 (emphasis added).

27. *Id.* at 30–31 (emphasis added).

28. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13D.38 (Matthew Bender, rev. ed., 2025) [hereinafter NIMMER ON COPYRIGHT] ("In every copyright

unauthorized copying is actionable, but only copying that rises to the level of "improper appropriation."[29] In other words, factual copying, on its own, "fails to prove infringement."[30] The factual copying must rise to the level of *legal copying*.[31] This threshold is designed to protect the courts from being flooded by trivial infringement litigation concerning *de minimis* copying.[32]

In *Arnstein v. Porter*, a case concerning musical compositions, the U.S. Court of Appeals for the Second Circuit explained that a jury must evaluate "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant *wrongfully appropriated* something which belongs to the plaintiff."[33] An allegedly infringing work is considered "substantially similar" to the plaintiff's work if "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[34] However,

---

infringement case, a successful plaintiff must swim through the shoals of substantial similarity."); Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) ("It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto."); Emerson v. Davies, 8 F. Cas. 615, 622 (C.C.D. Mass. 1845) (No. 4,436) ("It is not sufficient to show . . . that some parts and pages of [the defendant's book] have resemblances, in method and details and illustrations, to Emerson's. It must be further shown, that the resemblances in those parts and pages are so close, so full, so uniform, so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it. In short, that there is substantial identity between them. A copy is one thing, an imitation or resemblance another."); Greene v. Bishop, 10 F. Cas. 1128, 1134 (C.C.D. Mass. 1858) (No. 5,763) ("[I]f so much is taken that the val[u]e of the original is sensibly and materially diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that such taking or appropriation is sufficient in point of law to maintain the suit."); Daly v. Palmer, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552) (a secondary work "is a piracy, if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order . . . . The substantial identity between the two scenes would naturally lead to the conclusion, that the later one had been adapted from the earlier one.").

29. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

30. NIMMER ON COPYRIGHT, *supra* note 28, § 13D.02.

31. *Id.*

32. Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement* 2 (Stanford Pub. L. & Legal Theory, Working Paper No. 1661434, 2010).

33. *Arnstein*, 154 F.2d at 473 (emphasis added).

34. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

where the plaintiff's work is not "wholly original" but incorporates material from the public domain, the ordinary observer must be "more discerning" in their analysis of the substantial similarity between copyrightable elements.[35]

The Ninth Circuit developed its own bifurcated test for substantial similarity, comprised of a preliminary analysis of the similarity of ideas (the "extrinsic test"), followed by a secondary analysis of the similarity of protectable expression (the "intrinsic test"), guided by the response of the ordinary reasonable person.[36] The Ninth Circuit subsequently clarified that the two tests were "objective and subjective analyses of expression."[37] Other circuits apply the three-step "abstraction-filtration-comparison" test which instructs courts, first, to break down the plaintiff's work into its constituent structural parts; second, to filter out all non-protectable material; and third, to compare the remaining "kernels" of creative expression to the allegedly infringing work.[38] This process is designed to determine whether the protectable elements of the two works "are substantially similar so as to warrant a finding of infringement."[39]

Much ink has been spilled on the complexity, inconsistency, and ambiguity of the substantial similarity doctrine.[40] However, it continues to

---

35. Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001).

36. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

37. Shaw v. Lindheim, 919 F.2d 1353, 1357 (9th Cir. 1990) (emphasis omitted).

38. Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706 (2d Cir. 1992).

39. *Id.*

40. *See, e.g.*, Lemley, *supra* note 32, at 1 (advocating for a filtration and dissection approach to infringement analysis); Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 791 (2016) (critically examining *Arnstein*'s deference to juries on the substantial similarity analysis); Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1821 (2013) (arguing that courts have failed to provide clear guidance on which test to apply in substantial similarity analyses); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 687–88 (2012) (criticizing the murky legal tests for substantial similarity); Daryl Lim, *Saving Substantial Similarity*, 73 FLA. L. REV. 591, 596 (2021) (arguing that courts rely too much on market effects as a heuristic in infringement analyses); Carys J. Craig, *Transforming "Total Concept and Feel": Dialogic Creativity and Copyright's Substantial Similarity Doctrine*, 38 CARDOZO ARTS & ENT. L.J. 603, 604 (2020) (suggesting that revisions to the "total concept and feel" test would permit transformative copying without reliance on the fair use defense); Sandra M. Aistars, *Copyright's Lost Art of Substantial Similarity*, 26 VAND. J. ENT. & TECH. L. 109, 113 (2023) (arguing that courts which proceed too quickly to the fair use analysis and neglect the substantial similarity inquiry produce an inferior evidentiary record and undermine procedural justice); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 719 (1987) (criticizing the duplicative nature of the analyses that occur with probative similarity for proof of copying, substantial similarity for misappropriation, and the

serve as a critical barrier, constraining the entitlements of copyright owners from extending too far into the public domain. If copyright owners could prohibit *any* amount of unwanted copying, unconstrained by the qualitative and quantitative limits imposed by the substantial similarity doctrine, they would command an extraordinary monopoly on the marketplace of expression.[41] The suggestion made by Judge Chhabria—that infringement should turn on the *substitutability* of secondary works, rather than the *substantial similarity* of expression[42]—would dramatically extend the scope of rightsholders' entitlements beyond the bounds of Congressional intent and statutory text.

It would also collapse two procedurally distinct inquiries (substantial similarity and the fourth fair use factor) into a unitary analysis of the degree of market competition posed by the defendant to the plaintiff.[43] By focusing exclusively on the harm to the plaintiff's market caused by the influx of cheap and accessible AI-generated works (without considering the substantial similarity of protected expression), Judge Chhabria and the Copyright Office are engaged in the kind of distorted analysis that scholars have consistently discouraged: the corruption of the strict liability doctrine with "motivated reasoning" grounded in considerations of morality.[44] These considerations transform what should be a simple factual inquiry ("a comparison of the two works to assess whether they are sufficiently similar to render the copying problematic")[45] into a moral quest to avenge the perceived injustices perpetrated by AI training.

Judge Chhabria and the Copyright Office are, understandably, motivated by a desire to shield human creators from the deluge of cheap AI-generated

---

amount and substantiality of the portion used under the third fair use factor); Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 WASH. U. L. REV. 681, 687–88 (2016) (arguing that implicit biases in how the substantial analysis is framed are often more influential in copyright decision-making than the legal test used); Robert F. Helfing, *Substantial Similarity and Junk Science: Reconstructing the Test of Copyright Infringement*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 735, 737 (2020) (describing the doctrine as a "legal chameleon" that causes unnecessary litigation and frustrates judicial actors); Eric Rogers, Comment, *Substantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis Among the Federal Circuits*, 2013 MICH. ST. L. REV. 893, 930 (showing that the ordinary observer and extrinsic/intrinsic tests favor plaintiffs over the filtration/comparison test).

41. *See* Balganesh, *supra* note 40, at 858 & n.373.

42. Order Denying the Plaintiff's Motion for Partial Summary Judgment and Granting Meta's Cross-Motion for Partial Summary Judgment, *supra* note 18, at 32.

43. *See* Aistars, *supra* note 40, at 110, 130–31.

44. *See* Shyamkrishna Balganesh et al., *Judging Similarity*, 100 IOWA L. REV. 267, 285, 289–90 (2014).

45. *Id.* at 269.

substitutes.[46] However, as this Article will show, there is an alternative pathway that protects artists without inaugurating a new standard for infringement that turns on the *substitutability* of the defendant's work for that of the plaintiff (I call this "*substitutive similarity*"). Instead, Congress should strengthen the attribution rights of creators by imposing training data disclosure requirements on AI outputs. An AI-specific attribution right would enable creators to reap the full reputational benefits of their labor without stifling downstream creativity or departing from longstanding doctrine. Proper attribution would mitigate the labor-displacing effects of generative AI by directing consumers to the original authors of training data.[47] Low-protectionists have long advocated for attribution rights "as a substitute for expansive economic rights."[48]

This Article proceeds in four parts. Part I provides a descriptive account of the incentive-protection function of attribution. Drawing on labor theory and aesthetic philosophy, it explains how proper attribution can mitigate the substitution effects of generative AI by protecting reputational capital and preserving markets for authentic goods.[49] Part II provides a novel taxonomy of the attribution interests implicated by AI's mimetic capabilities. It distinguishes between the harms of "*misattribution*" (when AI-generated art is falsely ascribed to the authors of copyrighted training data) and "*non-attribution*" (when AI-generated art fails to acknowledge its causal origins

---

46. U.S. COPYRIGHT OFF., *supra* note 13, at 1.

47. For an excellent discussion about the importance of protecting consumer process preferences for human-authored art, see generally Jacob Noti-Victor*, Regulating Hidden AI Authorship*, 111 VA. L. REV. 139 (2025).

48. Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 792; *see also* Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345, 398 (2008) (suggesting the abolition of the derivative works right and the introduction of an attribution right would ease creators' fears around substitution by acknowledging the artistic debt owed to the original work); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 47 (1996) ("[A]ny adaptation, licensed or not, should be accompanied by a truthful disclaimer and a citation or hypertext link to an unaltered copy of the original. That suffices to safeguard the work's integrity, and protects our cultural heritage, but it gives copyright owners no leverage to restrict access to public domain materials by adding value and claiming copyright protection for the mixture."); Ben Depoorter et al., *Copyright Abolition and Attribution*, 5 REV. L. & ECON. 1063, 1065, 1076 (2009) (suggesting a new regime of copyright protection "grounded and limited to a mandatory right of attribution" as well as disclaimers for unauthorized copies or derivative works).

49. *See generally* Shyamkrishna Balganesh, *Copyright as Market Prospect*, 166 U. PA. L. REV. 443, 450 (2018). Balganesh argues that "the true object of protection for modern copyright law . . . is neither the 'work' nor the 'author,'" but "the prospective market for the work, a probabilistic entitlement" that bears some similarities with tortious interference with a prospect. *Id.*

and thereby obscures the labor of human artists). I show that different attribution harms require different legal remedies.

Part III explains why attribution interests are inadequately protected by existing law, including the uncopyrightability of style,[50] the unenforceability of community norms, the limited coverage of the Lanham Act, and the U.S.'s historical aversion to moral rights. Prior to the Supreme Court's decision in *Dastar v. Twentieth Century Fox,* creators brought claims for non-attribution and misattribution under § 43(a) of the Lanham Act, which prohibits the use of false designations of origin in commerce.[51] In 2003, however, the Supreme Court severely curtailed the ability of copyright owners to bring claims under this provision.[52]

Part IV sets out the contours of an AI-specific attribution right that would require the disclosure of copyrighted training data in model metadata. Strengthening the attribution rights of existing creators would serve the same incentive-protection function as that pursued by Judge Chhabria and the Copyright Office, without radically lowering the threshold for actionable infringement.

I. ATTRIBUTION'S INCENTIVE-PROTECTION FUNCTION

This Part provides a descriptive account of the incentive-protective function of authorial attribution. Drawing on labor theory and aesthetic philosophy, it explains how proper attribution can mitigate the market-substituting effects of AI by protecting reputational capital and preserving markets for authentic goods.[53]

---

50. To be clear, I am not advocating for a prohibition on style imitation. Style imitation serves a number of important public interests, including tribute, homage, secondary creativity, and signaling membership of a creative community. Instead, I am arguing that artists need more legal tools to protect their brands from misattribution, given the scale and sophistication of contemporary technological mimicry. *See, e.g.*, Keith Negus, *Copying, Copyright and Originality: Imitation, Transformation and Popular Musicians*, 20 EUR. J. CULTURAL STUD. 363, 365–67 (2017); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 162 (Oxford Univ. Press 2012).

51. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34–35 (2003).

52. *See id.* at 34 ("Assuming for the sake of argument that Dastar's representation of itself as the 'Producer' of its videos amounted to a representation that it originated the creative work conveyed by the videos, allowing a cause of action under § 43(a) for that representation would create a species of mutant copyright law that limits the public's 'federal right to "copy and to use"' expired copyrights.").

53. Note: This Article does not recommend prohibiting the imitation of an artist's distinctive style. Style imitation serves a number of important social goals, such as secondary creativity, homage, and signaling membership of a creative community. Many creators

A. Individual Incentives

There are at least three reasons why individuals care about the proper attribution of their work. First, individual expectations for credit closely track social norms against plagiarism. Plagiarism is the unauthorized taking of another's ideas or work without attribution, while falsely implying that what was taken originated with the thief.[54] It involves two *actus reus* elements (an act of copying and a failure to provide credit to the original author) and one possible *mens rea* element (intent to engage in unattributed copying or knowledge thereof).[55] It is commonly regarded as a moral wrong (irrespective of whether it rises to the level of copyright infringement) because the plagiarist reaps an "unearned benefit."[56]

The public outcry around generative AI is a powerful reminder that copyright law and anti-plagiarism norms "intersect only imperfectly."[57] The ease with which AI models can reproduce an artist's distinctive style has caused great consternation within creative communities, notwithstanding the uncopyrightability of style.[58] This suggests that social opposition to generative AI will persist even if courts find that AI models are non-infringing.[59] The public's expectations of copyright law—its purposes and goals—are often informed by their moral intuitions around plagiarism.[60]

---

deliberately imitate the distinctive aesthetic of their creative peers in order to signal membership of the same artistic community. *See, e.g.*, Negus et al., *supra* note 50, at 370–71; Legare & Nielsen, *supra* note 50, at 690–91; *see also* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 612–18 (2006); Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347, 353–55 (2002). What this Article recommends instead is that Congress provide creators with stronger attribution rights. The goal is to help artists protect their personal brands (by clearly delineating the scope of their work) and to protect consumers from confusion and deception, in light of AI's extraordinary imitation capabilities.

54. Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CALIF. L. REV. 513, 514 (1992).

55. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L. J. 167, 173 (2002).

56. Stearns, *supra* note 54, at 517.

57. *Id.* at 514.

58. Eric Reinhart, *The Trouble with AI Art Isn't Just Lack of Originality. It's Something Far Bigger*, GUARDIAN (May 20, 2025), https://www.theguardian.com/commentisfree/2025/may/20/ai-art-concerns-originality-connection [https://perma.cc/AS87-JQY7].

59. In May 2025, the Copyright Office, in its final report, *Copyright and Artificial Intelligence, Part 3: Generative AI Training*, rejected the argument that the use of copyrighted works to train AI models is inherently "non-expressive" because AI models extract only "unprotectable" facts about works in the form of statistical associations. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 3: GENERATIVE AI TRAINING 42 (2025). The

Although copyright law also sanctions unauthorized copying, it diverges from the norms against plagiarism in a few ways. First, copyright provides no protection against the copying of *ideas*.[61] Copyright polices a much narrower sphere of copying that excludes facts, ideas, concepts, processes, and public domain works.[62] Second, copyright infringement cannot be cured by attribution, whereas plagiarism often can.[63] Third, plagiarism represents an offense against society (in addition to the offense to the original creator) because society is *defrauded* with respect to the true authorship of the work.[64] In an infringement case, however, courts are focused on the harm to the market for the original work, not the deception experienced by the public.[65] Fourth, copyright is a strict liability offence (lack of intent is no defense), whereas plagiarism generally requires intent on the part of the plagiarist.[66] Finally, plagiarism norms tend to focus on the creative *process*, whereas copyright law focuses on the creative *result*.[67]

The second reason why creators care about attribution is because they expect, after they have labored over a particular work, to reap the rewards

---

Copyright Office focused on the market effects of model outputs and argued that AI training may be infringing even if model outputs are not "substantially similar" to model inputs if they nevertheless "dilute the market" for similar works found in the training data. *Id.* at 73. In this sense, the Office focused explicitly on the market-encroaching effects of AI-generated expression. In contrast, the following month, Judge William Alsup of the Northern District of California granted summary judgment for Anthropic, holding that the use of lawfully acquired copyrighted works that have been digitized to train LLMs to generate new text is a "quintessentially transformative" fair use. Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1022 (N.D. Cal. 2025). Judge Alsup described LLMs as "among the most transformative [technologies] many of us will see in our lifetimes." *Id.* at 1033. Importantly, Judge Alsup noted that the plaintiffs had not accused Anthropic's LLM ("Claude") of generating infringing outputs. *Id.* at 1021. If Claude had generated infringing outputs, the plaintiffs "would have a different case." *Id.*

60. Anne A. Fast et al., *Experimental Investigations on the Basis for Intellectual Property Rights*, 40 L. & HUM. BEHAV. 458, 459 (2016). *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918) (explaining that the defendant, by appropriating and selling the fruits of the complainant's labor as his own, is "endeavoring to reap where it has not sown"); *see also* Stearns, *supra* note 54, at 517.

61. 17 U.S.C. § 102(b).

62. *See id.*

63. Dorothy Kelly, *Plagiarism Versus Copyright Infringement: When Attribution Isn't Enough*, CFA MAG., Sept. 1, 2011, at 18.

64. Stearns, *supra* note 54, at 533–34.

65. *Id.* at 534.

66. Green, *supra* note 55, at 181.

67. Stearns, *supra* note 54, at 513.

of their labor.[68] Attribution allows a creator to capture the full reputational benefits associated with their work.[69] When a creator fails to receive recognition for their work, "they lose the enhanced reputation which would otherwise accompany quality work, reducing their future ability to sell or to charge a premium for those products."[70] In other words, they miss out on commercial opportunities they would otherwise receive.[71]

Attribution helps creators to more fully capture the benefits of their labor in the context of secondary works. Where consumers have a positive experience with a secondary work, they are often motivated to consume the original. Film adaptations, for example, often boost sales of literary works.[72] Following the success of Ridley Scott's 1982 film, *Blade Runner*, the 1968 novel, which inspired the film, was re-released with a new title, *Blade Runner: Do Androids Dream of Electric Sheep?*.[73] Almost a third of the 80 million copies of J.R.R. Tolkien's *The Lord of the Rings* books sold since 1938 "were purchased between 2001 and 2003 – when the popular movie versions were released."[74] Cover songs and tribute records can also provide helpful exposure to the otherwise obscure authors of original works.[75] Digital sampling has been shown to boost sales of the original songs,

---

68. *See, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 305 (1988); Herman T. Tavani, *Locke, Intellectual Property Rights, and the Information Commons*, 7 ETHICS & INFO. TECH. 87, 89 (2005); Adam Mossoff, *Saving Locke From Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL'Y 283, 307–11 (July 2012); Daniel Attas, *Lockean Justifications of Intellectual Property*, *in* INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE 29 (Axel Gosseries, Alain Marciano, & Alain Strowel eds., 2008), https://doi.org/10.1007/978-0-230-58239-2_2; Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited*, 49 S.D. L. REV. 1069, 1071 (2012).

69. Randolph Stuart Sergent, *Building Reputational Capital: The Right of Attribution Under Section 43 of the Lanham Act*, 19 COLUM.-VLA J. L. & ARTS 45, 46 (1994–1995); *see also* John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 WASH. L REV. 709, 728–31 (1997) (describing the two justifications for a cause of action for reverse passing off: preventing consumer deception and capturing future goodwill).

70. Sergent, *supra* note 69, at 47.

71. *Id.* at 55.

72. Philippe Aurier & Guergana Guintcheva, *Order of Re-Consumption of Partially Similar Objects in Consumers' Hedonic Experiences: The Case of Book-to-Film Adaptations*, 27 INT'L. J. ARTS MGMT. 4 (2025).

73. *Id.*

74. Bambauer, *supra* note 48, at 398.

75. George Plasketes, *Like A Version: Cover Songs and the Tribute Trend in Popular Music*, 15 STUDS. POPULAR CULTURE 1, 12 (1992).

especially where "the identity of the sample is readily ascertainable via digital or hardcopy attribution."[76]

David Fagundes offers a detailed taxonomy of the various ways in which unauthorized uses of copyrighted works can "drive up demand" for the originals, through "recognition" (exposure to a larger audience), "affirmation" (heightened popularity through flattering association), "reincarnation" (resurrecting an unpopular work), and "innovation" (unauthorized use creates an unexpected secondary market) effects.[77] In other words, the market harm caused by unauthorized use may, in some contexts, be offset by the economic benefits associated with heightened publicity.[78] Consistent with these findings, the public tends to be more accepting of infringement where the infringer acknowledges (attributes) the original creator.[79]

Third, attribution is important to many creators because it protects their personal interests in their expression. As Jeanne Fromer explains, connecting an author to their work "concretizes" their personhood interests in their creations "as extensions of the self."[80] Many creators view their work as their "offspring" and therefore as fundamentally intertwined with their legacy and identity.[81] As a result, attribution is a powerful expressive incentive,[82] which is reflected in the fact that many creators are willing to sacrifice financial reward in exchange for attribution.[83]

Attribution is a default entitlement of Creative Commons licenses, most of which permit extensive re-use, as long as attribution is given.[84] As Catherine Fisk observes, "even those devoted to minimizing intellectual

---

76. Mike Schuster et al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 224 (2019).

77. David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 378–85 (2014).

78. *Id.*

79. Fast et al., *supra* note 60, at 470; Gregory N. Mandel et al., *Intellectual Property Law's Plagiarism Fallacy*, 2015 BYU L. REV. 915, 947.

80. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1790–91 (2012).

81. JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 157 (2014).

82. Fromer, *supra* note 80, at 1790.

83. Christopher Jon Sprigman et al., *What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389, 1408 (2013).

84. *See A Simple Guide to Creative Commons*, OHIO ST. UNIV., https://teaching.resources.osu.edu/teaching-topics/simple-guide-creative-commons [https://perma.cc/T4M9-NTPT].

property rights still insist on attribution."[85] The Copyright Office has also acknowledged the importance of attribution to many creators, including those who permit widespread dissemination and re-use of their works.[86]

In 1992, popular novelist Stephen King sued the makers of the film *The Lawnmower Man* (which was based on King's short story by the same name) for marketing the film as "Stephen King's *The Lawnmower Man*."[87] There was no allegation of copyright infringement; King had assigned the motion picture rights to his short story in 1978, and they were sold to the defendants in 1990.[88] However, King objected to the use of the possessory credit in the marketing of the film because it falsely implied that he had been involved in the film's preparation or had endorsed it.[89]

King testified that his name and artistic reputation were his "major assets" and that they were damaged by negative reviews of the film "as a kind of failure on the part of King personally".[90] King successfully sued for injunctive relief to prevent the filmmakers from using the possessory credit, although they were permitted to describe the film as "based upon" King's short story.[91] This case highlights the significant personality interests at stake in proper attribution, even in the absence of copyright infringement.[92]

In *Gilliam v. American Broadcasting Companies, Inc*., the British comedy troupe "Monty Python" objected to the use of their name on performance footage that had been heavily edited without their permission.[93] Recognizing the artist's right "to have his work attributed to him in the form in which he created it," Judge Lumbard observed:

> [T]he economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.[94]

---

85. Fisk, *supra* note 10, at 91.
86. U. S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS 10 (2006).
87. King v. Innovation Books, 976 F.2d 824, 826–28 (2d Cir. 1992).
88. *Id.* at 826.
89. *See id.* at 827–28.
90. *Id.* at 832.
91. *Id.* at 826.
92. For an interesting discussion about the complex intersection between personal identity and trademark law, see generally William McGeveran, *Selfmarks*, 56 HOUS. L. REV. 333 (2018).
93. Gilliam v. Am. Broad. Cos., 538 F.2d 14, 17–18 (2d Cir. 1976).
94. *Id.* at 24 (citation omitted).

