

# THE NEW ART FORGERS

*Katrina Geddes\**

## **Abstract**

*AI models are exceptionally good at generating new works in the style of their training data. As a result, the internet is now flooded with AI-generated “dupes”: model outputs masquerading as authentic works by well-known artists. Human creators have discovered AI-generated works for sale under their names on a variety of digital marketplaces. Without property rights over the AI-generated content (most of which is not “substantially similar” to their prior works), creators who find themselves in this position have no remedy under existing law. How is this possible? This Article describes the gaps in existing law that enable this pernicious form of consumer deception, including the uncopyrightability of style and the absence of robust attribution rights.*

*As artists watch their distinctive styles proliferate across AI-generated works, they have two distinct attribution interests: first, they want to disclaim authorship of AI art generated in their distinctive style (“misattribution of authorship”) and second, they want to receive credit for the use of their work as training data (“non-attribution of source”). Consumers also have a strong interest in distinguishing authentic works by their favorite artists from AI-generated “dupes”. Given the U.S.’s longstanding hostility towards moral rights, this Article suggests that trademark law may offer a convenient way to protect artists from the misattribution of low-quality or offensive AI-generated works. Designations of authorship serve the same social functions as traditional marks by incentivizing the production of high-quality works and reducing consumer confusion. In the face of AI’s extraordinary imitation*

---

\*Assistant Professor, The Ohio State University, Moritz College of Law; Affiliated Fellow, Yale Law School, Information Society Project. I am grateful to James Grimmelman, Kathy Strandburg, Jeanne Fromer, Oren Bracha, Bryan Choi, Jess Miers, Jessica Silbey, Daniel Susser, Christopher Yoo, Bob Brauneis, Julie Cohen, Barton Beebe, Matthew Sag, Christopher Buccafusco, Jacob Noti-Victor, Guy Rub, Andres Sawicki, Deven Desai, Xiyin Tang, 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, and the Information Law Institute Fellows at NYU Law for their helpful feedback.

*capabilities, artists need robust attribution rights to continue creating valuable expressive works. This Article argues that Congress should restore the capacity of copyright owners to bring claims for false designation of origin under section 43(a) of the Lanham Act.*

## Table of Contents

<i>Introduction</i> .....	3
<i>I. An Unprecedented Attribution Problem</i> .....	6
A. AI-Generated Visual Art .....	6
B. Competing Attribution Interests .....	10
C. Why Does Attribution Matter? .....	12
1. Individual Interests in Attribution .....	13
2. Collective Interests In Attribution .....	18
D. Does Authenticity Matter? .....	31
<i>II. Copyright Provides No Remedy</i> .....	36
A. The Uncopyrightability of Style .....	36
B. VARA and the DMCA .....	39
C. Extra-Legal Protection .....	41
<i>III. The Trademark Function of Authorship</i> .....	45
A. Pre-Dastar .....	46
B. The Effect of Dastar .....	51
C. Overturning Dastar .....	54
D. Limitations .....	58
E. Alternative Remedies .....	65
<i>IV. Curing Non-Attribution</i> .....	68
A. Source Attribution .....	69
B. Training Data Transparency .....	72
<i>Conclusion</i> .....	75

## Introduction

Today, artists face an unprecedented threat to their creative brands. Almost anyone can use an AI model to create a “new” work in the style of an established artist with a few simple prompts. 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.<sup>1</sup> 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.”<sup>2</sup> In March, the Internet was flooded with disturbing images that looked as though they had been illustrated by beloved animation house, Studio Ghibli,<sup>3</sup> but had, in fact, been generated by ChatGPT.<sup>4</sup>

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,<sup>5</sup> and technical barriers to style imitation.<sup>6</sup> Prior to the advent of generative AI, few people had the technical skills to replicate an artist’s distinctive aesthetic, or the dulcet tones of Drake.<sup>7</sup> 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. This

---

<sup>1</sup> Zoe Thomas, *Artists Worry About Survival as AI Changes the Game for Creative Work*, TECH NEWS BRIEFING, THE WALL STREET JOURNAL, <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> (last visited Apr. 14, 2025). 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.”

<sup>2</sup> 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>.

<sup>3</sup> Max Read, *Studio Ghibli In The Age Of AI Reproduction*, READ MAX (Mar. 28, 2025), [https://substack.com/home/post/p-160035560?utm\\_source=substack](https://substack.com/home/post/p-160035560?utm_source=substack).

<sup>4</sup> Madison Kircher, *People Love Studio Ghibli. But Should They Be Able to Recreate It?*, THE NEW YORK TIMES, Mar. 27, 2025, <https://www.nytimes.com/2025/03/27/style/ai-chatgpt-studio-ghibli.html?searchResultPosition=1>.

<sup>5</sup> Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEORGETOWN LAW J. 49 (2006); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORGAN. SCI. 187 (2008).

<sup>6</sup> 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 LAW REV. 1605 (2007).

<sup>7</sup> Joe Coscarelli, *An A.I. Hit of Fake ‘Drake’ and ‘The Weeknd’ Rattles the Music World*, THE NEW YORK TIMES, Apr. 19, 2023, <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html>; Faith Branch, *The “Digital Blackface” Artist Competing for a Grammy*, Nov. 2023, <https://www.thenation.com/article/archive/digital-blackface-ghostwriter/>.

increases the risk that an artist's name will be attached to convincing AI-generated dupes.

Prior to the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox*, creators could bring claims for misattributions of authorship under section 43(a) of the Lanham Act, which prohibits the use of false designations of origin in commerce. In 2003, however, the Supreme Court severely curtailed the ability of copyright owners to bring claims under this provision.<sup>8</sup> In *Dastar*, the Court held that only the producers of *physical* goods could bring claims for false designation of origin, not the creators of *intangible* works.<sup>9</sup> The Court reasoned that the text of the Lanham Act (specifically, the term "origin") "should not be stretched to cover matters that are typically of no consequence to purchasers."<sup>10</sup>

Generative AI challenges the Court's "tenuous and largely unsupported distinction" between tangible and intangible goods under section 43(a).<sup>11</sup> Designations of authorship, like traditional trademarks, provide consumers with important information about the nature and quality of the expressive goods they are consuming.<sup>12</sup> On the creator side, proper attribution encourages creators to continue producing high-quality expression because they are able to reap the full reputational benefits of their labor.<sup>13</sup> All of these information flows are threatened by AI's imitation capabilities. In light of this threat, Congress should provide artists with more legal protection for their attribution interests.

To be clear, I am not advocating for a prohibition on style imitation.<sup>14</sup> Style imitation serves a number of important public

---

<sup>8</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) ("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").

<sup>9</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

<sup>10</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003).

<sup>11</sup> Mary LaFrance, *When You Wish upon Dastar: Creative Provenance and the Lanham Act*, 23 CARDOZO ARTS ENTERTAIN. LAW J. 197, 206 (2005).

<sup>12</sup> See generally Greg Lastowka, *The Trademark Function of Authorship*, 85 BOSTON UNIV. LAW REV. 1171 (2005). See also Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEG. STUD. 95 (1997); Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE LAW J. 218 (2012).

<sup>13</sup> Lastowka, *supra* note 13.

<sup>14</sup> Although my general stance is that all creators should be able to engage in style imitation (with or without the assistance of AI tools), this should not be interpreted as wholehearted endorsement of the actions taken by AI firms and technologists. I recognize that there are specific

interests, including tribute, homage, secondary creativity, and signaling membership of a creative community.<sup>15</sup> 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.

The Article proceeds as follows. Part I provides a descriptive account of the threat to artists' brands posed by generative AI, specifically, the risk that AI-generated art will be misattributed to the owners of copyrighted training data ("*misattribution of authorship*"). Additionally, the technological replicability of style increases the risk that a particular style, as it proliferates across AI outputs, will become untethered from its original creator, who will fail to receive credit for their creative contributions ("*non-attribution of source*"). Part I also provides a normative account of *why* attribution matters, cataloguing its benefits to both individuals and society.

Part II explains why copyright law provides no remedy against misattribution. It provides a descriptive account of the limitations of the Visual Artists Rights Act ("VARA") and the prohibitions on the removal of copyright management information ("CMI") under the Digital Millennium Copyright Act ("DMCA"). It also describes how creators have traditionally relied upon extra-legal protection for their attribution interests, including technical barriers to style imitation, and community attribution norms.

Part III argues that designations of authorship are properly characterized as trademark interests by virtue of their *market signaling* and *production incentive* effects. Accordingly, I argue that Congress should overturn *Dastar* and restore the capacity of copyright owners to bring claims for false designation of origin under section 43(a) of the Lanham Act.

---

contexts in which the imitation of a particular artistic style is deeply harmful to a particular community, particularly in the context of historical oppression and cultural appropriation. The reproduction of sacred Indigenous motifs in AI-generated outputs is a good example. In these contexts, I think there is a colorable argument that style imitation should not be permitted at all, but I do not explore that here. That is a subject for future work. For an excellent discussion of the role of attribution practices in cultural appropriation, see Jane Anderson & Kimberly Christen, *Decolonizing Attribution: Traditions of Exclusion*, 5 J. RADIC. LIBRARIANSH. 113 (2019).

<sup>15</sup> See, e.g., Keith Negus, John Street & Adam Behr, *Copying, Copyright and Originality: Imitation, Transformation and Popular Musicians*, 20 EUR. J. CULT. STUD. 363 (2017); Cristine H. Legare & Mark Nielsen, *Imitation and Innovation: The Dual Engines of Cultural Learning*, 19 TRENDS COGN. SCI. 688 (2015); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012).

Part IV examines the difficult issue of non-attribution. I argue that downstream creators should not be burdened with a legal duty to credit every source of creative influence. However, I distinguish such a duty 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.

## I. An Unprecedented Attribution Problem

### A. AI-Generated Visual Art

On October 3, 2022, a South Korean illustrator, Kim Jung Gi, passed away at the age of 47. He was famous for his impossibly detailed sketches, drawn from memory, often before a live audience.<sup>16</sup> 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. 2 below). The model was trained on Gi’s portfolio of works. 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. 5you received multiple death threats.<sup>17</sup>



Fig 1. Kim Jung Gi drawing one of his signature illustrations.<sup>18</sup>

---

<sup>16</sup> Scottie Andrew, *Kim Jung Gi, Acclaimed Comic Book Artist, Dies at 47*, CNN (Oct. 5, 2022), <https://www.cnn.com/style/article/kim-jung-gi-death-cec/index.html>.

<sup>17</sup> 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/>.

<sup>18</sup> Image Credit: <<https://www.kimjunggius.com/>>

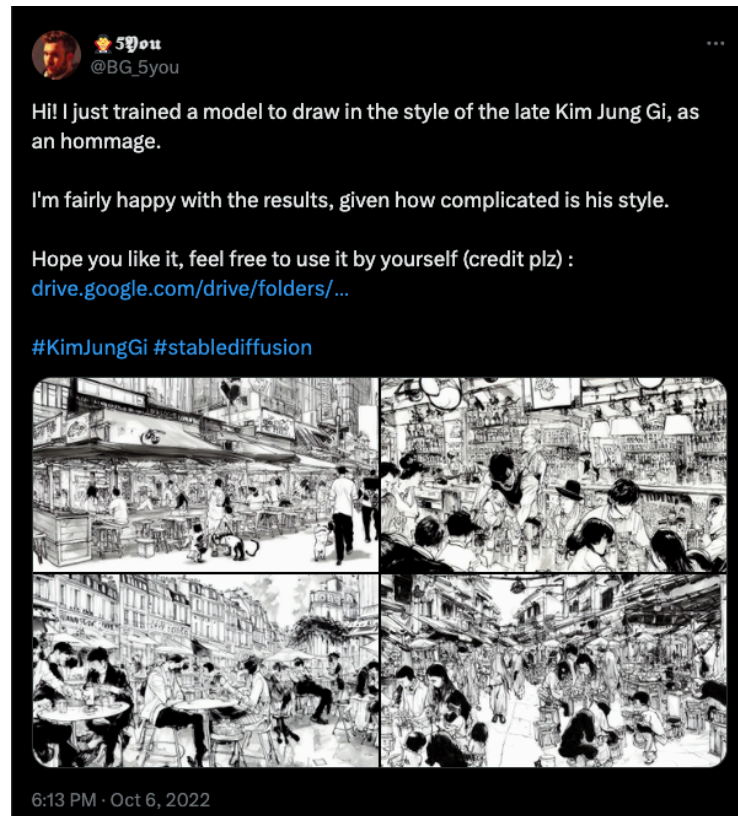


Fig. 2. Screenshot of model release by 5you on social media platform X.

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.<sup>19</sup> 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

---

<sup>19</sup> Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NORTHWEST. UNIV. LAW REV. 1607 (2009); Oren Bracha, *The Work of Copyright in the Age of Machine Production* (Sep. 24, 2023), <https://papers.ssrn.com/abstract=4581738>. But compare the U.S. Copyright Office, *Report on Copyright and Artificial Intelligence, Part 3: Generative AI Training*, May 2025, page 73 ("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") and page 107 ("making 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").

believe that these illustrations were created by Gi. Worse still, a bad actor could intentionally distribute the model’s outputs as “authentic” unseen 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.<sup>20</sup>

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.

If Gi were still alive, each of these harms might be remedied by clear labeling requirements. 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.<sup>21</sup> To remedy the *non-attribution of source*, Gi could demand *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.<sup>22</sup>

---

<sup>20</sup> See, e.g. the International Confederation of Societies of Authors and Composers (CISAC) Reply Comment to the U.S. Copyright Office’s Notice of Inquiry (NOI) on Copyright and Artificial Intelligence, 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 the U.S. Copyright Office, Report on *Copyright and Artificial Intelligence, Part 3: Generative AI Training*, May 2025, page 66.

