NOT THE PUPPETS BUT THE PUPPETMASTERS: WHY THE INTENT OF USERS OF ARTIFICIAL INTELLIGENCE SYSTEMS JUSTIFIES AN AMENDMENT TO THE COPYRIGHT ACT

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INTRODUCTION

Jimmy Wayne is a graphic designer who is well-known in the business sphere for creating logos and brand images with his unique graffiti style.[1] He does great work and has built a name for himself over the years. He finally can support himself using his art as a career. Because of his success, he cannot take on every client that calls and ultimately must turn some clients away. For this reason, Jimmy charges a premium price for his work.

Craig Lone has a moderately successful HVAC business, but he feels he is constantly losing customers to his competitors due to the old, outdated logos on his technician vans. Craig's logos are no longer eye-catching, so he researched and found Jimmy. When Craig called, Jimmy's schedule was almost full of client projects, but Jimmy said he had one opening for a simple design. Craig was excited because, in all his research, business owners raved about Jimmy's artistic vision, which brought in extra revenues. Craig gave Jimmy some direction to create a mockup design.

After one week, Jimmy sent Craig a watermarked mockup of an artistic logo design and an estimate for his work. Craig was shocked by the cost. Craig knew Jimmy was well-known but could not believe a *simple* logo design was worth the premium price. Jimmy explained that the reason behind the price was his value as an artist combined with the demand for his work. Craig could not fathom paying this much for "art" and claimed he could probably create something like Jimmy's mockup himself. Jimmy understood but did not want his time spent to go to waste, so he included the mockup design in his portfolio on his website for potential customers to see.

Craig researched and discovered he could use ChatGPT, an artificial intelligence software, to create a logo design like Jimmy's mockup. Craig filled out the prompt for ChatGPT while looking at Jimmy's mockup, describing it almost exactly and even adding the phrase "graffiti style."

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[1] This hypothetical is used to illustrate the legal issues in AI that this Note seeks to address.

ChatGPT made an image that looked almost identical to Jimmy's mockup. Craig was elated to have saved so much money using ChatGPT that he could reallocate to advertising instead of lining Jimmy's pockets.

Months later, Jimmy was walking around town and spotted one of Craig's HVAC vans with the new logo design; he could not believe his eyes—Craig's design looked just like his mockup. Enraged, he called his lawyer to sue Craig for copyright infringement.

Jimmy is not alone in his outrage. The new power of artificial intelligence (AI) affects thousands of creatives[2] whose customer base is unwilling to pay for work they can create themselves through AI models like ChatGPT. And, in cases like Jimmy and Craig, outdated copyright laws prevent creatives from holding wrongdoers—those who use AI to directly mimic a creative's work—accountable. As AI becomes a modern, widely-used tool, copyright law[3] must evolve to assign liability to wrongdoers with specificity.[4] This has only become a more apparent need as the intersection of copyright infringement and AI is pushed to the forefront of the legal arena.[5]

AI is a branch of computer science that was created to mimic human sentience as a machine that uses coding to independently process speech, play games, and recognize patterns, among other outputs.[6] For example, in the above scenario, Craig likely used a generative AI program, which is trained using a dataset made up of content—such as images from Jimmy's portfolio or social media pages.[7] Once the AI is trained, its human user writes a prompt for the AI to create a work within the prompt's specific parameters, using the pattern recognition from its training of the dataset.[8] For example,

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[2] *See Creative*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/creative [https://perma.cc/Q72N-WXWL] (defining "creative" as "a person whose job involves producing original ideas or doing artistic work"); Rick Jesse, *Who are Creatives?*, MEDIUM (Aug. 26, 2015), https://medium.com/@rickjesse/who-are-creatives-69ff1a77a4e0 [https://perma.cc/Q5SZ-6AJ3] (". . . a title usually attributed to designers, copywriters, photographers, playwrights and musicians."). Also referred to as "creators" throughout this Note.

[3] *See* 17 U.S.C. § 106.

[4] *See* Zack Naqvi, *Artificial Intelligence, Copyright, and Copyright Infringement*, 24 MARQ. INTELL. PROP. L. REV. 15, 17 (2020).

[5] *See* Winston Cho, *Authors Sue Meta, OpenAI in Lawsuits Alleging Infringement of Hundreds of Thousands of Novels,* HOLLYWOOD REP. (Sept. 12, 2023), https://www.hollywoodreporter.com/business/business-news/authors-sue-meta-openai-class-action-1235588711/ [https://perma.cc/E7NL-4Y7Y]; *See* Zachary Small, *As Fight Over A.I. Artwork Unfolds, Judge Rejects Copyright Claim*, N.Y. TIMES (Aug. 21, 2023), https://www.nytimes.com/2023/08/21/arts/design/copyright-ai-artwork.html [https://perma.cc/85V2-YF7S].

[6] *See* Rashi Maheshwari, *What is Artificial Intelligence (AI) and How Does it Work?*, FORBES ADVISOR (Apr. 3, 2023, 7:12 PM), https://www.forbes.com/advisor/in/business/software/what-is-ai/ [https://perma.cc/Z6LY-PZC8].

[7] *See* Laurie Clarke, *When AI Can Make Art—What Does it Mean for Creativity?*, THE GUARDIAN (Nov. 12, 2022), https://www.theguardian.com/technology/2022/nov/12/when-ai-can-make-art-what-does-it-mean-for-creativity-dall-e-midjourney [https://perma.cc/9DRQ-89WA].

[8] *See id.*

following the above scenario, the AI used Craig's parameters and created the advertisement by borrowing pixels here and there from millions of images that resemble Jimmy's style and the concept of the mockup because it was trained to recognize the imagery of those specific parameters.[9] AI copyright infringement cases, therefore, involve unique challenges that are not present in an ordinary copyright infringement claim.[10]

This Note argues that—just as it was warranted in 1992 with the Audio Home Recording Act and in 1998 with the Digital Millennium Copyright Act—modern advances in technology with AI garner an amendment to the Copyright Act that safeguards AI users without ill intent in using the AI program and makes the process of proving copyright infringement involving ill-intended AI users easier by lessening the burden of substantial similarity.

Part I of this Note lays out the purpose and history of The Copyright Act and the context surrounding its previous amendments prompted by modern technology—the Audio Home Recording Act and the Digital Millennium Copyright Act. Part I also provides relevant background on the elements of and defenses to copyright infringement and how AI works. Section IIA will compare copyright infringement as it is written with the different realities of copyright infringement using AI to show why an amendment is necessary. Section IIB will discuss existing defenses to copyright infringement and how they would be applied in a claim of copyright infringement using AI. Lastly, Part III will lay out the proposed amendment to the Copyright Act and its specificity about AI copyright infringement claims, modeled after the previous amendments and how they were designed.

This Note concludes by reiterating the need for and importance of this change to happen soon in order to reign in AI before it becomes a bigger monster to tame. The overall goal of this Note is to address the problem of how Congress can protect creatives from the use of AI to generate nearly identical versions of creatives' work for those unwilling to pay for its production while still acknowledging that AI can be used for good.

I. BACKGROUND

To analyze the inadequacy of applying the elements of copyright infringement for a copy created using AI, it is important to set out why the Copyright Act and its subsequent amendments were created. The Audio Home Recording Act and the Digital Millennium Copyright Act are two amendments added under circumstances like today's AI problem, and

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[9] *See id.*

[10] *See* Keith Kupferschmid, *Insights from Court Orders in AI Copyright Infringement Cases*, COPYRIGHT ALL. (Dec. 12, 2024), https://copyrightalliance.org/ai-copyright-infringement-cases-insights/ [https://perma.cc/3WL9-26FK] (reviewing recent AI copyright infringement cases).

because this Note advocates for the adoption of a similar amendment for today's AI problem, this section details the circumstances surrounding previous amendments' creation and their contents. This section also details the elements of copyright infringement and two popular defenses to it, and how AI works to provide the necessary principles that underlie the problem this Note sets out to solve.

A. The History and Purpose of the Copyright Act

The purpose of the Copyright Act stems directly from the intellectual property clause proposed by James Madison.[11] Copyright exists to "induce and reward authors . . . to create new works and to make those works available to the public to enjoy."[12] Creators are encouraged to create works, published or unpublished, for the economic benefits and protections granted to them under copyright, while enriching the public "through access to creative work."[13] This purpose remains paramount today, especially as creators face new threats that discourage them from creating works at all.[14]

With the enumerated power set out in the Constitution, Congress passed the Copyright Act of 1790, which served as the first federal copyright law.[15] Major revisions to the Copyright Act of 1790 occurred in 1831, 1870, 1909, and 1976.[16] President Gerald Ford enacted the current version of the Copyright Act (not including its amendments) in 1976, and it can be found in Title 17 of the United States Code.[17] This revision was made for two

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[11] *See What is the Purpose of Copyright Law*, COPYRIGHT ALL., https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/purpose-of-copyright/ [https://perma.cc/QRS7-6M5S]; The "intellectual property clause" can be found in Article I, Section 8 of the Constitution: "Congress shall have the power to 'promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'" *U.S. Copyright Beginnings*, COPYRIGHT.GOV, https://www.copyright.gov/history/copyright-exhibit/beginnings [https://perma.cc/6KSM-2G3A].