For many artists, proper attribution is akin to control over their identities. Cartoonist Sarah Andersen describes the handwriting she uses for her cartoons as "personal and intimate," something that defines her as strongly as other unique traits like her name or the color of her eyes.[95] When Andersen's signature style was applied by the alt-right to cartoons advocating genocide and Holocaust denial, she received "outraged" messages from her fans and so many late-night calls that she had to change her phone number.[96] Andersen says, "the alt-right created a shadow version of me, a version that advocated neo-Nazi ideology," and "people fell for it."[97] Andersen is witnessing the same violations occurring with generative AI, but on an exponential scale.[98] Concept artist Greg Rutkowski, for example, has been a popular target for prompts by fans seeking to reproduce his signature style.[99] Sarah observes:

> Now, his name is no longer attached to just his own work, but it also summons a slew of imitations of varying quality that he hasn't approved. This could confuse clients, and it muddies the consistent and precise output he usually produces. When I saw what was happening to him, I thought of my battle with my shadow self. We were each fighting a version of ourself that looked similar but that was uncanny, twisted in a way to which we didn't consent.[100]

Many artists have described AI mimicry of their distinctive styles as personally violating.[101] This reflects the strong personality interests at stake in authorial attribution.[102]

Given the critical importance of attribution to creative incentives, some scholars have suggested abolishing the current system of economic rights and replacing it with an "attribution-centered system of copyright protection."[103] Under this "compulsory attribution" regime, *all* uses of a work would be considered "fair" provided that proper attribution is given.[104]

---

95. Andersen, *The Alt-Right Manipulated My Comic*, *supra* note 1.
96. *Id.*
97. *Id.*
98. *See id.*
99. *Id.*
100. *Id.*
101. *See id.*
102. Fromer, *supra* note 80, at 1770.
103. Depoorter et al., *supra* note 48, at 1073.
104. *Id.* at 1074.

This type of model is considered particularly appropriate for the mimetic content that circulates on digital platforms.[105]

My proposal does not go this far (I am not proposing to abolish the exclusive rights afforded by § 106) but merely proposes that Congress strengthen the attribution rights of creators in order to meet the existential threat posed by generative AI. Although this approach may prove unsatisfactory to some artists,[106] it represents a far more prudent approach than lowering the threshold of infringement to "substitutive similarity."[107]

1. Collective Interests in Attribution

Postmodernists argue that attribution rights are unnecessary in contemporary meme culture, where everyone and no one is an author.[108] Attribution rights are a relic from a time when authors were isolated individuals, pouring their tortured souls into their art.[109] Today, many intellectual commodities are made by corporations, which have numerous tools at their disposal to protect their creative brands and reputation.[110]

---

105. *See* Aman K. Gebru, *Communal Authorship*, 58 U. RICH. L. REV. 337, 410 (2024) (explaining that "an open model that allows free use of the expressive content, but with a strong expectation of attribution, fits within dance creator communities," such as those found on TikTok).

106. For some artists, attribution is sufficient motivation to continue producing creative expression. *See* Sprigman et al., *supra* note 83, at 1409. For others, attribution will never be enough. Many artists want full control over all secondary uses of their work. *See id.* While conceding that my proposal will not satisfy all stakeholders, I think it provides some bulwark against the impending tsunami of AI-generated content.

107. I acknowledge that there are inherent limits to the capacity of intellectual property law to protect an artist's reputational interests, and those limits will continue to exist, even if Congress provides creators with attribution rights under law. *See* SILBEY, *supra* note 81, at 150. As Jessica Silbey explains, an artist's reputation is inherently relational; it is the product of the relationship between artist and their audience. *See id.* at 152. For this reason, it can never be fully controlled or possessed by the artist in the way that intellectual property law facilitates the propertization of the intangible. *See id.* at 181. An artist's reputation cannot be unilaterally conceived or controlled because it is co-constructed by artist and audience. *See id.* at 177. Consumers are "partner[s] in reputational maintenance." *Id.* For this reason, intellectual property law will always fall short of an artist's desire for complete control over their creative reputation. *See id.* at 183.

108. *See* Jane C. Ginsburg, *The Most Moral of Rights: The Right to Be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT. COM. L. 44, 46–47 (2016)*; see also* Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453, 532 (2022) (describing attribution as "too cumbersome" for meme culture).

109. *See* Ginsburg, *supra* note 108, at 46.

110. Gebru, *supra* note 105, at 347–48.

It is certainly true that enforcing individual attribution rights increases the cost of follow-on creativity.[111] The question is—is this cost worth the benefit to individual creators? This Subpart examines some supra-individual justifications for attribution rights: (1) reducing consumer search costs; (2) enhancing the public's capacity for aesthetic evaluation; (3) reducing misinformation associated with model hallucination; and (4) helping consumers identify "authentic" art.

a. Reducing Consumer Search Costs

Jane Ginsburg distinguishes between the "author-regarding" and "public-regarding" aspects of attribution rights.[112] Attribution rights serve authors by (1) recognizing their creative labor; (2) protecting the market for their works; and (3) providing incentives for creativity. Attribution incentivizes creators to produce high-quality works because of the associated increase in their reputational value.[113] Some progressive copyright scholars (so-called "low-protectionists") have promoted attribution rights as a relatively low-cost way of protecting creative incentives without expanding authors' economic rights.[114]

Attribution rights also serve the public by reducing consumer search costs, protecting consumers from deception, and incentivizing the creation and distribution of new creative works. Accurate attribution reduces consumer search costs by providing some signal of the type and quality of work that consumers can expect to receive.[115] For example, if I know that a novel has been written by Rachel Cusk, I know to expect "fluid, amorphous prose",[116] brutal honesty, and an almost neurotic dissection of character subjectivities. In the context of creative works, knowing the identity of the speaker significantly affects the consumer's valuation of the communication.[117]

---

111. *See id.* at 377 (explaining that requiring permissions for meme creation discourages creative process); Sarah E. Zybert, *The Derivative Work Right: Incentive or Hindrance for New Literature*, 45 CONN. L. REV. 1083, 1085 (2013) (arguing that exclusive rights to prepare a derivative work "stifles creativity to the detriment of the public").

112. Ginsburg, *supra* note 108, at 81.

113. *See* Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1176 (2005).

114. *See* Tushnet, *supra* note 48, at 792.

115. Lastowka, *supra* note 113, at 1179.

116. Zuhri James, *Cusk, Experimentalism and the Limits of Autofiction*, LONDON MAG., https://thelondonmagazine.org/article/essay-cusk-experimentalism-and-the-limits-of-autofiction-by-zuhri-james [https://perma.cc/9YD7-6TZE].

117. *See* Lastowka, *supra* note 113, at 1179–80.

Attribution also facilitates labor market mobility by helping employers evaluate the human capital of prospective employees.[118] Employers who do not have access to a reliable signal of quality may hire fewer people because they cannot distinguish between high- and low-quality job candidates.[119] Attribution norms help employers evaluate whether a candidate has the human capital required for a particular role by reviewing their historic productivity.[120] For example, a science department might look at the number of academic articles on which a prospective faculty member is listed as first author in evaluating their candidacy.

b. Public Capacity for Aesthetic Evaluation

Accurate attribution also enables societies to understand and appreciate their shared cultural heritage. Sherri Irvin explains that undetected art forgeries undermine the public's ability to understand the aesthetic significance of particular artworks by misrepresenting the socio-historical context of their production.[121]

When an individual is presented with a new artwork, they have limited tools with which to judge its aesthetic merit.[122] One approach is to situate the new work within the history of aesthetic developments, in order to understand how the techniques employed by the studied artist compare to techniques used by their peers and predecessors.[123] This aesthetic comparison affords art recipients some comprehension of the historical significance of the new artwork.[124] As Irvin explains:

> When confronted with new works, we (or our best critics) do not simply *detect* their aesthetic value; insofar as these works are truly novel, we must confer their value, based on the context and perceptual structures we succeed in building for them and on the way in which they appear to extend trajectories of aesthetic development we have observed in earlier works.[125]

---

118. Fisk, *supra* note 10, at 5.
119. *Id.* at 59.
120. *Id.* at 55, 59.
121. Sherri Irvin, *Forgery and the Corruption of Aesthetic Understanding*, 37 CAN. J. PHIL. 283, 294, 300 (2007).
122. *Id.* at 294.
123. *Id.* at 295.
124. *Id.*
125. *Id.*

When an artwork is forged, however, the public's ability to discern its aesthetic significance, based on its socio-historical context, is compromised.[126] The public cannot accurately comprehend "the achievement exemplified in the individual work."[127] Forgeries weaken the capacity of art-receivers to engage in aesthetic discrimination.[128] This is one feature that distinguishes appropriation art from art forgeries.[129] Appropriation artists like Sherrie Levine and Richard Prince became famous for photographing photographs by other artists.[130] However, because neither Levine nor Prince represented themselves as the authors of the original photographs, they did not misrepresent their methods or their achievements.[131] For this reason, appropriated art continues to hang on the walls of famous galleries, while art forgeries are generally denigrated or destroyed.[132]

A similar claim can be made about AI-generated art. An individual who encounters unidentified AI outputs may misapprehend their aesthetic significance.[133] They may assume the illustrations were hand-drawn, and marvel at the technical precision of the line drawings, without realizing that the images were generated by a computational model trained on the works of unidentified artists.[134] The public will be misled about "the genesis of certain stylistic features" of the works.[135]

Similarly, an AI-generated play in the style of William Shakespeare may share some of the Bard's stylistic elements, but it will not provide students with genuine insights into the socio-historical features of Elizabethan England. As Mark Jones explains, forgeries "loosen our hold on reality, deform and falsify our understanding of the past."[136]

Art provides not only aesthetic experience but also important insights into periods of human history. If art were valued purely according to aesthetic criteria, society would *want* more people to paint in the style of the Old Masters because this would maximize the quantity of such works that

---

126. *Id.* at 300.
127. *Id.*
128. *Id.*
129. Darren Hudson Hick, *Forgery and Appropriation in Art*, 5 PHIL. COMPASS 1047, 1052 (2010).
130. *Id.*
131. *Id.* at 1053.
132. *Id.*
133. *See* Irvin, *supra* note 121, at 300.
134. *See id.* at 291.
135. *Id.* at 302.
136. MARK JONES ET AL., FAKE?: THE ART OF DECEPTION 16 (1990).

were available to the public.[137] Instead, art is valued according to a variety of non-aesthetic criteria, including its historical, social, economic, and biographical context. For this reason, accurate attribution is important for proper aesthetic evaluation.[138]

Irvin explains that proper disclosure of the provenance of a work strengthens the public's capacity for "aesthetic perception."[139] The knowledge that a work has been forged allows the public to "disentangle the aesthetic features it has appropriated."[140] Art forger Han Van Meegeren (1889–1947) forged several paintings in the style of Dutch painter Johannes Vermeer, including *Supper at Emmaus*.[141] Once Van Meegeren's *Supper at Emmaus* was revealed to be a forgery, art critics deployed their "perceptual faculties more rigorously."[142] They noticed that the deep-set, hollowed eyes of the depicted figures were, in fact, "anachronistic stylistic elements" that betrayed the 1930s' fondness for celebrity portraits and would have been out of place in the seventeenth century.[143]

Writing about the music industry, Andres Sawicki observes the effect of improper attribution practices on public recognition of the aesthetic contributions made by different communities.[144] Describing the prominence of Elvis Presley and the erasure of Willie Mae Thornton (the original recording artist of *Hound Dog*), Sawicki notes:

> [W]e can at least more modestly conclude that private ordering through voluntary exchanges between makers and gatekeepers will not necessarily lead to desirable attribution practices because those exchanges will not account for the interests of third parties who would benefit from the domain following one or another potential path in the future.[145]

In other words, it is difficult to estimate how the trajectory of modern music might have changed if the industry's attribution practices had not reflected prevailing social prejudices—if Black artists had not faced greater

---

137. *See generally* Alfred Lessing, *What Is Wrong with a Forgery?*, 23 J. AESTHETICS & ART CRITICISM 461 (1965) (arguing that aesthetic value is independent of whether a work is genuine or forged).

138. Irvin, *supra* note 121, at 300.

139. *Id.* at 302.

140. *Id.*

141. *Id.* at 300–01; Lessing, *supra* note 137, at 461–62.

142. Irvin, *supra* note 121, at 284.

143. *Id.* at 301.

144. Andres Sawicki, *The Law of Creativity?*, 110 CORN. L. REV. 135, 211 (2025).

145. *Id.* at 216.

hurdles to public recognition than their White counterparts. The erasure of Willie Mae Thornton and other Black artists had long-term effects on the development of contemporary music and the public's capacity for aesthetic evaluation.[146]

Jane Anderson and Kimberly Christen observe similar dynamics of erasure in the context of Indigenous cultural expressions, which are frequently misattributed to the non-Indigenous collectors who recorded them.[147] These misattributions of authorship racialize Indigenous communities as *non-authors* and *non-owners* and thereby deprive them of control over their cultural heritage.[148] As non-authors, Indigenous communities are deprived of decision-making authority over the narration, curation, and circulation of their cultural expressions.[149] Anderson and Christian describe "authorship" (and its conferral on non-Indigenous collectors) "as both a site of colonial power"[150] (asserting the logics of individual property over collective cultural memory) and as a legal construct designed to enact specific relations of power and exclusion,[151] by legitimizing the appropriation of Indigenous culture.[152] Accordingly, a critical component of the "digital repatriation" initiatives currently taking place in institutions around the world involves the *re-attribution* of Indigenous cultural expression to its Indigenous creators.[153] Proper attribution is critical for the public's capacity to apprehend the social and historical significance of cultural artifacts.

c. Reducing Misinformation

In some contexts, attribution also promotes accountability. For example, architects and engineers are required to place their seal on building plans to ensure the proper allocation of blame when something goes wrong.[154]

---

146. *Id.*

147. *See, e.g.*, Jane Anderson & Kimberly Christen, *Decolonizing Attribution: Traditions of Exclusion*, 5 J. RADICAL LIBRARIANSHIP 113, 114–15 (2019) (discussing how Passamaquoddy songs recorded in 1890 were systematically attributed to collector Jesse Walter Fewkes and Harvard University rather than to the Passamaquoddy creators).

148. *Id.* at 129.

149. *Id.* at 114.

150. *Id.* at 123.

151. *Id.*

152. *Id.* at 112.

153. *Id.* at 137.

154. Fisk, *supra* note 10, at 49–51.

In the context of generative AI, training data attribution may reduce the risk of misinformation associated with model hallucination.[155] If the outputs of large language models ("LLMs") cited their sources, a user could verify whether the model's claims were factually supported.[156] Several lawyers have been disciplined for citing non-existent cases generated by AI models in their legal briefs.[157] Output attribution would improve the transparency and verifiability of model generations.

Many of the licensing agreements between AI vendors and news publishers require output attribution.[158] However, the computational literature suggests that it is very difficult to attribute outputs to specific training data.[159] Generative AI search engines frequently generate responses that are unsupported by sources or cite non-existent sources.[160] ChatGPT, for example, frequently and unpredictably misattributes block quotes to the wrong publisher, even if the publisher has a licensing deal with OpenAI that requires proper attribution.[161]

d. Satisfying Demand for Authentic Art

Finally, proper attribution of AI-generated content serves another important public interest, which is the capacity of consumers to distinguish between "authentic" (that is, human-authored) and "inauthentic" artwork.[162] As I will explain below, both the meaning and value of "authenticity" are deeply contested.

---

155. Jie Huang & Kevin Chen-Chuan Chang, *Citation: A Key to Building Responsible and Accountable Large Language Models*, *in* FINDINGS OF THE ASS'N FOR COMPUTATIONAL LINGUISTICS: NAACL 2024, 464, 471 (2024).

156. *See id.*

157. Sara Merken, *AI "Hallucinations" in Court Papers Spell Trouble for Lawyers*, REUTERS (Feb. 18, 2025), https://www.reuters.com/technology/artificial-intelligence/ai-hallucinations-court-papers-spell-trouble-lawyers-2025-02-18/ [https://perma.cc/E5NC-FMKC].

158. *See, e.g.*, Madhumita Murgia, *The Financial Times and OpenAI Strike Content Licensing Deal*, FIN. TIMES (Apr. 29, 2024), https://www.ft.com/content/33328743-ba3b-470f-a2e3-f41c3a366613 [https://perma.cc/ZN9Y-SDZS] (noting FT-OpenAI deal requires ChatGPT responses to include links back to original FT articles).

159. Huang & Chang, *supra* note 155.

160. Guido Zuccon et al., *ChatGPT Hallucinates When Attributing Answers*, *in* SIGIR-AP '23: PROCEEDINGS OF THE ANNUAL INTERNATIONAL ACM SIGIR CONFERENCE ON RESEARCH AND DEVELOPMENT IN INFORMATION RETRIEVAL IN THE ASIA PACIFIC REGION 46, 48 (2023).

161. Klaudia Jaźwińska & Aisvarya Chandrasekar, *How ChatGPT Search (Mis)Represents Publisher Content*, COLUM. JOURNALISM REV. (Nov. 27, 2024), https://www.cjr.org/tow_center/how-chatgpt-misrepresents-publisher-content.php [https://perma.cc/9KRE-JLM5].

162. *See, e.g.*, Noti-Victor, *supra* note 47, at 168–70 (discussing the importance of respecting consumers' process preferences for human-authored works).

Two years ago, Dan Burk correctly predicted that the proliferation of synthetic creativity would drive demand for "authentic" human expression, and that such demand would increase the importance of provenance-based doctrines, such as trademark and publicity rights.[163] For many consumers, AI-generated art is not an "authentic" human expression.[164] Etsy consumers, for example, have expressed anger and frustration after discovering that the art they purchased from human artists was, in fact, AI-generated, and successfully obtained refunds from the retail platform.[165]

When AI art is maligned as "inauthentic," those criticisms are often derived from frustration about the unauthorized use of training data or the displacement of human labor.[166] "Authenticity" becomes another tool for articulating the moral illegitimacy of generative AI.[167] But branding AI-generated art as "inauthentic" by virtue of its reliance on a machine is also ableist;[168] it unfairly stigmatizes the output of communities who may be unable to rely on more traditional artistic techniques. It also ignores the human user of the model, who is executing their creative vision through prompt engineering.[169] For many people, generative AI represents an inclusive, accessible, and empowering means of expressing their perspective and identity.[170] In this sense, AI-generated art is unquestionably "authentic" human expression.[171]

---

163. Dan L. Burk, *Cheap Creativity and What It Will Do*, 57 GA. L. REV. 1669, 1696 (2023).

164. *See* Noti-Victor, *supra* note 47, at 168–70.

165. @ThorReincarnated, *AI Art Scam: Seller Claims Otherwise*, REDDIT, https://www.reddit.com/r/Etsy/comments/1fyn6c3/ai_art_scam_seller_claims_otherwise/ [https://perma.cc/57PM-QYVH]. .

166. *See, e.g.*, Sabah Choudhry, *Thousands of Artists Call for 'Mass Theft' AI Auction to Be Cancelled*, SKY NEWS (Feb. 10, 2025), https://news.sky.com/story/thousands-of-artists-call-for-mass-theft-ai-auction-to-be-cancelled-13306656 [https://perma.cc/9S4M-WH23] (reporting on artists' efforts to cancel an AI-generated art auction and their claims that the underlying models relied on unlicensed data derived from artist works).

167. *See AI Threatens Authenticity Yet Boosts Creativity in Traditional Arts*, DEVDISCOURSE, https://www.devdiscourse.com/article/technology/3622487-ai-threatens-authenticity-yet-boosts-creativity-in-traditional-arts [https://perma.cc/9AWG-58XA] (Nov. 9, 2025).

168. *See* Stefan Milne, *Can AI Help Boost Accessibility? These Researchers Tested It for Themselves*, UW NEWS (Nov. 2, 2023), https://www.washington.edu/news/2023/11/02/ai-accessibility-chatgpt-midjourney-ableist/ [https://perma.cc/6YT8-9S5L].

169. *See* Danny Oppenheimer, *The Prompt Engineer Is the Artist of Our Age*, MIT PRESS READER (Nov. 17, 2025), https://thereader.mitpress.mit.edu/the-prompt-engineer-is-the-artist-of-our-age/ [https://perma.cc/WC2J-RJHV].

170. *The Role of AI in Enhancing Accessibility in Visual Arts: Bridging Gaps for Inclusive Art Experiences*, PRO EDU (Nov. 22, 2024), https://proedu.com/blogs/photoshop-skills/the-

At the same time, if consumers of a particular artist value their work in part because of the particular *process* employed by that artist, then those consumers may reasonably regard artworks created using a different process (such as an AI model) as "inauthentic" from a process perspective. For these consumers, it is now much harder to distinguish between "authentic" works by their favorite artists and AI-generated "dupes."[172]

To highlight the conceptual instability and context dependency of "authenticity," I will incrementally adjust the parameters of a hypothetical scenario involving an artist called Escher.

Scenario 1: Escher uses an ink pen to physically create one of his signature illustrations. The resulting artwork is considered to be an authentic work by Escher.

Scenario 2: An art forger uses an ink pen to physically create an illustration in the style of Escher and passes it off as an illustration by Escher. This artwork is considered inauthentic because it was not created by the named artist ("*identity inauthenticity"*). This type of inauthenticity is what characterizes most traditional art forgeries, for example, the artworks "by Vermeer" that were forged by Dutch painter Han Van Meegeren.[173]

Scenario 3: Escher develops early arthritis and can no longer manipulate an ink pen. He asks his assistant to draw his sketches for him in his signature style. He conceives and endorses all of the illustrations rendered by his assistant. The outputs might be regarded as inauthentic because they were not physically drawn by Escher, although he conceived and endorsed them ("*process inauthenticity*").

This perspective reveals a longstanding bias about the "legitimacy" of artistic expression based on the degree of physical exertion involved in its creation. As Amy Adler shows, this prejudice has been challenged by artists for a long time.[174] Many of the great painters, like Rembrandt and Rubens, relied on assistants to carry out the physical acts of painting.[175] Some of the most highly valued contemporary artworks involve almost no physical labor by the named artist; so-called "readymade" works are simply selected rather

---

role-of-ai-in-enhancing-accessibility-in-visual-arts-bridging-gaps-for-inclusive-art-experiences [https://perma.cc/5VCS-69X2].

171. Katrina Geddes, *Engineering Semiotic Democracy*, FIU L. REV. (forthcoming 2026).

172. Ella Creamer, *Amazon Removes Books 'Generated by AI' for Sale Under Author's Name*, GUARDIAN (Aug. 9, 2023), https://www.theguardian.com/books/2023/aug/09/amazon-removes-books-generated-by-ai-for-sale-under-authors-name [https://perma.cc/ZQS7-A3SC].

173. *See infra* Section I.B for more in-depth discussion regarding Han Van Meegeren.

174. *See* Amy Adler, *Artificial Authenticity*, 98 N.Y.U. L. REV. 706, 720–21 (2023).

175. *See id.* at 720 (noting artists worked with assistants in studio systems).

than produced, such as Duchamp's urinal or Cattelan's banana, duct-taped to the wall.[176] Each of these works was simply *designated* as art, rather than physically composed.[177]

Scenario 4: Escher decides to incorporate generative AI into his creative process because it accelerates his workflow. He trains an AI model on his portfolio of works and uses the model to generate new works in his signature style.[178] He endorses and distributes the model's outputs as his own works. Some people regard the model's outputs as inauthentic because Escher did not physically draw them, although he conceived and endorsed them ("*process inauthenticity*").

This scenario highlights the fact that authenticity conditions vary by art form.[179] For example, if I retype J.R.R. Tolkien's *The Fellowship of the Ring* word for word and provide you with my retyped copy, you still possess an "authentic" copy of Tolkien's novel.[180] Similarly, art forms like printmaking admit of multiple genuine copies, provided that they are all printed using the same process.[181] In contrast, traditional painting admits of only a *singular* authentic work; there is only one *Mona Lisa*, and it is the one physically painted by Leonardo da Vinci.[182] This is because the authenticity of traditional painting is tied to its physical embodiment.[183] Similarly, the authenticity of Escher's physical sketches is tied to his

---

176. *Id.* at 731.

177. For an excellent discussion about the commodification of contemporary art and the removal of the artist's physical touch (if not their signature), see Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L. J. 218, 230–33 (2012).

178. Many artists have trained AI models on their own work and incorporated these models into their workflow. *See* Thomas Graham, *Art Made by AI Is Selling for Thousands – Is It Any Good?*, BBC (Dec. 12, 2018), https://www.bbc.com/culture/article/20181210-art-made-by-ai-is-selling-for-thousands-is-it-any-good [https://perma.cc/R5PN-3MYG]. For example, Anna Ridler trained an AI model to create a video of tulips blooming based on thousands of her own tulip photos, controlled by fluctuations in the price of bitcoin. *Id.* Another artist, Sougwen Chung, trained an AI model on her own drawings, and the model transferred her drawing style to a robotic arm that draws alongside her. *Id.*

179. Hick, *supra* note 129, at 1048–49.

180. *See, e.g.*, *id.* at 1049 (using Dickens' *Hard Times* to illustrate the same principle).