<sup>21</sup> 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>; Emanuel Maiberg & Matthew Gault, *Miyazaki Probably Hates This*, 404 MEDIA (Mar. 27, 2025), <https://www.404media.co/email/5d418149-ed10-42f3-b535-c74d61ed5b6c/>. (describing the application of Studio Ghibli’s whimsical aesthetic to graphic war photographs).

<sup>22</sup> For a discussion about the importance of respecting consumers’ “process preferences” for



How could Gi compel these disclosures? Copyright law doesn't require attribution, except in very limited circumstances.<sup>23</sup> 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,<sup>24</sup> and style is not copyrightable.<sup>25</sup> You could market the outputs of his model as “undiscovered authentic works by the late Kim Jung Gi” and Gi would have no remedy under existing law.<sup>26</sup> Consumers would also be unprotected from this false designation of authorship.<sup>27</sup>

In light of the harms caused to artists and consumers by the misattribution of AI-generated art, this Article will argue that Congress should restore the capacity of copyright owners to bring claims for false designation of origin under section 43(a) of the Lanham Act. To remedy the non-attribution of training data, Congress should enact EU-style training data transparency provisions. I will elaborate on these proposals in Parts III and IV.

---

human-authored art, see Jacob Noti-Victor, *Regulating Hidden AI Authorship* (Jul. 29, 2024), <https://papers.ssrn.com/abstract=4909907>.

<sup>23</sup> See, e.g., 17 U.S.C. §106A (a limited attribution right for works of visual art) and §1202 (limited protection against the removal or alteration of copyright management information, including author-identifying information). See also 17 U.S.C. § 409 (requiring the author's name as part of copyright registration, which promotes attribution indirectly).

<sup>24</sup> Sag, *supra* note 20; Bracha, *supra* note 20. But compare the U.S. Copyright Office, *Report on Copyright and Artificial Intelligence, Part 3: Generative AI Training*, May 2025, page 73 (“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”) and page 107 (“making 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”).

<sup>25</sup> However, some plaintiffs have been able to obtain trade dress protection for an artist's distinctive style and prevent imitators from distributing similar works: *Romm Art Creations Ltd. v. Simcha Int'l, Inc.*, 786 F. Supp. 1126 (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 (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). See also Jane C. Ginsburg, *Exploiting the Artist's Commercial Identity: The Merchandizing of Art Images*, 19 COLUMBIA-VLA J. LAW ARTS 1, 16 (1994). (describing the *Romm Art* decision as “troublesome” not least because Tarkay's distinctive style “strongly resembles a Matisse crossed with a Modigliani”).

<sup>26</sup> Again, I am assuming that there is no substantial similarity between model inputs and outputs, and the courts have yet to provide a definitive answer on whether unlicensed training is infringing.

<sup>27</sup> Glynn S. Lunney, *Distinguishing Dastar: Consumer Protection, Moral Rights and Section 43(a)*, in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY” , 142 (2006).

### B. Competing Attribution Interests

As mentioned, Gi has two attribution interests: (1) he does not want the outputs of 5you’s model to be *misattributed* to him (*misattribution of authorship*); and (2) he wants recognition for the use of his work as training data (*source attribution*). Although this analysis focuses on the attribution interests of Gi (as the owner of the training data), other actors have attribution interests as well. For example, the user of 5you’s model has an interest in being credited as the author of the illustration they prompted the model to generate.<sup>28</sup> In this context, the attribution interests of Gi and the model user are aligned: the user wants to be seen as the author of the model output, and Gi wants to avoid the misattribution of AI art generated in his distinctive style.

In other contexts, the attribution interests of Gi and the model user may conflict. For example, a bad actor might market the model’s generations as “authentic” works by Kim Jung Gi – this is what happened to Tomer Hanuka, who found 400 AI-generated images for sale under his name on an NFT marketplace.<sup>29</sup> Here, the user has no interest in attribution; they want people to think that their generation was created by Gi. This interest conflicts with Gi’s interest in avoiding the misattribution of AI-generated output. Figure 3 summarizes these different attribution interests.

Scenario	Gi’s interests	User’s interests
Unattributed AI outputs closely resemble Gi’s works.	1. Disclaim authorship of model outputs 2. Receive attribution for training data	Receive attribution as author of model output
AI outputs are falsely marketed as “authentic” works by Gi.	1. Disclaim authorship of model outputs 2. Receive attribution for training data	No attribution

---

<sup>28</sup> However, this would require the Copyright Office to reverse its current position that users are *not* the legal authors of AI outputs: See the United States Copyright Office, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, A Report of the Register of Copyrights, January 2025, p 18 (“given current generally available technology, prompts alone do not provide sufficient human control to make users of an AI system the authors of the output”).

<sup>29</sup> Thomas, *supra* note 2.

AI outputs are marketed as works by user.	Receive attribution for training data	Receive attribution as author of model output
AI outputs are marketed as works by 5you.	Receive attribution for training data	Receive attribution as author of model output

Fig. 3. Competing Attribution Interests

In every scenario, consumers have a strong interest in avoiding confusion or deception as to the origin of a creative work. They also have an interest in being able to distinguish between AI-generated “Gi-style” works and authentic works created by Gi. This reduces information and transaction costs.

As aforementioned, the proper attribution of expressive works is threatened by AI’s ability to reproduce the distinctive styles of established artists quickly and cheaply, at scale. Copyright law provides limited recourse because most copyright owners have no attribution rights, and style is uncopyrightable.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> 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 substantial similarity.<sup>33</sup> Providing textual descriptions of nontextual works often results in “verbal overshadowing” or the distortion of gestalt reactions.<sup>34</sup> The

<sup>30</sup> See Part II.A for a deeper discussion of the uncopyrightability of style.

<sup>31</sup> See, e.g., 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>; 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-scams-books-amazon>; Jane Friedman, *I Would Rather See My Books Get Pirated Than This (Or: Why Goodreads and Amazon Are Becoming Dumpster Fires)*, JANE FRIEDMAN (Aug. 7, 2023), <https://janefriedman.com/i-would-rather-see-my-books-pirated/>.

<sup>32</sup> Michelle Brownlee, *Safeguarding Style: What Protection Is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUMBIA LAW REV. 1157 (1993).

<sup>33</sup> *Id.* at 1167.

<sup>34</sup> Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. LAW REV.

science of visual perception shows that visual experience is inherently contextual and nonverbal.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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. I describe this regime in separate work.<sup>40</sup>

### *C. Why Does Attribution Matter?*

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.<sup>41</sup> Many creators

---

683, 733 (2011).

<sup>35</sup> Moon Hee Lee, *Seeing's Insight: Toward a Visual Substantial Similarity Test for Copyright Infringement of Pictorial, Graphic, and Sculptural Works Notes*, 111 NORTHWEST. UNIV. LAW REV. 833 (2016).

<sup>36</sup> Brownlee, *supra* note 33 at 1167. See also Lee, *supra* note 36.

<sup>37</sup> Tushnet, *supra* note 35 at 739.

<sup>38</sup> 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.

<sup>39</sup> 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.

<sup>40</sup> Katrina Geddes, "Ghost Tracks: AI-Generated Songs and The Loss of Vocal Identity."

<sup>41</sup> See, e.g., Negus, Street, and Behr, *supra* note 16; Legare and Nielsen, *supra* note 16; RAUSTIALA AND SPRIGMAN, *supra* note 16.

deliberately imitate the distinctive aesthetic of their creative peers in order to signal membership of the same artistic community.<sup>42</sup>

What this Article recommends instead is that Congress provide creators with protection from the misattribution of AI-generated works. 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. This Part will describe the *individual* and *collective* interests in the proper attribution of expressive works.

### 1. Individual Interests in Attribution

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, and falsely implying that what was taken originated with the thief.<sup>43</sup> It involves two *actus reus* elements (an act of copying and a failure to provide credit to the original author) and one *mens rea* element (intent to engage in unattributed copying).<sup>44</sup> 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".<sup>45</sup>

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*.<sup>46</sup> Copyright polices a much narrower sphere of copying that excludes facts, ideas, concepts, processes, and public domain works. Second, copyright infringement cannot be cured by attribution, whereas plagiarism (in many cases) can. Third, plagiarism represents an offense against society (in addition to the offense to the original

---

<sup>42</sup> See, e.g., Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N. C. LAW REV. 547 (2005); Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENTERTAIN. LAW REV. 347 (2001).

<sup>43</sup> Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law Comment*, 80 CALIF. LAW REV. 513, 514 (1992).

<sup>44</sup> 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 LAW J. 167, 173 (2002).

<sup>45</sup> Stearns, *supra* note 44 at 517.

<sup>46</sup> 17 U.S.C. § 102(b).

creator) because society is *defrauded* with respect to the true authorship of the work.<sup>47</sup> In contrast, in an infringement case, courts are focused on the harm to the market for the original work, not the deception experienced by the public.<sup>48</sup> Fourth, copyright is a strict liability offence (lack of intent is no defense), whereas plagiarism generally requires intent on the part of the plagiarist.<sup>49</sup>

Laurie Stearns explains that plagiarism norms focus on the creative *process*, whereas copyright law focuses on the creative *result*.<sup>50</sup> Certainly, the harm caused to Gi by 5you’s actions is exacerbated by the fact that Gi’s creative process was unusually transparent; he created his art from scratch before a live audience. Substituting this process with a black-box machine feels antithetical to Gi’s creative ethos.

The public outcry around generative AI reminds us that copyright law and anti-plagiarism norms “intersect only imperfectly.”<sup>51</sup> The ease with which AI models can reproduce an artist’s distinctive style has caused great alarm within creative communities, notwithstanding the uncopyrightability of style. This suggests that social opposition to generative AI will persist even if courts ultimately conclude that AI models are non-infringing.<sup>52</sup>

Second, there is a fundamental expectation that an individual who expends effort on a particular task should be able to reap the rewards of their labor. Attribution allows a creator to capture the full reputational benefits associated with their work.<sup>53</sup> When a

---

<sup>47</sup> Stearns, *supra* note 44 at 534.

<sup>48</sup> *Id.*

<sup>49</sup> Green, *supra* note 45 at 181.

<sup>50</sup> Stearns, *supra* note 44 at 513.

<sup>51</sup> *Id.* at 514.

<sup>52</sup> 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. The 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. 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. Judge Alsup described LLMs as “among the most transformative [technologies] many of us will see in our lifetimes.” Importantly, Judge Alsup noted that the plaintiffs had not accused Anthropic’s LLM (“Claude”) of generating infringing outputs. If Claude had generated infringing outputs, the plaintiffs “would have a different case.” See *Andrea Bartz, et al. v. Anthropic PBC*, Case 3:24-cv-05417-WHA, Order on Fair Use, U.S. District Court, Northern District of California (June 23, 2025).

<sup>53</sup> Randolph Stuart Sergent, *Building Reputational Capital: The Right of Attribution under*

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.”<sup>54</sup> In other words, they miss out on commercial opportunities they would otherwise receive.<sup>55</sup> In contrast, creators who receive proper credit feel motivated to continue producing high-quality works.<sup>56</sup>

Our moral intuitions regarding the “unfairness” of 5you’s actions reveal the persistent influence of Lockean labor theory on moral justifications for intellectual property law.<sup>57</sup> A user who prompts 5you’s model can instantly generate a convincing imitation of Gi’s work, without any artistic talent or training, thereby reaping an “unearned benefit”.<sup>58</sup>

Third, attribution is important to many creators because it protects their personality 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.”<sup>59</sup> Many creators view their work as their “offspring” and therefore as fundamentally intertwined with their legacy and identity.<sup>60</sup> As a result, attribution is a powerful expressive incentive,<sup>61</sup> which is reflected in the fact that many creators are willing to sacrifice financial reward in exchange for attribution.<sup>62</sup>

---

*Section 43 of the Lanham Act*, 19 COLUMBIA-VLA J. LAW ARTS 45, 46 (1994). See also John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 WASH. LAW REV. 709, 731 (1997). (describing the two justifications for a cause of action for reverse passing off: preventing consumer deception, and capturing future goodwill).

<sup>54</sup> Sergent, *supra* note 54 at 47.

<sup>55</sup> *Id.* at 55.

<sup>56</sup> *Id.* at 48.

<sup>57</sup> See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEORGETOWN LAW J. 287 (1988); Herman T. Tavani, *Locke, Intellectual Property Rights, and the Information Commons*, 7 ETHICS INF. TECHNOL. 87 (2005); Adam Mossoff, *Saving Locke From Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHILOS. POLICY 283 (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](https://doi.org/10.1007/978-0-230-58239-2_2); Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited 2012 Editor’s Symposium*, 49 SAN DIEGO LAW REV. 1069 (2012).

<sup>58</sup> Stearns, *supra* note 44 at 517. See, e.g., *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918) (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”).

<sup>59</sup> Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. LAW REV. 1745, 1790–1791 (2012).

<sup>60</sup> JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 157 (2014).

<sup>61</sup> Fromer, *supra* note 60 at 1790.

<sup>62</sup> Christopher Jon Sprigman, Christopher Buccafusco & Zachary Burns, *What’s a Name Worth: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 BOSTON UNIV. LAW REV.

Attribution is also a default entitlement of Creative Commons licenses, most of which permit extensive re-use, as long as attribution is given. As Catherine Fisk observes, “even those devoted to minimizing intellectual property rights still insist on attribution”.<sup>63</sup> 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.<sup>64</sup>

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*.”<sup>65</sup> 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.<sup>66</sup> 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.

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”.<sup>67</sup> 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.<sup>68</sup> This case highlights the significant personality interests at stake in proper attribution, even in the absence of copyright infringement.<sup>69</sup>

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.<sup>70</sup> 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

---

1389 (2013).

<sup>63</sup> Fisk, *supra* note 6 at 91.

<sup>64</sup> United States Copyright Office, Report on Orphan Works, 2006.

<sup>65</sup> *King v. Innovation Books, a Div. of Innovative Corp.*, 976 F.2d 824 (2d Cir. 1992).