[12] *What is the Purpose of Copyright Law*, *supra* note 11; *U.S. Copyright Beginnings*, *supra* note 11.

[13] *What is the Purpose of Copyright Law*, *supra* note 11; *U.S. Copyright Beginnings*, *supra* note 11; *It Begins with a Spark*, COPYRIGHT.GOV, https://www.copyright.gov/history/copyright-exhibit/sparks/ [https://perma.cc/3K2V-W5DT] ("Copyright reflects that promise by protecting a broad range of creative expressions and giving creators from all backgrounds an incentive to tell their stories and an opportunity to inspire others with their experience.").

[14] *See What is the Purpose of Copyright Law*, *supra* note 11; *U.S. Copyright Beginnings*, *supra* note 11; *It Begins with a Spark*, *supra* note 13.

[15] *U.S. Copyright Beginnings*, *supra* note 11.

[16] *See Copyright Timeline: A History of Copyright in the United States*, ASSOC. RSCH. LIBR., https://www.arl.org/copyright-timeline [https://perma.cc/RCE2-BARX].

[17] *Preface*, COPYRIGHT.GOV, https://www.copyright.gov/title17/92preface.html [https://perma.cc/RZW4-BWKW] ("The United States copyright law is contained in chapters 1 through 8 and 10 through 12 of Title 17 of the United States Code. The Copyright Act of 1976, which provides the basic framework for the current copyright law, was enacted on October 19, 1976 . . . ."); *1950-2000*, COPYRIGHT.GOV, https://www.copyright.gov/timeline/timeline_1950-2000.html [https://perma.cc/J2RT-BUML].

reasons: (1) to address technological developments and their impact on copyright, how works can be copied, and what constitutes copyright infringement, and (2) to comply with the anticipated Berne Convention so that U.S. copyright law would align with international copyright law.[18] The 1976 Act set out many new changes, including federal copyright protection for all works (published or unpublished), establishing the renewal period for copyright protection as the life of the author plus fifty years, and the exclusion of copyright protection for government works created by a government officer or employee under their professional duties.[19]

The Copyright Act has been amended multiple times to accommodate technological innovations in society, as well as to comply with the United States' obligations from international treaties.[20] The Audio Home Recording Act of 1992 and the Digital Millennium Copyright Act of 1998 are two of these amendments.[21]

B. The Audio Home Recording Act (1992)

The Audio Home Recording Act of 1992 (AHRA) was born out of a tumultuous fight between creatives, consumers, and technology manufacturers—a similar climate to the one currently surrounding AI.[22] Major advancements in digital recording technology for consumers and the widespread uncertainty surrounding whether home recording was legal led to disagreements that could only be resolved with a compromise in the form of legislation.[23]

In the 1980s, digital audio recorders (DARs)—digital audio tape recorders (DATs), compact disc (CD) recorders, cassette recorders, mini-disc recorders, etc.—were introduced in the consumer marketplace.[24] The DATs were created with consumer convenience in mind: people who had no "special technical expertise" could "make digital copies of music recordings."[25] The introduction of this technology led to a major controversial issue: "home copying."[26] Consumers could make higher quality

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[18] *Copyright Timeline: A History of Copyright in the United States*, *supra* note 16.

[19] *1950-2000*, *supra* note 17.

[20] *Id.*

[21] *Id.*; Geoffrey Hull, *The Audio Home Recording Act of 1992: A Digital Dead Duck, or Finally Coming Home to Roost?*, MEIEA J. VOL 2 NO 1, 76-112 (2002).

[22] *See* Hull, *supra* note 21; *see also* All. of Artists & Recording Cos. v. DENSO Int'l Am., Inc., 947 F.3d 849, 854 (D.C. Cir. 2020).

[23] *All. of Artists & Recording Cos.*, 947 F.3d at 854 ("Advances in digital recording technology, together with lingering questions about the legal status of home recording, set the stage for the disagreements and compromises that produced the Audio Home Recording Act of 1992 . . . ."); 17 U.S.C. §§ 1001-1010.

[24] *All. of Artists & Recording Cos.*, 947 F.3d at 853-55.

[25] *Id.* at 854.

[26] *Id.* at 853.

copies—as well as copies of copies—than they could with older analog audio recorders.[27]

DATs were a good idea in theory for consumers and manufacturers, but the rise of digital audio recorders disturbed the music industry.[28] The rising popularity and consumer preferences for CDs and other digital formats over cassettes provided the kindling to stoke the flame that home copying created.[29] Consumers could make high quality copies of music recordings at home, so why would they pay for authorized copies?[30] A study in the early 1980s from Warner Communication estimated $2.85 billion in "home taping losses" per year.[31] A later study by the Office of Technology Assessment and the Roper Organization estimated the losses even higher at $3.2 billion, with annual lost sales of 322.5 million recordings.[32]

Additionally, there were questions regarding the legal implications of home copying in terms of liability in copyright law.[33] Who would be subject to liability?[34] Would it be on consumers who used DATs for home copying or on producers for creating the product that allowed copies of copyrighted works to be made?[35] Or both?[36]

The Copyright Act of 1976 was silent on the issue of home taping, so the judiciary settled the debate.[37] In 1981, the Ninth Circuit held that "the noncommercial private [videotaping] of broadcast television shows constituted copyright infringement."[38] But only three years later, the Supreme Court reversed the Ninth Circuit's decision, holding that "private home taping of television broadcasts" for "time-shifting reasons"[39] was fair use under copyright law.[40] Even though the Supreme Court spoke on home taping, the debate continued: technology manufacturers argued that the decision applied to *all* taping and recording, while the music industry argued that the decision only applied to the specific facts of the case, such as the time shifting reasoning.[41]

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[27] *Id.* at 854.
[28] *Id.*
[29] *See* Hull, *supra* note 21.
[30] *See All. of Artists & Recording Cos.*, 947 F.3d at 854.
[31] Hull, *supra* note 21.
[32] *Id.*
[33] *See All. of Artists & Recording Cos*., 947 F.3d at 853.
[34] *See id.*
[35] *See id.*
[36] *See id.*
[37] *See* Hull, *supra* note 21.
[38] *All. of Artists & Recording Cos*., 947 F.3d at 854 (discussing Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981)).
[39] *See All. of Artists & Recording Cos.*, 947 F.3d at 854.
[40] *Id.* (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).
[41] *See All. of Artists & Recording Cos*., 947 F.3d at 854 (citing S. REP. NO. 102-294, at 31 (1992)).

Eventually, the opposing music and technology industries had their stakeholders come to a compromise that served as a basis for the Audio Home Recording Act (AHRA).[42] The compromise had three components that make up the AHRA: (1) the technology manufacturers would implement "copy-control systems" in their digital audio recorders to prevent "second generation copying" (i.e., "copies of copies"); (2) DAR "manufacturers and distribut[ors] of covered digital audio recorders (and covered recording media, like blank tapes) would pay modest but certain royalties" set out in the AHRA; and (3) consumers and DAR manufacturers would be immune from liability for copyright infringement for "noncommercial use of covered digital audio recorders."[43]

The purpose of the AHRA was to protect the interests of consumers, the technology industry, and the music industry.[44] The AHRA created an "atmosphere of legal certainty" for the technology industry so liability could be known and carefully avoided.[45] It also provided compensation "for copyright owners and creators for sales displaced by home taping of copyrighted music" to quell the music industry's concerns.[46] Finally, the AHRA maintained protections for consumers' interests "to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."[47] The AHRA addressed the diverging interests present in the heated debate among consumers, the technology industry, and the music industry while maintaining copyright protections.[48] However, the AHRA is just one example of how an issue caused by technological advancement not addressed in the Copyright Act can be remedied.[49] Congress recognized another issue stemming from innovation that required legislation six years later with the Digital Millennium Copyright Act.[50]

C. The Digital Millennium Copyright Act (1998)

Where the AHRA centered on the heavily debated copyright issue surrounding new technology devices, the Digital Millennium Copyright Act (DMCA) addressed copyright issues involving the intersection of new

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[42] *See All. of Artists & Recording Cos.*, 947 F.3d at 854.

[43] *Id.* at 855.

[44] *See id.*

[45] *Id.* (citing S. REP. NO. 102-294, at 51 (1992)).

[46] *Id.* (citing S. REP. NO. 102-294, at 32 (1992)).

[47] *In re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 649 (N.D. Ill. 2002) (citing Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999)).

[48] *See* Hull, *supra* note 21; *see also All. of Artists & Recording Cos.*, 947 F.3d at 854.

[49] *See* Hull, *supra* note 21; *see also All. of Artists & Recording Cos.*, 947 F.3d at 854.