181. *See id.* (noting that genuine prints must be printed from original plates, not merely replicate the process).

182. *See, e.g.*, *id.* (using Rembrandt's Lucretia to illustrate the same principle).

183. *See id.*; Michelle Brownlee, *Safeguarding Style: What Protection Is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157, 1162 (1993) (noting that copyright in visual art attaches to the physical embodiment, unlike literary works, where it attaches to abstract expression).

process of creation. In contrast, the authenticity of literary works and musical compositions is not tied to the paper on which they are printed.[184]

At the same time, authenticity conditions are determined by shifting cultural practices and technological possibilities.[185] As the possibilities for technical reproduction change, authenticity conditions may change with them.[186] If Escher *chooses* to incorporate AI into his creative process and adopts the model's outputs as his own work, arguably, those outputs represent "authentic" Escher works even though he didn't draw them by hand.[187] (Convincing his longtime fans of this may be an uphill battle).

You might say, but the machine is unpredictable, and Escher cannot know in advance how the machine will execute his creative vision; how can we describe the model's outputs as "authentic"? Copyright has a long history of recognizing legal authorship of works that involve unpredictable methods of fixation.[188] For example, the art world generally regards Jackson Pollock as the author of his paint splatters, although he did not know in advance how each splatter would turn out.[189] The randomness was a deliberate creative choice, the unexpected results of which Pollock chose to incorporate into his work.[190]

Similarly, relying on an unpredictable machine learning model as the method of fixation should not automatically render the outputs "inauthentic" if Escher *chooses* to cede control over fixation to an unpredictable mechanical process and retains decisional authority over the final product.[191] As Dan Burk explains, the indeterminacy introduced by Escher's method of fixation should not be fatal to his authorship because it is the result of a *volitional creative choice*.[192]

---

184. *See* Hick, *supra* note 129, at 1049; Brownlee, *supra* note 183.

185. Hick, *supra* note 129, at 1049.

186. *Id.*

187. *See* Dan L. Burk, *Thirty-Six Views of Copyright Authorship, by Jackson Pollock*, 58 HOUS. L. REV. 263, 294 (2020).

188. *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951) (finding that inadvertent additions to a mezzotint print were original expression because the artist's acceptance of unintended results after the fact transformed the mistakes into expression).

189. Burk, *supra* note 187, at 274.

190. *Id.*

191. *See id.* at 317–18.

192. *Id.* at 294. For a detailed discussion of the role played by volition in copyright law, see Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COLUM. L. REV. 1887 (2019). *See also* Christopher Newman, *Adoption as Authorship*, 2025 (unpublished manuscript) (on file with author).

Conceptual artist Anna Ridler trained a machine learning model on 10,000 hand-labelled photographs of tulips and prompted the model to generate new images, which Ridler transformed into video works of tulips blooming in time with fluctuations in the price of Bitcoin.[193] Ridler wanted to simulate the ephemerality of Europe's original speculative bubble, "tulip mania," in the early 1600s.[194] Describing her decision to incorporate an unpredictable machine into her artistic practice, Ridler explains:

> I think there's parallels between working with machine learning and the very involved, slow methods of land artists. You're spending time planning, thinking, and building a system. Then you allow something that you can predict but never control to act on the system that you've created and that becomes part of what comes out.[195]

Land art refers to a movement that began in the 1960s, where artists would painstakingly build sculptural works in natural environments that often changed or dissipated over time.[196] By referencing land artists in relation to her own work, Ridler endorses the choice to relinquish control over fixation to unpredictable external forces.[197]

In the same vein, Chinese-Canadian artist Sougwen Chung creates illustrations alongside a robotic arm called *Drawing Operations Unit Generation_X* ("D.O.U.G."), which was trained to imitate her style from a dataset of her own drawings.[198] Chung explains:

> For me, this process of transforming my drawing archive into a dataset really reinforced how the AI systems are deeply connected to us as humans, our own data, and our own individual ways of

---

193. Haja Marie Kanu, *Anna Ridler – What's It Worth?*, AVANT ARTE (Oct. 17, 2024), https://avantarte.com/insights/avant-essay/anna-ridler-whats-it-worth [https://perma.cc/6AVJ-WVE2].

194. *Id.*

195. *Id.*

196. *Land Art*, TATE, https://www.tate.org.uk/art/art-terms/l/land-art [https://perma.cc/78QM-Z4KS] ("Land art or earth art is art that is made directly in the landscape, sculpting the land itself into earthworks or making structures in the landscape using natural materials such as rocks or twigs."); *see, e.g.*, Xiyin Tang, *Copyright in the Expanded Field*, 42 HOFSTRA L. REV. 945, 945 n.1, 946–47 (2014) (discussing land art works that implicate site, architecture, sculpture, and nature-as-material); *see also* Vivian F. Wang, *Saving the Spiral Jetty*, 2 NW. INTERDISC. L. REV. 179, 180 (2009) (describing land art movement beginning in the 1960s).

197. *See* Kanu, *supra* note 193.

198. Katherine Mitchell, *The Algorithmic Gesture: Sougwen Chung's MEMORY*, VICTORIA & ALBERT MUSEUM BLOG (Dec. 14, 2022), https://www.vam.ac.uk/blog/digital/the-algorithmic-gesture-sougwen-chungs-memory [https://perma.cc/NP4H-G3UP].

> processing and mediating this information. And when I first encountered D.O.U.G._2's interpretations of my past drawings, it did feel like engaging with my own artistic memory from five or six years ago. There are particular ways of mark-making that the robot would return to, in collaboration with me. But this act was never intended as an automation of the drawing process. Instead, I wanted to introduce an ulterior mode of communication with my past drawing selves through this robotic interpretation.[199]

Chung deliberately employs an unpredictable machine because she wants to engage with a robotic interpretation of her past self.[200] The indeterminacy of the machine's behavior (and thus the uncertainty surrounding the fixation of expression) is a volitional creative choice, rather than a factor that undermines her authorship.[201]

Scenario 5: The public is aware that Escher uses an AI model as part of his process. A third party, without Escher's consent, trains an AI model on Escher's works and distributes the model's outputs under Escher's name. These outputs might be regarded as inauthentic, not because they use a different process than the one now associated with Escher, but because they were not conceived and endorsed by Escher himself ("*identity inauthenticity*").

Scenario 6: Escher never incorporates an AI model into his artistic process. He exclusively hand-draws his illustrations. After he dies, a third party trains an AI model to generate new works in Escher's style, without Escher's consent. The model's outputs are considered inauthentic both because they were not hand-illustrated by Escher (*process inauthenticity*), *and* because they were not conceived or endorsed by him (*identity inauthenticity*).

These scenarios reveal the two axes along which art may be maligned as "inauthentic": *process* and *identity*. These are overlapping criteria. Often, art is valued based on the identity of the artist, precisely because the artist's process is difficult to replicate.[202] In contrast, where a creative process can be replicated by many different people, all output generated by that process may be considered authentic, irrespective of the identity of the individual artist.[203] The Ise shrine in Japan, for example, has been torn down and

---

199. *Id.*

200. *See id.*

201. *See id.*

202. *See* Adler, *supra* note 174, at 720–21.

203. *See id.* at 748–52 (discussing how certificates of authenticity, rather than unique materials or the artist's hand, determine which mass-produced objects qualify as authentic art).

rebuilt every twenty years since 478, but each version is considered authentic because the builders use the same materials, tools, and techniques each time.[204]

Similarly, after an artist dies, their estate may continue to produce and distribute works under their name, using a similar process.[205] This raises interesting questions about the authenticity of unauthorized posthumous works.[206] V.C. Andrews, for example, was a famous author of Gothic horror fiction, including the bestselling novel *Flowers in the Attic*.[207] After her death, her estate, in conjunction with her publisher, continued to sell books under her name that were written by an undisclosed ghostwriter called Andrew Niederman.[208] Similarly, the estate of Dan Flavin, a famous sculptor, did not view his death as an impediment to the completion and sale of his unfinished sculptures.[209] Flavin sculptures continued to be produced and sold, accompanied by estate-signed certificates of authenticity.[210] These examples confirm that the meaning of "authenticity" is highly context dependent.

B. Does Authenticity Matter?

The foregoing discussion highlights, as others have shown, that "authenticity" is an unstable and extrinsic feature of a work, derived from social customs and practices, rather than an intrinsic or inherent feature.[211] The Metropolitan Museum of Art, for example, has changed its mind on two occasions about the authenticity of a Velázquez in its own collection.[212] Unauthorized manufacturing overruns of designer goods, produced by the same workers in the same factories, are nevertheless considered "fake."[213] If

---

204. RUDOLF ARNHEIM, *On Duplication*, *in* NEW ESSAYS ON THE PSYCHOLOGY OF ART 274, 278 (2023).

205. *See, e.g.*, Adler, *supra* note 174, at 751.

206. *Id.*at 751–52.

207. *Ghostwriter Carries on V.C. Andrews' Gothic Legacy*, NPR (Oct. 27, 2013), https://www.npr.org/2013/10/27/241137349/ghostwriter-carries-on-v-c-andrews-gothic-legacy [https://perma.cc/2GW4-7SH4].

208. Lastowka, *supra* note 113, at 1225–26.

209. *See* Adler, *supra* note 174, at 751.

210. *Id.* at 751–52.

211. *See id.* at 765.

212. *Id.* at 723.

213. Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 832 (2010).

authenticity is not tied to the material conditions of the underlying good, why should it matter?

One answer is that authenticity determines the market value of art, and therefore influences the financial circumstances of artists, art dealers, and art collectors.[214] In some circumstances, the financial stakes of authenticity are very high.[215] An art collector who submits an artwork for authentication risks a significant loss in asset value or even the artwork's destruction if the art is determined to be inauthentic. Art collector Stephanie Clegg sent her Chagall painting to France to be authenticated by a panel of experts, only to learn that the panel considered the artwork to be a counterfeit and planned to destroy it.[216] Given the unpredictable nature of authenticity, some auction houses provide only a limited guarantee of authenticity.[217] For example, Sotheby's warrants the authenticity of a work for only five years.[218]

Furthermore, there is substantial money in authentication litigation.[219] Art galleries found to be selling inauthentic art have been sued for fraud.[220] Auction houses that failed to recognize authentic art have been sued for negligent misattribution.[221] Authentication boards that refused to certify artworks as authentic have been sued for artificially restricting competition in the marketplace.[222] Art experts who offered unpopular opinions about the inauthenticity of art have been sued.[223]

---

214. *See* Adler, *supra* note 174, at 711.

215. *See id.*

216. Colin Moynihan, *Her 'Chagall' Is Headed for the Trash. How's That for Caveat Emptor?*, N.Y. TIMES (July 6, 2022), https://www.nytimes.com/2022/07/06/arts/design/chagall-sothebys-expert-panel.html.

217. *Id.*

218. *Id.*

219. Adler, *supra* note 174, at 713–14; *see generally* Leila A. Amineddoleh, *Are You Faux Real: An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS & ENT. L. J. 59 (2016) (discussing the rise of forgeries and litigation as the market value and demand for art has risen).

220. *See, e.g.*, Patricia Cohen, *Art Gallery Sued Again Over Sale of Paintings*, N.Y. TIMES (Feb. 22, 2013), https://www.nytimes.com/2013/02/23/arts/design/knoedler-company-sued-over-artworks.html#:~:text=The%20once%20esteemed%20Knoedler%20%26%20Company,little%2Dknown%20Long%20Island%20dealer (summarizing a lawsuit brought against the Knoedler & Company gallery for the sale of fraudulent paintings).

221. *See* Marchig v. Christie's Inc., 430 F. App'x 22, 24 (2d Cir. 2011). Christie's expert concluded that the appellant's framed drawing was a nineteenth century German work and it was sold for $21,850; eleven years later Christie's informed the appellant that the drawing may in fact have been authored by Leonardo da Vinci and potentially worth $150 million, causing Christie's to be sued for negligent misrepresentation. *Id.*

222. Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *1–*2 (S.D.N.Y. May 26, 2009) (alleging that the Andy

Another answer is that authenticity does *not* matter; it is an inherently conservative concept that is used to *preserve*, rather than disband, social hierarchies.[224] Barton Beebe shows that manufacturers of luxury goods have long policed the "authenticity" of market substitutes in order to protect their brands from the diluting effects of overexposure.[225] Certainly, if every woman in Manhattan started wearing Khaite, Toteme, and The Row, then each of those brands would lose its luxury status. Preserving the scarcity of goods (by denigrating "inauthentic" copies) maintains the so-called "sumptuary code," or the signaling of social status through the consumption of rare goods.[226]

Beebe explains that intellectual property law maintains this "consumption-based system of social distinction"[227] by protecting distinctive marks from dilutive copying.[228] In this sense, IP law is complicit in the preservation of social hierarchy because it artificially maintains the conditions of scarcity on which that hierarchy depends.[229] In a "post-rarity world," IP law tries to "re-enchant" certain copies to enhance their perceived value as *authentic* and *original*.[230] If, instead, society abandoned its preoccupation with authenticity, Beebe suggests, it could realize the "socially progressive, even liberatory potential of our mimetic technologies to render obsolete, by flooding it with copies, our system of consumption-based social differentiation."[231]

Warhol Foundation, the Warhol estate, and the Warhol authentication board were engaged in a conspiracy to restrain and monopolize trade in the market for Warhol works by denying requests for authentication of Warhol paintings).

223. For example, an individual was sued after their declaration that a painting was not a genuine work by Leonardo de Vinci caused an art gallery to call off negotiations to purchase said artwork. Hahn v. Duveen, 234 N.Y.S. 185, 187 (N.Y. Sup. Ct. 1929).

224. *See* Beebe, *supra* note 213, at 814.

225. *See generally id.* at 821–23, 837–68 (discussing the dilution problem faced by luxury brands and the various strategies relied upon by such brands to monitor and control dilution).

226. *See id.* at 819, 837.

227. *Id.* at 813.

228. Substitutive copying results in lost sales and consumer confusion, whereas dilutive copying does something far worse, which is reduce the value or selling power of a mark by undermining its rarity and making it commonplace. *See* 15 USC §1125(c)(2)(B); Beebe, *supra* note 213, at 816.

229. Beebe, *supra* note 213, at 888.

230. *See id.* at 836, 844.

231. *Id.* at 817.

Art forgers have long criticized the social hierarchy maintained by the distinction between authentic and inauthentic art.[232] Like AI models, many art forgers engaged in *imitation* rather than direct copying; they emulated the *style* of famous artists without reproducing any of their individual works.[233] Many forgers became legendary for their imitations.

Dutch painter Han van Meegeren forged several works by Vermeer.[234] His first forgery, *Christ at Emmaus*, was a religious painting created in the style of Vermeer, if Vermeer had been influenced by Caravaggio.[235] Van Meegeren explained that he "took care to produce this work in such a way that it would pass the five tests usually imposed to ascertain whether a seventeenth-century picture is genuine," for example, by using Vermeer's traditional colors.[236] The painting was authenticated by an expert as "every inch a Vermeer" and was sold to a museum in Rotterdam for half a million guilders.[237] Even after van Meegeren's forgeries were exposed, critics continued to describe *Christ at Emmaus* as one of the "most moving works" created by Vermeer, and begged the Dutch courts not to destroy it.[238]

Art forgers justified their forgery on a number of grounds. Some felt that their own talents were underappreciated and set out to disprove their critics. Van Meegeren famously reasoned that his forgeries would prove to his detractors that he was "as great an artist as Vermeer."[239] Others justified their forgery by economic needs. Hungarian forger, Elmyr de Hory, described himself as "a painter who had fallen on hard times and occasionally forged a few small things in order to eat."[240]

By far the most consistent motivation expressed by art forgers was hatred for the art establishment.[241] British art forger Tom Keating justified his forgery on the basis that many revered artists had died in poverty after being exploited by "unscrupulous" art dealers.[242] Keating described his work as "a protest against merchants who make capital out of those I am

---

232. *See* Gary Alan Fine, *Cheating History: The Rhetorics of Art Forgery*, 1 EMPIRICAL STUD. ARTS 75, 78 (1983).
233. *Id.* at 76.
234. *Id.* at 81.
235. *Id.* at 76, 83.
236. *Id.* at 82.
237. *Id.* at 83.
238. Lessing, *supra* note 137, at 462–63.
239. *Id.* at 469.
240. Fine, *supra* note 232, at 86.
241. *See id.* at 78.
242. *Id.* at 88.

proud to call my brother artists, both living and dead."[243] Many forgers sought to expose the greed and arbitrariness of the art market.[244] They claimed that art dealers used non-aesthetic criteria, such as an artist's fame or the age of a canvas, to inflate prices for art, without truly appreciating the aesthetic qualities of the works they sold.[245] If, as art dealers claimed, the aesthetic qualities of an artwork justified its price tag, then a forgery should be valued as highly as the original. In reality, art dealers treated artworks as historical artifacts.[246] They were "autograph hunters," not art lovers.[247] Accordingly, art forgers sought to expose the "false aesthetic standards of art critics."[248]

Public reactions to art forgery were often positive. After the Dutch public discovered that Han van Meegeren had sold a fake Vermeer to the Nazis, he became "the second most popular man in the Netherlands, behind only the prime minister."[249] Similarly, after the British public learned of Tom Keating's forgeries, he received a book contract and an appearance on the BBC.[250] The British public took great pleasure in Keating's deception of pompous art dealers, and called the scandal "Watercolorgate."[251]

To date, the public response to AI-generated "dupes" has been far more negative. There are a few reasons for this. First, users of AI models are not viewed as technically skilled, in the way that forgers of the Old Masters had to be physically capable of re-creating their brushstrokes. Second, since AI models threaten the livelihoods of living artists, it is harder for model users to claim that they are acting in solidarity with living artists. Third, users of AI models cannot argue, as art forgers did, that their actions are "anti-establishment" because most of the revenue earned from AI-generated art flows into the pockets of large AI firms. Finally, many people believe that AI-generated art is not art at all, whereas fine art forgeries were often viewed as art because of the technical skill involved in their production.[252]

---

243. *Id.* at 78.
244. *See id.*
245. *See id.*
246. *Id.* at 76.
247. *Id.* at 90–91.
248. Lessing, *supra* note 137, at 462.
249. Fine, *supra* note 232, at 84.
250. *Id.* at 89.
251. *Id.*
252. *See Is AI Generated Artwork Actually Artwork?*, Mike Wardynski: Premium Fine Art Photography, https://www.wardynskiphoto.com/gallery/is-ai-generated-artwork-actually-artwork/?srsltid=AfmBOorA4ruUGtlTV4nfAWwv4YzQrXPsAq8HNcHTcA8OAcbEoUoIjfaC [https://perma.cc/246V-M2P8]. For an excellent discussion about how the analytical devices

Nevertheless, the history of art forgery is useful for this discussion because it raises important questions about whether art should be valued according to purely aesthetic criteria, or by its historical, economic, or biographical characteristics.[253] As Alfred Lessing explains, to the man standing in front of *Christ at Emmaus*, having a particular aesthetic experience, with no knowledge of either artist, "it can make no difference whether he is told that it is a seventeenth century Vermeer or a twentieth century Van Meegeren."[254]

In summary, the proper attribution of AI outputs would not only protect the creative incentives of individual artists but also serve the following public-facing goals: (1) reducing consumer search costs; (2) enhancing the public's capacity for aesthetic evaluation; (3) reducing misinformation associated with model hallucination; and (4) helping consumers identify "authentic" art, to the extent that this is considered socially valuable.[255]

II. AI'S ATTRIBUTION PROBLEM

Part I offered a descriptive account of the incentive-protection function of attribution. It explained how proper attribution can mitigate the substitution effects of AI by protecting the reputational capital of individual creators and preserving markets for authentic goods. The next Part provides a taxonomy of the attribution interests affected by generative AI. It distinguishes between *misattribution* (when AI-generated art is falsely ascribed to the authors of copyrighted training data) and *non-attribution* (when AI-generated art fails to acknowledge its causal origins and thereby obscures the labor of human artists). I show that different attribution harms require different legal remedies.

---

employed by copyright jurists reflect competing aesthetic theories, see generally Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1997). Yen shows that concepts such as originality, the useful articles doctrine, and substantial similarity have been interpreted differently according to the particular aesthetic theory preferred by the relevant jurists. *Id.* at 266–97.

253. *See* Fine, *supra* note 232, at 90.

254. Lessing, *supra* note 137, at 464.

255. Of course, there are also contexts where consumer confusion is the express purpose of a particular work, for example, parodies, or appropriation art. *See* Nancy Kranzberg, *Commentary: What Does Art Appropriation Really Mean?*, ST. LOUIS PUB. RADIO (Jan. 6, 2023), https://www.stlpr.org/arts/2023-01-06/commentary-what-does-art-appropriation-really-mean [https://perma.cc/4AR3-22PA]. In these contexts, policing attribution requirements would defeat the very purpose of these works.

A. Unprecedented Technological Mimicry

In 1942, during the German occupation of the Netherlands, Han van Meegeren sold a Vermeer painting to the Nazis.[256] In 1945, he was arrested for aiding and abetting the enemy and plundering Dutch cultural property.[257] In response to these charges, which carried the death penalty, Van Meegeren confessed that, in fact, he had painted the "Vermeer" that he sold to the Nazis.[258] To prove its inauthenticity, Van Meegeren created another "Vermeer" in the presence of court-appointed witnesses, using a seventeenth-century canvas, traditional pigments, badger-hair paintbrushes, and baked resin to simulate the craquelure of aged paint.[259] In November 1947, the Fourth Chamber of the Amsterdam Regional Court found Han van Meegeren guilty of forgery and fraud.[260]

Today, aspiring art forgers do not need to procure vermillion or lapis lazuli to create new works in the style of Vermeer. They can simply prompt an AI model to generate a new work in the style of an established artist in a matter of seconds.[261] As a result, the internet is now flooded with AI-generated "dupes": synthetic works masquerading as authentic works by famous artists. New York-based artist Tomer Hanuka discovered 400 images generated in his distinctive style, listed for sale under his name on an NFT marketplace.[262] Recording artists Drake and The Weeknd discovered that their vocals had been appropriated for an AI-generated song called "Heart On My Sleeve."[263] In March of 2025, the Internet was flooded with disturbing images that looked as though they had been illustrated by

---

256. *See* Fine, *supra* note 232, at 83–84.

257. *See id.*

258. *The Death Penalty for Forgery?*, KING'S COLL. LOND., https://www.kcl.ac.uk/research/the-death-penalty-for-forgery [https://perma.cc/6VFF-BXVN].

259. *Han van Meegeren's Fake Vermeers*, ESSENTIAL VERMEER, https://www.essentialvermeer.com/misc/van_meegeren.html [https://perma.cc/LEE5-4F43].

260. *'Perfect Forgery': Han van Meegeren's Fake Fine Art, 1932-1947*, BREWMINATE (Dec. 4, 2024), https://brewminate.com/perfect-forgery-han-van-meegerens-fake-fine-art-1932-1947/#google_vignette [https://perma.cc/MGD5-GWG9].

261. Taylor Dafoe, *After Sending 'Girl With a Pearl Earring' Out on Loan, the Mauritshuis Has Hung an A.I. Facsimile in Its Place. Fans Are Not Happy*, ARTNET (Feb. 28, 2023), https://news.artnet.com/art-world/mauritshuis-museum-girl-with-a-pearl-earring-ai-fascimile-2263100 [https://perma.cc/QS7L-DGVK].