<sup>66</sup> *King v. Innovation Books, a Div. of Innovative Corp.*, 976 F.2d 824, 826 (2d Cir. 1992).

<sup>67</sup> *King v. Innovation Books, a Div. of Innovative Corp.*, 976 F.2d 824, 832 (2d Cir. 1992).

<sup>68</sup> *King v. Innovation Books, a Div. of Innovative Corp.*, 976 F.2d 824 (2d Cir. 1992).

<sup>69</sup> For an interesting discussion about the complex intersection between personal identity and trademark law, see generally William McGeeveran, *Selfmarks*, 56 HOUST. LAW REV. 333 (2018).

<sup>70</sup> *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976).



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.<sup>71</sup>

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.<sup>72</sup> 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.<sup>73</sup> Andersen says, “the alt-right created a shadow version of me, a version that advocated neo-Nazi ideology” and “people fell for it.”<sup>74</sup> Andersen is witnessing the same violations occurring with generative AI, but on an exponential scale.<sup>75</sup> Concept artist Greg Rutkowski, for example, has been a popular target for prompts by fans seeking to reproduce his signature style.<sup>76</sup> 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.<sup>77</sup>

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

---

<sup>71</sup> *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14, 24 (2d Cir. 1976).

<sup>72</sup> Sarah Andersen, *Opinion* | *The Alt-Right Manipulated My Comic. Then A.I. Claimed It.*, THE NEW YORK TIMES, Dec. 31, 2022, <https://www.nytimes.com/2022/12/31/opinion/sarah-andersen-how-algorithm-took-my-work.html>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

I want to briefly 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. As Jessica Silbey explains, an artist's reputation is inherently *relational*; it is the product of the relationship between artist and their audience.<sup>78</sup> 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.<sup>79</sup> An artist's reputation cannot be unilaterally conceived or controlled because it is co-constructed by artist and audience.<sup>80</sup> Consumers are "partner[s] in reputational maintenance".<sup>81</sup> For this reason, intellectual property law will always fall short of an artist's desire for complete control over their creative reputation.

## 2. *Collective Interests In Attribution*

Postmodernists argue that attribution rights are unnecessary in contemporary meme culture, where everyone and no one is an author.<sup>82</sup> Attribution rights are a "relic" from a time when authors were isolated individuals, pouring their tortured souls into their art.<sup>83</sup> Today, many intellectual commodities are made by corporations, which have numerous tools at their disposal to protect their creative brands and reputation.

It is certainly true that enforcing individual attribution rights increases the cost of follow-on creativity. The question is – is this cost worth the benefit to individual creators? This Part 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.

---

<sup>78</sup> SILBEY, *supra* note 61 at 152.

<sup>79</sup> *Id.* at 181.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 177.

<sup>82</sup> Jane C. Ginsburg, *The Most Moral of Rights: The Right to Be Recognized as the Author of One's Work*, 8 GEORGE MASON J. INT. COMM. LAW 44, 46 (2016). See also Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N. Y. UNIV. LAW REV. 453, 532 (2022). (describing attribution as "too cumbersome" for meme culture).

<sup>83</sup> Ginsburg, *supra* note 83 at 46.

a. Reducing Consumer Search Costs

Jane Ginsburg distinguishes between the “author-regarding” and “public-regarding” aspects of attribution rights.<sup>84</sup> Attribution rights serve authors by (1) recognizing their creative labor; (2) protecting the market for their works; and (3) providing incentives for creativity. Proper attribution incentivizes creators to produce high-quality works because of the associated increase in their reputational value.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> For example, if I know that a novel has been written by Rachel Cusk, I know to expect “fluid, amorphous prose”,<sup>88</sup> brutal honesty, and an almost neurotic dissection of character subjectivities. Similarly, if every output of 5you’s model is accompanied by an “AI-generated” disclaimer, then fans of Gi’s work can more easily locate authentic works online. Even scholars who argue that there should be no general cause of action for reverse passing off concede that in the context of creative works, knowing the identity of the speaker affects the consumer’s valuation of the communication.<sup>89</sup>

Attribution also facilitates labor market mobility by helping employers evaluate the human capital of prospective employees.<sup>90</sup> Employers who do not have access to a reliable signal of quality may hire fewer people because they cannot distinguish between

---

<sup>84</sup> *Id.* at 81.

<sup>85</sup> Lastowka, *supra* note 13 at 1176.

<sup>86</sup> Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH LAW REV. 789, 792 (2007).

<sup>87</sup> Lastowka, *supra* note 13 at 1179.

<sup>88</sup> Zuhri James, *Cusk, Experimentalism and the Limits of Autofiction*, THE LONDON MAGAZINE, May 2024, <https://thelondonmagazine.org/article/essay-cusk-experimentalism-and-the-limits-of-autofiction-by-zuhri-james/>.

<sup>89</sup> Cross, *supra* note 54 at 763.

<sup>90</sup> Fisk, *supra* note 6 at 104.

high- and low-quality job candidates.<sup>91</sup> Attribution norms help employers evaluate whether a candidate has the human capital required for a particular role by reviewing their historic productivity.<sup>92</sup> For example, a science department might look at the number of academic articles on which a prospective faculty member is listed as the 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.<sup>93</sup>

When an individual is presented with a new artwork, they have limited tools with which to judge its aesthetic merit.<sup>94</sup> 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.<sup>95</sup> This aesthetic comparison affords art recipients some comprehension of the historical significance of the new artwork.<sup>96</sup> 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.<sup>97</sup>

When an artwork is forged, however, the public's ability to discern its aesthetic significance, based on its socio-historical context, is compromised. The public cannot accurately comprehend

---

<sup>91</sup> *Id.* at 108.

<sup>92</sup> *Id.* at 107.

<sup>93</sup> Sherri Irvin, *Forgery and the Corruption of Aesthetic Understanding*, 37 CAN. J. PHILOS. 283, 294 (2007).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 295.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

“the achievement exemplified in the individual work.”<sup>98</sup> Forgeries weaken the capacity of art-receivers to engage in aesthetic discrimination.<sup>99</sup> This is one feature that distinguishes appropriation art from art forgeries.<sup>100</sup> Appropriation artists like Sherrie Levine and Richard Prince became famous for photographing photographs by other artists.<sup>101</sup> However, because neither Levine nor Prince represented themselves as the authors of the original photographs, they did not misrepresent their methods or their achievements.<sup>102</sup> For this reason, appropriation art continues to hang on the walls of famous galleries, while art forgeries are generally denigrated or destroyed.<sup>103</sup>

A similar claim can be made about AI-generated art. An individual who encounters the unattributed outputs of 5you’s model online may misapprehend their aesthetic significance. 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 a deceased artist. The public will be misled about “the genesis of certain stylistic features.”<sup>104</sup>

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.”<sup>105</sup>

Art provides not only aesthetic experience but important insights into periods of human history. If art was 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 were available to the public.<sup>106</sup>

---

<sup>98</sup> *Id.* at 300.

<sup>99</sup> *Id.*

<sup>100</sup> Darren Hudson Hick, *Forgery and Appropriation in Art*, 5 PHILOS. COMPASS 1047, 1052 (2010).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1053.

<sup>103</sup> *Id.*

<sup>104</sup> Irvin, *supra* note 94 at 302.

<sup>105</sup> MARK JONES, PAUL T. CRADDOCK & NICOLAS BARKER, *FAKE?: THE ART OF DECEPTION* 16 (1990).

<sup>106</sup> See generally Alfred Lessing, *What Is Wrong with a Forgery?*, 23 J. AESTHET. ART CRIT. 461 (1965).

Instead, art is valued according to a variety of non-aesthetic criteria, including its historic, social, economic, and biographical context. For this reason, accurate attribution is important for proper aesthetic evaluation.<sup>107</sup>

Irvin explains that proper disclosure of the provenance of a work strengthens the public's capacity for "aesthetic perception."<sup>108</sup> The knowledge that a work has been forged allows the public to "disentangle the aesthetic features it has appropriated."<sup>109</sup> Art forger Han Van Meegeren (1889-1947) forged several paintings in the style of Dutch painter Johannes Vermeer, including *Supper at Emmaus*. Once Van Meegeren's *Supper at Emmaus* was revealed to be a forgery, art critics deployed their "perceptual faculties more rigorously".<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup>

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 hurdles to public recognition than

---

<sup>107</sup> Irvin, *supra* note 94 at 295.

<sup>108</sup> *Id.* at 302.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 284.

<sup>111</sup> *Id.* at 301.

<sup>112</sup> Andres Sawicki, *The Law of Creativity?*, 110 CORNELL LAW REV. 135, 216 (2025).

<sup>113</sup> *Id.*

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.

Jane Anderson and Kimberly Christian observe similar dynamics of erasure in the context of Indigenous cultural expressions, which are frequently misattributed to the non-Indigenous collectors who recorded them.<sup>114</sup> These misattributions of authorship racialize Indigenous communities as *non-authors* and *non-owners* and thereby deprive them of control over their cultural heritage.<sup>115</sup> As non-authors, Indigenous communities are deprived of decision-making authority over the narration, curation, and circulation of their cultural expressions.<sup>116</sup> Anderson and Christian describe "authorship" (and its conferral on non-Indigenous collectors) as both a "site of colonial power"<sup>117</sup> (asserting the logics of individual property over collective cultural memory) and as a legal construct designed to enact specific relations of power and exclusion,<sup>118</sup> by legitimizing the appropriation of Indigenous culture.<sup>119</sup> 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 their Indigenous creators.<sup>120</sup> 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.<sup>121</sup>

In the context of generative AI, training data attribution may reduce the risk of misinformation associated with model

---

<sup>114</sup> Anderson and Christen, *supra* note 15 at 115.

<sup>115</sup> *Id.* at 129.

<sup>116</sup> *Id.* at 114.

<sup>117</sup> *Id.* at 123.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 112.

<sup>120</sup> *Id.* at 128.

<sup>121</sup> Fisk, *supra* note 6 at 98.

hallucination. If the outputs of large language models (“LLMs”) cited their sources, a user could verify whether the model’s claims were factually supported.<sup>122</sup> Several lawyers have been disciplined for citing non-existent cases generated by AI models in their legal briefs.<sup>123</sup> 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.<sup>124</sup> However, the computational literature suggests that it is very difficult to attribute outputs to specific training data.<sup>125</sup> Generative AI search engines frequently generate responses that are unsupported by sources or cite non-existent sources.<sup>126</sup> 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.<sup>127</sup>

#### 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.<sup>128</sup> As I will explain below, both the meaning and value of “authenticity” are deeply contested.

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

---

<sup>122</sup> Jie Huang & Kevin Chen-Chuan Chang, Citation: A Key to Building Responsible and Accountable Large Language Models (Mar. 31, 2024), <http://arxiv.org/abs/2307.02185>.

<sup>123</sup> Sara Merken & 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/>.

<sup>124</sup> See, e.g., Madhumita Murgia, *The Financial Times and OpenAI Strike Content Licensing Deal*, FINANCIAL TIMES, Apr. 29, 2024, <https://www.ft.com/content/33328743-ba3b-470f-a2e3-f41c3a366613>.

<sup>125</sup> Huang and Chang, *supra* note 123.

<sup>126</sup> Guido Zuccon, Bevan Koopman & Razia Shaik, *ChatGPT Hallucinates When Attributing Answers*, in PROCEEDINGS OF THE ANNUAL INTERNATIONAL ACM SIGIR CONFERENCE ON RESEARCH AND DEVELOPMENT IN INFORMATION RETRIEVAL IN THE ASIA PACIFIC REGION 46 (2023), <https://dl.acm.org/doi/10.1145/3624918.3625329>.

<sup>127</sup> Klaudia Jaźwińska & Aisvarya Chandrasekar, *How ChatGPT Search (Mis)Represents Publisher Content*, COLUMBIA JOURNALISM REVIEW, [https://www.cjr.org/tow\\_center/how-chatgpt-misrepresents-publisher-content.php](https://www.cjr.org/tow_center/how-chatgpt-misrepresents-publisher-content.php) (last visited Nov. 29, 2024).

<sup>128</sup> See, e.g., Noti-Victor, *supra* note 23. (discussing the importance of respecting consumers’ “process preferences” for human-authored works).



increase the importance of provenance-based doctrines, such as trademark and publicity rights.<sup>129</sup> For many consumers, AI-generated art is not “authentic” human expression.<sup>130</sup> 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.<sup>131</sup>

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. “Authenticity” becomes another tool for articulating the moral illegitimacy of generative AI. But branding AI-generated art as “inauthentic” by virtue of its reliance on a machine is also ableist; 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. For many people, generative AI represents an inclusive, accessible, and empowering means of expressing their perspective and identity. In this sense, AI-generated art is unquestionably “authentic” human expression.<sup>132</sup>

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”.

To illustrate the different meanings of “inauthenticity” that have been attached to AI-generated art, I will incrementally adjust the parameters of the fact scenario involving Kim Jung Gi, while holding the content of the output the same throughout. These scenarios will highlight the conceptual instability and context dependency of “authenticity”.

*Scenario 1:* Gi uses an ink pen to physically create one of his

---

<sup>129</sup> Dan L. Burk, *Cheap Creativity and What It Will Do*, 57 GA. LAW REV. 1669, 1696 (2022).

<sup>130</sup> Noti-Victor, *supra* note 23.

<sup>131</sup> [https://www.reddit.com/r/Etsy/comments/16ri3n8/i\\_accidentally\\_bought\\_ai\\_art\\_from\\_an\\_etsy\\_seller/](https://www.reddit.com/r/Etsy/comments/16ri3n8/i_accidentally_bought_ai_art_from_an_etsy_seller/); [https://www.reddit.com/r/Etsy/comments/1fyn6c3/ai\\_art\\_scam\\_seller\\_claims\\_otherwise/](https://www.reddit.com/r/Etsy/comments/1fyn6c3/ai_art_scam_seller_claims_otherwise/).