[50] *See* Diane M. Barker, *PART I: LAW AND TECHNOLOGY: I. INTELLECTUAL PROPERTY: A. COPYRIGHT: 1. Notes: Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47, 47-48 (2005).

technology *and* the internet.[51] Some of these issues include "digital rights management (methods for stopping infringement and certain rights and privileges (safe harbors) that protect internet service providers."[52] President Bill Clinton signed the DMCA into law in 1998,[53] and it primarily served to place the United States in compliance with the World Intellectual Property Organization (WIPO) Copyright Treaty and to "update domestic copyright for the digital age."[54]

The DMCA was born out of a similar situation to that of the AHRA—a new trend in technology caused major concern for owners of copyrighted works and led to the law being enacted.[55] In the 1990s, digital content exploded on the Internet, which in turn led to digital piracy for copyrighted works found and shared online.[56] Content creators became less incentivized to put their works online and more concerned about possible copyright infringement of their works.[57] In response, the digital content industry lobbied and threatened Congress to withhold the sharing of content for the public until protections were codified to address the booming digital piracy problem.[58]

The digital content industry was not alone in its activism.[59] Internet service providers (ISPs) were concerned over the potential liability for digital piracy and copyright infringement that occurred using the internet.[60] The Internet had not yet reached its full potential, and this kind of liability would have halted its progress.[61] "Congress considered adopting a number of safe harbors to shield ISPs from liability" so that ISPs could only be sued for copyright infringement when a content creator's work was put online without consent.[62] Unfortunately, all attempts to address the concerns of the digital content industry and the ISPs by enacting laws were futile until the WIPO Conference in 1996.[63] The U.S. participated in the WIPO treaties, which in turn placed a burden on Congress to comply with its obligations by passing

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[51] *See Digital Millennium Copyright Act*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/digital_millennium_copyright_act [https://perma.cc/PZA3-G99B].

[52] *Id.*

[53] *1950-2000*, *supra* note 17.

[54] Capitol Records, Ltd. Liab. Co. v. Vimeo, Ltd. Liab. Co., 826 F.3d 78, 82-85 (2d Cir. 2016) (citing Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 26 (2012)).

[55] *See* Barker, *supra* note 50.

[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] *See id.* at 48-49.

legislation on previously unaddressed matters "to facilitate the development of electronic commerce in the digital age," which became the DMCA.[64]

The DMCA's five titles are:

> [The implementation of] the WIPO Internet Treaties; [the establishment of] safe harbors for online service providers; [the permittance of] temporary copies of programs during computer maintenance; [the making of] miscellaneous amendments to the Copyright Act, including amendments which facilitated Internet broadcasting; and [the creation of] *sui generis* protection for boat hull designs.[65]

The DMCA includes four safe harbor provisions routinely discussed[66] that "protect qualifying Internet service providers from liability for certain claims of copyright infringement."[67] The DMCA was enacted to enforce copyright protections on the Internet and to provide immunity to service providers from copyright infringement liability stemming from the actions of another using its system.[68] More specifically, the safe harbor provisions were included to "clarify liability" for ISPs "who transmit potentially infringing material over their networks," and to allow the Internet to expand and improve with efficiency—an important public interest.[69] In terms of general public policy, the DMCA is one of the amendments that was created in order to protect the public interest of access to creative works, which would not otherwise be created or published if not for protections enacted in legislation.[70] On a global scale, the DMCA was the United States' response to the WIPO treaties towards updating copyright law to exist in the digital age.[71] It has left an impact as one of the major and extremely relevant amendments in the modern age of technological advancement by adding six new sections and two new chapters to the Copyright Act of 1976.[72]

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[64] *Id.*; *Executive Summary Digital Millennium Copyright Act: Section 104 Report*, COPYRIGHT.GOV, https://www.copyright.gov/reports/studies/dmca/dmca_executive.html [https://perma.cc/FK7Z-ZDEV].

[65] *Copyright Timeline: A History of Copyright in the United States*, *supra* note 16; *Appendix B: The Digital Millennium Copyright Act of 1998*, COPYRIGHT.GOV, https://www.copyright.gov/title17/92appb.html [https://perma.cc/T5DP-9DS3].

[66] *See* 17 U.S.C. § 512.

[67] Capitol Records, Ltd. Liab. Co. v. Vimeo, Ltd. Liab. Co., 826 F.3d 78, 82 (2d Cir. 2016) (citing Viacom International, Inc. v. YouTube, Inc., 676 F.3d 19, 27 (2012)).

[68] *In re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 649 (N.D. Ill. 2002) (citing ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001)).

[69] *Capitol Records, Ltd. Liab. Co.*, 826 F.3d at 82 (citing S. REP. NO. 105-190, at 2 (1998)).

[70] *See What is the Purpose of Copyright Law*, *supra* note 11.

[71] *See Executive Summary Digital Millennium Copyright Act: Section 104 Report*, *supra* note 64.

[72] *See* Barker, *supra* note 50, at 48-49.

The DMCA remains controversial, but, as Congress has stated, it will inevitably need to be revised.[73] The DMCA and its potential changes reflect how the relationship between technological innovation and U.S. copyright law must constantly be reevaluated to maintain cohesion amidst change.[74] The issues with copyright infringement liability stemming from advances in technology occurred in the 1990s—effectively addressed with both the DMCA and AHRA—and are recurring again regarding copyright infringement and generative AI.[75]

D. The Elements of Copyright Infringement

To understand how this amendment can be tailored to the issues involving infringement and AI, one must understand the starting point: the elements of copyright infringement set out in the current Copyright Act. Copyright infringement requires two elements to be proven by the claimant: (1) ownership of a valid copyright, and (2) the wrongdoer copied that which the copyright protected.[76]

Under the Copyright Act today, copyright adheres to the work at the moment of its creation.[77] Creation is defined as "when it is fixed in a copy or phonorecord for the first time,"[78] or in other words, when the work is transfixed from an idea into a "tangible medium."[79] However, to sue for infringement, registration with the U.S. Copyright Office is required.[80]

An owner of a copyright is entitled to exclusive rights regarding copying, reproduction, display, and distribution of the work.[81] A copyright holder has the exclusive rights to create any derivatives of their copyrighted work or to authorize another individual to create derivatives of a work.[82] To receive those rights, a work must meet the qualification of originality—the work is

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[73] *See Executive Summary Digital Millennium Copyright Act: Section 104 Report*, *supra* note 64.

[74] *See id.*

[75] *See Digital Millennium Copyright Act*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/digital_millennium_copyright_act [https://perma.cc/PZA3-G99B].

[76] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020); *see* Scholz Design, Inc. v. Sard Custom Homes, LLC, 691 F.3d 182, 186 (2d Cir. 2012); *see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

[77] *See* 2 Nimmer on Copyright § 7.16 (2023).

[78] *Id.*

[79] Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L. J. 305, 326 (2015) (citing 17 U.S.C. § 102 (2012)) ("Upon fixing an original authorship in a tangible medium, the author automatically received copyright protection over the work.").

[80] *See Copyright in General,* COPYRIGHT.GOV, https://www.copyright.gov/help/faq/faq-general.html [https://perma.cc/65TT-S5SN].

[81] *See* 17 U.S.C. § 106.

[82] *See id.*; *see Circular 14: Copyright in Derivative Works and Compilations*, COPYRIGHT.GOV, https://www.copyright.gov/circs/circ14.pdf [https://perma.cc/3UDG-JYZ6] ("A derivative work is a work based on or derives from one or more already existing works. Common derivative works include translations, musical arrangements, motion picture versions of literary material or plays . . . .").

independently created by the author and shows some degree of creativity.[83] The bar for creativity is low;[84] it does not mean the work has to be novel, unusual, or never seen before.[85]

One major limitation of protection under copyright law is that only an individual's creative *expression* is protected, not their ideas themselves.[86] If an individual is looking for additional protection, then that individual must extend into the other branches of intellectual property law. Copyright law does not protect things like style and genre because doing so would place limitations on how others could express themselves.[87] Whether an alleged infringement is a copied expression or just merely a similar style depends on a case-by-case analysis led by a discussion of the subsequently mentioned elements.[88]

The first element of copyright infringement, ownership of a valid copyright,[89] can be fulfilled by a plaintiff proving the originality of their work in its entirety, and that the plaintiff complied with any statutory formalities.[90] A certificate of a registered copyright is *prima facie* evidence, which then shifts the burden from the plaintiff to the alleged infringer to rebut the presumption by proving the claim's invalidity.[91]

The second element, that the wrongdoer copied,[92] can be proven in two different ways: (a) direct evidence of copying, or (b) circumstantial evidence of substantial similarities between the copyrighted work and the alleged copy.[93] If it is possible, the easiest way to fulfill this element is through direct evidence, such as providing evidence of an unauthorized display of copyrighted content, like a film or an unauthorized copy of a pirated book being sold online.[94]

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[83] *See What is Copyright?*, COPYRIGHT.GOV, https://www.copyright.gov/what-is-copyright [https://perma.cc/HS9V-HEWC]; *see* Scholz Design, Inc. v. Sard Custom Homes, LLC, 691 F.3d 182, 186 (2d Cir. 2012) (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).