262. Thomas, *supra* note 1. Hanuka said, "[h]ere is an entire process of creation, and marketing, and sale that has nothing to do with me. It's a direct threat on what I do, and it uses my identity in a way that I just can't control." *Id.*

263. Veltman, *supra* note 1.

beloved animation house, Studio Ghibli,[264] but had, in fact, been generated by ChatGPT.[265]

Author Jane Friedman discovered multiple books for sale on Amazon under her name.[266] She had not written any of them. All of the "sham" books were written in Friedman's style and covered topics that were consistent with her earlier work.[267] They also appeared on her Goodreads profile.[268] When Friedman asked Amazon to remove the AI-generated books that had been falsely attributed to her, Amazon declined to remove the titles in the absence of a trademark registration for Friedman's name (see Fig. 1 below).[269] Amazon did later remove the AI-generated titles after Friedman took the matter to the press.[270]

264. Read, *supra* note 1.

265. Kircher, *supra* note 9.

266. Cecily Mauran, *Author Finds AI Books Falsely Written Under Her Name for Sale on Amazon*, MASHABLE (Aug. 9, 2023), https://mashable.com/article/amazon-removes-fake-ai-generated-books-jane-friedman [https://perma.cc/ZTC7-RGN7].

267. *See* Limbong, *supra* note 1.

268. *I Would Rather See My Books Get Pirated Than This (Or: Why Goodreads and Amazon Are Becoming Dumpster Fires)*, JANE FRIEDMAN (Feb. 18, 2025), https://janefriedman.com/i-would-rather-see-my-books-pirated/ [https://perma.cc/227E-XVP7].

269. *Id.*

270. Mauran, *supra* note 266.

Figure 1. Post on Social Media Platform X by Author Jane Friedman[271]

On her personal blog, Friedman argued that authors "desperately need guardrails on this landslide of misattribution and misinformation. Amazon and Goodreads, I beg you to create a way to verify authorship, or for authors to easily block fraudulent books credited to them."[272]

AI's extraordinary ability to mimic an artist's distinctive style makes it extremely difficult for artists to control their personal brands and for consumers to locate authentic works by their favorite artists. AI-generated art is often circulated with little or no identifying metadata, making it indistinguishable from human-authored art created in the same style.[273] This raises urgent questions for intellectual property law. How can artists protect themselves against the misattribution of AI art generated in their distinctive style? How can they ensure that they receive credit for art generated using AI models that have been trained exclusively on their work? How can art markets function effectively when an artist's distinctive style is no longer a reliable indication of source? The following sections will explore these questions.

---

271. Jane Friedman (@JaneFriedman), X (Aug. 7, 2023, 5:25 PM), https://x.com/janefriedman/status/1688662730419429376?s=46 [https://perma.cc/S4M7-JBTM].

272. FRIEDMAN, *supra* note 268.

273. *See* Anna Yoo Jeong Ha et al., *Organic or Diffused: Can We Distinguish Human Art from AI-Generated Images?, in* PROCEEDINGS 2024 ACM SIGSAC CONF. ON COMPUT. & COMMC'NS SEC. 4822, 4822 (2024), https://dl.acm.org/doi/10.1145/3658644.3670306 [https://perma.cc/U2DT-3NAM].

B. Misattribution vs. Non-Attribution

On October 3, 2022, a South Korean illustrator, Kim Jung Gi, passed away at the age of 47.[274] He was famous for his impossibly detailed sketches, drawn from memory, often before a live audience.[275] Three days after Gi's death, a French developer called "5you" released an AI model that allows users to create artwork in the style of Gi (see Fig. 3 below).[276] The model was trained on Gi's portfolio of works.[277] 5you encouraged the use of his model but asked to be credited in return. Fans of Gi were outraged. They described 5you as an "untalented" "AI bro" who was exploiting Gi's death for his own gain.[278] 5you received multiple death threats.[279]

Figure 2. Kim Jung Gi Drawing One of His Signature Illustrations[280]

274. Scottie Andrew, *Kim Jung Gi, Acclaimed Comic Book Artist, Dies at 47*, CNN, https://www.cnn.com/style/article/kim-jung-gi-death-cec/index.html [https://perma.cc/L2DJ-XKMA] (Oct. 6, 2022).

275. *Id.*

276. Deck, *supra* note 1.

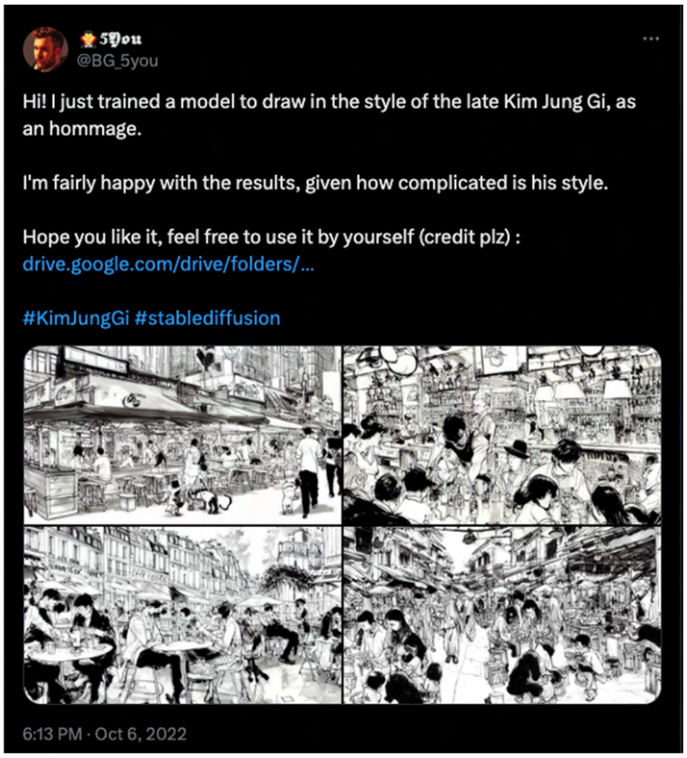
277. *Id.*

278. *Id.*

279. *Id.*

280. KIM JUNG GI US, https://www.kimjunggius.com/ [https://perma.cc/TK9X-ZMCD].

Figure 3. Screenshot of Model Release by 5you on X[281]



What is harmful about 5you's actions? He is unlikely to have infringed the copyright in Gi's works if the model's outputs are not substantially similar to any of the underlying training data.[282] Nevertheless, why does it feel as though 5you has *taken* something from Gi by building this model? A few things spring to mind.

First, there is a real risk that unsuspecting fans of Gi's work will encounter the outputs of 5you's model online and mistakenly believe that

---

281. @BG_5you, X, (Oct. 6, 2022, 6:13 PM), https://x.com/bg_5you/status/1578146498768175105?s=12 [https://perma.cc/6GS9-PCQP].

282. *See* Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1636 (2009); Oren Bracha, *The Work of Copyright in the Age of Machine Production*, 38 HARV. J. L. TECH. 171, 193 (2024). *But see* U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 3: GENERATIVE AI TRAINING 73, 107 (2025) ("Even where a model's outputs are not substantially similar to any specific copyrighted work, they can dilute the market for works similar to those found in its training data, including by generating material stylistically similar to those works.") ("[M]aking commercial use of vast troves of copyrighted works to produce expressive content that competes with them in existing markets . . . goes beyond established fair use boundaries.").

these illustrations were created by Gi. Worse still, a bad actor could intentionally distribute the model's outputs as "authentic" works by Gi. This *misattribution of authorship* violates Gi's personality interests in his work. Furthermore, if the AI-generated works are offensive or low-quality, their misattribution to Gi will tarnish his artistic reputation and divert revenue away from his estate. Misattribution also increases consumer search costs; it becomes harder for consumers to locate "authentic" Gi works in the sea of AI-generated dupes.[283]

The second harm is *non-attribution of source*. Consumers who have never heard of Kim Jung Gi will encounter the outputs of 5you's model online and assume that this artistic style originated with 5you or with the user who prompted the model. Over time, the memory of Kim Jung Gi will fade as subsequent generations of consumers become familiar with his aesthetic through unattributed AI-generated content. Not only does this erase Gi's labor and disrespect his memory, but it diverts revenue away from his estate and towards model developers like 5you.[284]

If Gi were still alive, each of these harms might be remedied by clear labeling requirements.[285] To remedy the *misattribution of authorship*, Gi could require 5you to attach a disclaimer to the model's outputs to inform consumers that they are AI-generated. This would protect Gi's artistic reputation from being tarnished by association with offensive or low-quality AI outputs.[286] To remedy the *non-attribution of source*, Gi could demand

---

283. *See, e.g.*, INT'L CONFEDERATION SOC'YS AUTHORS AND COMPOSERS (CISAC), *Reply Comment to the U.S. Copyright Office's Notice of Inquiry (NOI) on Copyright and Artificial Intelligence* (Jan. 2023) ("[W]hile general aspects of style and character are not themselves copyrightable, AI can create, as the final output, near perfect copies of works or deceptively similar works so that the average person cannot discern a difference in the marketplace."), cited in U.S. COPYRIGHT OFF., *Copyright and Artificial Intelligence, Part 3: Generative AI Training* 66 (May 2025).

284. Our moral intuitions about the "wrongfulness" of 5you's actions are almost certainly influenced by the untimely death of Kim Jung Gi. For excellent discussions about the dignitary interests of the dead and their family. *See, e.g.*, Mark Bartholomew, *A Right to Be Left Dead*, 112 CAL. L. REV 1591 (2024); Oliver Wendell Holmes Jr. & Mark A. Lemley, *Authoring While Dead*, 59 GA. L. REV. 285 (2025).

285. Note that under U.S. law, moral rights expire with the death of the author. *See* 17 U.S.C. § 106A(d).

286. *See, e.g.*, Billal Rahman, *White House Shares Crying Woman's ICE Arrest as Studio Ghibli Picture*, NEWSWEEK (Mar. 28, 2025), https://www.newsweek.com/white-house-crying-woman-ice-studio-ghibli-2051924 [https://perma.cc/BM5M-5REA]; Emanuel Maiberg & Matthew Gault, *Miyazaki Probably Hates This*, 404 MEDIA (Mar. 27, 2025), https://www.404media.co/email/5d418149-ed10-42f3-b535-c74d61ed5b6c/ [https://perma.cc/J6S4-Q9RF] (describing the application of Studio Ghibli's whimsical aesthetic to graphic war photographs).

source attribution for the outputs of 5you's model. This could take the form of a disclaimer attached to the model's outputs, stating that the model was trained on the works of Kim Jung Gi. This disclosure might prompt some consumers to commission Gi to produce new works, rather than relying on 5you's model.[287]

How could Gi compel these disclosures? Copyright law doesn't require attribution, except in very limited circumstances.[288] Furthermore, such attribution is limited to authorship of specific works and does not extend to attribution for style. As far as copyright is concerned, training an AI model on copyrighted works is probably fair use,[289] and style is not copyrightable.[290]

If the outputs of 5you's model are falsely marketed as "authentic works by Kim Jung Gi", Gi's estate could potentially sue for passing off,[291] false

---

287. For a discussion about the importance of respecting consumers' "process preferences" for human-authored art, see Noti-Victor, *supra* note 47, at 164–75.

288. *See, e.g.*, 17 U.S.C. § 106A (limiting attribution rights for works of visual art); 17 U.S.C. § 1202 (limiting protection against the removal or alteration of copyright management information, including author-identifying information); *see also* 17 U.S.C. § 409(1) (requiring the author's name as part of copyright registration, which promotes attribution indirectly).

289. *See* Sag, *supra* note 282, at 1636; Bracha, *supra* note 282, at 193. *But see* U.S. COPYRIGHT OFF., *supra* note 282, at 73, 107 (May 2025) ("Even where a model's outputs are not substantially similar to any specific copyrighted work, they can dilute the market for works similar to those found in its training data, including by generating material stylistically similar to those works. . . . [M]aking commercial use of vast troves of copyrighted works to produce expressive content that competes with them in existing markets . . . goes beyond established fair use boundaries.").

290. However, some plaintiffs have been able to obtain trade dress protection for an artist's distinctive style and prevent imitators from distributing similar works. *See* Romm Art Creations, Ltd. v. Simcha Int'l, Inc., 786 F. Supp. 1126, 1129 (E.D.N.Y. 1992) (concerning the distribution of limited editions and fine art posters based on the work of Israeli artist Tarkay); *see also* Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268, 1274 (10th Cir. 1988) (creators of greeting cards characterized by a "distinctive combination of features" enjoined Hallmark from producing and distributing cards incorporating the plaintiff's trade dress in a manner likely to cause consumer confusion); Jane C. Ginsburg, *Exploiting the Artist's Commercial Identity: The Merchandizing of Art Images*, 19 COLUMBIA-VLA J.L. & ARTS 1, 16 (1995) (describing the *Romm Art* decision as "troublesome" not least because Tarkay's distinctive style "strongly resembles a Matisse crossed with a Modigliani").

291. *See, e.g.*, Expressway Music, Inc. v. Slep-Tone Ent. Corp., No. 12 CIV. 834 ALC MHD, 2013 WL 5345969, at *3 (S.D.N.Y. Sept. 23, 2013) (Expressway made unauthorized copies of Slep-Tone's karaoke accompaniment tracks and marked these media- and format-shifted copies with Slep-Tone's trademark and distinctive trade dress; Slep-Tone argued that Expressway was "passing off" its own physical products as those of Slep-Tone. Based on a literal interpretation of *Dastar*, the Court concluded that Slep-Tone had established a claim for unfair competition, based on the fact that Slep-Tone's trademarks were visible on a format-shifted product that physically originated from Expressway); *see also* Craigslist Inc. v. 3Taps

endorsement,[292] or false advertising.[293] In contrast, if model outputs are attributed to the user who prompted the model, the law would not recognize

---

Inc., 942 F. Supp. 2d 962, 978–79 (N.D. Cal. 2013) (Craigslist could bring a claim for "passing off" against defendants that aggregated and republished Craigslist ads because defendant's unauthorized use of the "craigslist" mark created "the false and misleading impression that defendant's products or services are provided by craiglist"; the Court observed that "[t]he Copyright Act provides no recourse for Craigslist to prevent others from trading on Craigslist's name and mark, and thus does not overlap with the present Lanham Act claim"); O. & W. Thum Co. v. Dickinson, 245 F. 609, 621 (6th Cir. 1917) ("The essence of unfair competition consists in palming off, either directly or indirectly, one person's goods as the goods of another, and this, of course, involves an intent to deceive.").

292. *See generally* Mary LaFrance, *Passing Off and Unfair Competition: Conflict and Convergence in Competition Law*, 2011 MICH. STATE L. REV. 1413 (arguing that the line between false endorsement and free riding has become less distinct over time). *See also* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992) ("A false endorsement claim based on the unauthorized use of a celebrity's identity is a type of false association claim, for it alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product."); Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204–05 (2d Cir. 1979) ("In order to be confused, a consumer need not believe that the owner of the mark actually produced the item and placed it on the market. The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement. In the instant case, the uniform depicted in 'Debbie Does Dallas' unquestionably brings to mind the Dallas Cowboys Cheerleaders. Indeed, it is hard to believe that anyone who had seen defendants' sexually depraved film could ever thereafter disassociate it from plaintiff's cheerleaders."); ETW Corp. v. Jireh Publ'g., Inc., 332 F.3d 915, 925–26 (6th Cir. 2003) ("False endorsement occurs when a celebrity's identity is connected with a product or service in such a way that consumers are likely to be misled about the celebrity's sponsorship or approval of the product or service."); Souza v. Exotic Island Enters., Inc., 68 F.4th 99, 110 (2d Cir. 2023) ("To prevail on a so-called false endorsement claim under Section 43 of the Lanham Act, a plaintiff must prove, among other uncontested requirements, 'that there is the likelihood of confusion between the plaintiff's good or service and that of the defendant.' . . . To determine whether there is a likelihood of consumer confusion, we look to our eight familiar *Polaroid* factors: (1) strength of the trademark; (2) similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the senior user may bridge the gap by developing a product for sale in the market of the alleged infringer's product; (5) evidence of actual consumer confusion; (6) evidence that the imitative mark was adopted in bad faith; (7) respective quality of the products; and (8) sophistication of consumers in the relevant market.").

293. 15 U.S.C. § 1125(a)(1)(B); *see* Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir. 1995) ("To establish a false advertising claim pursuant to § 43(a) the plaintiff must demonstrate that the message in the challenged advertisement is false. Falsity may be established by proving that (1) the advertising is literally false as a factual matter, or (2) although the advertisement is literally true, it is likely to deceive or confuse consumers."); United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) ("To establish a claim under the false or deceptive advertising prong of the Lanham Act, a plaintiff must prove: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the

the user's failure to attribute Gi ("*non-attribution*") as a cognizable harm. The user who prompted the specific AI output is technically its author. However, since the output draws so heavily on the recognizable work of Kim Jung Gi, it's easy to see why Gi's estate might want credit for his contributions to the training data. Following the Supreme Court's decision in *Dastar*, however, it is very unlikely that Gi's estate could sue the model user for "reverse passing off" (passing off Gi's work as their own).[294]

In *Dastar*, the defendant copied and edited the plaintiff's television series before presenting the series as its own product.[295] Prompting an AI model to generate a new work in the style of copyrighted training data feels very different from editing and repackaging video footage. Furthermore, courts struggle to agree on how much of the plaintiff's work the defendant must take in order to establish a claim of reverse passing off.[296]

This Article does not recommend that *Dastar* be overturned. The *Dastar* Court correctly observed that a broad duty of attribution would be unworkable.[297] Instead, Congress should enact a narrower, AI-specific attribution right that would require the disclosure of copyrighted training data in model metadata. This narrow requirement would avoid the pitfalls of a more general attribution right, while addressing the ethical concerns surrounding unauthorized AI training.

---

deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products. . . . The false statement necessary to establish a Lanham Act violation generally falls into one of two categories: (1) commercial claims that are literally false as a factual matter; and (2) claims that may be literally true or ambiguous but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers.").

294. *See generally* Diana Wade, *To Plead or Not to Plead: Whether to Bring a Reverse Passing Off Claim in the Post*-Dastar *Era of Lanham Act § 43(A) Litigation*, 88 S. CAL. L. REV. 1269 (2015) (discussing the impact of *Dastar* on producers of digital products bringing claims under § 43(a) of the Lanham Act).

295. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003).

296. Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 1005–08 (2002). (comparing the Ninth Circuit's requirement for reverse passing off that the defendant's work represent a "bodily appropriation" of the original, and the Second Circuit's requirement that the two works be "substantially similar").

297. *See generally* Jonathan Band & Matt Schruers, Dastar*, Attribution, and Plagiarism*, 33 AIPLA Q.J. 1 (2005) (arguing that non-attribution should not be actionable since the law is not equipped to navigate the contextual nuances of where non-attribution is unacceptable, and where it is acceptable or even encouraged).

In summary, where AI-generated outputs are explicitly misattributed to the owners of copyrighted training data (like Gi), copyright owners are likely to be protected under existing law. However, where AI-generated works are attributed to the model users who prompted them, copyright owners will not be able to claim reverse passing off, following *Dastar* (and this is a normatively desirable outcome, as I will explain below). Finally, where model outputs are distributed without any attribution whatsoever, copyright owners have no remedy unless Congress enacts an AI-specific attribution right that requires the disclosure of copyrighted training data in model metadata. I will elaborate on this proposal in Part IV. Figure 4 summarizes these different attribution remedies.

Figure 4. Attribution Interests Triggered by the Circulation of AI-Generated Outputs of 5you's Model

Model output attributed to:	Harm to Gi	Existing remedy	Proposed remedy
Kim Jung Gi	Misattribution	False advertising False endorsement Passing off	
Model user	Non-attribution	No reverse passing off post-*Dastar*	AI-specific attribution right: mandatory disclosure of training data in output metadata
No one	Non-attribution	No remedy	

This Article focuses on the misattribution of visual art. I recognize, however, that generative AI threatens the proper attribution of almost all expressive works, not just visual art.[298] In this Article, I focus on visual art for a few reasons. First, the uncopyrightability of style arguably provides visual artists with weaker protection against nonliteral copying than literary authors.[299] Courts have a much harder time distinguishing unprotectable ideas from protectable expression because it is often difficult to parse visual art into discrete "patterns" or "abstractions" for the sake of analyzing

298. *See, e.g.*, Mauran, *supra* note 266; Limbong, *supra* note 1; Friedman, *supra* note 268.
299. *See* Brownlee, *supra* note 183, at 1170.

substantial similarity.[300] Providing textual descriptions of nontextual works often results in "verbal overshadowing" or the distortion of gestalt reactions.[301] The science of visual perception shows that visual experience is inherently contextual and nonverbal.[302] The traditional tests used to evaluate substantial similarity, however, were developed in the context of literary works, which are more amenable to verbal description and abstraction.[303] Given its difficult application to nontextual works, Rebecca Tushnet has suggested abandoning substantial similarity altogether and limiting infringement of the author's reproduction right to cases where the works are virtually identical.[304] These characteristics of nontextual works do not mean that my proposals should exclude literary works, but simply that visual art may be particularly vulnerable to nonliteral copying by AI models.[305] This helps to explain the focus of my Article.

Second, AI-generated music requires different legal treatment than AI-generated visual art because vocal imitation implicates interests in privacy and identity that cannot be remedied by proper attribution.[306] This suggests that an individual's voice should be the subject of a different regulatory regime (namely, right of publicity) which prohibits unauthorized vocal imitation, rather than simply requiring attribution.[307]

III. THE INADEQUACY OF EXISTING LAW

Part I provided a descriptive account of the incentive-protection function of attribution. Part II explained why stronger attribution rights would help

---

300. *Id.* at 1166–67.

301. Tushnet, *supra* note 40, at 733–36.

302. Moon Hee Lee, *Seeing's Insight: Toward a Visual Substantial Similarity Test for Copyright Infringement of Pictorial, Graphic, and Sculptural Works*, 111 NW. U. L. REV. 833, 833 (2017).

303. *See* Brownlee, *supra* note 183, at 1160–67; *see also* Lee, *supra* note 302, at 833.

304. Tushnet, *supra* note 40, at 739.

305. If I ask ChatGPT to generate an original novel in the style of Stephen King, what the model will discern as the "style" of Stephen King is more likely to be uncopyrightable tropes of the genre of horror fiction rather than anything that Stephen King should be able to own or exclusively exploit. In other words, I think the risk that consumers will mistakenly believe that the AI-generated novel was written by Stephen King is very low. I think consumers are more likely to attribute distinctive features of the book to the genre of horror fiction.

306. Of course, many would argue that a visual artist's style is also an expression of their identity and not simply an issue of branding or market capture. However, I think the arguments about privacy and identity are stronger in the context of vocal imitation.

307. Katrina Geddes, Runaway Replicas 43 (Nov. 21, 2025) (unpublished manuscript) (on file with author).

to protect creators from the substitution effects of AI works generated in their distinctive style. The following Part will explain why attribution rights are inadequately protected under existing law, and why an AI-specific attribution right is needed.[308] There are at least four explanations for the inadequacy of existing law, including the U.S.'s historical aversion to moral rights, the uncopyrightability of style, the unenforceability of community norms, and the limited coverage of the Lanham Act.

A. Moral Rights Aversion

The absence of attribution rights under existing law has been the subject of extensive scholarship.[309] It reflects the U.S.'s longstanding hostility towards moral rights, and its reputation as "a place that cares more about commerce than culture."[310]

The Visual Artists Rights Act ("VARA") only offers an attribution right to authors of visual art.[311] A "work of visual art" is narrowly defined as a "limited edition" painting, drawing, print, or sculpture consisting of 200 signed copies or fewer, or a photographic image "produced for exhibition

---

308. In response to the existential threat posed by generative AI, many artists have turned to copyright law for protection. This instinct is natural and understandable. *See, e.g.*, Blake E. Reid, *What Copyright Can't Do*, 52 PEPP. L. REV. 519, 579–85 (2025); Cathay Y. N. Smith, *Weaponizing Copyright*, 35 HARV. J.L. & TECH. 193, 193 (2021); Craig, *supra* note 2, at 1.

309. *See generally* Bambauer, *supra* note 48 (criticizing the right of copyright holders to control the production of derivative works); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 BOS. U. L. REV. 41 (2007) (arguing for a copyright system with a right to credit and open access forms of copyright creation); Lastowka, *supra* note 113 (discussing societal interests in protecting authorial marks on creative works); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007) (discussing the legal implications of fans who make new works based on copyrighted characters of others); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263 (2004) (discussing the author's interest in name recognition for their work); Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"*, 23 CARDOZO ARTS & ENT. L.J. 379 (2005) (arguing that an author's attribution right derives from trademark law); Green, *supra* note 55 (discussing potential criminal sanctions for plagiarism); Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55 (2007) (discussing attribution rights in copyright law); Tushnet, *supra* note 48 (discussing the difficulties of attribution rights); Fromer, *supra* note 80 (analyzing expressive incentives in copyright law); Patrick R. Goold, *The Lost Tort of Moral Rights Invasion*, 51 AKRON L. REV. 1093 (2017) (discussing the history of moral rights, such as attribution, in copyright law).