<sup>132</sup> Katrina Geddes, *Generative AI’s Public Benefit* (Jun. 14, 2024), <https://papers.ssrn.com/abstract=4865510>.

signature illustrations. The resulting artwork is considered to be an authentic work by Gi.

*Scenario 2:* An art forger uses an ink pen to physically create an illustration in the style of Gi and passes it off as an illustration by Gi. 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.

*Scenario 3:* Gi develops early arthritis and can no longer wield an ink pen effectively. 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 Gi, 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. As Amy Adler shows, this prejudice has been challenged by artists for a long time.<sup>133</sup> Many of the great painters, like Rembrandt and Rubens, relied on assistants to carry out the physical acts of painting.<sup>134</sup> 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 than produced, such as Duchamp’s urinal or Cattelan’s banana, duct-taped to the wall.<sup>135</sup> Each of these works was simply *designated* as art, rather than physically constructed.<sup>136</sup>

*Scenario 4:* Gi 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.<sup>137</sup> He endorses and distributes

---

<sup>133</sup> Amy Adler, *Artificial Authenticity*, 98 N. Y. UNIV. LAW REV. 706, 720–721 (2023).

<sup>134</sup> *Id.* at 720.

<sup>135</sup> *Id.* at 721.

<sup>136</sup> For an excellent discussion about the commodification of contemporary art and the removal of the artist’s physical touch (if not their signature), see Tang, *supra* note 13.

<sup>137</sup> Many artists have trained AI models on their own work and incorporated these models into their workflow. 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. 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. See Thomas Graham, *Art Made by AI Is Selling for Thousands – Is It Any Good?*, BBC (Dec. 12, 2018),

the model's outputs as his own works. Some people regard the model's outputs as inauthentic because Gi did not physically draw them, although he conceived and endorsed them (“*process inauthenticity*”).

This scenario reveals that authenticity conditions vary significantly by art form.<sup>138</sup> For example, if I re-type J.R.R. Tolkien's *The Fellowship of the Ring* word for word and provide you with my re-typed copy, you still possess an “authentic” copy of Tolkien's novel.<sup>139</sup> Similarly, art forms like printmaking admit of multiple genuine copies, provided that they are all printed using the same process.<sup>140</sup> 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.<sup>141</sup> This is because the authenticity of traditional painting is tied to its physical embodiment.<sup>142</sup> Similarly, the authenticity of Gi's physical sketches is tied to his process of creation. In contrast, the authenticity of literary works and musical compositions is not tied to the paper on which they are printed.<sup>143</sup>

At the same time, authenticity conditions are determined by shifting cultural practices and technological possibilities.<sup>144</sup> As the possibilities for technical reproduction change, authenticity conditions may change with them.<sup>145</sup> If Gi *chooses* to incorporate AI into his creative process and adopts the model's outputs as his own work, arguably those outputs represent “authentic” Gi works even though he didn't draw them by hand.<sup>146</sup> (Convincing his longtime fans of this may be an uphill battle).

You might say, but the machine is unpredictable, and Gi 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

---

<https://www.bbc.com/culture/article/20181210-art-made-by-ai-is-selling-for-thousands-is-it-any-good>.

<sup>138</sup> Hick, *supra* note 101 at 1049.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Brownlee, *supra* note 33 at 1162.

<sup>143</sup> *Id.*

<sup>144</sup> Hick, *supra* note 101 at 1049.

<sup>145</sup> *Id.*

<sup>146</sup> Dan L. Burk, *Thirty-Six Views of Copyright Authorship, by Jackson Pollock*, 58 HOUST. LAW REV. 263, 294 (2020).

involve unpredictable methods of fixation.<sup>147</sup> 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.<sup>148</sup> The randomness was a deliberative creative choice, the unexpected results of which Pollock chose to incorporate into his work.<sup>149</sup>

Similarly, relying on an unpredictable machine learning model as the method of fixation should not automatically render the outputs “inauthentic” if Gi *chooses* to cede control over fixation to an unpredictable mechanical process, and retains decisional authority over the final product.<sup>150</sup> As Dan Burk explains, the indeterminacy introduced by Gi’s method of fixation should not be fatal to his authorship because it is the result of a *volitional creative choice*.<sup>151</sup>

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.<sup>152</sup> Ridler wanted to simulate the ephemerality of Europe’s original speculative bubble, “tulip mania”, in the early 1600s.<sup>153</sup> 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.<sup>154</sup>

---

<sup>147</sup> Alfred Bell case, 1951 (inadvertent additions to a mezzotint print were deemed original expression; the artist’s acceptance of unintended results after the fact transformed the mistakes into expression).

<sup>148</sup> Burk, *supra* note 147 at 274.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 317.

<sup>151</sup> *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 COLUMBIA LAW REV. 1887 (2019). See also Christopher Newman, *Adoption As Authorship*, 2025 (manuscript on file with author).

<sup>152</sup> Haja Kanu, *Anna Ridler – What’s It Worth?*, AVANT ARTE (Oct. 18, 2024), <https://avantarte.com/insights/avant-essay/anna-ridler-whats-it-worth>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

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.<sup>155</sup> By referencing land artists in relation to her own work, Ridler endorses the creative choice to relinquish control over fixation to unpredictable external forces.

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.<sup>156</sup> 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 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.<sup>157</sup>

Chung deliberately employs an unpredictable machine because she wants to engage with a robotic interpretation of her past self. The indeterminacy of the machine’s behavior is precisely the point of the exercise.

*Scenario 4:* The public is aware that Gi uses an AI model as part of his process. A third party, without Gi’s consent, trains an AI model on Gi’s works and distributes the model’s outputs under Gi’s name. These outputs might be regarded as inauthentic, not

---

<sup>155</sup> See, e.g., Xiyin Tang, *Copyright in the Expanded Field*, 42 HOFSTRA LAW REV. 945 (2013); Vivian F. Wang, *Saving the Spiral Jetty*, 2 NORTHWEST. INTERDISCIP. LAW REV. 179 (2009).

<sup>156</sup> Katherine Mitchell, *The Algorithmic Gesture: Sougwen Chung’s MEMORY*, VICTORIA AND ALBERT MUSEUM BLOG (Dec. 14, 2022), <https://www.vam.ac.uk/blog/digital/the-algorithmic-gesture-sougwen-chungs-memory>.

<sup>157</sup> *Id.*

because they use a different process than the one ordinarily used by Gi, but because they were not conceived and endorsed by Gi himself (“*identity inauthenticity*”).

*Scenario 5:* Gi 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 Gi’s style, without Gi’s consent. These works are considered inauthentic both because they were not hand-illustrated by Gi (*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. 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. The Ise shrine in Japan, for example, has been torn down and rebuilt every twenty years since 478 but each version is considered authentic because the builders use the same materials, tools, and techniques each time.<sup>158</sup>

Similarly, after an artist dies, their estate may continue to produce and distribute works under their name, using a similar process. This raises interesting questions about the legitimacy and authenticity of unauthorized posthumous works.<sup>159</sup> V.C. Andrews, for example, was a famous author of gothic horror fiction, including the bestselling novel, *Flowers in the Attic*.<sup>160</sup> After her death, her estate, in conjunction with her publisher, continued to sell books under her name that were, in fact, written by an undisclosed ghostwriter called Andrew Niederman.<sup>161</sup> 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

---

<sup>158</sup> Rudolf Arnheim, *On Duplication*, in *NEW ESSAYS ON THE PSYCHOLOGY OF ART* 274, 278 (2023).

<sup>159</sup> Adler, *supra* note 134. See also Oliver Wendell Jr. Holmes & Mark A. Lemley, *Authoring While Dead*, 59 GA. LAW REV. 385 (2024); Mark Bartholomew, *A Right to Be Left Dead*, 112 CALIF. LAW REV. 1591 (2024).

<sup>160</sup> N. P. R. Staff, *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>.

<sup>161</sup> Lastowka, *supra* note 13 at 1225–1226.

sculptures.<sup>162</sup> Flavin sculptures continued to be produced and sold, accompanied by estate-signed certificates of authenticity.<sup>163</sup> The main difference between Andrews, Flavin, and Gi is that Gi's works are being posthumously produced by a machine, rather than a team of unscrupulous estate managers. But each of these examples suggests that the meaning of authenticity is highly unstable and context specific.

#### ***D. 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.<sup>164</sup> The Metropolitan Museum of Art, for example, has changed its mind multiple times about the authenticity of a Velázquez in its own collection.<sup>165</sup> Unauthorized manufacturing overruns of designer goods, produced by the same workers in the same factories, are nevertheless considered “fake”.<sup>166</sup> If 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. In some circumstances, the financial stakes of authenticity are very high. 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.<sup>167</sup> Given the unpredictable nature of authenticity, some auction houses provide only a limited guarantee of authenticity. For example, Sotheby's warrants the

---

<sup>162</sup> Adler, *supra* note 134 at 751.

<sup>163</sup> *Id.* at 752.

<sup>164</sup> *Id.* at 765.

<sup>165</sup> *Id.* at 723.

<sup>166</sup> Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. LAW REV. 809, 832 (2009).

<sup>167</sup> Colin Moynihan, *Her 'Chagall' Is Headed for the Trash. How's That for Caveat Emptor?*, THE NEW YORK TIMES, Jul. 6, 2022, <https://www.nytimes.com/2022/07/06/arts/design/chagall-sothebys-expert-panel.html>.

authenticity of a work for only five years.<sup>168</sup>

Furthermore, there is substantial money in authentication litigation.<sup>169</sup> Art galleries found to be selling inauthentic art have been sued for fraud.<sup>170</sup> Auction houses that failed to recognize authentic art have been sued for negligent misattribution.<sup>171</sup> Authentication boards that refused to certify artworks as authentic have been sued for artificially restricting competition in the marketplace.<sup>172</sup> Art experts that offered unpopular opinions about the inauthenticity of art have been sued.<sup>173</sup>

Another answer is that authenticity does *not* matter; that it is an inherently conservative concept that is used to *preserve*, rather than disband, social hierarchies.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup>

Beebe explains that intellectual property law maintains this “consumption-based system of social distinction”<sup>177</sup> by protecting

---

<sup>168</sup> *Id.*

<sup>169</sup> See generally Leila A. Amineddoleh, *Are You Faux Real: An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS ENTERTAIN. LAW J. 59 (2016).

<sup>170</sup> See Complaint, *Lagrange et al v. Knoedler Gallery, LLC et al*, 1:11CV08757 (S.D.N.Y., 2011) (action for breach of express and other contractual warranties, fraud and unjust enrichment, arising out of the sale of a painting, purportedly by Jackson Pollock, for \$17 million).

<sup>171</sup> *Marchig v. Christie's Inc.*, 430 F. App'x 22 (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. Appellant sued for negligent misrepresentation).

<sup>172</sup> *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 CIV. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009) (plaintiff alleged that the Andy 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).

<sup>173</sup> *Hahn v. Duveen*, 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. 1929) (defendant's declaration that plaintiff's painting was not a genuine work by Leonard da Vinci caused art gallery to call off negotiations to purchase said artwork).

<sup>174</sup> Beebe, *supra* note 167.

<sup>175</sup> See generally *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 813.



distinctive marks from dilutive copying.<sup>178</sup> 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.<sup>179</sup> In a “post-rarity world,” IP law tries to “re-enchanted” certain copies, to enhance their perceived value as *authentic* and *original*.<sup>180</sup> 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.”<sup>181</sup>

Art forgers have long criticized the social hierarchy maintained by the distinction between authentic and inauthentic art. 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.<sup>182</sup> Many forgers became legendary for their imitations.

Dutch painter Han van Meegeren forged several works by Vermeer. His first forgery, *Christ and the Disciples at Emmaus*, was a religious painting created in the style of Vermeer, if Vermeer had been influenced by Caravaggio.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup>

Art forgers justified their forgery on a number of grounds. Some

---

<sup>178</sup> 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). See *Id.* at 816.

<sup>179</sup> *Id.* at 888.

<sup>180</sup> *Id.* at 836, 844.

<sup>181</sup> *Id.* at 817.

<sup>182</sup> Gary Alan Fine, *Cheating History: The Rhetorics of Art Forgery*, 1 EMPIR. STUD. ARTS 75, 76 (1983).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 82.

<sup>185</sup> *Id.* at 83.

<sup>186</sup> Lessing, *supra* note 107 at 463.

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.”<sup>187</sup> 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.”<sup>188</sup>

By far the most consistent motivation expressed by art forgers was hatred for the art establishment.<sup>189</sup> 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.<sup>190</sup> Keating described his work as “a protest against merchants who make capital out of those I am proud to call my brother artists, both living and dead.”<sup>191</sup> Many forgers sought to expose the greed and arbitrariness of the art market. 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.<sup>192</sup> 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.<sup>193</sup> They were “autograph hunters”, not art lovers.<sup>194</sup> Accordingly, art forgers exposed the “false aesthetic standards of art critics.”<sup>195</sup>

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”.<sup>196</sup> Similarly, after the British public learned of Tom Keating’s forgeries, he received a book contract and an appearance on the BBC.<sup>197</sup> The British public took great pleasure in Keating’s deception of

---

<sup>187</sup> *Id.* at 469.

<sup>188</sup> Fine, *supra* note 183 at 86.

<sup>189</sup> *Id.* at 78.

<sup>190</sup> *Id.* at 88.

<sup>191</sup> *Id.* at 78.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 76.

<sup>194</sup> *Id.* at 91.

<sup>195</sup> Lessing, *supra* note 107 at 462.

<sup>196</sup> Fine, *supra* note 183 at 84.