[84] *See id.*

[85] *See Scholz Design, Inc.*, 691 F.3d at 186 (citing Mattel, Inc. v. Goldberger Doll Mfg. Co., 365 F.3d 133, 135 (2d Cir. 2004)).

[86] *See* Tanksley v. Daniels, 902 F.3d 165, 174 (3d Cir. 2018).

[87] *See* Stephen Wolfson, *The Complex World of Style, Copyright, and Generative AI*, CREATIVE COMMONS (Mar. 23, 2023), https://creativecommons.org/2023/03/23/the-complex-world-of-style-copyright-and-generative-ai/ [https://perma.cc/5U94-VEWY].

[88] *See id.*

[89] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020); *see Scholz Design, Inc.*, 691 F.3d at 186; *see Feist Publ'ns, Inc.,* 499 U.S. at 361.

[90] *See* CMM Cable Rep., Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1513 (1st Cir. 1996) (citing *Feist Publ'ns, Inc.,* 499 U.S. at 361).

[91] *See CMM Cable Rep., Inc.*, 97 F.3d at 1513; *see* 17 U.S.C. § 410.

[92] *See Skidmore*, 952 F.3d at 1064; *see Scholz Design, Inc.*, 691 F.3d at 186; *see Feist Publ'ns, Inc.,* 499 U.S. at 361.

[93] *See Skidmore*, 952 F.3d at 1064; *Copyright Litigation 101*, THOMSON REUTERS, (Dec. 16, 2022) https://legal.thomsonreuters.com/blog/copyright-litigation-101/#what-are-elements-of-a-copyright-infringement-claim? [https://perma.cc/CX62-BCJN].

[94] *See Copyright Litigation 101*, *supra* note 93.

Unfortunately, proving the second element through direct evidence is not always simple due to the intangible nature of intellectual property. Proving the second element through circumstantial evidence is the best strategy for situations involving "the unauthorized creation of derivative work," a challenging category of works where a copy might be a much less obvious copy.[95] However, the circumstantial evidence produced must show substantial similarities between the copyrighted work and the infringing derivative.[96]

The federal circuit courts, when faced with a question of substantial similarity in a copyright infringement action, often apply a two-part test to determine substantial similarity.[97] The first part is an extrinsic test that compares the "objective similarities of specific expressive elements in the two works."[98] Some expressive elements include, but are not limited to plot, themes, mood, characters, and sequence of events.[99] This test is a bit awkward for certain copyrighted creative works due to those works lacking "distinct elements of idea and expression."[100] The second part is an intrinsic test that compares "the similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance,"[101] looking closely at "the total concept and feel of the works."[102] This test is subjective.[103] Once the extrinsic test is met, the factfinder applies the intrinsic test is applied by the factfinder.[104] Both tests must be satisfied in order to find substantial similarity.[105]

However, there is another test the courts have considered for proving circumstantial evidence of substantial similarity for the second element of copyright infringement: the Inverse Ratio Rule.[106] It requires a lower standard of proof for substantial similarity when a high degree of access is shown:[107] "[T]he stronger the evidence of access, the less compelling the similarities between the two works need be in order to give rise to an inference of copying."[108] It is not very popular among the Federal Circuits,

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[95] *Id.*

[96] *Id.; see Skidmore*, 952 F.3d at 1064.

[97] *See Skidmore*, 952 F.3d at 1064.

[98] *Id.*

[99] *See* Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (quoting Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)).

[100] Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004).

[101] *Skidmore*, 952 F.3d at 1064.

[102] *Cavalier*, 297 F.3d at 822 (quoting *Kouf*, 16 F.3d at 1045).

[103] *See Cavalier*, 297 F.3d at 822.

[104] *See* Amini Innovation Corp. v. Anthony Cal., Inc., 439 F.3d 1365, 1369 (Fed. Cir. 2006).

[105] *See Skidmore*, 952 F.3d at 1064.

[106] *See id.* at 1066.

[107] *See id.* at 1065-66 (citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).

[108] *Skidmore*, 952 F.3d at 1066 (quoting Rentmeester v. Nike, Inc., 883 F.3d 1111, 1124 (9th Cir. 2018).

with the Ninth Court being the most recent to criticize the test and reject its application.[109] The Ninth Circuit criticized the rule for its inconsistent application over the years it was used within the circuit.[110] The Ninth Circuit also criticized the rule and how it determines "access," taking the position that claimants whose work is more accessible through financial resources or more popular in the digital age have an unfair advantage to have the burden of proof for substantial similarity lowered.[111]

Proving substantial similarity is the key to establishing the second element of a copyright infringement claim involving the use of AI. To properly define liability for an AI user, the amendment must address how the test for substantial similarity applies when an AI work is involved.

E. Defenses to a Copyright Infringement Claim

Relevant to this Note are two defenses to a claim of infringement: the doctrines of fair use and independent creation. Fair use is the doctrine against copyright infringement that "promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances."[112] The doctrine of fair use is codified in 17 U.S.C. § 107, which sets guidelines for these exceptional circumstances. The fair use factors are:

> 1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.[113]

Examples of the "certain circumstances" permitted under fair use are "criticism, comment, news reporting, teaching, scholarship, and research."[114]

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[109] *See Skidmore*, 952 F.3d at 1066-69; *see also Good Times, Bad Times: Ninth Circuit Does Away with "Inverse Ratio Rule" in Led Zeppelin Copyright Case and Questions Need to Prove "Access"*, NIXON PEABODY (Mar. 10, 2020), https://www.nixonpeabody.com/insights/alerts/2020/03/10/inverse-ratio-ruling-in-zeppelin-copyright-case# [https://perma.cc/Z62M-YUJM].

[110] *See Skidmore*, 952 F.3d at 1068 ("The flaws in the rule can be seen in the inconsistent ways in which we have applied the rule within our circuit.").

[111] *See Skidmore*, 952 F.3d at 1068 ("To the extent 'access' still has meaning, the inverse ratio rule unfairly advantages those whose work is *most* accessible . . . . This benefits those with highly popular works . . . which are also highly accessible . . . . But nothing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.").

[112] *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, https://www.copyright.gov/fair-use/ [https://perma.cc/UU5Q-VVXA].

[113] 17 U.S.C. § 107(1)–(4).

[114] *U.S. Copyright Office Fair Use Index*, *supra* note 112.

Independent creation is a doctrine not yet codified, but it is a complete defense to a claim of copyright infringement.[115] Independent creation is the doctrine of originality: "Without originality there is no copyright."[116] This doctrine serves two fundamental purposes: (1) "establishes the validity and scope of copyright works;" and (2) "copyright liability occurs only in the absence of originality."[117]

The amendment to the Copyright Act addressing the innovation of AI must anticipate the use of these defenses in copyright infringement claims involving AI to grant the most robust protection possible to creators of works, as well as the innocent AI-user.

F. Artificial Intelligence

The first AI system was built in 1950, but the most advancements have occurred within the last twenty years.[118] Ten years ago, AI systems were nowhere close to human-level recognition for language and images; now, AI systems can beat humans in simple tests.[119] In 2014, AI image recognition was limited to black-and-white grainy photos, and by 2022, AI was able to generate clear, detailed, and colorful imagery even from the most complicated of prompts.[120] AI's language recognition followed a similar trajectory in its sophistication over time, but AI generating human language still struggles to maintain coherency when creating a lengthy passage.[121] However, if its history is any indication, AI will likely adapt and overcome within the decade.[122]

AI is defined as "a set of techniques or instructions that are aimed to simulate some aspect of biological cognition using machines."[123] AI systems are able to generate various kinds of artistic works because of its in-depth training process in which the program is exposed to large amounts of pre-existing data.[124] Modern AI technology training is based on "machine learning"—using "computer algorithms that can 'learn' or improve

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[115] *See* Christopher Buccafusco, *There's No Such Thing as Independent Creation, and it's a Good Thing, Too*, 64 WM. & MARY L. REV. 1617, 1657 (2023).

[116] *Id.* at 1620.

[117] *Id.*

[118] *See* Max Roser, *The Brief History of Artificial Intelligence: The World Has Changed Fast – What Might Be Next?*, OUR WOLRD IN DATA (Dec. 6, 2022), https://ourworldindata.org/brief-history-of-ai [https://perma.cc/XN57-U75D].

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Naqvi, *supra* note 4, at 18.