310. Justin Hughes, *American Moral Rights and Fixing the* Dastar *"Gap"*, 2007 UTAH L. REV. 659, 714.

311. 17 U.S.C. § 106(a).

purposes only."[312] This impossibly narrow definition excludes artists who produce images for commercial publication, rather than exhibition, and artists who have made more than 200 copies of their work.[313] Furthermore, visual artists can only enforce their attribution rights against other works of visual art that meet this strict definition, leaving them with no recourse against mass produced works that violate their attribution rights.[314] Jane Ginsburg argues that VARA represents "a very feeble measure for enforcing artists' attribution rights."[315] Michael Landau agrees that VARA is "really a type of 'art preservation' legislation intended to protect very limited special works of art."[316] Accordingly, VARA cannot protect ordinary creators from the threat of misattribution associated with generative AI.

The Digital Millennium Copyright Act ("DMCA") provides some limited protection against the intentional removal of "copyright management information" ("CMI") which may include author-identifying information.[317] However, the statute imposes no obligation to attach the author's name in the first place, and removal of the author's name is not actionable unless it facilitates infringement.[318]

In order to prove a violation of § 1202, plaintiffs must meet the so-called "double intent standard" which requires both (1) knowledge of the unauthorized removal or alteration of CMI *and* (2) knowledge that such removal or alteration would *induce* or *facilitate* copyright infringement.[319] It would be difficult for a plaintiff to show that a distributor of a copyrighted work (who had deliberately removed the author's name) *knew* that end-users would be induced by the absence of attribution to infringe the unattributed work.[320]

---

312. 17 U.S.C. § 101.

313. Ginsburg, *supra* note 108, at 54.

314. *See id.*

315. Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian* Ad Litem, 30 CARDOZO ARTS & ENT. L.J. 73, 82 (2012).

316. Michael Landau, *Copyrights, Moral Rights, and the End of the Right of Attribution Under US Trademark Law*, 19 INT'L. REV. L. COMPUTS. & TECH. 37, 50 (2005).

317. 17 U.S.C. § 1202.

318. Ginsburg, *supra* note 315, at 74; *see also* Raw Story Media, Inc. v. OpenAI, Inc., 756 F. Supp. 3d 1, 6 (S.D.N.Y. 2024) (holding that mere removal of copyright management information, in the absence of dissemination, was insufficient to show standing under Article III).

319. Ginsburg, *supra* note 315, at 77.

320. *Id.* at 78; *see* 17 U.S.C. § 1202.

Additionally, CMI is frequently removed as part of an automated process.[321] Many platforms automatically remove metadata from digital files to reduce file size and promote efficient circulation.[322] It is unclear whether the automated stripping of metadata from digital files as part of their upload to, or download from, digital platforms would meet the double intent standard.[323] If CMI-stripping is automatic and indiscriminate, it may be difficult for plaintiffs to show that AI vendors meet the double intent standard. However, if AI vendors *choose* to adopt technical processes, knowing that such processes will strip CMI from copyrighted works, that choice might be sufficient to demonstrate the requisite intent.[324] In *Intercept Media, Inc. v. OpenAI, Inc.*, Judge Rakoff found that OpenAI's use of certain algorithms to extract text from websites, knowing that the author and title information would be removed, could meet the first intent requirement under 1202(b)(1).[325]

In *Doe 1 v. GitHub*, Judge Tigar of the Northern District of California rejected the defendants' argument that § 1202 requires the "active" removal of CMI, rather than the "passive non-inclusion of CMI by neutral technology."[326] Judge Tigar described this as a "semantic distinction" and emphasized the defendants' knowledge that CMI "appeared repeatedly"

> (b) Removal or Alteration of Copyright Management Information—No person shall, without the authority of the copyright owner or the law—
>
> (1) intentionally remove or alter any copyright management information,
>
> (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
>
> (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,
>
> knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

321. Ginsburg, *supra* note 108, at 67.

322. *Id.* at 68.

323. *See* Stevens v. CoreLogic, Inc., 194 F. Supp. 3d 1046, 1052–53 (S.D. Cal. 2016).

324. Ginsburg, *supra* note 108, at 68.

325. Intercept Media, Inc. v. OpenAI, Inc., 767 F. Supp. 3d 18, 29–30 (S.D.N.Y. 2025).

326. Doe 1 v. Github, Inc., 672 F. Supp. 3d 837, 857 (N.D. Cal. 2023) (internal quotation marks omitted).

across the training data.[327] Defendants had "trained these programs to ignore or remove CMI and therefore stop reproducing it."[328] Accordingly, Judge Tigar found that there was enough evidence "to support a reasonable inference that Defendants intentionally designed the programs to remove CMI from any licensed code they reproduce as output."[329] With respect to the second intent requirement (actual or constructive knowledge that removal of CMI would induce infringement), Judge Tigar found that there was a reasonable inference of such knowledge, given that GitHub "regularly processed DMCA takedowns" and "knew that CMI was important for protecting copyright interests."[330]

Similarly, in *New York Times v. Microsoft*, Judge Stein found that the use of algorithmic content extractors (designed to remove CMI from web-scraped content) could meet the first intent requirement.[331] Additionally, there was plausible evidence that OpenAI had actual or constructive knowledge that CMI removal would enable end-user infringement due to its user indemnification policy, and its awareness of model regurgitation.[332]

Despite these recent judicial developments, § 1202 would not provide a remedy for *non-attribution*, which is the core harm that this paper seeks to address. Liability under § 1202 is limited to the "removal" or "alteration" of CMI from copyrighted works, which means that liability is limited to the stripping of CMI from perfect copies. Liability under § 1202 does not attach when the author of a derivative work fails to include CMI from the source work.[333]

---

327. *Id.*

328. *Id.* at 858.

329. *Id.*

330. *See id.*

331. N.Y. Times Co. v. Microsoft Corp., 777 F. Supp. 3d 283, 315 (S.D.N.Y. 2025).

332. *Id.* at 316.

333. *See* Brief of Amici Curiae Intellectual Property Law Professors in Support of Appellees and Affirmance, at 2–3, Doe 1 v. GitHub, Inc., 672 F. Supp. 3d 837 (N.D. Cal. 2023), (No. 4:22-cv-06823) (arguing that the text of § 1202 supports an identicality requirement); *see also* Falkner v. General Motors LLC, 393 F. Supp. 3d 927, 938 (C.D. Cal. 2018) (creating a secondary work that omits a first work's CMI does not violate § 1202(b)(1)); Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC, No. SA-21-CV-01158-XR, 2022 WL 4352480, at *4 (W.D. Tex. Sept. 16, 2022) (holding that creating a new work, even if it infringes an existing work, does not involve "removal" of CMI).

B. The Uncopyrightability of Style

Artists who discover that AI models are able to reproduce their distinctive style intuitively believe that style imitation should be recoverable under the copyright statute.[334] They are frequently told, however, that style is not copyrightable.[335] This statement is generally true: another artist may use the same subject and style, provided they do not substantially copy the first artist's specific expression of their idea.[336] The protection of an artist's distinctive "style" (in the form of an exclusive entitlement to a set of abstract features discernible only across a collection of works) would be inconsistent with the idea-expression dichotomy.[337] Copyright only protects "the author's interests in relation to singular works."[338]

However, there are a few caveats to this. First, "style" is a notoriously difficult concept to define.[339] Sometimes it refers to a genre of works ("jazz"), or a particular artistic technique ("pointillism"), or the holistic combination of expressive elements deployed by a particular artist (for example, the free-wheeling lines and limited palette of Jean Dubuffet's *l'Hourloupe* series).[340] If style is broadly defined, then it is more likely to represent an unprotectable idea.[341] However, if style is narrowly defined as a unique combination of stylistic elements, then it may represent protectable

---

334. *See, e.g.*, Min Chen, *Artists and Illustrators Are Suing Three A.I. Art Generators for Scraping and 'Collaging' Their Work Without Consent*, ARTNET (Jan. 24, 2023), https://news.artnet.com/art-world/class-action-lawsuit-ai-generators-deviantart-midjourney-stable-diffusion-2246770 [https://perma.cc/B2RL-ZC8S] (discussing a case where a group of artists sued A.I. art generators in part because the A.I. generators sold artwork in the artists' "style").

335. See, for example, popular remarks on the social media platform X, which have received over 40,000 views. Shad M. Brooks (@shadmbrooks), X (Nov. 23, 2023, 05:45 AM), https://x.com/shadmbrooks/status/1727684716688748753 [https://perma.cc/FL5X-DV77].

336. Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150, 1156–57 (N.D. Ill. 1972) ("For example, Picasso may be entitled to a copyright on his portrait of three women painted in his Cubist motif. Any artist, however, may paint a picture of any subject in the Cubist motif, including a portrait of three women, and not violate Picasso's copyright so long as the second artist does not *substantially copy* Picasso's specific expression of his idea.").

337. Pamela Samuelson, Christopher Jon Sprigman & Matthew Sag, *Comments in Response to the Copyright Office's Notice of Inquiry on Artificial Intelligence and Copyright*, at 9-10, SSRN (Oct. 30, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4976391.

338. *Id.* at 36.

339. *See, e.g.*, Brownlee, *supra* note 183, at 1157–58; Benjamin L.W. Sobel, *Elements of Style: Copyright, Similarity, and Generative AI*, 38 HARV. J.L. & TECH. 49, 71–72 (2024).

340. *See* Sobel, *supra* note 339, at 53–54 (discussing how "style" can broadly refer to a work's attributes or narrowly refer to a visual art's particularized expression).

341. *See* 17 U.S.C. § 102(b); *see also* Sobel, *supra* note 339, at 74.

expression.[342] It is often difficult to distinguish unprotectable stylistic elements from protectable expression.[343]

Second, although copyright law does not protect an artist's distinctive style, the reproduction of that style in a secondary work may be probative of copying and may support a claim that the secondary work was not created independently.[344]

Third, although copyright doctrine affirms the unprotectability of style, it is nevertheless possible to identify cases where courts have allowed plaintiffs to protect distinctive stylistic elements of their work.[345] Courts have extended copyright protection to stylistic elements of visual works where those elements were applied to the same subject matter.[346] They have also extended protection to the features of copyrighted characters that emerge across a series of works.[347]

Additionally, the exclusive right to prepare derivative works effectively yields copyright protection for style where the application of an artist's distinctive style is what makes the secondary work recognizable as a derivative.[348] Copyright doctrine provides "a substantial zone of derivative works protection around an individual original expression of a theme" that precludes second comers from drawing on that theme themselves.[349]

Similarly, the "total concept and feel" test for substantial similarity effectively prohibits any copying that dilutes "the distinctive style or 'aesthetic appeal' of the plaintiff's work."[350] The application of the test has allowed "very abstract similarities between two works" to form the basis for

---

342. Brownlee, *supra* note 183, at 1159–60.

343. Sobel, *supra* note 339, at 74.

344. *See* Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 714 (S.D.N.Y. 1987).

345. Sobel, *supra* note 339, at 73 & n.94.

346. *See, e.g.*, *Steinberg*, 663 F. Supp. at 712 ("Even at first glance, one can see the striking stylistic relationship between the posters, and since style is one ingredient of 'expression,' this relationship is significant. Defendants' illustration was executed in the sketchy, whimsical style that has become one of Steinberg's hallmarks."); Jewelry 10, Inc. v. Elegance Trading Co., No. 88 Civ. 1320, 1991 WL 144151, at *5 (S.D.N.Y. July 20, 1991) (finding that copying distinctive jewelry designs exceeded the permitted taking of stylistic ideas); Dr. Seuss Enters., v. ComicMix LLC, 983 F.3d 443, 448, 452 (9th Cir. 2020) (rejecting a fair use argument by the creators of a parody that reproduced Dr. Seuss' "characteristic style"); *see also* Brownlee, *supra* note 183, at 1168 ("*Steinberg* demonstrates that the style of an individual work of visual art may be afforded some protection by the copyright law.").

347. Sobel, *supra* note 339, at 88.

348. 17 U.S.C. § 106(2).

349. Ginsburg, *supra* note 290, at 10.

350. Beebe, *supra* note 213, at 862.

infringement.[351] Alfred Yen argues that the ambiguity and expansiveness of this test has had a chilling effect on creative expression.[352] Copyright in a work's "total concept and feel" effectively deters "the creation of new works which bear even superficial similarity to prior copyrighted works."[353]

In *Roth Greeting Cards v. United Card Co.*, the Ninth Circuit held that greeting cards created by the plaintiff and the defendant were effectively "the same" in "total concept and feel" by virtue of "the mood they portrayed."[354] In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, the Ninth Circuit held that the defendant's commercials captured the "total concept and feel" of the plaintiff's television show by depicting a very similar "fantasyland filled with diverse and fanciful characters."[355]

Judicial evaluation of "transformativeness" under the first fair use factor also provides some protection for an artist's distinctive style because courts struggle to comprehend non-visual transformations of earlier works.[356] Appropriation art, for example, is often visually indistinguishable from the art that it appropriates, in order to highlight, among other things, the death of originality, the exhaustion of signs, and the "impossibility of producing anything entirely new."[357] However, since courts expect transformativeness to manifest in visual differences between two works, they frequently do not recognize as "transformative" works that bear a visual resemblance to earlier works.[358] This effectively produces copyright protection for an artist's distinctive style.[359] Courts view works of appropriation art "as

---

351. Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 410 (1989).

352. *Id.* at 420.

353. *Id.* at 429.

354. 429 F.2d 1106, 1110 (9th Cir. 1970).

355. 562 F.2d 1157, 1165 (9th Cir. 1977).

356. For example, Sherrie Levine's rephotograph of Walker Evans' original photo, *Alabama Tenant Farmer Wife*, has been interpreted as a "meditation on the authorlessness of photography" even though it is formally indistinguishable from the original work. *See* Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 606 (2016).

357. *See* JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 236 (1991); s*ee also* Ginsburg, *supra* note 290, at 20.

358. *See* Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 543 (2006).

359. *See, e.g.*, Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 448 (9th Cir. 2020) (holding the appropriation of Dr. Seuss' characteristic illustration style was infringement of copyright); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (finding defendant's work was not a lawful parody of the plaintiff's copyrighted work because it mimicked Dr. Seuss' characteristic style without holding that style up to ridicule).

substitutes for the original work," rather than as forms of commentary that are meant to stand alongside them.[360]

Despite these nuances, it remains generally true that style is uncopyrightable, and this confirms the incongruence between copyrightable subject matter and what creators believe copyright law *should* protect.[361] Artists and authors strongly believe that they should be able to stop AI models from generating new content in their signature style, but copyright provides no remedy for style imitation. As Oren Bracha explains, there is a fundamental mismatch between the type of information that copyright law protects (work-specific expression) and the kind of information that generative models extract and exploit (relational metadata aggregated across millions of different works).[362] Many creators feel entitled to property rights in the metadata associated with their portfolios, not just the expression contained within individual works. The dissonance between creators' moral intuitions and the strictures of copyright doctrine explains some of the public frustration around unauthorized AI training.

C. The Unenforceability of Community Norms

To date, artists have survived without robust attribution rights under law because they have been able to rely on socio-technical barriers to style imitation. These barriers include community norms against plagiarism[363] and the technical difficulty of replicating an artist's distinctive style and

---

360. Katyal, *supra* note 358, at 544.

361. *See generally* Fast et al., *supra* note 60 (demonstrating that lay beliefs conflict with intellectual property doctrine); Mandel et al., *supra* note 79 (finding that the American public largely perceives intellectual property law's core function as preventing plagiarism).

362. Bracha, *supra* note 282, at 182–89.

363. For a broader discussion of the regulating effects of extralegal norms, see, for example, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (Harvard Univ. Press 2009); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999); Jonathan Barnett, *Sharing in the Shadow of Property: Rational Cooperation in Innovation Markets*, (USC Ctr. L. Econ. Org. Rsch., Working Paper No. C08-22, 2008), https://papers.ssrn.com/abstract=1287283 [https://perma.cc/Y3TU-3BT5]; Katherine J. Strandburg, *Legal but Unacceptable:* Pallin v. Singer *and Physician Patenting Norms*, *in* INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP 321 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2014); Katherine J. Strandburg, *User Innovator Community Norms: At the Bounds Between Academic and Industry Research*, 77 FORDHAM L. REV. 2237 (2009); William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417 (2010).

applying it to new subject matter at scale. Generative AI reveals the vulnerability of these extra-legal protections.

Almost two decades ago, Harry Surden warned policymakers to be attentive to non-legal constraints on anti-social behavior that might be eroded by new technologies.[364] Surden explained that many undesirable activities are constrained by extra-legal devices, such as markets, social norms, and physical and technological features of the world that make certain activities unscalable.[365] For example, obtaining sensitive information from court records was previously constrained by the prohibitive cost of searching hundreds of physical documents.[366] Those constraints were eliminated by the introduction of electronic records. Many physical constraints on unwanted behavior are subtle or non-obvious to policymakers, so that their regulating effect on undesirable activity goes unnoticed until it is removed by a new technology.[367]

Although Surden focused on the "latent structural constraints" protecting individual privacy, his theory also reveals the latent structural protections against authorial misattribution. AI models substantially lower the cost of activities that used to be incredibly labor-intensive, like generating convincing new works in the style of an established artist.[368] This activity was previously costly in the sense that very few people had the technical skills to convincingly imitate an artist's distinctive style and apply it to new subject matter. For example, one of the reasons that art forgers (such as Han Van Meegeren) developed such notoriety was because it was so rare to possess the technical skills required to convincingly imitate the work of an Old Master. AI models, however, can generate Vermeer-style images in a matter of seconds. They significantly lower the physical barriers to style imitation (see Fig. 5 below). Accordingly, the protection that artists previously enjoyed against misattribution—protection offered by the

---

364. *See generally* Surden, *supra* note 11 (discussing whether an implicitly regulated interest warrants explicit regulation when nonlegal regulators cease to constrain behavior).

365. *Id.* at 1606.

366. *Id.* at 1613–14.

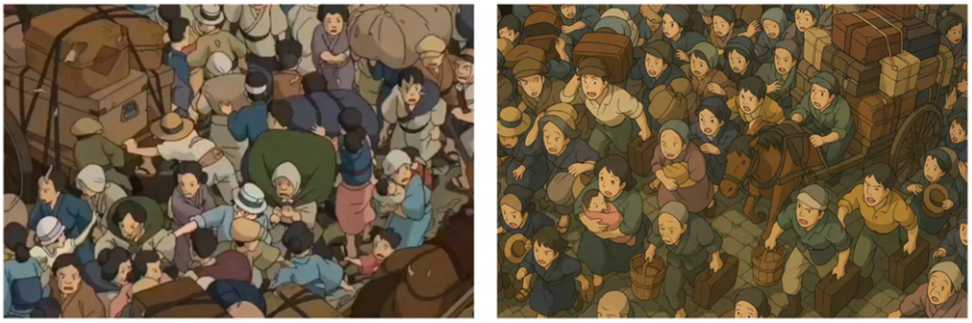
367. *Id.* at 1607; *see also* BJ Ard, *Creativity Without IP? Vindication and Challenges in the Video Game Industry*, 79 WASH. & LEE L. REV. 1285, 1285–86 (2022) (describing how the stability of non-IP protections is often contingent on the copy-resistant features of certain technologies).

368. *See* Surden, *supra* note 11, at 1613.

technical difficulty of style replication—has been eroded by a new technology.[369]

Similarly, recording artists were previously protected from voice imitation by the difficulty of finding an impersonator who could credibly imitate the distinctive voice of an established artist. This difficulty acted as a latent structural constraint, protecting recording artists from the risk of misattribution associated with vocal imitation. Generative AI, however, makes it incredibly easy to reproduce the sound of your favorite celebrity, exposing the vulnerability of structural constraints on voice imitation.[370]

Figure 5. Comparison of Studio Ghibli and AI-generated Images



The Studio Ghibli image on the left took fifteen months to complete, while the image on the right was generated by ChatGPT in 30 seconds.[371]

Prior to the emergence of generative AI, social norms served as the primary constraint on non-infringing, unattributed copying.[372] Many

369. *See, e.g.*, U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 3: GENERATIVE AI TRAINING 65 (pre-publication version 2025) ("The speed and scale at which AI systems generate content pose a serious risk of diluting markets for works of the same kind as in their training data.").

370. Elizabeth Pineau et al., *Voice Actors Push Back as AI Threatens Dubbing Industry*, REUTERS (July 30, 2025), https://www.reuters.com/business/media-telecom/voice-actors-push-back-ai-threatens-dubbing-industry-2025-07-30/ [https://perma.cc/VJN8-ZN8W].

371. Erik Hoel, *Welcome to the Semantic Apocalypse*, INTRINSIC PERSP. (Mar. 27, 2025), https://substack.com/home/post/p-159983195?utm_medium=email [https://perma.cc/E8D7-YUQ3].

372. For a discussion of how creators use self-help strategies to, *inter alia*, insist on attribution of their work and correct misattributions, see generally Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455 (2019).

creative communities developed their own norms of attribution.[373] The informal norms-based attribution systems that developed across different industries offered substantial flexibility and sensitivity to context.[374] They range from guild-negotiated allocations of screen credit for Hollywood productions to non-attribution norms for speechwriters, ghostwriters, judicial clerks, and media outlets that eschew individual bylines.[375] The development of industry-specific attribution norms reflects the fact that the incentivizing force of attribution operates differently in different sectors.[376]

French chefs, for example, have highly specific norms around the sharing, copying, and attribution of *haute cuisine* recipes.[377] Credit for developing novel and popular recipes helps to boost restaurant traffic and cookbook sales, and also leads to employment opportunities.[378] Accordingly, chefs who use or present the recipes of others without proper attribution are subject to public shaming, loss of status, and reduced access to recipe information in the future.[379]

Academic researchers also have strong citation norms.[380] These norms have largely obviated the need for attribution rights under law because academic communities enforce their citation norms internally. A privacy scholar who applied the theory of contextual integrity without citing Helen Nissenbaum, for example, would be heavily censured by their academic peers.[381] Generative AI, however, erodes the regulatory capacity of

---

373. *See, e.g.*, Fisk, *supra* note 10; KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012), http://ebookcentral.proquest.com/lib/nyulibrary-ebooks/detail.action?docID=978156; Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable*, 24 CARDOZO ARTS & ENT. L. J. 1121 (2007).

374. Fisk, *supra* note 10, at 28–52.

375. *Id.*

376. A federal attribution right, in contrast, would disrupt these industry-specific norms by imposing universal requirements, without evaluating the specific costs and benefits of attribution in different contexts.

377. *See generally* Fauchart & von Hippel, *supra* note 10 (documenting the existence of a norms-based IP system among French chefs).

378. *Id.* at 193.

379. *Id.* at 187.

380. *See, e.g.*, Jeremy Birnholtz, *When Authorship Isn't Enough: Lessons from CERN on the Implications of Formal and Informal Credit Attribution Mechanisms in Collaborative Research*, 11 J. ELEC. PUBL'G (2008), https://doi.org/10.3998/3336451.0011.105 [https://perma.cc/64A7-CKAN]; Ken Hyland, *Academic Attribution: Citation and the Construction of Disciplinary Knowledge*, 20 APPLIED LINGUISTICS 341 (1999).

381. *See generally* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004) (developing a model of informational privacy in terms of contextual integrity). Interestingly, Anthropic's large language model, Claude, offers a summary of the theory of

community norms. A machine cannot be socially censured for plagiarism in the way that a community member can be. Accordingly, the protection against non-attribution previously provided by community norms has been eroded by a new technology. AI models are not bound by the norms of any particular community.[382]

The concept of "latent structural constraints" demonstrates that the need for explicit legal regulation is often not obvious until a physical or technological limitation on antisocial behavior is removed by a new technology.[383] Prior to the emergence of generative AI, visual artists were protected against misattribution by the sheer difficulty of replicating an artist's distinctive style and applying it to new subject matter at scale. Accordingly, they survived in a world without attribution rights under law. Generative AI, however, makes it incredibly easy for anyone (with no artistic or computing skills) to generate a convincing new work in the style of a known artist by entering a few simple prompts.[384] This significantly increases the risk of misattribution and consumer confusion, highlighting the need for greater legal protection for artists' attribution interests.