<sup>197</sup> *Id.* at 89.

pompous art dealers, and called the scandal “Watercolorgate”.<sup>198</sup>

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 recreating 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.<sup>199</sup>

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.<sup>200</sup> 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.”<sup>201</sup>

In summary, the proper attribution of AI outputs would 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.<sup>202</sup>

---

<sup>198</sup> *Id.*

<sup>199</sup> For an excellent discussion about how the analytical devices employed by copyright jurists reflect competing aesthetic theories, see Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 *SOUTH. CALIF. LAW 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.

<sup>200</sup> Fine, *supra* note 183 at 90.

<sup>201</sup> Lessing, *supra* note 107 at 464.

<sup>202</sup> Of course, there are also contexts where consumer confusion is the express purpose of a particular work, for example, parodies, or appropriation art. In these contexts, policing attribution requirements would defeat the very purpose of these works.

## II. Copyright Provides No Remedy

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.<sup>203</sup> However, as this Part will show, artists like Gi have no remedy under copyright law because (a) style is uncopyrightable, and (b) the copyright statute contains no general right of attribution.

### A. *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. They are frequently told, however, that “style is not copyrightable.”<sup>204</sup> 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.<sup>205</sup> The protection of an artist’s distinctive “style” (in the form of an exclusive entitlement to a set of abstract features discernable only across a collection of works) would be inconsistent with the idea-expression dichotomy.<sup>206</sup> Copyright only protects “the author’s interests in relation to singular works.”<sup>207</sup>

However, there are a few caveats to this. First, “style” is a notoriously difficult concept to define.<sup>208</sup> 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

---

<sup>203</sup> See, e.g., Blake E. Reid, What Copyright Can’t Do (Sep. 8, 2024), <https://papers.ssrn.com/abstract=4766540>; Cathay Y. N. Smith, *Weaponizing Copyright*, 35 HARV. J. LAW TECHNOL. 193 (2021); Carys J. Craig, The AI-Copyright Trap (Jul. 15, 2024), <https://papers.ssrn.com/abstract=4905118>.

<sup>204</sup> See, e.g., popular remarks on the social media platform X, which have received over 40,000 views. <<https://x.com/shadmbrooks/status/1727684716688748753>>

<sup>205</sup> *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”).

<sup>206</sup> Chris Sprigman, Pam Samuelson, and Matthew Sag, Notice to Copyright Office, Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright, October 30, 2023.

<sup>207</sup> *Id.*

<sup>208</sup> See, e.g., Brownlee, *supra* note 33; Benjamin Sobel, *Elements of Style: Copyright, Similarity, and Generative AI*, 38 HARV. J. LAW TECHNOL. (2024), <https://papers.ssrn.com/abstract=4832872>.

and limited palette of Jean Dubuffet's *l'Hourloupe* series). If style is broadly defined, then it is more likely to represent an unprotectable idea.<sup>209</sup> However, if style is narrowly defined as a unique combination of stylistic elements, then it may represent protectable expression.<sup>210</sup> It is often difficult to distinguish unprotectable stylistic elements from protectable expression.<sup>211</sup>

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.<sup>212</sup>

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.<sup>213</sup> Courts have extended copyright protection to stylistic elements of visual works where those elements were applied to the same subject matter,<sup>214</sup> and also to the features of copyrighted characters that emerge across a series of works.<sup>215</sup>

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.<sup>216</sup> 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.<sup>217</sup>

Similarly, the "total concept and feel" test for substantial similarity effectively prohibits any copying that dilutes "the

---

<sup>209</sup> 17 U.S.C. § 102(b).

<sup>210</sup> Brownlee, *supra* note 33 at 1160.

<sup>211</sup> Sobel, *supra* note 209.

<sup>212</sup> *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F.Supp. 706 (S.D.N.Y. 1987).

<sup>213</sup> Benjamin Sobel, *Elements of Style: Copyright, Similarity, and Generative AI* (May 18, 2024), <https://papers.ssrn.com/abstract=4832872>.

<sup>214</sup> See, e.g., *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987) ("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.*, (the copying of distinctive jewelry designs was found to exceed the permitted taking of stylistic ideas); *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020) (rejecting a fair use argument by the creators of a parody that reproduced Dr. Seuss' "characteristic style"). See Brownlee, *supra* note 33 at 1168.

<sup>215</sup> Sobel, *supra* note 209 at 88.

<sup>216</sup> 17 U.S. Code § 106(2).

<sup>217</sup> Ginsburg, *supra* note 26 at 10.

distinctive style or ‘aesthetic appeal’ of the plaintiff’s work.”<sup>218</sup> The application of the test has allowed “very abstract similarities between two works” to form the basis for infringement.<sup>219</sup> Alfred Yen argues that the ambiguity and expansiveness of this test has had a chilling effect on creative expression.<sup>220</sup> 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.”<sup>221</sup>

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.”<sup>222</sup> In *Sid & Marty Krofft Television Prods., 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.”<sup>223</sup>

Additionally, judicial evaluation of “transformativeness” under the first fair use factor provides some protection for an artist’s distinctive style because courts struggle to appreciate non-visual transformations of earlier works.<sup>224</sup> 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.”<sup>225</sup> 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.<sup>226</sup> This effectively produces copyright protection for an artist’s distinctive style.<sup>227</sup>

---

<sup>218</sup> Beebe, *supra* note 167 at 862.

<sup>219</sup> Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s Total Concept and Feel*, 38 EMORY LAW J. 393, 410 (1989).

<sup>220</sup> *Id.* at 420.

<sup>221</sup> *Id.* at 429.

<sup>222</sup> *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

<sup>223</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977). See also *Boisson v. Banian, Ltd.*, 273 F.3d 262, 266 (2d Cir. 2001).

<sup>224</sup> 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. UNIV. LAW REV. 559, 606 (2016).

<sup>225</sup> JANE GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 236 (1991). See also Ginsburg, *supra* note 26 at 20.

<sup>226</sup> Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. UNIV. LAW REV. 489, 543 (2006).

<sup>227</sup> See, e.g., *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020)

Courts view works of appropriation art “as substitutes for the original work,” rather than as forms of commentary that are meant to stand alongside them.<sup>228</sup>

Despite these nuances, it remains generally true that style is uncopyrightable, and this confirms the stark differences between copyright law and anti-plagiarism norms. Artists and authors strongly feel 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).<sup>229</sup> Many creators feel entitled to property rights in the metadata associated with their portfolios, not just the expression contained within individual works. However, this metadata is not something that copyright law protects. The distance between creators’ moral intuitions and the strictures of copyright doctrine may explain some of the public’s frustration with copyright law’s inability to ameliorate the labor effects of generative AI.

### B. VARA and the DMCA

The absence of attribution rights under existing law has been the subject of extensive scholarship.<sup>230</sup> It reflects the U.S.’s longstanding hostility towards moral rights, and its reputation as “a place that cares more about commerce than culture.”<sup>231</sup>

---

(appropriation of Dr. Seuss’ characteristic illustration style was held to be infringing); *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (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).

<sup>228</sup> Katyal, *supra* note 227 at 544.

<sup>229</sup> Bracha, *supra* note 20.

<sup>230</sup> See generally Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. LAW REV. 345 (2007); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 BOSTON UNIV. LAW REV. 41 (2007); Lastowka, *supra* note 13; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW CONTEMP. PROBL. 135 (2007); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUST. LAW REV. 263 (2004); Jane C. Ginsburg, *The Author’s Name as a Trademark: A Perverse Perspective on the Moral Right of Paternity Featured Essays*, 23 CARDOZO ARTS ENTERTAIN. LAW J. 379 (2005); Green, *supra* note 45; Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU LAW REV. 55 (2007); Tushnet, *supra* note 87; Fromer, *supra* note 60; Patrick R. Goold, *The Lost Tort of Moral Rights Invasion*, 51 AKRON LAW REV. 1093 (2017).

<sup>231</sup> Justin Hughes, *American Moral Rights and Fixing the Dastar Gap*, 2007 UTAH LAW REV.

The Visual Artists Rights Act (“VARA”) only offers an attribution right to authors of visual art.<sup>232</sup> 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 purposes only.”<sup>233</sup> 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.<sup>234</sup> 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.<sup>235</sup> Jane Ginsburg argues that VARA represents “a very feeble measure for enforcing artists’ attribution rights”.<sup>236</sup> Michael Landau agrees that VARA is “really a type of ‘art preservation’ legislation intended to protect very limited special works of art.”<sup>237</sup> Accordingly, VARA cannot protect ordinary creators from the threat of misattribution associated with generative AI.

The DMCA provides some limited protection against the intentional removal of “copyright management information” (“CMI”) which may include author-identifying information.<sup>238</sup> 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.<sup>239</sup>

In order to prove a violation of section 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. It would be difficult for a plaintiff to show that a distributor of a copyrighted work (who had

---

659, 714 (2007).

<sup>232</sup> 17 U.S.C. §106A.

<sup>233</sup> 17 U.S. Code § 101.

<sup>234</sup> Ginsburg, *supra* note 83 at 54.

<sup>235</sup> *Id.*

<sup>236</sup> Jane C. Ginsburg, *Moral Rights in the U.S. Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS ENTERTAIN. LAW J. 73, 82 (2012).

<sup>237</sup> Michael Landau, *Copyrights, Moral Rights, and the End of the Right of Attribution under US Trademark Law*, 19 INT. REV. LAW COMPUT. TECHNOL. 37, 50 (2005).

<sup>238</sup> 17 U.S.C. §1202.

<sup>239</sup> Ginsburg, *supra* note 237 at 74. See also *Raw Story Media, Inc. v. OpenAI, Inc.*, No. 24 Civ. 01514, S.D.N.Y., November 7, 2024 (mere removal of copyright management information, in the absence of dissemination, was insufficient to show standing under Article III).



deliberately removed the author's name) *knew* that end-users would be induced by the absence of attribution to infringe the unattributed work.<sup>240</sup>

Additionally, CMI is frequently removed as part of an automated process. Many platforms automatically remove metadata from digital files to reduce file size and promote efficient circulation.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> In *The Intercept v. OpenAI*, 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, met the first intent requirement under 1202(b)(1).<sup>244</sup>

### C. Extra-Legal Protection

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,<sup>245</sup> and the technical difficulty of replicating an artist's distinctive style and applying it to new subject matter at scale. Generative AI exposes the vulnerability of

---

<sup>240</sup> *Id.* at 78.

<sup>241</sup> Ginsburg, *supra* note 83 at 68.

<sup>242</sup> See *Stevens v. CoreLogic, Inc.*, 2016 U.S. Dist. LEXIS 86843 at 15-16 (S.D. Cal. July 1, 2016).

<sup>243</sup> Ginsburg, *supra* note 83 at 68.

<sup>244</sup> *The Intercept Media, Inc. v. OpenAI, Inc.*, No. 24-cv-1515 (JSR), S.D.N.Y., February 20, 2025.

<sup>245</sup> For a broader discussion of the regulating effects of extralegal norms, see for example, Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes*, in *ORDER WITHOUT LAW* (2009); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. LEG. STUD.* 115 (1992); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 *NORTHWEST. UNIV. LAW REV.* 77 (1999); Jonathan Barnett, *Sharing in the Shadow of Property: Rational Cooperation in Innovation Markets* (Oct. 17, 2008), <https://papers.ssrn.com/abstract=1287283>; 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 Boundary between Academic and Industry Research*, 77 *FORDHAM LAW REV.* 2237 (2008); William W. III Fisher, *The Implications for Law of User Innovation*, 94 *MINN. LAW REV.* 1417 (2009).

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.<sup>246</sup> 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.<sup>247</sup> For example, obtaining sensitive information from court records was previously constrained by the prohibitive cost of searching hundreds of physical documents.<sup>248</sup> 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.<sup>249</sup>

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. 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 became so famous was because it was so rare to possess the technical skills 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. 4 below). Accordingly, the protection that artists previously enjoyed against misattribution – protection offered by the technical difficulty of style replication – has been eroded by a new technology.<sup>250</sup>

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.

---

<sup>246</sup> See generally Surden, *supra* note 7.

<sup>247</sup> *Id.* at 1606.

<sup>248</sup> *Id.* at 1613.

<sup>249</sup> *Id.* at 1607.

<sup>250</sup> See, e.g., U.S. Copyright Office, Report on *Copyright and Artificial Intelligence, Part 3: Generative AI Training*, May 2025, page 65 (“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”).

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.

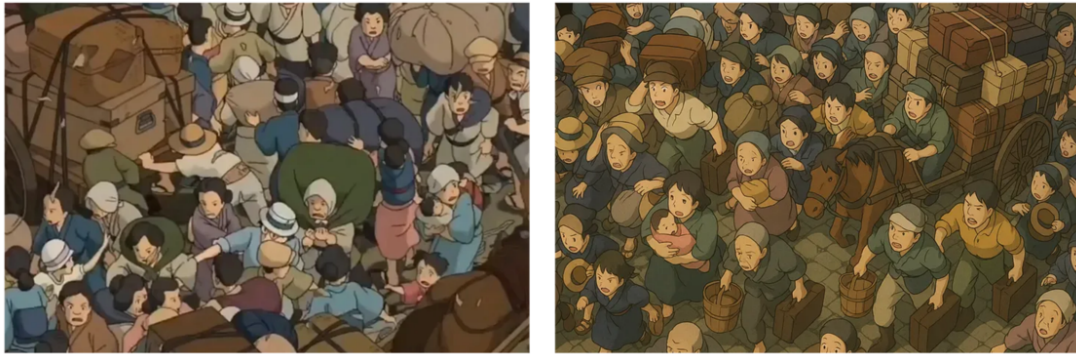


Fig. 4. The Studio Ghibli image on the left took 15 months to complete, while the image on the right was generated by ChatGPT in 30 seconds.<sup>251</sup>

Prior to the emergence of generative AI, social norms served as the primary constraint on non-infringing, unattributed copying.<sup>252</sup> Many creative communities developed their own norms of attribution.<sup>253</sup> The informal norms-based attribution systems that developed across different industries offered substantial flexibility and sensitivity to context.<sup>254</sup> 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.<sup>255</sup> The development of industry-specific attribution norms reflects the fact that the incentivizing force of attribution operates differently in

<sup>251</sup> Erik Hoel, *Welcome To The Semantic Apocalypse*, THE INTRINSIC PERSPECTIVE (Mar. 27, 2025), [https://substack.com/home/post/p-159983195?utm\\_medium=email](https://substack.com/home/post/p-159983195?utm_medium=email).