[124] *See* CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW 2, 3 (2023).

performance on a specific task."[125] AI machine learning is better understood through an example, such as teaching AI to recognize the image of a cat:

> The AI is first shown thousands of images of cats. The AI's program contains numerous nodes (also called a neural network) that work together to focus on different aspects of each image. For example, some nodes in the network focus on color and brightness differences between adjacent pixels while other nodes work together to find the edges of the image. Other nodes focus on repeated shapes (like the nose of the cat) in the image and their relative positioning to other shapes in the image (like the eyes of the cat). As the AI goes through iterations of its instructions, it pieces together elements of a typical cat's face from the information it has learned.[126]

Today, most generative AI systems are trained in this way. Some popular AI systems include OpenAI, ChatGPT, Midjourney, and DALL-E.

Though convenient, AIs do not always perfectly replicate the user's prompt.[127] There are even some instances in which AI systems have policies in place or are designed to trigger automatic denials to prompts that are too specific to copy a specific artist or author.[128] Even with these imperfections, AI's machine learning training from "billions of images" allows AI to "create a pretty faithful approximation,"[129] so much so that artists can still recognize their "artistic trademark" within the work created by AI.[130] It is, therefore, reasonable to presume that with enough time and training, AIs will learn to be more accurate and produce more than just "faithful approximations."[131] Accordingly, it is critical for an amendment to the Copyright Act that establishes liability and protections to be in place before AI's further sophistication comes to fruition.

II. ANALYSIS

This section illustrates how claims of copyright infringement using AI are different than ordinary copyright infringement claims by illustrating the problems of applying the current elements and defenses of copyright infringement to a hypothetical. Part IIA explores the questions of whether AI

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[125] Naqvi, *supra* note 4, at 18.
[126] *Id.* at 19 (footnotes omitted).
[127] *See* Clarke, *supra* note 7.
[128] *See* ZIRPOLI, *supra* note 124, at 5; *see Usage Policies*, OPENAI, https://openai.com/policies/usage-policies [new perma link] (last updated Jan. 29, 2025).
[129] Clarke, *supra* note 7.
[130] *See id.*
[131] *Id.*

creates derivatives, how the substantial similarity test of the second element of copyright infringement remains challenging for AI works, and who can be held liable. Part IIB discusses how applying the defenses to a copyright infringement claim may or may not work due to the nature of a work created using AI.

A. What Makes Copyright Infringement Using AI Different?

The nature of AI makes it difficult to prove certain elements of copyright infringement as it stands. Copyright infringement using AI is more complicated than ordinary copyright infringement. An ordinary copyright infringement claim usually involves the copyright owner of the work and the person who infringed upon the others' rights by making a copy.[132] A copyright infringement claim using AI involves the copyright owner of the protected work, the AI software that makes the alleged copy, and the person using the AI and giving it the prompt to produce the copy.[133]

1. Strict Liability vs. Fault Liability

Copyright infringement is currently codified as a strict liability claim, which means that intent is not considered to determine fault, only proof of the infringement is necessary. [134] Intent is exclusively reserved as an element for criminal liability.[135] This creates a problem when analyzing a claim of copyright infringement using AI like in the hypothetical laid out in the Introduction of this Note. Thus, the proposed solution is to codify AI copyright infringement as a claim built upon fault liability because using AI involves more intentional choices than normal copyright infringement.[136]

It is possible for there to be innocent users of AI that have no intent to infringe—these users are *not* the problem. Innocent users likely are not prompting the AI with enough specificity to make substantially similar copies.[137] These innocent users should remain free to use AI. But users like Craig in the introductory hypothetical are the problem with keeping the Copyright Act as it is. Craig specifically tailored the prompt to get a copy substantially similar to what he wanted from Jimmy without paying him. In order to punish the few without affecting the many, the intent of the AI user—

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[132] *See Copyright Litigation 101*, *supra* note 93.

[133] *See* ZIRPOLI, *supra* note 124, at 5.

[134] *See* Goold, *supra* note 79, at 312 ("Strict liability is a liability imposed when a defendant infringes the legal right of another person.").

[135] *See* Goold, *supra* note 79, at 312.

[136] *Id.* at 314.

[137] *See* Clarke, *supra* note 7; *see also* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020); *see also Copyright Litigation 101*, *supra* note 93.

which can be gleaned from their prompt to the AI system that created a substantially similar copy of a protected work—must matter in the analysis.

While changing infringement from a strict liability claim to a fault liability would create a higher bar for recovery for creators whose work was copied, the inconvenience would be offset by making it easier for the creator to prove substantial similarity between their work and the work generated by AI to hold the ill-intended user liable.

2. Proving the Second Element with Substantial Similarity

The main difference between a standard copyright infringement claim and one involving AI-generated is the added complexity of proving the second element of copyright infringement.[138] The second element is that the infringer copied—by producing a derivative—which can be proven through direct evidence or circumstantial evidence, and direct evidence is not always possible for normal infringement, let alone infringement using AI.[139] Works created by AI are usually subject to the second way of proving the second element—through circumstantial evidence of substantial similarity.[140] Thus, a claim of copyright infringement using AI must pass the test for substantial similarity to prove that an unauthorized derivative has been made.[141]

The already difficult burden of proving evidence of substantial similarity in a non-AI copyright infringement claim is made even more complicated by the issue of whether AI produces a derivative.[142] Registered copyright owners have exclusive rights to derivatives of their work and can sue for enforcement of these rights.[143] However, if it is not a derivative, then the claim falls apart.[144]

3. Whether AI Creates a Derivative

There has been much debate about whether AI produces a derivative work due to the nature of how AI creates images or text.[145] AI takes pixels from a multitude of images, with no guarantee that the copyright owners' image is

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[138] *Copyright Litigation 101*, *supra* note 93.

[139] *See Skidmore*, 952 F.3d at 1064; *Copyright Litigation 101*, *supra* note 93.

[140] *See Skidmore*, 952 F.3d at 1064; *see Copyright Litigation 101*, *supra* note 93.

[141] *See Skidmore*, 952 F.3d at 1064; *Copyright Litigation 101*, *supra* note 93.

[142] *See* 17 U.S.C. § 106; *see Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82.

[143] *See* CMM Cable Rep., Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1513 (1st Cir. 1996); *see* 17 U.S.C. § 410; *see* 17 U.S.C. § 106.

[144] *See* 17 U.S.C. § 106; *see Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82.

[145] *See Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82; *see also* Naqvi, *supra* note 4, at 18; *see* ZIRPOLI, *supra* note 124.

in the pool it is drawing from.[146] One pixel from an image is likely not enough to produce a copy.[147] However, the user's prompt to the AI will affect the chance of substantial similarity between the copyrighted work and the image AI produces in output depending on the length and specificity of the user's prompt.[148] The intentional choice of every word of the prompt in turn influences the AI to pull more pixels from one or more images from a collection.[149]

But this issue of whether AI creates a derivative is not limited to AI and its generative image capabilities. Here is another hypothetical to demonstrate how AI could create a potential derivative, this time based on AI's skill with generative text: J.K. Rowling wrote the *Harry Potter* novels, so she has copyright over any derivatives of her work, including the names of her characters. But what if an AI user that is familiar with *Harry Potter* wants to create a story using a character resembling Ron Weasley, but not actually Ron Weasley? The user would just have to create a detailed prompt using some of Ron Weasley's characteristics—like his ginger hair, large family, pure-blooded wizard heritage, etc.—to write a story. But it would be difficult to determine when and where the line would be crossed with the user's AI-generated character infringing on J.K. Rowling's copyright for Ron Weasley. How many characteristics would be enough to transform the AI-generated character from a literature archetype instead into a derivative for copyright infringement purposes? This is the challenge with AI and its ability to create: How far is too far? How much can AI piece together before it has created a substantial copy?

4. How Similar is Substantially Similar?

In an infringement case not involving AI, substantial similarity is often shown by proving the *multiple* characteristics of the alleged infringing work strongly resembling the original work.[150] The number of shared characteristics is weighed to determine whether a derivative has been made or not.[151] But there is not a set list or number of these characteristics that will satisfy the test.[152] There are not many court cases on copyright infringement using AI since AI is a new technological innovation, but there are plenty of cases showcasing copyright infringement that relay this concept. In *Swirsky*

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[146] *See id.*
[147] *See id.*
[148] *See id.*
[149] *See id.*
[150] *See Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82; *see also* Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).
[151] *See Swirsky*, 376 F.3d at 849.
[152] *See id.*

v. Carey, the Ninth Circuit reversed a summary judgment on the grounds that there was enough proof to show extrinsic similarities between a song and an alleged copy.[153] In its analysis, the Ninth Circuit evaluated the lower court's application of the extrinsic and intrinsic tests for substantial similarity and also applied the Inverse Ratio Rule.[154] The Court made a point that the requirement for substantial similarity is for protected elements of a copyrighted work, so some elements are not protected.[155] However, the Court acknowledged the challenge of what elements are to be considered in such an analysis of a musical composition, and how it differs from case-to-case and court-to-court:

> In analyzing musical compositions under the extrinsic test, we have never announced a uniform set of factors to be used. We will not do so now. Music, like software programs and art objects, is not capable of ready classification into only five or six constituent elements; music is comprised of a large array of elements, some combination of which is protectable by copyright.[156]