D. The Limited Coverage of the Lanham Act

As mentioned in Section II.B, if a user prompts ChatGPT to create a new work "in the style of Yayoi Kusama" and then falsely markets the AI output on Etsy as an "authentic work by Yayoi Kusama," Kusama probably has a remedy under existing law.[385] However, if the AI-generated work is attributed to the model user, or to no one at all, Kusama cannot bring a claim for reverse passing off, following the Supreme Court's 2003 decision in *Dastar*.[386] While the Court's refusal to "use trademark law to prosecute

---

contextual integrity without citing Helen Nissenbaum, when prompted by this author to describe the theory.

382. *See, e.g.*, Mark A. Lemley & Lisa Larrimore Ouellette, *Plagiarism, Copyright, and AI*, U. CHI. L. REV. ONLINE (2025), https://lawreview.uchicago.edu/online-archive/plagiarism-copyright-and-ai [https://perma.cc/5TJF-9XDG] (describing how large language models break citation chains and thereby undermine the efficacy of academic attribution norms).

383. Surden, *supra* note 11, at 1607–09.

384. Maggie Lee, *Vulnerability of Artistic Style in the Age of Generative AI*, COLUM. J.L. & ARTS (Mar. 23, 2024), https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/699 [https://perma.cc/DJ76-8VXY].

385. Yayoi Kusama could likely sue for passing off, false endorsement, or false advertising. *See supra* Section II.B.

386. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003).

plagiarism"[387] was normatively desirable, the technological landscape has changed dramatically since 2003. While non-attribution should remain generally non-actionable,[388] there are compelling reasons to recognize a duty of attribution in the limited context of generative AI. The threat to creative incentives posed by generative AI demands a legislative solution. Stronger attribution rights represent a far less perilous solution than lowering the standard of actionable infringement to "substitutive similarity".

1. The Relevance of the Lanham Act

As the late Greg Lastowka showed, the accurate attribution of expressive works serves many of the same goals as the protection of distinctive marks for goods and services.[389] First, authors who are able to capture the full reputational benefits of their labor are motivated to produce high-quality works.[390] Second, consumers who can rely on author identity as a proxy for the nature and quality of an expressive work are more likely to engage in market transactions.[391] In other words, authorial attribution serves the same social functions as source indication: incentivizing the creation of high-quality works and reducing consumer confusion.[392] Designations of authorship are properly characterized as trademark interests by virtue of their *market signaling* and *production incentive* effects.

Lastowka argued that because designations of authorship, like trademarks, are capable of misleading consumers about the salient features of expressive works, authors should be able to protect their attribution interests under trademark law.[393] It seems strange that the physical manufacturer of a book could bring a claim for false designation of origin under the Lanham Act, whereas the book's author could not, despite the fact that the consumer cares far more about the book's authorship than its

---

387. Craigslist Inc. v. 3Taps Inc., 942 F. Supp. 2d 962, 980 (N.D. Cal. 2013).

388. Band & Schruers, *supra* note 297, at 3, 4, 12 (arguing that because non-attribution is acceptable in some contexts and unacceptable in others, it is best governed by community norms that can navigate these contextual nuances, rather than legal sanction). Additionally, requiring attribution in *all* contexts would impose unnecessary costs in circumstances where attribution offers no market benefit. *Id.*

389. Lastowka, *supra* note 113, at 1175.

390. *Id.* at 1176.

391. *Id.* at 1188.

392. *Id.* at 1176.

393. *Id.* at 1199–1200.

physical manufacturer.[394] Mary LaFrance agrees that in order for designations of authorship "to perform their consumer protection function, they must receive the same degree of protection under the Lanham Act as more traditional trademarks."[395]

Authorial attribution is closer to a trademark interest than a core copyright interest because it concerns the communication of the work's *origin*, rather than the exploitation of the work *qua* work.[396] Unlike trademark law, copyright law is generally unconcerned with consumer confusion. Even where consumer confusion occurs as a byproduct of substantial similarity, copyright law focuses on the harm to the *author*'s market, rather than any confusion or deception experienced by consumers.[397]

Furthermore, the conceptual underpinnings of trademark law map neatly onto the moral intuitions surrounding AI style imitation. Trademark law is designed to prevent producers from "free riding" on the investments their competitors have made in creating high-quality goods. This entire body of law is referred to as "unfair competition" because "by using a rival's mark, the infringer capitalizes on the investment of time, money and resources of his competitor; unfair also because, by doing so, he obtains the consumer's hard-earned dollar through something akin to fraud."[398] Similarly, an AI user's ability to free ride on the goodwill generated by an artist over the

---

394. *Id.* at 1208.

395. Mary LaFrance, *When You Wish upon* Dastar*: Creative Provenance and the Lanham Act*, 23 CARDOZO ARTS ENT. L.J. 197, 235 (2005).

396. Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 58 (2007).

397. *See id.* at 62; *see also* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95 (1997) (discussing the reputational externalities of moral rights violations); Tang, *supra* note 177 (arguing that an artist's name serves as an indicator of quality and status in the modern art market and advocating for a trademark model of moral rights that recognizes art making as brand making). *But cf.* Lee B. Burgunder, *Trademark and Copyright: How Intimate Should the Close Association Become*, 29 SANTA CLARA L. REV. 89, 113 (1989) ("The courts should not use the trademark system to correct possible deficiencies in copyright law."). I should note that in an ideal world, attribution rights would properly be housed within a robust moral rights regime. Attribution represents a core interest for authors and coheres with personhood theory. However, my proposal is informed by the U.S.'s longstanding hostility towards moral rights and my assumption that the U.S. is extremely unlikely to enact a moral right of attribution. Given these practical realities, I believe that protecting authors' attribution interests under trademark law is a more realistic prospect than advocating for a moral right of attribution.

398. New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 305–06 (9th Cir. 1992).

course of their career through the reproduction of their signature style in AI outputs strikes many within the creative community as deeply "unfair."

Section 43(a) of the Lanham Act prohibits the use of "any false designation of origin" or "false or misleading" description or representation of fact in connection with any goods or services where this is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or approval of the goods or services.[399] Section 43(a) is not preempted by § 301(a) of the Copyright Act,[400] and it does not render the Visual Artists Rights Act ("VARA") superfluous because VARA does not turn on a likelihood of consumer confusion.[401]

Prior to the Supreme Court's decision in *Dastar*, copyright owners enforced their attribution interests under § 43(a) of the Lanham Act.[402] It provided important protection for artists' moral rights, in line with the United States' obligations to respect moral rights under the Berne Convention.[403] Legislative history strongly suggests that the 100th Congress endorsed the application of § 43(a) to false designations of authorship as

---

399. 15 U.S.C. § 1125(a)(1).

400. Section 301 does not apply to § 43(a) because it is a federal provision. 17 U.S.C. § 301(d) ("Nothing in this title annuls or limits any rights or remedies under any other Federal statute."). However, it would apply to a state unfair competition law.

401. Hughes, *supra* note 310, at 686.

402. *See, e.g.*, Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (finding a valid claim for relief under § 43(a) after a film distributor removed an actor's name from all credits and advertising and substituted the name of a different actor); Gilliam v. Am. Broad. Cos., Inc., 538 F.2d 14 (2d Cir. 1976) (recognizing an artist's right to have his work attributed to him in the form in which he created it, with Monty Python obtaining an injunction to restrain ABC from broadcasting highly edited versions of their original programs); Follett v. New Am. Libr., Inc., 497 F. Supp. 304, 313 (S.D.N.Y. 1980) (holding that representing Follett as the principal author of the book would be false and that the Lanham Act protects an author from the presentation of his work to the public in distorted form and also protects the public and the artist from misrepresentations of his contributions to a final work); Johnson v. Jones, 149 F.3d 494 (6th Cir. 1998) (upholding a finding for plaintiff when defendant reproduced architectural drawings and removed plaintiff's name and seal from the drawings and replaced them with his own); Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775 (2d Cir. 1994) (holding that defendant's publication and sale of children's books that were substantially similar to those published by the plaintiff, where the defendant was described as the author, constituted a false designation of origin); Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27 (2d Cir. 1982) (granting injunctive relief to a licensed distributor of Paddington Bear products to prevent defendant manufacturer from falsely designating origin of a "knock-off" Paddington bear image on shirts labeled "© Fred Original"); Carell v. Shubert Org., Inc., 104 F. Supp. 2d 236 (S.D.N.Y. 2000) (holding that failure to credit plaintiff as creator of makeup designs for cast of Broadway musical *Cats*, and misattribution of authorship of designs to defendant and others, constituted a violation of Lanham Act).

403. Lastowka, *supra* note 113, at 1212.

evidence that the U.S. could comply with Berne's provisions without passing new legislation.[404] Congress relied upon the Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, which cited 43(a) as a proxy for the moral right of attribution.[405]

Section 43(a) prohibits both *passing off* and *reverse passing off*.[406] *Passing off* occurs when A promotes A's products under B's name, for example, a *Twilight* fan passes off her fan fiction as an unseen manuscript by Stephenie Meyer. *Reverse passing off* occurs when A promotes B's products under A's name, for example, Stephenie Meyer publishes fan fiction she found on Archive of Our Own as a new novel by Stephenie Meyer. The harm caused by *reverse passing off* is that the originator of the product "is involuntarily deprived of the advertising value of its name and of the goodwill that otherwise would stem from public knowledge of the true source of the satisfactory product."[407] This is similar to the harm caused by plagiarism.

Reverse passing off can be *express* or *implied*.[408] *Express* reverse passing off occurs when the defendant removes the name or trademark from the plaintiff's product and sells it under a different name or mark.[409] *Implied* reverse passing off occurs when the defendant removes the name or mark of the plaintiff's product and distributes it in an *unbranded* state.[410]

To claim "reverse passing off" under the Lanham Act, the plaintiff must prove four elements: first, that the work at issue originated with the plaintiff; second, that the defendant falsely designated the work's origin; third, that the false designation of origin is likely to cause consumer confusion; and finally, that the plaintiff was harmed by this false representation.[411]

---

404. LaFrance, *supra* note 395, at 222.

405. *Id.* at 224.

406. *But see* LaFrance, *supra* note 395, at 212 (arguing that § 43(a) does not cover reverse passing off because the text only prohibits a person who misrepresents the origin of "*his or her* goods, services, or commercial activities" (emphasis added)); *see also* Cross, *supra* note 69, at 740 (arguing that the statutory language of § 43(a) does not cover reverse passing off).

407. Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981).

408. *But see* Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 327 (2d Cir. 1995) (finding no cause of action under § 43(a) for non-attribution); Murray Hill Publ'ns, Inc. v. ABC Commc'ns, Inc., 264 F.3d 622 (6th Cir. 2001) (finding no cause of action under § 43(a) where "no one was falsely credited").

409. Shaw v. Lindheim, 919 F.2d 1353, 1364 (9th Cir. 1990).

410. *Id.*

411. Lipton v. Nature Co., 71 F.3d 464, 473 (2d Cir. 1995).

Enforcing the Lanham Act's prohibition on false designations of origin requires a stable definition of the term "origin". However, courts have struggled to define the "origin" of an expressive work.[412] In the paradigmatic case of reverse passing off, an author's name (let's call him Joseph) is removed from his book, and the book is distributed under somebody's else name (let's call him Peter). The work itself is not altered; it's just re-labeled. Clearly, the true "origin" of the book is Joseph, not Peter.

But things get more complicated when Peter takes Joseph's original manuscript and alters it slightly, for example, by re-naming all of the characters, and setting the story in Paris, rather than in Rome. Is the "origin" of the work still Joseph, or is it now Peter? Reasonable people disagree about "how much of a taking will make an authorship identification false."[413] In the 1990s, a circuit split arose over the degree of similarity required to justify a claim for misrepresentation of origin under § 43(a).[414] The Second Circuit found reverse passing off where defendants created works that were not *identical* to the plaintiff's but similar enough that the failure to credit the plaintiff constituted a false designation of origin.[415] This included similarities between the structure, texts, and illustrations of different books.[416] The standard of comparison used by the Second Circuit was essentially the "substantial similarity" test used for copyright infringement.[417]

In contrast, to prove reverse passing off under the Lanham Act, the Ninth Circuit required the secondary work to be a "bodily appropriation" of the first.[418] This was defined as the "copying or unauthorized use of

---

412. *See, e.g.*, Dahlen v. Michigan Licensed Beverage Ass'n, 132 F. Supp. 2d 574, 589 (E.D. Mich. 2001) (discussing a circuit split about misrepresentation of origin under 43(a)).

413. Glynn S. Lunney, Jr., *Distinguishing* Dastar*: Consumer Protection, Moral Rights and Section 43(a)*, *in* CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 148, 158 (Jane K. Winn ed. 2006).

414. *Dahlen*, 132 F. Supp. 2d at 589.

415. Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994).

416. *Id.* at 782–83.

417. *Id.* at 783.

418. Cleary v. News Corp., 30 F.3d 1255, 1261 (9th Cir.1994) (noting that removal of the plaintiff's name from the title page of a book after crediting the plaintiff for twenty years was not a violation of the Lanham Act because the new version was sufficiently different from the previous versions and the plaintiff did not contribute to the preparation of the latest version); *see also* Shaw v. Lindheim, 919 F.2d 1353, 1364 (9th Cir. 1990) (holding that the doctrine of "reverse passing off" is limited to situations of bodily appropriation and does not apply where two products are merely substantially similar).

substantially the entire item"[419] and essentially referred to verbatim copying.[420] This limited the scope of relief to cases of relabeling, with perhaps very minor modifications. It denied relief where the defendant had made "significant" revisions to the plaintiff's work.[421]

Scholars have warned that an overly expansive reading of "origin" could deter other creators from producing similar works, which would ultimately harm consumers by reducing competition in the marketplace.[422] Creators would not produce works that might be perceived as too "similar" to existing works out of fear that they would be required to credit other artists for works they had created themselves.[423]

As Randolph Sergent explains, "we want to *encourage* defendants to build similar and competing products" because this "will lower prices for consumers and give them more alternatives in the marketplace."[424] Accordingly, relief for misattribution should be limited, Sergent says, to cases where "the defendant took the plaintiff's *actual* product," and did not simply create a similar work.[425] John T. Cross agrees that relief should be limited to cases of *relabeling* rather than copying:

> As long as the defendant is free to copy the good—an issue governed by the copyright laws—it should be free to claim credit for its copies. The author should only receive credit for the works produced *by the author*, not by other parties.[426]

Cross argues that trademark law should leave the adjudication of improper copying to copyright law and focus instead on securing accurate source designations for goods that have merely been relabeled.[427]

2. The Effect of *Dastar*

The Supreme Court's decision in *Dastar* severely limited the ability of creators to bring claims for authorial misattribution under the Lanham

---

419. *Cleary*, 30 F.3d at 1261.
420. *Id.* (holding it is not sufficient for the two works to be "generally similar").
421. *Id.* at 1262.
422. Sergent, *supra* note 69, at 48.
423. *Id.*
424. *Id.* at 81.
425. *Id.* at 83 (emphasis added).
426. Cross, *supra* note 69, at 766 (emphasis added).
427. *Id.*

Act.[428] The Court held that the statute's prohibition of reverse passing off only protected the producers of *tangible* goods rather than the creators of intangible works.[429]

Dastar had edited, repackaged, and distributed a television series that was originally created by Twentieth Century Fox ("Fox") but had fallen into the public domain due to Fox's failure to renew its copyright.[430] Dastar marketed the series as its own product and did not credit Fox.[431] Fox claimed that Dastar's representation of the series as its own, "without acknowledging its nearly wholesale reliance on" Fox, created a "false designation of origin" under § 43(a).[432]

The Court considered whether the term "origin" under § 43(a) referred to the manufacturer or producer of the *physical* goods, or the author of the underlying work. The Court decided that the term "origin" referred only to the manufacturer or producer of the *physical* goods, finding for Dastar.[433] This narrow reading of the term "origin" is difficult to reconcile with the Lanham Act's consumer-protection rationale, since consumers of communicative works are generally more interested in the identity of the works' *authors* rather than their physical manufacturers.[434] Thinking about which party the consumer would hold responsible for product defects is instructive.[435] For example, if a consumer of Dastar's *World War II Campaigns in Europe* found the narration to be tedious or historically inaccurate, they would take their complaint to the creator of the video's expressive content, not the manufacturer of its physical tapes.[436]

Additionally, the Court's narrow interpretation of the term "origin" ignores the Lanham Act's broad protection for service marks, which frequently communicate the origin of intangible services.[437] Moreover, an

---

428. Lastowka, *supra* note 113, at 1200–01; *see, e.g.*, Williams v. UMG Recordings, 281 F. Supp. 2d 1177, 1183 (C.D. Cal. 2003) (finding *Dastar* precludes plaintiffs Lanham Act claim); Borrego v. BMG U.S. Latin, 92 F. App'x. 572, 572 (9th Cir. 2004) (affirming the grant of summary judgement against plaintiff's Lanham Act claim); Bob Creeden & Assocs., Ltd. v. Infosoft, Inc., 326 F. Supp. 2d 876, 879 (N.D. Ill. 2004) (holding that plaintiff cannot prevail on its Lanham Act claim under *Dastar*).

429. Lastowka, *supra* note 113, at 1208.

430. *Id.* at 1201–02.

431. *Id.* at 1202.

432. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003).

433. *Id.* at 31, 38.

434. Lastowka, *supra* note 113, at 1207–08.

435. Sometimes consumers are only interested to know which party is responsible for post-sale product support. *See* Cross, *supra* note 69, at 754.

436. LaFrance, *supra* note 395, at 246.

437. Lunney, *supra* note 413, at 132.

expressive work is generally "the result of creative *services* performed by someone" and trademark law protects the originator of services to the same degree that it protects the originator of physical goods.[438]

Despite the Court's questionable statutory interpretation, the *Dastar* decision has been praised for recognizing two important features of the copyright landscape: first, the threat to the public domain posed by "perpetual" trademark protection; and second, the double bind associated with simultaneously avoiding claims for both non-attribution *and* misattribution.

With respect to the first feature, the Court noted that allowing Fox to sue Dastar for its misrepresentation of authorship "would create a species of mutant copyright law that limits the public's 'federal right to "copy and to use"' expired copyrights."[439] Some scholars have suggested that the Court was trying to protect the public domain from additional burdens following its decision to extend the copyright term in *Eldred v. Ashcroft*.[440] Certainly, the optics of the case were poor; the unsuccessful plaintiffs were not artists seeking credit for their work, "but corporate licensees who had let their copyright protection lapse" and appeared to be using the Lanham Act to vindicate their expired copyright interests.[441] Fox seemed more interested in *preventing* the circulation of the footage, than in requiring proper attribution.[442]

With respect to the second feature (the double bind of non-attribution and misattribution), the Court noted that a positive duty of attribution would place the manufacturers of expressive products "in a difficult position."[443] The Court observed:

> On the one hand, they would face Lanham Act liability for failing to credit the creator of a work on which their lawful copies are based; and on the other hand they could face Lanham Act liability for crediting the creator if that should be regarded as implying the creator's "sponsorship or approval" of the copy.[444]

---

438. LaFrance, *supra* note 395, at 245.

439. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34 (2003).

440. Hughes, *supra* note 310, at 685.

441. Rick Mortensen, *D.I.Y. After* Dastar*: Protecting Creators' Moral Rights Through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements*, 8 VAND. J. ENT. & TECH. L. 335, 342 (2006).

442. *Id.*

443. *Dastar*, 539 U.S. at 36.

444. *Id.* (emphasis omitted).

In other words, even if Dastar had credited Fox in their television series (thereby resolving the non-attribution claim), attribution to Fox could also falsely imply that Fox had sponsored or endorsed Dastar's product. The Court was right to acknowledge the difficulty of satisfying these competing attribution interests. In *Shostakovich v. Twentieth Century-Fox Film Corp.*, the Court noted the tension between an author's attribution interests and the public's right to freely use public domain works.[445] Several Russian composers had objected to the use of their names in a film about Soviet espionage which reproduced their (public domain) music.[446] The composers argued that the use of their names and music in the film implied their "consent, approval or collaboration in the production and distribution of the picture because 'the public at large knows that living composers receive payment for the use of their names and creations in films.'"[447] Justice Koch observed:

> Conceivably, under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works.[448]

While *Dastar* could have resolved the double bind in this case with a relatively simple disclaimer ("This series is based on an original series created by Fox, but it was neither authored nor sponsored by Fox."), providing a sufficient disclaimer to avoid legal sanction for either misattribution or non-attribution becomes more complicated when the "origin" of an expressive work is deeply contested.

---

445. Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 578 (Sup. Ct. 1948).

446. *Id.* at 576–77.

447. *Id.* at 578.

448. *Id.*

3. Should Congress Overturn *Dastar*?

While *Dastar* may have been a victory for the public domain, it left creators unprotected against the misattribution of their expressive works.[449] As AI models become increasingly adept at simulating the distinctive styles of human creators, the dissemination of unattributed or misattributed AI-generated content will increase consumer confusion. This makes a compelling case for restoring the capacity of copyright owners to enforce their attribution interests under § 43(a).[450] This could be achieved by adding a definition of the term "origin" to the statute that includes the author of a copyrighted work.[451]

Although the *Dastar* Court left open the possibility of creators bringing claims for "false advertising" under § 43(a)(1)(B),[452] some courts have relied on *Dastar* to bar such claims where they concerned the origin of a work.[453] As Mark McKenna explains, it would violate the spirit of *Dastar* "to allow parties to avoid the decision simply by recharacterizing as false

---

449. There has been *very limited* use of the Lanham Act to assert attributional interests in creative works post-*Dastar*. *See, e.g.*, Clauson v. Eslinger, 455 F. Supp. 2d 256 (S.D.N.Y. 2006); *see also* Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927 (E.D. Va. 2010).

450. Lastowka, *supra* note 113, at 1174.

451. Hughes, *supra* note 310, at 700. Hughes has suggested incorporating the following definition of the word "origin" in the statute: "The word 'origin' as used in 15 USC § 1125(a) shall, as applied to and only to such works as are protected by copyright, be interpreted to include the person(s) defined as the author(s) of the copyrighted work under Title 17." *Id.*

452. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 38 (2003). Justin Hughes argues that misattributions of authorship may still be actionable under § 43(a) if they are framed as misrepresentations of *fact*. Hughes, *supra* note 310, at 714. In other words, even if "*Deep Throat* falls into the public domain, you still cannot package it with a label that says 'Walt Disney presents' because that is a false description of fact" under § 43(a). *See id.* at 698–99.