<sup>252</sup> 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. LAW REV. 1455 (2019).

<sup>253</sup> See, e.g., Fisk, *supra* note 6; 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 ENTERTAIN. LAW J. 1121 (2006).

<sup>254</sup> Fisk, *supra* note 6 at 109.

<sup>255</sup> *Id.* at 65, 96.

different sectors.<sup>256</sup>

French chefs, for example, have highly specific norms around the sharing, copying, and attribution of *haute cuisine* recipes.<sup>257</sup> Credit for developing novel and popular recipes helps to boost restaurant traffic and cookbook sales, and also leads to employment opportunities.<sup>258</sup> 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.<sup>259</sup>

Academic researchers also have strong citation norms.<sup>260</sup> 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 censured by their academic peers.<sup>261</sup> Generative AI, however, erodes the regulatory capacity 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.

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.<sup>262</sup> 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

---

<sup>256</sup> 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.

<sup>257</sup> Fauchart and von Hippel, *supra* note 6.

<sup>258</sup> Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORGAN. SCI.* 187, 193 (2008).

<sup>259</sup> Fauchart and von Hippel, *supra* note 6 at 187.

<sup>260</sup> 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. ELECTRON. PUBL.* (2008), <https://doi.org/10.3998/3336451.0011.105>; K Hyland, *Academic Attribution: Citation and the Construction of Disciplinary Knowledge*, 20 *APPL. LINGUIST.* 341 (1999).

<sup>261</sup> Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 *WASH. LAW REV.* 119 (2004). Interestingly, Anthropic’s large language model, Claude, offers a summary of the theory of contextual integrity without citing Helen Nissenbaum, when prompted by this author to describe the theory.

<sup>262</sup> Surden, *supra* note 7 at 1607.

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. This significantly increases the risk of misattribution and consumer confusion, highlighting the need for greater legal protection for artists' attribution interests.

### III. The Trademark Function of Authorship

Twenty years ago, the late Greg Lastowka argued that Congress should restore the “trademark function of authorship” by “prohibiting deceptive misattributions of authorship that result in consumer harms.”<sup>263</sup> Lastowka explained that accurate attribution of expressive works serves many of the same goals as the protection of distinctive marks for goods and services.<sup>264</sup> First, authors that are able to capture the full reputational benefits of their labor are motivated to produce high-quality works. Second, consumers that 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.<sup>265</sup> In other words, authorial attribution serves the same social functions as source indication: incentivizing the creation of high-quality works and reducing consumer confusion.<sup>266</sup>

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.<sup>267</sup> 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 physical manufacturer.<sup>268</sup> 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

---

<sup>263</sup> Lastowka, *supra* note 13 at 1241.

<sup>264</sup> *Id.* at 1175.

<sup>265</sup> *Id.* at 1188.

<sup>266</sup> *Id.* at 1176.

<sup>267</sup> *Id.* at 1200.

<sup>268</sup> *Id.* at 1208.

Lanham Act as more traditional trademarks”.<sup>269</sup>

In this Part, I apply Lastowka’s insights to the current technological moment. AI’s extraordinary imitation capabilities threaten creative incentives by (1) reducing artists’ ability to capture the goodwill associated with their work, and (2) increasing the risk of consumer confusion, due to the difficulty of identifying AI-generated “dupes”. For this reason, it is more important than ever to protect the trademark function of authorship in order to help artists and consumers navigate the marketplace of AI. Congress should restore the capacity of copyright owners to bring claims for false designation of origin under the Lanham Act.

### ***A. Pre-Dastar***

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.<sup>270</sup> 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. These doctrinal differences suggest that attribution rights should be enforced under trademark rather than copyright law.<sup>271</sup>

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

---

<sup>269</sup> LaFrance, *supra* note 12 at 235.

<sup>270</sup> Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU LAW REV. 55, 58 (2007).

<sup>271</sup> *Id.* at 62. See also Hansmann and Santilli, *supra* note 13. (discussing the reputational externalities of moral rights violations) and Tang, *supra* note 13. (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). However, *cf.* Lee B. Burgunder, *Trademark and Copyright: How Intimate Should the Close Association Become*, 29 ST. CLARA LAW REV. 89, 113 (1989). (arguing that jurists “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.

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.”<sup>272</sup> Similarly, an AI user’s ability to free ride on the goodwill generated by an artist over the 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.<sup>273</sup> Section 43(a) is not preempted by section 301(a) of the Copyright Act,<sup>274</sup> and it does not render VARA superfluous because VARA does not turn on a likelihood of consumer confusion.<sup>275</sup>

Prior to the Supreme Court’s decision in *Dastar*, copyright owners enforced their attribution interests under section 43(a) of the Lanham Act.<sup>276</sup> It provided important protection for artists’ moral rights, in line with the United States’ obligations to respect

---

<sup>272</sup> *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 305–06 (9th Cir. 1992).

<sup>273</sup> 15 USC § 1125(a)(1).

<sup>274</sup> Section 301 does not apply to section 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.

<sup>275</sup> Hughes, *supra* note 232 at 686.

<sup>276</sup> See, e.g., *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (finding a valid claim for relief under section 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. Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976) (Monty Python obtained an injunction to restrain ABC from broadcasting highly edited versions of their original programs; the Court recognized an artist’s right to have his work attributed to him in the form in which he created it); *Follett v. New Am. Libr., Inc.*, 497 F. Supp. 304, 313 (S.D.N.Y. 1980) (representing Follett as the principal author of the book would be false; 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) (defendant reproduced architectural drawings and removed plaintiff’s name and seal from the drawings and replaced them with his own); *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994) (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) (a licensed distributor of Paddington Bear products was granted injunctive relief 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) (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).

moral rights under the Berne Convention.<sup>277</sup> The 100<sup>th</sup> Congress endorsed the application of section 43(a) to false designations of authorship as evidence that the U.S. could comply with Berne's provisions without passing new legislation.<sup>278</sup> 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.<sup>279</sup>

Section 43(a) prohibits both *passing off* and *reverse passing off*.<sup>280</sup> *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."<sup>281</sup> This is similar to the harm caused by plagiarism.

Reverse passing off can be *express* or *implied*.<sup>282</sup> *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.<sup>283</sup> *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.<sup>284</sup>

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

---

<sup>277</sup> Lastowka, *supra* note 13 at 1212.

<sup>278</sup> LaFrance, *supra* note 12 at 222.

<sup>279</sup> *Id.* at 224.

<sup>280</sup> But see LaFrance, *supra* note 12. (arguing that section 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 54 at 740. (arguing that the statutory language of section 43(a) does not cover reverse passing off).

<sup>281</sup> *Smith v. Montoro*, 648 F.2d 602, 607 (9th Cir. 1981).

<sup>282</sup> But see *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 327 (2d Cir. 1995) (no cause of action under section 43(a) for non-attribution); *Murray Hill Publications, Inc. v. ABC Commc'ns, Inc.*, 264 F.3d 622 (6th Cir. 2001) (no cause of action under section 43(a) where "no one was falsely credited").

<sup>283</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1364 (9th Cir. 1990).

<sup>284</sup> *Ibid.*



plaintiff was harmed by this false representation.<sup>285</sup>

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. 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."<sup>286</sup> In the 1990s, a circuit split arose over the degree of similarity required to justify a claim for misrepresentation of origin under section 43(a).<sup>287</sup> 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.<sup>288</sup> This included similarities between the structure, texts, and illustrations of different books.<sup>289</sup> The standard of comparison used by the Second Circuit was essentially the "substantial similarity" test used for copyright infringement.<sup>290</sup>

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.<sup>291</sup> This was defined as the "copying or unauthorized use of substantially the entire item"<sup>292</sup> and essentially referred to verbatim copying.<sup>293</sup> This limited the scope

---

<sup>285</sup> *Lipton v. Nature Co.*, 71 F.3d 464, 473 (2d Cir. 1995).

<sup>286</sup> Lunney, *supra* note 28 at 130.

<sup>287</sup> *Dahlen v. Michigan Licensed Beverage Ass'n*, 132 F. Supp. 2d 574, 589 (E.D. Mich. 2001).

<sup>288</sup> *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994).

<sup>289</sup> *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994).

<sup>290</sup> *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 783 (2d Cir. 1994).

<sup>291</sup> *Cleary v. News Corp.*, 30 F.3d 1255, 1261 (9th Cir. 1994) (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) (the doctrine of "reverse passing off" is limited to situations of bodily appropriation and does not apply where two products are merely substantially similar).

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.* It is not sufficient for the two works to be "generally similar".

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.<sup>294</sup>

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.<sup>295</sup> 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.<sup>296</sup>

As Randolph Sargent 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.”<sup>297</sup> Accordingly, relief for misattribution should be limited, Sargent says, to cases where “the defendant took the plaintiff’s *actual* product”, and did not simply create a similar work.<sup>298</sup> 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.<sup>299</sup>

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. If relief under the Lanham Act was limited to “bodily appropriations”, however, this would *not* protect Kim Jung Gi and other owners of copyrighted training data from the misattribution of AI-generated outputs, which often substantially modify the underlying training data.

---

<sup>294</sup> *Cleary v. News Corp.*, 30 F.3d 1255, 1262 (9th Cir.1994).

<sup>295</sup> Sargent, *supra* note 54 at 48.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 81.

<sup>298</sup> *Id.* at 83.

<sup>299</sup> Cross, *supra* note 54 at 766. (emphasis added)

### ***B. 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 Act.<sup>300</sup> 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.<sup>301</sup>

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. Dastar marketed the series as its own product and did not credit Fox. 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 section 43(a).

The Court considered whether the term “origin” under section 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.<sup>302</sup> 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. Thinking about which party the consumer would hold responsible for product defects is instructive.<sup>303</sup> 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.<sup>304</sup>

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

---

<sup>300</sup> Lastowka, *supra* note 13 at 1200. See, e.g., *Williams v. UMG Recordings; Borrego v. BMG U.S. Latin; Bob Creeden & Assoc., Ltd. v. Infsoft, Inc.*

<sup>301</sup> *Id.* at 1208.

<sup>302</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003).

<sup>303</sup> Sometimes consumers are only interested to know which party is responsible for post-sale product support. See Cross, *supra* note 54 at 754.

<sup>304</sup> LaFrance, *supra* note 12 at 246.

services.<sup>305</sup> Moreover, an expressive work is generally “the result of creative *services* performed by someone”<sup>306</sup> and trademark law protects the originator of services to the same degree that it protects the originator of physical goods.<sup>307</sup>

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”.<sup>308</sup> 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*.<sup>309</sup> 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.<sup>310</sup> Fox seemed more interested in *preventing* the circulation of the footage, than in requiring proper attribution.

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.”<sup>311</sup> 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

---

<sup>305</sup> Lunney, *supra* note 28 at 132.

<sup>306</sup> LaFrance, *supra* note 12 at 245.

<sup>307</sup> *Id.*

<sup>308</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003).

<sup>309</sup> Hughes, *supra* note 232 at 685.

<sup>310</sup> Rick Mortensen, *D.I.Y. after Dastar: Protecting Creators’ Moral Rights through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements*, 8 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 335, 342 (2005).

<sup>311</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36 (2003).

as implying the creator's "sponsorship or approval" of the copy.<sup>312</sup>

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.<sup>313</sup> Several Russian composers had objected to the use of their names in a film about Soviet espionage which reproduced their (public domain) music. 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.'" 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.<sup>314</sup>

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 contested.

---

<sup>312</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36 (2003).

<sup>313</sup> *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948).

<sup>314</sup> *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 578–79 (Sup. Ct. 1948).

### *C. Overturning Dastar*

While *Dastar* may have been a victory for the public domain, it left creators unprotected against the misattribution of their expressive works.<sup>315</sup> Following *Dastar*, “the designation of John Grisham as the author of a novel that he did not write ... would not constitute a false designation of origin, at least so long as the creator of the physical item at issue was correctly identified.”<sup>316</sup> This seems like a patently absurd result, particularly in light of contemporary technological conditions.<sup>317</sup> By prompting ChatGPT, I could easily generate new books in the style of John Grisham and market them under his name.<sup>318</sup> As long as the physical manufacturer of the books was correctly identified, Grisham would have no legal recourse.

If this hypothetical scenario seems far-fetched, it is not. In 2023, author Jane Friedman discovered multiple books for sale on Amazon under her name.<sup>319</sup> 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.<sup>320</sup> They also appeared on her Goodreads profile.<sup>321</sup> 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. 5 below).<sup>322</sup> (Amazon later removed the AI-generated titles after Friedman took the matter to the press).<sup>323</sup>

---

<sup>315</sup> 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.* (2010).

<sup>316</sup> Lunney, *supra* note 28 at 137.

<sup>317</sup> The Authors Guild has introduced a certification system to help consumers identify works that are human-authored rather than AI-authored, setting aside “trivial” uses of AI for spelling, grammar, or brainstorming. See *Human Authored Certification*, THE AUTHORS GUILD, <https://authorsguild.org/human-authored/> (last visited Jun. 3, 2025).

<sup>318</sup> Some scholars have observed that by eliminating trademark as a mechanism for enforcing attribution rights, the Supreme Court effectively “licensed plagiarism.” See, e.g., Lastowka, *supra* note 231 at 76.

<sup>319</sup> Mauran, *supra* note 32.

<sup>320</sup> Limbong, *supra* note 32.

<sup>321</sup> Friedman, *supra* note 32.