The Court went on to list the factors considered in a previous decision made by the Court—e.g., the title hook phrase, the shifted cadence, the verse/chorus relationship—and how other courts look at a combination of different factors.[157] To conclude, the Court states that there "is no magical combination of factors" that will fulfill the requirements of a copyright infringement lawsuit.[158] But even if there is no specific combination, the Court held that as long as the plaintiff could show and support some or all of the elements, then there was substantial similarity and the extrinsic test for protected elements of the copyright work could be satisfied.[159]

5. Applying the Inverse Ratio Rule

Finding substantial similarity between a copyrighted work and a work created using AI would prove that AI created a derivative and would fulfill the second element of copyright infringement.[160] It is already difficult for the extrinsic and intrinsic tests to be applied to some creative works due to the

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[153] *Id.* at 843 (using Inverse Ratio Rule before the Ninth Circuit rejected it).
[154] *Id.* at 844.
[155] *Id.* at 845.
[156] *Id.* at 849.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020); *also see Copyright Litigation 101*, *supra* note 93.

case-by-case and court-by-court nature of the similar element analysis, and this holds true for creative works generated by AI because of the artistic elements as well as the artificial generation process.[161] But the Inverse Ratio Rule would make the analysis for substantial similarity easier.[162] The rule lessens the burden of proof required for substantial similarity through a presumption of access.[163] For AI, this would mean that, with the understanding of how AI is trained and creates images or text, the user of AI is knowingly subjecting themselves to more access, which would lessen the burden of actual similarities required and make it easier for the extrinsic and intrinsic tests to be satisfied.[164]

So, using the *Harry Potter* hypo above and applying the extrinsic test, intrinsic test, and the Inverse Ratio Rule, a plaintiff would be able to use the evidence of the alleged infringer using AI with the knowledge of how AI works and that the AI was trained using *Harry Potter* as a reference to lessen the burden of how similar the AI-generated character needed to be to Ron Weasley for the extrinsic and intrinsic tests to be satisfied.

Despite its unpopularity among the Circuits, the Inverse Ratio Rule would adequately address the difficulty of determining whether AI has created a derivative from a prompt.[165] The Ninth Circuit previously accepted the Inverse Ratio Rule but just recently rejected the rule because of the rule's inconsistent application and unfairness for those who have more money to make their works highly accessible or more popular.[166] The Ninth Circuit also agreed with the Second Circuit's reasoning for rejecting the rule: ". . . [I]t does not follow that 'more' access increases the likelihood of copying . . . Yet that is what the rule compels."[167] However, this reasoning from the Ninth and Second Circuits and their rejection of the Inverse Ratio Rule are not applicable to rejecting the application of the rule to establish substantial similarity in a case involving a claim of copyright infringement using AI.[168]

The Ninth Circuit's reasoning of inconsistent application can be remedied by codifying the Inverse Ratio Rule and expressly delineating what "access"

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[161] *See Swirsky*, 376 F.3d at 848.

[162] *See Skidmore*, 952 F.3d at 1065-66 (citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

[163] *See id.*

[164] *See Skidmore*, 952 F.3d at 1064.

[165] *See id.* at 1065-66 (citing *Three Boys Music Corp.*, 212 F.3d at 485); *see also* 17 U.S.C. § 106; *see also Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82.

[166] *See Skidmore*, 952 F.3d at 1068-69.

[167] *Id.* at 1068-69 (citing David Aronoff, *Exploding the "Inverse Ratio Rule"*, 55 J. COPYRIGHT SOC'Y U.S.A. 125, 136 (2008)).

[168] *See id.*; *see also id.* at 1068-69.

means.[169] Also, its reasoning that some works are unfairly situated by having a higher degree of access through financial resources or popularity is not applicable to copyright infringement using AI because AI pulls from systems that are not solely comprised of popular or more protected works.[170] If a copyrighted work is in an AI's database and fits the prompt, the AI will use it to generate its work.[171]

The Second Circuit's reasoning focuses on the idea that more access does not inherently increase the likelihood of a *person* copying another's work.[172] This logic does not follow for an AI system—a non-sentient entity—that is trained on others' works and directly pulls from them when prompted to generate a work.[173] For AI, more access in its machine-learning training process and database of works to pull from *does* causally lead to a higher likelihood that AI would generate a copy that looks like a copyrighted work.[174]

Therefore, even though circuit courts have previously rejected it, the Inverse Ratio Rule should be allowed to be used with the intrinsic and extrinsic tests to help prove substantial similarity, the second element of copyright infringement, for claims about an infringing work generated by AI.[175]

6. Liability of the User of AI

An additional complication for copyright infringement involving the use of AI is the issue of liability.[176] While it is the AI that produces the copy, AI is insentient property, so it cannot be held liable for copyright infringement as a conscious being could be.[177] The AI and its user have an agency relationship—the AI is producing the copy on behalf of and in the control of

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[169] *See Skidmore*, 952 F.3d at 1068; *see id.* at 1065-66 (citing *Three Boys Music Corp.*, 212 F.3d at 485)).

[170] *See Skidmore*, 952 F.3d at 1068.

[171] Naqvi, *supra* note 4, at 18.

[172] *Skidmore*, 952 F.3d at 1068 (citing Aronoff, *supra* note 167).

[173] *See* Naqvi, *supra* note 4, at 18; *see also* Robayet Syed, *So Sue Me: Who Should be Held Liable When AI Makes Mistakes?*, MONASH UNIV.: LENS (Mar. 29, 2023), https://lens.monash.edu/@politics-society/2023/03/29/1385545/so-sue-me-wholl-be-held-liable-when-ai-makes-mistakes [https://perma.cc/8NQK-RHCJ].

[174] *See* Naqvi, *supra* note 4, at 18; *see also Skidmore*, 952 F.3d at 1068 (citing Aronoff, *supra* note 167).

[175] *See Skidmore*, 952 F.3d at 1066-69; *see also Good Times, Bad Times: Ninth Circuit Does Away with "Inverse Ratio Rule" in Led Zeppelin Copyright Case and Questions Need to Prove "Access"*, *supra* note 109.

[176] *See* ZIRPOLI, *supra* note 124.

[177] *See id.*; *see also* Syed, *supra* note 173.

the user.[178] The AI acts as the agent for the user as the principal.[179] And under agency law, the principal is liable for the acts of the agent.[180]

That leaves the inventor of the AI and the user of the AI. While the inventor of the AI system provided the method in which to make a copy, it is a situation similar to that of the service providers in the DMCA.[181] The AI software developer created the tool; it is the user of the AI that used it for harm.[182] Thus, the inventor of the AI likely has some insulation from liability—so long as they were not aware of any intentional misuse of the AI—which leaves the AI user as the one held liable.[183] The AI user can and should be held responsible for a copy made by AI because the user wrote the prompt that was unique and specific enough to cause the AI to pull enough pixels to create a substantially similar work.[184]

B. Applying Copyright Infringement Defenses to AI Copyright Infringement

This section of the analysis will apply the fair use and independent creation doctrines as defenses to a claim of copyright infringement. This section will demonstrate that fair use is not an available defense to users of AI who generate works with the intent to copy, and the doctrine may not be an available defense to some users of AI who prompt AI with good intentions unless protections are codified as discussed in the proposed amendment. Additionally, this section will argue that independent creation—though considered an absolute defense to a claim of copyright infringement—should not be an available defense for either copyright infringement using AI or ordinary copyright infringement.

Importantly, a defense exists—the innocent infringer defense—that applies only to remedies and is a strict liability, but that is beyond the scope of this Note. This Note is more focused on providing more straightforward guidelines to predict liability.

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[178] Naqvi, *supra* note 4, at 15.
[179] *Id.*
[180] *Id.*
[181] *See Digital Millennium Copyright Act*, *supra* note 51.
[182] *See* Clarke, *supra* note 7.
[183] *See id.*; *see also Digital Millennium Copyright Act*, *supra* note 51; *see also* ZIRPOLI, *supra* note 124.
[184] *See* Clarke, *supra* note 7; *see also Digital Millennium Copyright Act*, *supra* note 51; *see also* ZIRPOLI, *supra* note 124.