453. *See, e.g.*, Antidote Int'l Films, Inc. v. Bloomsbury Pub., PLC, 467 F. Supp. 2d 394, 399 (S.D.N.Y. 2006) ("[T]he holding of *Dastar* would be meaningless if a false authorship claim could be recast in this manner."); Agence France Presse v. Morel, 769 F. Supp. 2d 295, 308 (S.D.N.Y. 2011) ("The import of *Dastar* . . . cannot be avoided by shoe-horning a claim into section 43(a)(1)(B) rather than 43(a)(1)(A)."); Romero v. Buhimschi, 396 F. App'x 224, 233 (6th Cir. 2010) (finding that the plaintiff's claims "related to authorship, rather than the nature, characteristics, or qualities" of the relevant work); Dutch Jackson IATG, LLC v. Basketball Mktg. Co., 846 F. Supp. 2d 1044, 1048–49 (E.D. Mo. 2012) ("The plaintiffs' novel misrepresentation-by-implication theory is an impermissible work-around of the holding in *Dastar*. The Court ruled that 'no Lanham Act liability attaches to [defendant]' for merely saying that it was the producer of the video. This statement holds true whether plaintiffs bring their claim under the 'confusion . . . as to the origin' provision of section 43(a)(1)(A) or the 'misrepresents the nature, characteristics [or] qualities' provision of section 43(a)(1)(B)." (alteration in original)).

advertising a claim that is really about the origin of content."[454] In light of these judicial trends, it would be more prudent for Congress to amend the definition of "origin" under the Lanham Act.[455]

Trademark-style protection for authorial attribution offers several advantages. First, it does not confine the benefit of attribution to the protection of personality rights but recognizes the broader public interest in protecting consumers from misleading designations of authorship.[456] Arguably, this interest extends to proper attribution of public domain works.[457] The capacity to distinguish between authentic works by Shakespeare and AI-generated works in the style of Shakespeare is an important means of preserving our shared cultural heritage.[458]

Under the dominant understanding of *Dastar*, a bad actor could manufacture and distribute new physical copies of Shakespeare's *Othello* under their own name, without violating the Lanham Act, because they would represent the true "origin" of the *physical* goods.[459] This outcome is deeply problematic (although *Othello* is in the public domain) because it distorts the public's understanding of our shared cultural history. If the Lanham Act's protection did not extend to public domain works, "[g]reat masters would fall into obscurity . . . and some with no talent would develop artistic reputations solely through dishonestly claiming authorship."[460]

---

454. Mark P. McKenna, Dastar*'s Next Stand*, 19 J. INTELL. PROP. L. 357, 379 (2012).

455. However, there may be some scope for false endorsement claims under 1125(a)(1)(A). *See, e.g.*, Pellegrino v. Epic Games, Inc., 451 F. Supp. 3d 373, 386–87 (E.D. Pa. 2020) (finding that reproduction of a musical performer's signature dance move in a video game created the false impression that the performer had endorsed the game; holding that the performer's false endorsement claim is distinct from his false designation of origin claim and is not barred by *Dastar*). *See also* Alcon Ent., LLC v. Tesla, Inc., CV 24-9033-GW-RAO (C.D. Cal. Sept. 11, 2025) (alleging false endorsement under 1125(a)(1)(A) by appropriation of the aesthetic of Blade Runner 2049 for an AI-generated promotional image).

456. Lastowka, *supra* note 113.

457. Landau, *supra* note 316, at 49.

458. *Id.* I understand the concerns expressed by the Court in *Dastar* that secondary uses of public domain works may be chilled if creators are concerned that they will be sued for failing to provide proper attribution to the original creators of public domain works. But I think this fear is overblown. Attribution requirements do not prevent *uses* of public domain works but simply ensure that our cultural heritage is accurately acknowledged and preserved. For public domain works in particular, I am more concerned with avoiding misattribution than remedying non-attribution.

459. *Id.*

460. *Id.*

Second, trademark law provides a natural limit to the scope of attribution rights; they arise only when consumers are likely to be confused as to the origin of a particular work. This limitation recognizes that not every attributional interest should manifest in a legally cognizable claim; that would impose an extraordinary burden on downstream creators.[461] Instead, only plaintiffs who can show that their work is recognizable would be able to obtain relief.[462] If relief were not limited by the need to show consumer confusion as to origin, then *any* degree of similarity between two works could potentially be perceived as a "misrepresentation" of the origin of the work. This could impose significant burdens on downstream creators.

Third, relief can be tailored to the attributional interests being asserted. For example, injunctive relief might be limited to dissemination of the plaintiff's work without proper attribution.[463] In *Follett v. New American Library, Inc*., the defendant publisher was permitted to continue distributing the disputed work, provided that it was accompanied by proper attribution.[464]

Fourth, relief under § 43(a) is not limited to copyright owners. Relief is available to "any person who believes that he or she is or is likely to be damaged by" a false designation of origin or false or misleading description or representation of fact.[465] This allows a broader cohort of creators affected by generative AI to vindicate their attributional interests, even if they are not the copyright owners.[466]

---

461. Heymann, *supra* note 396, at 60.

462. *Id.* at 97.

463. *See* Sergent, *supra* note 69, at 64.

464. 497 F. Supp. 304, 313 (S.D.N.Y. 1980).

465. 15 U.S.C. § 1125(a)(1).

466. However, plaintiffs would still need to substantiate allegations of concrete injury caused by, for example, diversion of sales and reputational harm associated with the misattribution of AI-generated works. *See* MillerKing, LLC v. DoNotPay, Inc., 702 F. Supp. 3d 762, 773 (S.D. Ill. 2023) ("The Lanham Act provides a cause of action to a competitor who 'is or is likely to be damaged by' the defendant's false advertising or false association . . . [b]ut 'Article III standing requires a concrete injury even in the context of a statutory violation.'"); TransUnion LLC v. Ramirez, 594 U.S. 413, 417, 426, 427 (2021) ("To have Article III standing to sue in federal court, a plaintiff must demonstrate, among other things, that they suffered a concrete harm . . . [those include] [p]hysical harm, monetary harm, or various intangible harms including . . . reputational harms . . . . [T]his Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right[]' . . . an injury in law is not an injury in fact.").

4. Limitations

Despite these advantages, the Lanham Act is an imperfect vehicle for enforcing the attribution interests of artists, for at least seven reasons. First, the Act's focus on consumer protection subordinates the author's personality interests in attribution.[467] As Jessica Silbey observes, "trademark law does not map well onto claims about the importance of nourishing and protecting reputation for both personal and professional benefit."[468] For example, § 43(a) limits relief to creators with name recognition because only then will the defendant's actions cause consumer confusion.[469] However, there are many unknown creators with equally compelling interests in attribution. This is a considerable limitation, but not a novel one. Copyright law generally provides greater protection to well-known artists who "have a lesser burden than obscure artists in proving access to the infringed work."[470] Pro-consumer justifications for attribution rights may also be "more likely to overcome the anti-moral rights orientation" of American law.[471] And limiting the scope of relief to works that cause consumer confusion is one way of reducing the burdens imposed by attribution requirements on downstream creators.

Second, relief under § 43(a) is limited to the use of false designations of origin "in commerce."[472] This commercial use requirement may exclude defendants who distribute AI-generated art in non-commercial settings, even if such distribution also causes harm to the plaintiff's attributional interests.

Third, if the developers, deployers, or users of AI models are required by § 43(a) to disclose the true provenance of AI outputs, such disclosure obligations may need to grapple with the limitations on compelled speech. Broadly speaking, courts have held that a commercial party's First

---

467. Kwall, *supra* note 296, at 1020. *See also* McGeveran, *supra* note 92, at 361 (discussing trademark doctrine's reliance on consumer perceptions to set the boundaries of infringement).

468. SILBEY, *supra* note 81, at 150.

469. 15 U.S.C. § 1125(a)(1).

470. Judith B. Prowda, *Application of Copyright and Trademark Law in the Protection of Style in the Visual Arts*, 19 COLUM.-VLA J. L. ARTS 269, 298 (1994).

471. Derek E. Bambauer & Robert W. Woods, *AI, Artists, and Anti-Moral Rights*, 113 GEO. L.J. (forthcoming 2024) (Apr. 11, 2024), https://papers.ssrn.com/abstract=4790497. *See also* Daniel J. Gervais, *The Right of Attribution in Literary Works in Three Acts, by W. Shakespeare*, 22 VAND. J. ENT. & TECH. L. 39, 67 (2019) (arguing that the "trademarkization" of attribution may increase the purchase of European attribution norms in the U.S.).

472. 15 U.S.C. § 1125(a)(1).

Amendment rights "are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[473] Prohibiting 5you or a user of his model from marketing the model's outputs as "authentic" works by Kim Jung Gi seems "reasonably related" to the consumer-protection rationale of the Lanham Act. However, as the scale of a pretraining dataset expands, any legal requirements imposed on model developers, deployers, or users to attribute the "originators" of model outputs may raise much more complex First Amendment questions.

Fourth, there is a risk that powerful rights holders might weaponize attribution requirements to chill the creation of stylistically similar expression. Jane Ginsburg describes this as "the slippery slope argument" or the fear that attribution rights might "open a back door to integrity rights" and thereby stifle the creative re-use of prior works.[474] In other words, the threat of legal sanction for non-attribution or misattribution might discourage secondary creators from creating new expressions that are similar to existing works.[475] This threat to downstream creativity is non-trivial, but it is one that trademark law has always managed. As Glynn Lunney observes, trademark enforcement is inherently anti-competitive; courts have always wrestled with the proper balance between improved information flow and reduced competition.[476] Accordingly, "the question is not whether improper motives are present in any given case—they are—but whether there is also a relevant consumer interest at stake."[477]

To reduce the risk of powerful rights holders weaponizing § 43(a), relief should be limited to proper labeling and should not include statutory damages, injunctive relief against copying, or recovery of the defendant's profits.[478] If relief is so limited, only plaintiffs who value proper attribution will bear the costs of litigation.[479] Courts can further discourage bad actors

---

473. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

474. Ginsburg, *supra* note 108, at 47–48.

475. Sergent, *supra* note 69, at 48.

476. Lunney, *supra* note 413, at 150.

477. *Id.* at 151.

478. *Id.* at 163.

479. *Id.* Many creators don't care about attribution; leaving attribution interests to be enforced under a private right of action self-selects for creators for whom proper attribution is worth the legal fees. This is one reason why a private right of action is preferable to a general requirement to disclose any use of AI in the creative process.

from weaponizing attribution rights by requiring proof of materiality,[480] and awarding attorney's fees to the prevailing party.[481]

Additionally, Congress could limit relief under § 43(a) to affirmative misrepresentations of origin, rather than mere omissions.[482] Congress could exclude non-attribution from the scope of relief, so that 43(a) only covers *express* rather than *implied* reverse passing off. This would reduce the scope for abuse by limiting the range of actions that could be weaponized by opportunistic litigants. It would also promote the *Dastar* Court's objective of shielding the distributors of public domain works from unnecessary burdens.[483]

Mary LaFrance argues that "mere silence" should be excluded from the scope of relief under § 43(a) for the same reason that Chrysler would not be sanctioned for failing to disclose the non-Chrysler source of every component of its vehicles.[484] If non-attribution was actionable under § 43(a), it could impose an unlimited burden on downstream creators. Some courts have already held that non-attribution is not actionable under the Lanham Act.[485] Limiting the scope of relief under 43(a) to affirmative acts of misattribution would also be consistent with the moral intuition that non-attribution is often less egregious than deliberate misattribution.[486]

Fifth, although the Lanham Act is consumer-oriented, § 43(a) does not prevent artists from licensing their work in ways that may continue to deceive consumers.[487] For example, if John Grisham grows tired of writing,

---

480. U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922 (3d Cir. 1990) ("[P]laintiff must also show that defendant's misrepresentation is 'material, in that it is likely to influence the purchasing decision.'").

481. Lunney, *supra* note 413, at 164.

482. LaFrance, *supra* note 395, at 234–35.

483. *Id.* at 241.

484. *Id.* at 237. *See also* Cross, *supra* note 69, at 756 (explaining that trademark law does *not* require "full disclosure of source information").

485. *See, e.g.*, Cleary v. News Corp., 30 F.3d 1255, 1260 (9th Cir. 1994) ("[T]he case law does suggest that the Lanham Act does not create a duty of express attribution, but does protect against misattribution."). *But see* Lamothe v. Atl. Recording Corp., 847 F.2d 1403, 1408 (9th Cir. 1988) (affixing an *incomplete* designation of authorship is no less "false" than affixing an *inaccurate* designation of authorship)*; see also Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, *reprinted in* 10 COLUM.-VLA J. L. & ARTS 513, 553 (1986) ("[O]mission of an author's name from his work may constitute 'an implied reverse passing off' and thus violate section 43(a) of the Lanham Act.").

486. Hansmann & Santilli, *supra* note 397, at 130–31. (explaining that the negative right of attribution is designed to protect artists from the theft of the reputation they have cultivated and to protect the public from being misled about the true source of the work).

487. Noti-Victor, *supra* note 47, at 172–73.

he can license the use of his name on books written by an undisclosed ghostwriter, and there would be no cause of action under § 43(a), although consumers would be deceived about the true origin of these books. Similarly, before his death, Gi could have licensed the use of his name on the outputs of 5you's model without disclosing this information to his fans.[488] As Mary LaFrance points out, the consumer's interest in accurate authorial attribution is "just as significant" when misattribution is authorized as when it is unauthorized.[489] However, § 43(a) does not protect the public from *licensed* reverse passing off.[490]

Sixth, to the extent that AI art generated in the style of a well-known artist "free rides" on the goodwill generated by that artist, that effect will persist even in the context of proper attribution.[491] This is a longstanding issue with art merchandise that is "inspired by" the work of well-known artists.[492] The Museum of Modern Art, for example, is currently selling "Joan Miró Gold-Plated Dot Squiggle Earrings" for ninety-six dollars.[493] At first glance, this seems like a relatively small sum to part with for a Miró. However, upon closer inspection, it becomes apparent that the earrings were not, in fact, created by Joan Miró but manufactured by a Spanish jewelry brand that collaborated with the artist's estate to create a collection "that pays tribute to the famed Spanish artist."[494] The earrings are inspired by a motif from Miró's 1924–25 oil painting, *The Harlequin's Carnival,* which contains several prominent "squiggles."[495]

Disclosure that merchandise is "inspired by" an artist's distinctive aesthetic (and is not an authorized reproduction of their work) may not "adequately dispel the confusion generated by the consumer's initial contact" with the product.[496] Jane Ginsburg explains that a "Mondrian-style" handkerchief does not need to bear the artist's name or signature in order to

---

488. For an interesting discussion of the normative implications of ghostwriting, and the public's participation in the charade, see, for example, *id.* at 183–84.

489. LaFrance, *supra* note 395, at 247.

490. *Id.* at 248.

491. Gerard Scimeca, *AI's Free Ride on Creative Labor Is Undermining the Marketplace*, DC J. (Oct. 29, 2025), https://dcjournal.com/ais-free-ride-on-creative-labor-is-undermining-the-marketplace/ [https://perma.cc/AA5S-2X6H].

492. Ginsburg, *supra* note 290, at 16.

493. *Joan Miró Gold-Plated Dot Squiggle Earrings*, MOMA DESIGN STORE, https://store.moma.org/products/joan-miro-gold-plated-dot-squiggle-earrings [https://perma.cc/RTR2-E3U8].

494. *Id.*

495. *Id.*

496. Ginsburg, *supra* note 290, at 22.

visually suggest to consumers that "the article is 'a Mondrian' and not simply 'inspired by Mondrian'" by virtue of its "strong stylistic similarity with Mondrian's work."[497] In other words, the creators of secondary works that reproduce an artist's distinctive style still benefit from the favorable impression given by the similarities between the works.[498] These similarities may be sufficient to generate sales, even if they are tempered by proper disclosure about the origin of the works.[499] Accordingly, even if 5you were required by law to attach disclaimers to the outputs of his model, he would still benefit from the favorable impression caused by the similarities between Gi's work and the outputs of his model.

Finally, perhaps the most important limitation of § 43(a) is that it cannot prevent the dilution of an artist's brand. In March 2025, OpenAI updated ChatGPT with new image generation capabilities, including the reproduction of Studio Ghibli's distinctive style.[500] The Internet was soon flooded with "Ghiblified" content, ranging from wholesome family photographs to disturbing scenes of war.[501] Although this scenario is not dissimilar from the circumstances surrounding 5you and Kim Jung Gi, there are several important differences. First, there is no *misattribution of authorship* because the use of ChatGPT to create these images was well publicized.[502] Nobody believes that Hayao Miyazaki sat down to redraw the events of September 11 in his signature style.[503]

Second, unlike Gi, Studio Ghibli is not concerned with *non-attribution of source*. Studio Ghibli is sufficiently well-known that most consumers encountering the Ghiblified outputs of ChatGPT recognize the distinctive aesthetic as originating with Studio Ghibli. They do not think that the aesthetic originated with OpenAI, or with the user who prompted the model.[504]

In other words, the harm suffered by Studio Ghibli does not fall into a category of harm (*misattribution of authorship* or *non-attribution of source*) that can be remedied by proper attribution. Even if ChatGPT's outputs were

---

497. *Id.* at 16.
498. *Id.* at 17.
499. *Id.*
500. Kircher, *supra* note 9.
501. Read, *supra* note 1.
502. Kircher, *supra* note 9.
503. Kate Plummer, *Studio Ghibli Trend Sparks Flood of Offensive Images*, NEWSWEEK (Mar. 27, 2025), https://www.newsweek.com/studio-ghibli-chatgpt-internet-trend-2051443. [https://perma.cc/Q44G-L2YW].
504. Hoel, *supra* note 371.

accompanied by a detailed disclaimer ("This image was generated by an AI model trained on the works of Studio Ghibli and was not endorsed by Studio Ghibli"), this would not prevent the flood of "Ghiblified" images from tainting the distinctive quality of Miyazaki's work.[505]

One user observed that the reproducibility of Ghibli's aesthetic felt like "someone laughingly stole their special bag of magic and dumped it out on an unkept playground."[506] Another user described their emotional response to the flood of Ghibli-style images online: "[I] grew up on Studio Ghibli. [I] come back to it for comfort and to watch it with my mom. [N]ow it's everywhere, everything. [I']ve lost something sacred."[507] As writer Erik Hoel explains:

> While ChatGPT can't pull off a perfect Miyazaki copy, it doesn't really matter. The semantic apocalypse doesn't require AI art to be exactly as good as the best human art. You just need to flood people with close-enough creations such that the originals feel less meaningful.[508]

The harm to Studio Ghibli is exacerbated by Miyazaki's reputation "as an uncompromising craftsman and humanist" and his well-documented disdain for AI.[509] As one commentator observed, "the man on record with likely the strongest and bluntest disavowal of using AI tools for art, is now the same man whose notoriously painstakingly handcrafted art is being giddily automated by ChatGPT users."[510]

The mindless generation of Ghibli-style images also obscures the cultural significance of Miyazaki's work. As Primavera de Filippi explains, Miyazaki's art is "deeply embedded" in Japanese cultural practices and philosophical traditions, including Shinto animism and Japanese folklore.[511] Consequently, AI-generated "Ghibli-style" images are "surface-level

---

505. *See, e.g.*, Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* AESTHETICS (4th ed. 2017) (arguing that what "withers in the age of mechanical reproduction is the aura of the work of art"). The harm suffered by Studio Ghibli here follows the same theory of harm as dilution by blurring, where the overuse of a mark dilutes its distinctive quality.

506. Hoel, *supra* note 371.

507. *Id.*

508. *Id.*

509. Read, *supra* note 1.

510. Merchant, *supra* note 1.

511. Primavera de Filippi, *Studio Ghibli: When AI Meets Artistic Legacy*, MEDIUM (Mar. 31, 2025), https://medium.com/alien-club/studio-ghibli-when-ai-meets-artistic-legacy-fc65d004ad65 [https://perma.cc/JR5Q-8K28].

imitations divorced from the profound cultural context that gives the original work its emotional weight and significance."[512] Proper attribution, while important for dispelling consumer confusion, cannot protect an artist's distinctive style from AI dilution.

Two doctrines within intellectual property law bear some conceptual resonance with the "cheapening" of Studio Ghibli's hand-drawn aesthetic via machinic over-saturation: trademark genericide and copyright's *scenes a faire* doctrine. Genericide occurs when a trademark no longer signifies a particular source but instead represents an entire category or type of product, for example, "aspirin" or "shredded wheat."[513] When this occurs, the generic mark is no longer protected and falls into the public domain.[514]

Similarly, the copyright doctrine of *scenes a faire* denies protection to stock or standard elements of a particular genre of expression, for example, the capes, alter egos, and extraordinary abilities of most fictional superheroes.[515] Accordingly, those features are unprotectable because they need to be available for use by subsequent creators within the same genre.[516] Some scholars have described the process by which formerly protected elements permeate the public consciousness and become stock or expected features of certain genres as "copyright genericide."[517]

Something of this nature is clearly occurring with the "Ghiblification" of the Internet. As ChatGPT transforms every user photo into a Studio Ghibli knockoff, the features of Miyazaki's work that were previously distinctive may become stock or expected features of digital illustrations: soft color palettes, dreamlike backgrounds, organic shapes, fluid motion, and characters with simple, rounded features and large, emotive eyes. Attribution rights, while important, cannot prevent AI from "genericizing" the formerly distinctive features of popular artists.

---

512. *Id.*

513. Xiyin Tang, *Against Fair Use: The Case for a Genericness Defense in Expressive Trademark Uses*, 101 IOWA L. REV. 2021, 2027 (2015).

514. *Id.*

515. Jamie Lund, *Copyright Genericide*, 42 CREIGHTON L. REV. 131, 142 (2009).

516. *Compare* Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 433 (2d Cir. 1940) ("We think it plain that the defendants have used more than general types and ideas and have appropriated the pictorial and literary details embodied in the complainant's copyrights."), *with* Lewinson v. Henry Holt & Co., 659 F. Supp. 2d 547, 567 (S.D.N.Y. 2009) ("[I]n a work about a superhero, scenes that depict the superhero 'perform[ing] feats of miraculous strength,' wearing a 'tight-fitting acrobatic costume[ ],' battling 'wealthy megalomaniacal villains,' exercising the 'power of self-propelled flight,' or leading a double life are all unprotectable scènes à faire." (alterations in original)).

517. Lund, *supra* note 515, at 131–32.

Given these substantial limitations, Congress should not overturn *Dastar* but instead recognize a narrow right of attribution exclusively in the context of AI-generated works. Non-attribution should remain generally non-actionable outside the AI context.[518] The following Part will set out the contours of such an AI-specific attribution right in more detail.

IV. AN AI-SPECIFIC ATTRIBUTION RIGHT

This Part sets out the contours of an AI-specific attribution right that would require the disclosure of copyrighted training data in model metadata. In general, I argue that downstream creators should not be burdened with a positive legal duty to credit every source of creative influence. As detailed in Part III, community attribution norms are, and should remain, context-specific. There are plenty of contexts in which the public interest is served by norms of non-attribution. However, I distinguish a general duty of attribution from the narrower obligation of AI firms to disclose the copyrighted works on which they trained their generative models. I argue that Congress should enact training data transparency provisions modeled on the European Union's *Artificial Intelligence Act*. This may help to mitigate the obscuring effect of AI models on the labor and legacy of human artists.

A. Source Attribution

As mentioned, Kim Jung Gi has two attribution interests: first, he wants to disclaim authorship of the outputs of 5you's model; second, he wants consumers to know that 5you's model was trained on his works. In other words, Gi wants to avoid two outcomes: (1) *misattribution of authorship*; and (2) *non-attribution of source*.[519]

---

518. *See generally* Band & Schruers, *supra* note 297 (arguing that attribution should remain community-driven and non-actionable because the law cannot handle the various contextual nuances of when non-attribution is unacceptable and when it is not only acceptable, but strongly encouraged).

519. *See supra* Section II.A. The Court in *Dastar* acknowledged the twin difficulty of avoiding both misattribution and non-attribution:

> On the one hand, [the creators of secondary works] would face Lanham Act liability for failing to credit the creator of a work on which their lawful copies are based; and on the other hand they could face Lanham Act liability for crediting the creator if that should be regarded as implying the creator's "sponsorship or approval" of the copy.

Avoiding the second outcome is more complex than avoiding the first. Intuitively, we can understand why Gi wants some credit for the outputs of 5you's model; the model was trained on his body of works. The model's outputs were not just "inspired by" Gi; they were designed *to look as though they were created by him*. Gi wants recognition for this use of his work, even if he doesn't want to be regarded as the author of the model's outputs.

To understand the complexity of this impulse, let's modify the facts a little. Gi's long-term assistant, Inok, has become very good at imitating Gi's distinctive style after years of shadowing him and studying his works. After Gi's death, Inok begins to paint new works in the style of Gi that look as though they were authored by him but are not substantially similar to any of his individual works. Inok distributes these works in foreign markets that are not familiar with Gi. Does she have a duty to attribute these works to Gi? What degree of similarity between Inok's new works and Gi's originals would trigger a duty of source attribution?

Modifying the fact pattern reveals that our initial instinct ("of course Gi should receive source credit for the model outputs") appears less persuasive when the "Gi dupes" are created by a human hand, rather than by a machine. This difference in our intuitions reveals an underlying bias about authorship credit based on the contributions made by physical labor and skill.