<sup>322</sup> *Id.*

<sup>323</sup> Mauran, *supra* note 32.



Fig. 5. Post on social media platform X by author Jane Friedman.

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.”<sup>324</sup>

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 section 43(a).<sup>325</sup> This could be achieved by adding a definition of the term “origin” to the statute that includes the author of a copyrighted work.<sup>326</sup>

Although the *Dastar* Court left open the possibility of creators bringing claims for “false advertising” under § 43(a)(1)(B),<sup>327</sup> some

<sup>324</sup> Friedman, *supra* note 32.

<sup>325</sup> Lastowka, *supra* note 13 at 1174.

<sup>326</sup> Hughes, *supra* note 232 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.”

<sup>327</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 38 (2003). Justin Hughes

courts have relied on *Dastar* to bar such claims where they concerned the origin of a work.<sup>328</sup> As Mark McKenna explains, it would violate the spirit of *Dastar* “to allow parties to avoid the decision simply by recharacterizing as false advertising a claim that is really about the origin of content.”<sup>329</sup> In light of these judicial trends, it would be more prudent for Congress to amend the definition of “origin” under the Lanham Act than to ask creators to rely on the uncertain protection offered by § 43(a)(1)(B).<sup>330</sup>

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.<sup>331</sup> Arguably, this interest extends to proper attribution of public domain works.<sup>332</sup> 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.<sup>333</sup>

---

argues that misattributions of authorship may still be actionable under section 43(a) if they are framed as misrepresentations of *fact*. 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 section 43(a). See *Id.* at 698.

<sup>328</sup> See, e.g., *Antidote Int'l Films, Inc. v. Bloomsbury Pub., PLC*, 467 F. Supp. 2d 394, 399 (S.D.N.Y. 2006) (“the 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 § 43(a)(1)(A) or the “misrepresents the nature, characteristics [or] qualities” provision of § 43(a)(1)(B)”).

<sup>329</sup> Mark P. McKenna, *Dastar's next Stand*, 19 J. INTELLECT. PROP. LAW 357, 379 (2011).

<sup>330</sup> 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) (reproduction of a musical performer's signature dance move in a video game created the false impression that the performer had endorsed the game; the performer's false endorsement claim is distinct from his false designation of origin claim and is not barred by *Dastar*). See also *Alcon Entertainment, LLC v. Tesla, Inc., et al.*, CV 24-9033-GW-RAOx (2025) (producer of film *Blade Runner 2049* sued Tesla for appropriating the film's aesthetic for an AI-generated promotional image, alleging, *inter alia*, false endorsement in violation of 1125(a)(1)(A)).

<sup>331</sup> Lastowka, *supra* note 13.

<sup>332</sup> Landau, *supra* note 238 at 49.

<sup>333</sup> *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,



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.<sup>334</sup> 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.”<sup>335</sup>

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.<sup>336</sup> Instead, only plaintiffs who can show that their work is recognizable would be able to obtain relief.<sup>337</sup> 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.<sup>338</sup> 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.<sup>339</sup>

Fourth, relief under section 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.<sup>340</sup> This allows a broader cohort of creators affected by generative AI to

---

I am more concerned with avoiding misattribution than remedying non-attribution.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Heymann, *supra* note 271 at 60.

<sup>337</sup> *Id.* at 97.

<sup>338</sup> Sargent, *supra* note 54 at 64.

<sup>339</sup> *Follett v. New Am. Libr., Inc.*, 497 F. Supp. 304, 313 (S.D.N.Y. 1980).

<sup>340</sup> 15 U.S.C. § 1125(a)(1).

vindicate their attributional interests, even if they are not the copyright owners. For example, this would protect Indigenous artists, whose traditional cultural expressions have been the subject of AI training but may not be copyrightable.<sup>341</sup> It would also protect human artists who incorporate AI into their creative process and consequently lose their legal status as authors.<sup>342</sup>

#### ***D. 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.<sup>343</sup> 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."<sup>344</sup> For example, section 43(a) limits relief to creators with name recognition because only then will the defendant's actions cause consumer confusion. 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".<sup>345</sup> Pro-consumer justifications for attribution rights may also be "more likely to overcome the anti-moral rights orientation" of American law.<sup>346</sup>

---

<sup>341</sup> Chris Griffith, *Fake Art for Sale at Adobe Stock*, AUSTRALIAN, THE, Apr. 9, 2024, at 20.

<sup>342</sup> For example, if Gi, before his death, had begun incorporating AI into his creative process (for example, by training an AI model on his portfolio of works) this would potentially render his works uncopyrightable. See U.S. Copyright Office, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, (2025), <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf>. See also *Stephen Thaler v. Shira Perlmutter*, D.C. Cir., No. 23-5233, March 18, 2025 (affirming the human-authorship requirement).

<sup>343</sup> Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire between Copyright and Section 43(A)*, 77 WASH. LAW REV. 985, 1020 (2002). See also McGeeveran, *supra* note 70 at 361. (discussing trademark doctrine's reliance on consumer perceptions to set the boundaries of infringement).

<sup>344</sup> SILBEY, *supra* note 61 at 150.

<sup>345</sup> Judith B. Prowda, *Application of Copyright and Trademark Law in the Protection of Style in the Visual Arts*, 19 COLUMBIA-VLA J. LAW ARTS 269, 298 (1994).

<sup>346</sup> Derek E. Bambauer & Robert Woods, *AI, Artists, and Anti-Moral Rights* (Apr. 10, 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 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 39, 67 (2019). (arguing that the "trademarkization" of attribution may increase the purchase of European attribution norms in the U.S.).

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 section 43(a) is limited to the use of false designations of origin “in commerce”.<sup>347</sup> 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 section 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 Amendment rights “are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”<sup>348</sup> Prohibiting you 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.<sup>349</sup> In other words, the threat of legal sanction for non-attribution or misattribution might discourage secondary creators from creating new expression that is similar to existing works.<sup>350</sup> 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.<sup>351</sup>

---

<sup>347</sup> 15 U.S.C. § 1125(a)(1).

<sup>348</sup> *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).

<sup>349</sup> Ginsburg, *supra* note 83 at 47.

<sup>350</sup> Sergent, *supra* note 54 at 48.

<sup>351</sup> Lunney, *supra* note 28 at 122.

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.”<sup>352</sup>

To reduce the risk of powerful rights holders weaponizing section 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.<sup>353</sup> If relief is so limited, only plaintiffs that value proper attribution will bear the costs of litigation.<sup>354</sup> Courts can further discourage bad actors from weaponizing attribution rights by requiring proof of materiality,<sup>355</sup> and awarding attorney’s fees to the prevailing party.<sup>356</sup>

Additionally, Congress could limit relief under section 43(a) to affirmative misrepresentations of origin, rather than mere omissions.<sup>357</sup> 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.<sup>358</sup>

Mary LaFrance argues that “mere silence” should be excluded from the scope of relief under section 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.<sup>359</sup> If non-attribution was actionable under section 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.<sup>360</sup> Limiting the scope of relief under 43(a) to

---

<sup>352</sup> *Id.* at 124.

<sup>353</sup> *Id.* at 134.

<sup>354</sup> *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.

<sup>355</sup> *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 922 (3d Cir. 1990) (“plaintiff must also show that defendant’s misrepresentation is “material, in that it is likely to influence the purchasing decision”).

<sup>356</sup> Lunnay, *supra* note 28 at 140.

<sup>357</sup> LaFrance, *supra* note 12 at 235.

<sup>358</sup> *Id.* at 241.

<sup>359</sup> *Id.* at 237. See also Cross, *supra* note 54 at 756. (explaining that trademark law does *not* require “full disclosure of source information”).

<sup>360</sup> See, e.g., *Cleary v. News Corp.*, 30 F.3d 1255, 1260 (9th Cir. 1994) (“the case law does suggest that the Lanham Act does not create a duty of express attribution but does protect against

affirmative acts of misattribution would also be consistent with the moral intuition that non-attribution is often less egregious than deliberate misattribution.<sup>361</sup>

Fifth, although the Lanham Act is consumer-oriented, section 43(a) does not prevent artists from licensing their work in ways that may continue to deceive consumers. For example, if John Grisham grows tired of writing, he can license the use of his name on books written by an undisclosed ghostwriter, and there would be no cause of action under section 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.<sup>362</sup> 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.<sup>363</sup> However, section 43(a) does not protect the public from *licensed* reverse passing off.<sup>364</sup>

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. This is a longstanding issue with art merchandise that is “inspired by” the work of well-known artists.<sup>365</sup> The Museum of Modern Art, for example, is currently selling “Joan Miró Gold-Plated Dot Squiggle Earrings” for ninety-six dollars.<sup>366</sup> 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

---

misattribution”). But see *Lamothe v. Atl. Recording Corp.*, 847 F.2d 1403, 1407 (9th Cir. 1988) (affixing an *incomplete* designation of authorship is no less “false” than affixing an *inaccurate* designation of authorship). See also the Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention (“omission of an author’s name from his work may constitute an implied reverse passing off and thus violate section 43(a)”). See also

<sup>361</sup> Hansmann and Santilli, *supra* note 13 at 130–131. (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).

<sup>362</sup> For an interesting discussion of the normative implications of ghostwriting, and the public’s participation in the charade, see, e.g., Noti-Victor, *supra* note 23.

<sup>363</sup> LaFrance, *supra* note 12 at 247.

<sup>364</sup> *Id.* at 248.

<sup>365</sup> Ginsburg, *supra* note 26 at 16.

<sup>366</sup> *Joan Miró Gold-Plated Dot Squiggle Earrings*, MOMA DESIGN STORE, <https://store.moma.org/products/joan-miro-gold-plated-dot-squiggle-earrings> (last visited Mar. 14, 2025).

collection “that pays tribute to the famed Spanish artist.”<sup>367</sup> The earrings are inspired by a motif from Miró’s 1924-1925 oil painting, *The Harlequin’s Carnival*, which contains several prominent “squiggles”.<sup>368</sup>

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.<sup>369</sup> Jane Ginsburg explains that a “Mondrian-style” handkerchief does not need to bear the artist’s name or signature in order to 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”.<sup>370</sup> 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.<sup>371</sup> These similarities may be sufficient to generate sales, even if they are tempered by proper disclosure about the origin of the works.<sup>372</sup> Accordingly, even if 5you was 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 section 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.<sup>373</sup> The Internet was soon flooded with “Ghiblified” content, ranging from wholesome family photographs to disturbing scenes of war.<sup>374</sup> 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.<sup>375</sup> Nobody thinks that Hayao Miyazaki sat down to

---

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> Ginsburg, *supra* note 26 at 22.

<sup>370</sup> *Id.* at 16.

<sup>371</sup> *Id.* at 17.

<sup>372</sup> *Id.*

<sup>373</sup> Kircher, *supra* note 5.

<sup>374</sup> Read, *supra* note 4.

<sup>375</sup> Kircher, *supra* note 5.

redraw the events of September 11 in his signature style.<sup>376</sup>

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.

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 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.<sup>377</sup>

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."<sup>378</sup> 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. Now it's everywhere, everything. I've lost something sacred."<sup>379</sup> 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.<sup>380</sup>

The harm to Studio Ghibli is exacerbated by Miyazaki's reputation "as an uncompromising craftsman and humanist" and his well-documented disdain for AI.<sup>381</sup> As one commentator

---

<sup>376</sup> Kate Plummer, *Studio Ghibli Trend Sparks Flood of Offensive Images*, NEWSWEEK, Mar. 27, 2025, <https://www.newsweek.com/studio-ghibli-chatgpt-internet-trend-2051443>.

<sup>377</sup> See, e.g., Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *AESTHETICS* (4 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.

<sup>378</sup> Hoel, *supra* note 252.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> Read, *supra* note 4.

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”.<sup>382</sup>

The mindless generation of Ghibli-style images also obscures the cultural significance of Miyazaki’s work. As Primavera de Filipi explains, Miyazaki’s art is “deeply embedded” in Japanese cultural practices and philosophical traditions, including Shinto animism and Japanese folklore.<sup>383</sup> Consequently, AI-generated “Ghibli-style” images are “surface-level imitations divorced from the profound cultural context that gives the original work its emotional weight and significance.”<sup>384</sup> 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*. 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”.<sup>385</sup> When this occurs, the generic mark is no longer protected and falls into the public domain. 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.<sup>386</sup> Accordingly, those features are unprotectable because they need to be available for use by subsequent creators within the same genre.<sup>387</sup> Some scholars have

---

<sup>382</sup> 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/openai-studio-ghibli-meme-factory>.

<sup>383</sup> Primavera de Filipi, *Studio Ghibli: When AI Meets Artistic Legacy*, ALIEN INTELLIGENCE (Mar. 31, 2025), <https://papers.alien.club/studio-ghibli-when-ai-meets-artistic-legacy-fc65d004ad65>.

<sup>384</sup> *Id.*

<sup>385</sup> Xiyin Tang, *Against Fair Use: The Case for a Genericness Defense in Expressive Trademark Uses*, 101 IOWA LAW REV. 2021 (2015).

<sup>386</sup> Jamie Lund, *Copyright Genericide*, 42 CREIGHTON LAW REV. 131, 142 (2008).

<sup>387</sup> Compare *Detective Comics v. Bruns Publications*, 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”) and *Lewinson v. Henry Holt & Co., LLC*, 659 F. Supp. 2d 547, 567 (S.D.N.Y. 2009) (“in 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*”).



described the process by which formerly protected elements permeate the public consciousness and become stock or expected features of certain genres as “copyright genericide”.<sup>388</sup>

It is clear that something of this nature is 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. Indeed, a judge in the Northern District of California has already offered a novel theory of harm based on AI “market dilution” or “indirect substitution”, that is, flooding the market with similar works.<sup>389</sup>

Despite these limitations, section 43(a) still represents the most promising vehicle for securing the proper attribution of expressive works in the marketplace of AI. Accordingly, Congress should amend the Lanham Act to restore the capacity of copyright owners to bring claims for false designation of origin under section 43(a).