1. Fair Use

Despite the Copyright Act gatekeeping creative expression, the fair use doctrine serves as a defense for those who are not authorized to make copies or display creative work but have good intentions.[185] However, fair use is limited to specific circumstances, and anything outside of what is explicitly listed must be analyzed by a court based on the fair use factors.[186]

The most recent case on how to interpret derivatives and fair use is *Andy Warhol Found. v. Goldsmith*.[187] In the case, the Court discussed two artists and their works: Andy Warhol, the famous pop-art artist, and Lynn Goldsmith, a less well-known photographer.[188] Goldsmith was known for her photo portraits of celebrities, and in 1984, *Vanity Fair* licensed her photo of Prince for a one-time use as an "artist reference."[189] *Vanity Fair* hired Warhol as the artist who would use this photo as a reference, and he made a silkscreen of the photo.[190] However, his use of the photo did not end there.[191] He went on to create fifteen derivatives of the photo—the "Prince Series"—and his foundation, the Andy Warhol Foundation for the Visual Arts, Inc. (AWF)—even licensed one to Condé Nast for a story it was running on Prince.[192] Goldsmith was only compensated for the first license by *Vanity Fair*.[193] Goldsmith sued AWF, and AWF countersued.[194] AWF claimed the license of the work to Condé Nast was fair use, which the district court agreed with and the Second Circuit did not.[195] The Supreme Court heard the case on the narrow issue of whether the analysis of the first fair use factor—"purpose and character of the use"—favored AWF or Goldsmith and affirmed the ruling of the Second Circuit that it did not support AWF's claim of fair use.[196]

The Supreme Court reached its conclusion in *Goldsmith* through a discussion about what a transformative work means in the context of fair use.[197] A transformative work takes the original copyrighted work and turns

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[185] *See U.S. Copyright Office Fair Use Index*, *supra* note 112; 17 U.S.C. § 107(1)–(4).

[186] *See U.S. Copyright Office Fair Use Index*, *supra* note 112; 17 U.S.C. § 107(1)–(4) (". . . (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

[187] *See generally* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 529 (2023).

[188] *Goldsmith*, 598 U.S. at 514-15.

[189] *Id.* at 515.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* at 515-16.

[197] *Id.* at 529.

it into a new work by fundamentally changing its purpose and character.[198] If a new work can transform its use, then it could be protected under fair use.[199] However, the Court noted that copyright holders are entitled to the exclusive rights set out in 17 U.S.C. § 106, one of which includes derivative works.[200] 17 U.S.C. § 101 includes the phrase ". . . or any other form in which a work may be . . . transformed" in the definition of a derivative work.[201] Thus, *Goldsmith* distinctly categorizes transforming a work merely aesthetically as a protected right of the copyright holder, while transforming the use will fulfill one of the fair use factors in favor of the new work's owner.[202]

As stated earlier, there are not many cases on generative AI, and the problems with it are still being discovered. While *Goldsmith* does not speak to AI, it introduces why works created by AI may not be covered under fair use.[203] In the hypo in the Introduction, Craig prompted the AI to generate a work for the same character and purpose as Jimmy's original work—advertising—just as AWF licensed the Prince Series work for the same character and purpose as Goldsmith did the original photo.[204] The Court said this indicated that it was not fair use, so it should not be fair use for Craig either.[205]

The ill-intended users of AI, like Craig, will most likely not be protected by fair use, and an innocent AI user may not be either, depending on the AI's generated output.[206] An innocent AI user may not be trying to harm anyone and write a prompt for AI to create something with moderate specificity, and because the AI system could pull from an already existing, copyrighted work, the AI user could infringe accidentally.[207] Under the current Copyright Act as written, if that innocent AI user did not instruct the AI system to generate a work under one of the codified fair use purposes, the user could be facing copyright infringement liability without a good defense.[208] However, since

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[198] *Id.* ("A use that has a further purpose or different character is said to be 'transformative.'"); *Copyright Act of 1976—Fair Use*—Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith, 137 HARV. L. REV. 410, 412 (Nov. 12, 2023).

[199] *Goldsmith*, 598 U.S. at 529; *Copyright Act of 1976—Fair Use*—Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith, *supra* note 198.

[200] *See Goldsmith*, 598 U.S. at 529; 17 U.S.C. § 106.

[201] *See Goldsmith*, 598 U.S. at 529; 17 U.S.C. § 101.

[202] *Goldsmith*, 598 U.S. at 550 ("Lynn Goldsmith's original works . . . are entitled to copyright protection, even against famous artists. Such protection includes the right to prepare derivative works that transform the original. The use of a copyrighted work may nevertheless be fair if, among other things, the use has a purpose and character that is sufficiently distinct from the original.").

[203] *See Goldsmith*, 598 U.S. at 550.

[204] *See id.* ("In this case, however, Goldsmith's original photograph of Prince, and AWF's copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature.").

[205] *See id.*

[206] *See U.S. Copyright Office Fair Use Index*, *supra* note 112; *see also* 17 U.S.C. § 107(1)–(4).

[207] *See* Clarke, *supra* note 7.

[208] *See id.*; *U.S. Copyright Office Fair Use Index*, *supra* note 112; *see also* 17 U.S.C. § 107(1)–(4).

the reasoning behind the prompt to the AI aids the character and purpose analysis for fair use, then the intent of the AI user should determine whether fair use applies, allowing an exception to be made for the innocent AI user.[209]

2. Independent Creation

Despite its acceptance and use, the doctrine of independent creation—also referred to as the doctrine of originality—should not be a defense in ordinary copyright infringement, especially regarding copyright infringement using AI.[210] At its core, independent creation is about originality, and if a work is not inherently original, it cannot be protected under copyright law.[211]

However, in the modern age, this makes no sense. [212] The amount of creative works has only grown as society has developed more art forms and tools to create.[213] What can be considered truly *original* anymore? Almost every work is inspired by or based on other works.[214] A creative cannot learn how to create their work unless exposed to other works to some degree, so whatever that creative produces is not truly original.[215] For this reason, independent creation should not be an absolute defense to copyright infringement.[216]

In addition to the notion that independent creation should not be an absolute defense to copyright infringement, it should not be a defense for copyright infringement using AI. Because of the nature of how AI is trained and works, any generative creation from AI will be inspired or based on something already existing, which directly goes against originality—the very basis of the independent creation doctrine.[217] In *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, the Court stated, "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[218] The Court went on to discuss an example of two poets producing an identical poem.[219] Each poem is only considered a protected original work because the poets did not know

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[209] *See Goldsmith*, 598 U.S. at 529.

[210] *See* Buccafusco, *supra* note 115, at 1621.

[211] *See id.* at 1620.

[212] *See id.* at 1621 ("The doctrine reflects an outdated and impoverished view of human creativity and memory . . .").

[213] *See* M. Enquist et al., *Why Does Human Culture Increase Exponentially?*, 74 THEORETICAL POPULATION BIOLOGY 46, 46 (2008), https://pubmed.ncbi.nlm.nih.gov/18571686/ [https://perma.cc/J7FL-CC25] ("[H]uman culture is *cumulative*.").

[214] *See* Buccafusco, *supra* note 115, at 1621.

[215] *See id.*

[216] *See* Enquist, *supra* note 213 ("[H]uman culture is *cumulative*."); *see also* Buccafusco, *supra* note 115, at 1621.

[217] *See* Clarke, *supra* note 7; *see also* Buccafusco, *supra* note 115, at 1620.

[218] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345-46 (1991).

[219] *Id.*

each other so they could not copy off each other.[220] But if the poets knew of each other, or at least one knew of the other, the outcome would be different.[221] It could be said that one intentionally copied off the other.[222] In the case of the two poets who do not know each other, each could argue independent creation; in the instance where at least one knew of the other's work, the defense of independent creation would fail because the knowledge draws a presumption of copying.[223]

If knowledge equates to a presumption of copying, then there should be a rebuttable presumption that when an AI user writes a prompt and submits it to the AI, with the bare knowledge of how AI works, the user is waiving that right to argue independent creation.[224] The user knows AI pulls from a database made up of other works and risks pulling words and images that could be identical to an existing work; this is the intent to copy.[225] The intent is there even if it is the AI that produces the copy from the user's prompt and not the user doing the copying themselves. Because the user had knowledge, the user had the intent to copy, at least in part, from other works.[226] If the user had the intent to copy, then there is a presumption of copying.[227] And if there is a presumption of copying, the user cannot argue originality as an absolute defense to a copyright infringement claim using AI.[228] It has been waived.[229]

Fair use and independent creation are popular defenses to copyright infringement, they will likely be brought up in a copyright infringement lawsuit involving an AI-generated work.[230] These anticipated defenses to copyright infringement involving AI-generated work should be addressed alongside the issues regarding the liability of the AI user and the elements of copyright infringement using AI in the proposed amendment.

III. RESOLUTION

This Note has established that creatives stand to be taken advantage of by users of AI; however, recognizing that there are some benefits to AI, the proposed amendment to the Copyright Act does not shut down the use of AI completely. This Note's proposed amendment—inspired by the Audio Home

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[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *See* Clarke, *supra* note 7; *see also* Naqvi, *supra* note 4, at 19.
[225] *See* Clarke, *supra* note 7; *see also* Naqvi, *supra* note 4, at 19.
[226] *See Feist Publ'ns, Inc.*, 499 U.S. at 345-46.
[227] *See id.*
[228] *See id.*; *see also* Buccafusco, *supra* note 115, at 1620.
[229] *See Feist Publ'ns, Inc.*, 499 U.S. at 345-46 (1991); *see also* Buccafusco, *supra* note 115, at 1620.
[230] *See U.S. Copyright Office Fair Use Index*, *supra* note 112.; *see also* Buccafusco, *supra* note 115.