As the imitation capabilities of AI expand, it poses a unique challenge to authors' interests in attribution. Many artists face a similar conundrum to Kim Jung Gi: they do not want to be associated with AI-generated art they did not create (*misattribution of authorship*) but they do want to receive credit for the use of their work as training data (*source attribution*).[520]

While the influence of Gi's work on the outputs of 5you's model is clear (because the model was trained exclusively on Gi's work), a duty of source attribution—if it applied to all copyrightable subject matter, not just training data— would expose secondary creators to potentially unlimited liability for failure to credit every source of influence.

Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 36 (2003) (emphasis omitted).

520. Alec Tyson & Brian Kennedy, *Many Americans Think Generative AI Programs Should Credit the Sources They Rely On*, PEW RSCH. CTR. (Mar. 26, 2024), https://www.pewresearch.org/short-reads/2024/03/26/many-americans-think-generative-ai-programs-should-credit-the-sources-they-rely-on/. [https://perma.cc/9G9K-XP99].

In *Dastar*, the Court acknowledged the potentially unlimited scope of a positive legal duty of attribution. Delivering his opinion for the Court, Justice Scalia explained that:

> A video of the MGM film Carmen Jones, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Merimee (who wrote the novel on which the opera was based). In many cases, figuring out who is in the line of "origin" would be no simple task. . . . We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.[521]

In its Amicus Brief, the Department of Justice expressed similar concerns:

> Section 43(a) should not be construed in a manner that would establish a generalized duty on the part of producers to credit the original creators of works. Such a construction could overextend the Lanham Act by giving the original creators of works a perpetual *trademark* right to prevent the uncredited copying of a work, even after the work is no longer subject to *copyright or patent* protection from such copying.[522]

The Court in *Dastar* refused to recognize a positive duty of attribution for public domain works due to its potentially unlimited nature.[523] The same concerns would also apply to a duty of attribution for copyrighted works. As Amy Adler explains, copying is part of "the history of art: a history of innovation built on emulation."[524] A duty of attribution, without limits, would impose significant burdens on downstream creators. Every painting of a sleeping woman would conceivably need to acknowledge Manet's *Olympia* (1865), Titian's *Venus of Urbino* (1538), Giorgione's *Sleeping Venus* (1510), and many others.[525]

If copyright law required creators to credit every source of inspiration, this would transform attribution into a search for causation and impose an enormous burden on downstream creators. How could judges possibly

---

521. *Dastar*, 539 U.S. at 35–36.

522. Brief for the U.S. as Amicus Curiae Supporting Petitioner at 6, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (No. 20-428).

523. *Dastar*, 539 U.S. at 35.

524. Adler, *supra* note 356, at 568.

525. *Id.*

identify all of the different sources of influence for a creative work? What quantitative contribution must an original work have made to a secondary work in order to trigger a positive duty of attribution to the original creator? A legal requirement to attribute all sources of influence to avoid legal sanction would chill downstream creativity.

In addition to creating almost unlimited liability, a duty of attribution would quickly encounter difficult edge cases where the true "origin" of a work is hotly contested.[526] For example, how much does country music owe to African American artists?[527] Where the "origin" of something is contested, what is the "correct" attribution required to avoid legal sanction? How can we compel someone to speak on something that has no clear factual correspondence? A positive duty of attribution would open intolerable and normatively undesirable floodgates.

B. Training Data Transparency

To remedy the non-attribution of training data, without creating a positive legal duty of attribution, Congress could require the developers of AI models to disclose their training data, following the EU's approach.[528] The EU's AI Act requires providers of general-purpose AI models to "draw up and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model."[529] These transparency provisions are designed to enable copyright owners to

---

526. I am grateful to Ben Sobel for this point.

527. *See, e.g.*, Nadine Hubbs, *Is Country Music Quintessentially American?*, 40 AM. MUSIC 505 (2022); Jordan-Marie Smith, *Tracing Country Music's Roots Back to 17th-Century Slave Ships*, WASH. POST (Aug. 2, 2019), https://www.washingtonpost.com/nation/2019/08/02/tracing-country-musics-roots-back-th-century-slave-ships/; Andrew R. Chow, *Black Artists Helped Build Country Music—And Then It Left Them Behind*, TIME (Sept. 11, 2019), https://time.com/5673476/ken-burns-country-music-black-artists/ [https://perma.cc/CXP9-DWP6]; Lynn Brown, *Beyoncé's Grammy-Winning Cowboy Carter Highlights the Long History of Texas' Black Cowboy Culture*, BBC (Feb. 4, 2025), https://www.bbc.com/travel/article/20240404-beyoncs-cowboy-carter-highlights-the-long-history-of-texas-black-cowboy-culture [https://perma.cc/XPD3-YJFY].

528. *See, e.g.*, the Generative AI Copyright Disclosure Act of 2024 (H.R.7913) introduced in 2024 which, if enacted, would require the developers of training datasets used to build generative AI systems to provide a "sufficiently detailed summary of any copyrighted works used" in the training dataset, or to alter the dataset, to the Register of Copyrights.

529. Regulation 2024/1689, of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act), 2024 O.J. (L), Recital (107).

"exercise and enforce their rights under Union law,"[530] for example, by verifying that their requests to opt-out of commercial text and data mining under Article 4(3) of the EU Copyright Directive have been respected.[531]

The EU's training data transparency provisions, while normatively desirable, may encounter some practical hurdles.[532] It is extremely resource-intensive to provide and verify even basic information (such as title, author, date of publication) about every item listed within a training dataset comprised of billions of works, especially where those works were automatically scraped from the Internet.[533] This suggests that even a "detailed summary" of training data may not satisfy a creator's desire for proper attribution.[534]

Since 5you's model was trained exclusively on Gi's works, the value of training data transparency to Gi is very clear. Conceivably, the following disclaimer could be included in the metadata attached to all model outputs: "This work was generated by an AI model that was trained on works created by Kim Jung Gi. Kim Jung Gi did not endorse this work."[535]

While the disclosure obligations are intuitive in the case of Gi, they are less intuitive where a model has been trained on billions of works by different creators. How could attribution be meaningfully provided in that context?[536] Does the duty extend to all the data used to train the earlier models that trained, tuned, or otherwise informed the final model?[537]

Mass attribution is a difficult problem. As the number of contributors to a project increases, the ability of a third party to discern their individual contributions declines. In other words, mass attribution dilutes the value of individual credit.[538] This is one reason why the Writers Guild of America

---

530. *Id.*

531. Adam Buick, *Copyright and AI Training Data—Transparency to the Rescue?*, 20 J. INTELL. PROP. L. PRAC. 182, 189 (2025).

532. *Id.*

533. *Id.* at 185.

534. *Id.* at 189.

535. However, metadata can easily be removed.

536. Michael Weinberg, *Is There A Coherent Theory of Attributing AI Training Data?*, MICHAEL WEINBERG (July 15, 2024), https://michaelweinberg.org/blog/2024/07/15/ai-attribution-what-does-it-mean/ [https://perma.cc/327R-4E5D].

537. *Id.*

538. Fisk, *supra* note 10, at 27.

has always insisted on limiting the number of writers who can rewrite a script.[539]

There are some interesting lessons to be learned about mass attribution from the history of free and open-source software ("F/OSS"). Most licenses require the creators of code to be attributed when their code is redistributed. However, attribution often appears in product documentation "stretching into tens of thousands of pages."[540] The problem is so bad that some F/OSS consumers choose to pass on an entire project's source code instead of compiling tedious attribution documents.[541] Arguably, this defeats the purpose of permissive licenses, which is to *maximize* downstream uses.[542] Kate Downing argues that more developers would likely donate their work to the public domain if they knew that their "permissive" licenses were actually increasing the overhead for downstream users and making attribution inaccessible.[543]

Where attribution is buried deep in documentation, some of the original motivation for attribution also disappears. Previously, attribution allowed developers to signal their skills to prospective employers.[544] Today, such signals are found in other places, not from an individual name discovered "among a sea of other OSS projects in someone's attribution file."[545]

One solution to the problem of mass attribution could be a threshold requirement. Specifically, attribution would only be required where the author's work constitutes a threshold fraction of the training data. This threshold could be set by industry-specific norms. For example, the Writers Guild of America requires the first writer of an original screenplay to receive credit if their work represents "a contribution of more than 33% to the final shooting script."[546] Similarly, where a copyright owner's work constitutes over 50% of a training dataset, this could trigger a duty of disclosure.

---

539. Writers Guild of America West, *Screen Credits Manual*, https://www.wga.org/contracts/credits/manuals/screen-credits-manual [https://perma.cc/2DRU-FLTE].

540. Kate Downing, *Is Open Source Attribution Dead?*, L. OFFS. KATE DOWNING (Nov. 28, 2022), https://katedowninglaw.com/2022/11/28/is-open-source-attribution-dead/ [https://perma.cc/5GAN-S5FT].

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. Writer's Guild of America, *supra* note 539.

However, if disclosure requirements are only triggered by threshold contributions to training data, this misapprehends the harm caused by unattributed output. When a large language model reproduces the scholarship of an academic researcher without citing them,[547] it is not defensible that the researcher's work constitutes a tiny fraction of the dataset on which the overall model was trained. The model's individual response is entirely reliant on the researcher's work. This is one reason why output attribution is a better approach.

Tracing the influence of specific training data on generated outputs is an active area of research within the machine unlearning community.[548] Training data attribution ("TDA") is a technically complex problem because LLMs internalize and transform the information they receive during training into hidden representations within a high-dimensional space, containing mathematical patterns and structures.[549] This transformation process "does not inherently retain any clear mapping back to individual data points in the training set."[550] Furthermore, a generated output will be influenced by multiple data points in the training set, not just one.[551] This makes it difficult to attribute a generated response to specific training data.[552] Consequently, generative search engines often fail to cite supporting sources or cite nonexistent sources.[553]

---

547. In a conversation with the author, Anthropic's large language model, Claude, reproduced the theory of contextual integrity without citing the theory's author, Helen Nissenbaum.

548. *See, e.g.*, Woosung Choi et al., Large-Scale Training Data Attribution for Music Generative Models via Unlearning (Oct. 7, 2025) (unpublished manuscript) (on file with arXiv), http://arxiv.org/abs/2506.18312 [https://perma.cc/KL57-3VD6]; Shiyuan Zhang et al., Exploring Training Data Attribution Under Limited Access Constraints (Sept. 16, 2025) (unpublished manuscript) (on file with arXiv), http://arxiv.org/abs/2509.12581 [https://perma.cc/A372-V2HR].

549. Huang & Chang, *supra* note 155, at 4.

550. *Id.*

551. *Id.* at 5.

552. *Id.*

553. *See, e.g.*, Tianyu Gao et al., *Enabling Large Language Models to Generate Text with Citations*, *in* PROCEEDINGS OF THE 2023 CONFERENCE ON EMPIRICAL METHODS IN NATURAL LANGUAGE PROCESSING 6465 (Houda Bouamor et al. eds., 2023), https://aclanthology.org/2023.emnlp-main.398/ [https://perma.cc/B36B-BXYK] ("[E]ven the best models lack complete citation support 50% of the time."); Zuccon et al., *supra* note 160, at 51 (most of the references cited by ChatGPT in its responses do not exist, and of those that do exist, they do not support the model's claims); Nelson Liu et al., *Evaluating Verifiability in Generative Search Engines*, *in* FINDINGS OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS: EMNLP 2023 7001, 7002 (Houda Bouamor et al. eds., 2023), https://aclanthology.org/2023.findings-emnlp.467/ [https://perma.cc/9GDU-EQFN] (on average, only 51.5% of sentences generated by AI search

However, technological improvements are occurring all the time, motivated in part by the strong financial interests of large rights holders. Universal Music Group has partnered with an AI start-up called ProRata.ai to develop a system of fractional attribution that will facilitate per-use proportional compensation for artists whose works are used to generate AI outputs.[554]

Although the enforcement of training data transparency requirements will inevitably require some difficult administrative choices,[555] it represents an important step in mitigating the harmful effects of generative AI on creative incentives.

C. Alternative Remedies

This section will explain why alternative mechanisms for enforcing attribution rights would not meet the challenge presented to artists by generative AI.

First, some large rights holders have negotiated attribution requirements as part of their licensing deals with AI firms.[556] While licensing may be an effective tool for some copyright owners,[557] not all creators have the bargaining power to negotiate with AI firms, and not all AI firms have the

---

engines are fully supported with citations, and only 74.5% of citations support their associated sentence); Jaźwińska & Chandrasekar, *supra* note 161 (ChatGPT frequently misattributes block quotes to the wrong publisher, even if the publisher has a licensing deal with OpenAI that requires proper attribution). *But see* Orion Weller et al., "According to ...": Prompting Language Models Improves Quoting from Pre-Training Data (Feb. 26, 2024) (unpublished manuscript) (on file with arXiv), http://arxiv.org/abs/2305.13252 [https://perma.cc/6T6W-RGR9] (showing that LLMs can be steered via "according to" prompting to quote more from training data sources, also known as "grounding" their outputs to their pre-training corpus).

554. *ProRata Invents Generative AI Attribution Technology to Compensate and Credit Content Owners While Facilitating Fairness and Fact, with Support from Universal Music Group*, UNIVERSAL MUSIC GRP. (Aug. 6, 2024), https://www.universalmusic.com/prorata-invents-generative-ai-attribution-technology-to-compensate-and-credit-content-owners-while-facilitating-fairness-and-fact/ [https://perma.cc/EN28-SEQ3].

555. For example, at what temporal point would training data disclosures be most effective: at the input or output stage? Should all creators get equal attribution rights, even if this imposes regulatory costs on AI developers for the benefit of creators who are unconcerned about attribution? How would training data disclosure requirements deal with trade secret barriers?

556. *See, e.g.*, Murgia, *supra* note 158 ("The agreement also allows ChatGPT to respond to questions with short summaries from FT articles, with links back to FT.com. This means that the chatbot's 100mn users worldwide can access FT reporting through ChatGPT, while providing a route back to the original source material."); *see also AI-Policy for Authors*, DE GRUYTER BRILL, https://degruyterbrill.com/en/ai-for-authors/ [https://perma.cc/RTG5-2J37].

557. *See, e.g.*, Sprigman et al., *supra* note 83, at 1428.

resources to license copyrighted training data.[558] Accordingly, leaving attribution rights to the whims of the private licensing market represents a precarious long-term solution.[559]

Second, some scholars have suggested folding attribution into the fair use analysis, under either the first factor,[560] or as an additional fifth factor.[561] However, this approach would limit relief to AI outputs that are substantially similar to copyrighted training data, whereas non-infringing outputs also carry a risk of misattribution. A bad actor who distributes the outputs of 5you's model as "undiscovered" works by the late Kim Jung Gi causes harm to Gi's reputation even if the model's outputs are not substantially similar to any of Gi's prior works. An artist's attribution interests are inadequately protected if they are only addressed in the context of a fair use analysis for infringement.

Third, artists could claim trade dress infringement for the reproduction of their distinctive style in AI outputs.[562] The *Rogers* exception for expressive

---

558. *See also* Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007, 1022 (N.D. Cal. 2025) (suggesting that AI firms do not need to license the use of copyrighted works to train LLMs to generate new text because this is a "quintessentially transformative" fair use).

559. *See* Melville Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 520 (1967) ("[Contract law provides] no right at all, since a right dependent upon the voluntary agreement of individual contracting parties . . . hardly satisfies the [Berne] Convention requirement of obligatory recognition.").

560. Ginsburg, *supra* note 108, at 72–73. In their evaluation of the nature and purpose of the defendant's use, courts could consider whether the defendant credited the source of the copied material. This could potentially weigh in favor of a finding of fair use. In *Maxtone-Graham v. Burtchaell*, the Second Circuit noted that the defendant had credited the plaintiff as the original source of specific quotes and had therefore not tried to supplant the market for the original work. *See* 803 F.2d 1253, 1260 (2d Cir. 1986). In *Richard Feiner & Co. v. H.R. Industries*, *Inc.*, the defendant's failure to attribute the author of the copyrighted work contributed to the court's finding that the secondary use was not fair. *See* 10 F. Supp. 2d 310, 315 (S.D.N.Y. 1998).

561. Lastowka, *supra* note 309, at 85. In evaluating whether a particular secondary use was fair, courts would also consider "the provision of attribution, in a manner reasonable under the circumstances, to the author of the work." To help courts evaluate what types of attribution are "reasonable," the Copyright Office could develop guidelines for industry-specific attribution norms.

562. *See, e.g.*, Second Amended Complaint, Andersen v. Stability AI Ltd., 3:23-cv-00201 (N.D. Cal. Oct. 31, 2024), ECF No. 238 (alleging trade dress infringement based on appropriation of artists' distinctive styles). Kim Jung Gi could conceivably claim trade dress protection for the "overall visual impression that is uniquely associated with . . . and serves as a source identifier" for his illustrations. Gi could argue that the "confusing similarity" between the outputs of 5you's model and his own work will cause "irreparable loss of reputation and goodwill" because consumers will not be able to distinguish between authentic and AI-

works does not apply where the use of trade dress is source-designating, even if it also communicates an expressive message unrelated to source.[563] Some visual artists have successfully secured trade dress protection for their distinctive style,[564] but many have not.[565] It is difficult to claim trade dress protection for an artist's style, since trade dress law does not protect ideas or concepts.[566] Furthermore, artists may not be able to show that their trade dress has acquired "secondary meaning" if they have promoted their works exclusively for artistic rather than commercial purposes.[567]

These limitations on trade dress protection for visual style are normatively desirable.[568] Allowing artists to claim trade dress protection for

---

generated works, and might falsely ascribe low-quality AI outputs to Gi. Gi could also argue that the outputs of 5you's model "will harm legitimate collectors of [his work] by diluting the distinctiveness of the trade dress in the marketplace." To claim trade dress infringement, a plaintiff must precisely describe "the character and scope of the claimed trade dress" and "articulate the elements of their product design with specificity." The plaintiff must also show that the trade dress is non-functional, has secondary meaning, and there is a likelihood of consumer confusion. *See* Roberts v. Gallery, 755 F. Supp. 3d 235, 247 (E.D.N.Y. 2024) (defendant created collages that were similar to the plaintiff's collages in total concept and feel; plaintiff could not secure trade dress protection because she failed to offer precise description of character and scope of claimed trade dress). *See also* Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373, 381 (2d Cir. 1997); Sherwood 48 Assocs. v. Sony Corp. of Am., 76 F. App'x 389, 391 (2d Cir. 2003).

563. Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 155–56 (2023).

564. Some plaintiffs have been able to obtain trade dress protection for an artist's distinctive style and prevent imitators from distributing similar works. *See* Romm Art Creations Ltd. v. Simcha Int'l, Inc., 786 F. Supp. 1126, 1141 (E.D.N.Y. 1992) (concerning the distribution of limited editions and fine art posters based on the work of Israeli artist Tarkay). *See also* Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268, 1274–75 (10th Cir. 1988) (enjoining Hallmark from producing and distributing cards incorporating the trade dress of plaintiff creators of greeting cards characterized by a "distinctive combination of features" in a manner likely to cause consumer confusion).

565. *See, e.g.*, Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc., 58 F.3d 27, 34 (2d Cir. 1995) (no trade dress protection for the idea or concept of die-cut photographic greeting cards); Hughes v. Design Look Inc., 693 F. Supp. 1500, 1507–08 (S.D.N.Y. 1988) (finding Warhol estate was unable to prevent a calendar maker from distributing a calendar containing twelve uncopyrighted Warhol images because the images had never been used by the estate to promote any goods or services and in the absence of secondary meaning, there was no viable claim for consumer confusion).

566. *Milstein*, 58 F.3d at 32.

567. Brownlee, *supra* note 183, at 1174; *see Hughes*, 693 F. Supp. at 1500.

568. For a discussion of the normative implications of extending trademark protection to artistic style, see generally Christine Farley, Style as Trademark: The Dangers of Extending Protection in an Era of Generative AI (2025) (unpublished manuscript) (on file with author). *See also* Sari Mazzurco & Christopher Buccafusco, *Style Marks*, U. CHI. L.R. (forthcoming 2027).

their distinctive style[569] would effectively create a prohibition on style imitation, which, as I have said, is *not* the goal of this Article.[570] Trade dress protection for visual style would give artists a perpetual monopoly in a particular style where "copyright's substantial similarity analysis would leave them empty-handed."[571] This would create a significant loophole in copyright's prohibition against the ownership of ideas.[572]

Trademark protection for style would also discourage style evolution because protection requires continued commercial use.[573] This would create a perverse incentive for artists to maintain a particular style, even if they would like to experiment with a different aesthetic.[574] AI models should be able to imitate the distinctive styles of visual artists, provided that the outputs are accompanied by proper disclosures. The harm I seek to prevent in this Article is not the *use* of an artist's distinctive style, but the erosion of creative incentives through the *misattribution* of AI-generated works and the *non-attribution* of training data.

Fourth, there is early evidence of fan communities enforcing attribution norms with respect to AI-generated works. For example, a popular trend on TikTok involves the conversion of family photographs into nostalgic watercolor illustrations by prompting ChatGPT with the hashtag "cottage core." Within the comments section of these videos, fans are listing the names of famous children's illustrators whose style is clearly the source of

---

569. *See, e.g.*, Second Amended Complaint, Andersen v. Stability AI Ltd., 3:23-cv-00201 (N.D. Cal. Oct. 31, 2024), ECF No. 238 (alleging trade dress infringement based on appropriation of artists' distinctive styles).

570. Artists should be able to engage in style imitation (with or without AI), but they also need protection from the heightened risk of misattribution associated with AI mimicry. For the same reason, I do not advocate for owners of copyrighted training data to rely on the derivative works right to prevent style imitation. If AI art generated in the distinctive style of an established artist was considered an unauthorized derivative work, this would stymie a large fraction of the valuable expression facilitated by generative AI models.

571. William P. Fitzpatrick, *The Hazards of Extending Copyright of Trademark Protection to an Artist's Visual Style*, 17 COLUM.-VLA J.L. & ARTS 453, 473 (1993).

572. *Id.* at 474.

573. Irene Calboli, *Hands Off "My" Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation*, *in* THE PROTECTION OF NON-TRADITIONAL TRADEMARKS: CRITICAL PERSPECTIVES 287, 306 (Irene Calboli & Martin Senftleben eds., 2018).

574. *See also* Tang, *supra* note 177, at 253. ("[T]he requirement that an artist acquire distinctiveness in his trade dress would demand that an artist paint in a consistent, repetitive style—while many of the most famous artists today work in largely heterogeneous styles across a wide variety of media.").

this aesthetic, such as Beverly Cleary and Jan Brett.[575] Individuals are performing this annotation labor to ensure that human artists are credited for their work. However, relying on fan communities to police attribution norms is not a sustainable or equitable solution for the attribution concerns of human artists.

V. CONCLUSION

Generative AI places copyright jurisprudence at a critical crossroads – in the face of unprecedented technological mimicry, should jurists lower the standard for copyright infringement to the new and dubious threshold of "*substitutive similarity*", or should Congress strengthen the attribution rights of existing creators? This Article demonstrates that proper attribution serves the same incentive-protection function, without the associated costs to downstream creativity. Jurists should not allow their moral qualms about AI training to inaugurate a dangerously low threshold for infringement. The substantial similarity doctrine should continue to serve as the bedrock of copyright infringement jurisprudence. Instead of altering this doctrine, Congress should enact an AI-specific attribution right that protects artists' reputational capital. Although the *misattribution* of AI-generated art may fall under existing remedies, *non-attribution* remains largely non-actionable following the Supreme Court's decision in *Dastar*. Congress should mandate the disclosure of copyrighted training data in output metadata to ensure that AI models do not erase the labor and legacy of human creators. Refocusing our attention on *attribution* would allow us to shield the creative incentives of human authors without stifling AI innovation or chilling downstream creativity.

---

575. *See* ericalynn031, *I wanna print these and hang them in the nursery*, TIKTOK (Apr. 11, 2025), https://www.tiktok.com/@ericalynn031/photo/7492054036770737438?_r=1&_t=ZP-94DpbuMKAlK.