### ***E. Alternative Remedies***

This sub-part 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.<sup>390</sup> While licensing may be an effective tool for some copyright owners,<sup>391</sup> not all creators have the bargaining power to negotiate with AI firms, and not all AI firms have the resources to license copyrighted training data.<sup>392</sup> Accordingly, leaving attribution

---

<sup>388</sup> Lund, *supra* note 387.

<sup>389</sup> See *Richard Kadrey v. Meta Platforms*, Case 3:23-cv-03417-VC, Northern District of California, Order denying plaintiff’s motion for partial summary judgment, June 25, 2025.

<sup>390</sup> See, e.g., Murgia, *supra* note 125. (“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: *Information for Authors on Artificial Intelligence*, (Sep. 30, 2024), <https://degruyterbrill.com/en/ai-for-authors/>.

<sup>391</sup> See, e.g., Sprigman, Buccafusco, and Burns, *supra* note 63 at 1428.

<sup>392</sup> See also *Andrea Bartz, et al. v. Anthropic PBC*, Case 3:24-cv-05417-WHA, Order on Fair Use,

rights to the whims of the private licensing market represents a precarious long-term solution.<sup>393</sup>

Second, some scholars have suggested folding attribution into the fair use analysis, under either the first factor,<sup>394</sup> or as an additional fifth factor.<sup>395</sup> 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.<sup>396</sup> The *Rogers*

---

U.S. District Court, Northern District of California (June 23, 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).

<sup>393</sup> See Melville Nimmer, Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 Stan L Rev, 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."

<sup>394</sup> Ginsburg, *supra* note 83 at 72. 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. Burtchaeil*, 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. In *Richard Feiner & Co. v. H.R. Industries*, 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 803 F.2d 1253 (2d Cir. 1986), and 10 F. Supp. 2d 310 (S.D.N.Y. 1998).

<sup>395</sup> Lastowka, *supra* note 231 at 84. 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.

<sup>396</sup> See, e.g., *Andersen v. Stability AI Ltd.*, 3:23-cv-00201, (N.D. Cal. Oct 31, 2024), Amended Complaint (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-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*, 2024 WL 4654113 (E.D.N.Y. Nov. 1, 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.

exception for expressive works does not apply where the use of trade dress is source-designating, even if it also communicates an expressive message unrelated to source.<sup>397</sup> Some visual artists have successfully secured trade dress protection for their distinctive style,<sup>398</sup> but many have not.<sup>399</sup> It is difficult to claim trade dress protection for an artist's style, since trade dress law does not protect ideas or concepts.<sup>400</sup> Furthermore, artists may not be able to show that their trade dress has acquired "secondary meaning" if they have promoted their works for exclusively artistic rather than commercial purposes.<sup>401</sup>

These limitations on trade dress protection for visual style are normatively desirable.<sup>402</sup> Allowing artists to claim trade dress protection for their distinctive style<sup>403</sup> would effectively create a prohibition on style imitation which, as I have said, is *not* the goal of this Article.<sup>404</sup> 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."<sup>405</sup> This would create a significant loophole in

1997), and *Sherwood 48 Assocs. v. Sony Corp. of Am.*, 76 F. App'x 389, 391 (2d Cir. 2003).

<sup>397</sup> *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 156 (2023).

<sup>398</sup> Some plaintiffs have been able to obtain trade dress protection for an artist's distinctive style and prevent imitators from distributing similar works: *Romm Art Creations Ltd. v. Simcha Int'l, Inc.*, 786 F. Supp. 1126 (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 (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).

<sup>399</sup> See, e.g., *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27 (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 (S.D.N.Y. 1988) (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; in the absence of secondary meaning, there was no viable claim for consumer confusion).

<sup>400</sup> *Jeffrey Milstein v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32 (2d Cir. 1995).

<sup>401</sup> Brownlee, *supra* note 33 at 1174. See *Hughes v. Design Look Inc.*, 693 F. Supp. 1500 (S.D.N.Y. 1988).

<sup>402</sup> 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) (manuscript on file with author).

<sup>403</sup> See, e.g., *Andersen v. Stability AI Ltd.*, 3:23-cv-00201, (N.D. Cal. Oct 31, 2024), Amended Complaint (alleging trade dress infringement based on appropriation of artists' distinctive styles).

<sup>404</sup> 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.

<sup>405</sup> William P. Fitzpatrick, *The Hazards of Extending Copyright of Trademark Protection to an Artist's Visual Style*, 17 COLUMBIA-VLA J. LAW ARTS 453, 473 (1992).

copyright's prohibition against the ownership of ideas.<sup>406</sup>

Trademark protection for style would also discourage style evolution because protection requires continued commercial use. This would create a perverse incentive for artists to maintain a particular style, even if they would like to experiment with a different aesthetic.<sup>407</sup> 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 *misattribution* of AI-generated content.

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 this aesthetic, such as Beverly Cleary and Jan Brett. 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.

Finally, a federal attribution right, while normatively desirable,<sup>408</sup> is an unlikely prospect, particularly in the current political climate. Asking Congress to amend the Lanham Act may be "an easier political task than seeking entirely new copyright entitlements."<sup>409</sup>

#### IV. Curing Non-Attribution

Even if Congress restored the capacity of copyright owners to bring claims for false designation of origin under the Lanham Act, Kim Jung Gi could not compel 5you to disclose that his AI model was trained on Gi's copyrighted works. There is no positive legal

---

<sup>406</sup> *Id.* at 474.

<sup>407</sup> See also Tang, *supra* note 13 at 253. ("the 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").

<sup>408</sup> See, e.g., Kwall, *supra* note 344; Landau, *supra* note 238; Ginsburg, *supra* note 231.

<sup>409</sup> Bambauer and Woods, *supra* note 347.

duty to provide attribution for *influence*, rather than authorship. If you had taken one of Gi's works, removed Gi's name, and distributed the work in an unbranded state, Gi might have a claim for non-attribution. However, you is not legally obliged to provide attribution to Gi for outputs of an AI model that was trained on Gi's works, i.e., derivative works.

To remedy the harm of *non-attribution of training data*, we need to look outside the Lanham Act. One solution could be to enact training data transparency provisions such as those found in the European Union's *Artificial Intelligence Act* ("the AI Act"). This Part will examine this approach.

### A. Source Attribution

As mentioned, Kim Jung Gi has two attribution interests: first, he wants to disclaim authorship of the outputs of you's model; second, he wants consumers to know that you'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*.<sup>410</sup>

Avoiding the second outcome is more complex than avoiding the first. Intuitively, we can understand why Gi wants some credit for the outputs of you's model; the model was trained on his body of works. The model's outputs were not just "influenced" 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

---

<sup>410</sup> 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": *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36 (2003).

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 also want to receive credit for the use of their work as training data (*source attribution*).<sup>411</sup>

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.

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.<sup>412</sup>

---

<sup>411</sup> Alec Tyson and Brian Kennedy, *Many Americans Think Generative AI Programs Should Credit the Sources They Rely On*, PEW RESEARCH CENTER (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/>.

<sup>412</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35-36 (2003).

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.<sup>413</sup>

The Court in *Dastar* refused to recognize a positive duty of attribution for public domain works due to its potentially unlimited nature. 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.”<sup>414</sup> 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.<sup>415</sup>

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 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.<sup>416</sup> For example, how much does country music owe to African American artists?<sup>417</sup> Where the

---

<sup>413</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 2003 WL 544536, 6 (U.S. Amicus Brief, 2003).

<sup>414</sup> Adler, *supra* note 225 at 568.

<sup>415</sup> *Id.*

<sup>416</sup> I am grateful to Ben Sobel for this point.

<sup>417</sup> See, e.g., Nadine Hubbs, *Is Country Music Quintessentially American?*, 40 AM. MUSIC 505 (2022); *Tracing Country Music’s Roots Back to 17th-Century Slave Ships*, THE WASHINGTON POST,

“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.<sup>418</sup> 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”.<sup>419</sup> These transparency provisions are designed to enable copyright owners to “exercise and enforce their rights under Union law”,<sup>420</sup> 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.<sup>421</sup>

The EU’s training data transparency provisions, while normatively desirable, may encounter some practical hurdles.<sup>422</sup> 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

---

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 Built Country Music—And Then It Left Them Behind*, TIME, Sep. 11, 2019, <https://time.com/5673476/ken-burns-country-music-black-artists/>; Lynn Brown, *Beyoncé’s Grammy-Winning Cowboy Carter Highlights the Long History of Texas’ Black Cowboy Culture*, THE BBC, Feb. 4, 2025, <https://www.bbc.com/travel/article/20240404-beyonces-cowboy-carter-highlights-the-long-history-of-texas-black-cowboy-culture>.

<sup>418</sup> 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.

<sup>419</sup> Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) [hereafter ‘AI Act’], Article 53(1)(d).

<sup>420</sup> AI Act, Recital 107.

<sup>421</sup> Adam Buick, *Copyright and AI Training Data—Transparency to the Rescue?*, 20 J. INTELLECT. PROP. LAW PRACT. 182 (2025).

<sup>422</sup> *Id.*



Internet.<sup>423</sup> This suggests that even a “detailed summary” of training data may not satisfy a creator’s desire for proper attribution.<sup>424</sup>

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. Gi did not endorse this work.”<sup>425</sup>

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?<sup>426</sup> Does the duty extend to all the data used to train the earlier models that trained, tuned, or otherwise informed the final model?<sup>427</sup>

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.<sup>428</sup> This is one reason why the Writers Guild of America has always insisted on limiting the number of writers who can re-write a script.<sup>429</sup>

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”.<sup>430</sup> 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.<sup>431</sup> Arguably, this defeats the purpose of permissive licenses, which is to *maximize*

---

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> However, metadata can easily be removed.

<sup>426</sup> Michael Weinberg, *Is There A Coherent Theory of Attributing AI Training Data?*, MICHAEL WEINBERG (Jul. 15, 2024), <https://michaelweinberg.org/blog/2024/07/15/ai-attribution-what-does-it-mean/>.

<sup>427</sup> *Id.*

<sup>428</sup> Fisk, *supra* note 6 at 87.

<sup>429</sup> Writers Guild of America West, *Screen Credits Manual*, <https://www.wga.org/contracts/credits/manuals/screen-credits-manual> (last visited Jul. 15, 2025).

<sup>430</sup> Kate Downing, *Is Open Source Attribution Dead?*, LAW OFFICES OF KATE DOWNING (Nov. 28, 2022), <https://katedowninglaw.com/2022/11/28/is-open-source-attribution-dead/>.

<sup>431</sup> *Id.*

downstream uses.<sup>432</sup> 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.<sup>433</sup>

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.<sup>434</sup> 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.”<sup>435</sup>

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.”<sup>436</sup> Similarly, where a copyright owner’s work constitutes over 50% of a training dataset, this could trigger a duty of disclosure.

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,<sup>437</sup> it is not defensible that the researcher’s work constitutes a tiny fraction of the dataset on which the 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.

However, it is notoriously difficult to attribute model output to specific training data. This is because LLMs internalize and transform the information they receive during training into hidden

---

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> The Writer’s Guild of America, *Screen Credits Manual*, <https://www.wga.org/contracts/credits/manuals/screen-credits-manual> (last visited Feb. 16, 2025).

<sup>437</sup> 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.

representations within a high-dimensional space, containing mathematical patterns and structures.<sup>438</sup> This transformation process “does not inherently retain any clear mapping back to individual data points in the training set.”<sup>439</sup> Furthermore, a generated output will be influenced by multiple data points in the training set, not just one.<sup>440</sup> This makes it very difficult to attribute a generated response to specific training data.<sup>441</sup> Consequently, generative search engines often fail to cite supporting sources or cite nonexistent sources.<sup>442</sup>

Although training data transparency is beset with practical hurdles,<sup>443</sup> it represents a step in the right direction and may go some way to alleviating the harm of non-attribution of training data.

## Conclusion

Artists have survived without attribution rights under law for a long time. However, generative AI’s extraordinary imitation capabilities create a significant risk of misattribution. The misattribution of offensive or low-quality AI-generated art undermines artists’ incentives to produce high-quality works and makes it harder for consumers to locate authentic works by their

---

<sup>438</sup> Huang and Chang, *supra* note 123 at 4.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 5.

<sup>441</sup> *Id.* at 3.

<sup>442</sup> 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, Juan Pino, & Kalika Bali eds., 2023), <https://aclanthology.org/2023.emnlp-main.398/>. (“even the best models lack complete citation support 50% of the time”); Zuccon, Koopman, and Shaik, *supra* note 127. (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, Tianyi Zhang & Percy Liang, *Evaluating Verifiability in Generative Search Engines*, in FINDINGS OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS: EMNLP 2023 7001 (Houda Bouamor, Juan Pino, & Kalika Bali eds., 2023), <https://aclanthology.org/2023.findings-emnlp.467/>. (on average, only 51.5% of sentences generated by AI search engines are fully supported with citations, and only 74.5% of citations support their associated sentence); Jaźwińska and Chandrasekar, *supra* note 128. (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 also Orion Weller et al., “According to ...”: Prompting Language Models Improves Quoting from Pre-Training Data (Feb. 26, 2024), <http://arxiv.org/abs/2305.13252>. (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).

<sup>443</sup> For example, trade secret barriers to training data transparency; the need to disclose model weights to render training data transparency more meaningful; and pre-training vs. post-training disclosures.

favorite artists. In light of the threat posed by AI to the proper attribution of expressive works, Congress should overturn *Dastar* and restore the capacity of copyright owners to bring claims for false designation of origin under section 43(a) of the Lanham Act. While not a perfect solution, this would help creators and consumers more effectively navigate the burgeoning marketplace of AI-generated expression.