Recording Act[231] and the Digital Millennium Copyright Act[232]—delineates where the line should be drawn between someone using AI properly with no nefarious intent behind the prompt and someone using AI improperly to create and use a derivative that is harmful to an individual and their work.

Both the DMCA and AHRA targeted the issues stemming from modern technological innovation with multiple parts to each amendment.[233] The AHRA had three principal parts, and the DMCA had five different titles.[234] Each part focused on something different to be fixed, and altogether, successfully amended the Copyright Act with adequate protections.[235] The AHRA focused on specifying liability to provide and reinforce protections for those without ill intent.[236] The DMCA specifically outlined what constituted circumvention to draw the line of what constituted unlawful actions.[237] Similarly, this Note's proposed amendment shall target the issues stemming from AI use with its focus on multiple sections of the Copyright Act to ensure adequate protections and delineate the determination of liability.

A. The AI Amendment

First and foremost, generally, any amendment should not take away or change the rights and protections for copyright regarding works not involving AI. This amendment should only serve to *add* protections and rights specific to the issues AI causes. It should also remain as "technologically neutral" as possible—similar to the AHRA—in order to anticipate future growth within the field of computer science and AI innovation.[238]

The two goals of this amendment are to provide safeguards for those using AI without ill intent and to lessen the burden of proof for holding those ill-intended AI users responsible for copyright infringement. The Copyright Act has many potential areas in which amendments could be made to address the

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[231] *See* Hull, *supra* note 21; *see* All. Of Artists & Recording Cos. V. DENSO Int'l Am., Inc., 947 F.3d 849, 854 (D.C. Cir. 2020).

[232] *See Digital Millennium Copyright Act*, *supra* note 51.

[233] *See Executive Summary Digital Millennium Copyright Act: Section 104 Report*, *supra* note 64; *see also Appendix B: The Digital Millennium Copyright Act of 1998*, *supra* note 65; *see also All. of Artists & Recording Cos.*, 947 F.3d at 854.

[234] *See Executive Summary Digital Millennium Copyright Act: Section 104 Report*, *supra* note 64; *see also Appendix B: The Digital Millennium Copyright Act of 1998*, *supra* note 65; *see also All. of Artists & Recording Cos.*, 947 F.3d at 854.

[235] *See Executive Summary Digital Millennium Copyright Act: Section 104 Report*, *supra* note 64; *see also Appendix B: The Digital Millennium Copyright Act of 1998*, *supra* note 65; *see also All. of Artists & Recording Cos.*, 947 F.3d at 854.

[236] *See All. of Artists & Recording Cos.*, 947 F.3d at 855 (citing S. REP. NO. 102-294, at 51).

[237] *See Copyright Timeline: A History of Copyright in the United States*, *supra* note 16; *see also Appendix B: The Digital Millennium Copyright Act of 1998*, *supra* note 65; *see generally* 17 U.S.C. § 512.

[238] *See All. of Artists & Recording Cos.*, 947 F.3d at 856.

concerns brought about by copyright infringement using AI. Even just amending two of these subsections would constitute a vast improvement towards protection and rights for creators regarding copyright infringement using AI. Ultimately, this amendment—made up of however many amendments to the subsections of 17 U.S.C. as needed—should change the elements of copyright infringement for claims using AI to achieve the two goals set out above: 1) raise the bar for proving copyright infringement when AI is involved by adding intent as a factor, while 2) lowering the standard of the substantial similarity test that presents a challenge to proving infringement using AI-generated works.

Remedies[239] would likely need to be carved out for when copyright infringers that used AI are found to be liable, but that is beyond the scope of this Note. This Note is more focused on providing more straightforward guidelines to establish protections and to make it easier to prove liability.

1. Amending Definitions (17 U.S.C. § 101)

An amendment to the Definitions section should add to the definition of "derivative work" and add the definition of "AI-generated work."[240] This amendment would serve to lower the burden of substantial similarity by codifying the underlying maxim that AI can create a derivative work.[241] This would assist in achieving the goal of making it easier to hold ill-intended users of AI liable.

As it stands, the definition of "derivative work" is:

> . . . a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship . . . .[242]

Just adding ". . . a work generated by an AI system that was trained with a database of existing works from a prompt crafted by a human user" would

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[239] 17 U.S.C. § 502. These remedies likely would not differ much from those already codified. Injunctions would likely always be the awarded remedy, no matter the intent of the user, but the ill-intended users found liable would also have to pay money damages.

[240] 17 U.S.C. § 101.

[241] *See* 17 U.S.C. § 106; *see Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82.

[242] 17 U.S.C. § 101.

address the underlying issue of whether AI even creates a derivative at all.[243] This would solve precursory debates and provide a foundation for the proposed amendment for infringement.[244]

However, if that is too radical or nonspecific, adding the definition of what an AI-generated work is would also provide clarification. The following proposed language addresses this: "An 'AI-generated work' is an output from a user prompting an AI system to create imagery or text by piecing together existing works in an electronic database, or a derivative work generated by an AI system from the written prompt of the user of the AI system." Ideally, both amendments would be made to provide the most clarity.

2. Amending Limitations on Exclusive Rights: Fair Use (17 U.S.C. § 107)

An amendment in the Fair Use Exceptions section should focus on protecting innocent AI users.[245] This amendment addresses a possible defense in anticipation of its use while adding the intent of the user as a factor for the courts to consider if not overtly shown. To do this, a subsection should be added, carving out the scenario in which it would be fair use for AI users to write a prompt that results in an AI-generated work that is a derivative, but because of the user's lack of ill intent, the user is not liable for anything except future use. To prevent ambiguity,[246] some examples of ill intentions should be listed—such as the intent to get a work identical to another's for free to avoid paying the creative—with an acknowledgment that it is not an exclusive list and is subject to the discretion of the court or factfinder.

The infringer would have to establish its lack of ill intent if using this fair use exception as a defense. Lack of ill intent can be circumstantially proven by showing the language of the prompt. If it lacks specificity, then it does not have a nefarious purpose. Additionally, a lack of ill intent can also be shown through the AI user's intended nature and purpose of the use for the AI-generated work, which can be proven through testimony under oath. Anything not clearly within this lack of ill intent fair use provision should be evaluated at the court's discretion using the fair use factors set out in 17 U.S.C. § 107.[247]

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[243] 17 U.S.C. § 106; *see Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82.

[244] 17 U.S.C. § 501.

[245] *See* 17 U.S.C. § 107

[246] *See* Skidmore v. Led Zepplin, 952 F.3d 1051,1066 (9th Cir. 2020).

[247] 17 U.S.C. § 107(1)–(4) ("(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

This may seem like an ambiguous provision, but even in the hypo, Craig had ill intent, and it would be very difficult for Craig to prove otherwise. There was evidence of Craig seeking Jimmy out for his work for advertising use, his refusal to pay, and his subsequent use of AI with the specific prompt. This evidence would be nearly impossible to refute. Therefore, Craig's use would not fall within the fair use exception for the innocent AI user.

The fair use exception for lack of ill intent should be applied narrowly so that wrongdoers cannot escape liability. It would allow the courts to tailor judgments to the specific facts—such as the exact wording of the prompt, which changes with every AI-generated work—when fair use is argued as the defense to a claim of copyright infringement. It may be concerning to give a court discretion on this matter, but each case of copyright infringement is different, even more so when AI is involved.[248] Because AI produces different results every time it is used, a narrow exception with broader discretion is necessary.[249]

3. Amending Infringement of Copyright (17 U.S.C. § 501)

Amending the Infringement section should first, codify the elements of copyright infringement,[250] and then codify the substantial similarity test of the extrinsic test, the intrinsic test, and the lessened burden of the Inverse Ratio Rule specifically as the test for proving a claim of copyright infringement using AI.[251] This amendment would make the two end goals of heightening the proof needed and lowering the standard of similarity stated previously by just making it explicit and uniform for all courts to follow.

The elements of copyright infringement should be codified because the two elements with the two ways of proving the second element are currently not codified and can only be found in caselaw.[252] If courts plan to use them, they should be codified. The elements should also be codified to promote a universal understanding of copyright law as federal law. Additionally, this section should include an explicit statement—like a pre-requisite to infringement—that AI systems cannot be held liable for copyright

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[248] *See* Wolfson, *supra* note 87; *see also* Jason Brownlee, *Why Do I Get Different Results Each Time in Machine Learning?*, MACHINE LEARNING MASTERY (Aug. 27, 2020), https://machinelearningmastery.com/different-results-each-time-in-machine-learning/ [https://perma.cc/9KEL-CFHN].

[249] *See* Brownlee, *supra* note 248.

[250] *See Skidmore*, 952 F.3d at 1064; *see also* Scholz Design, Inc. v. Sard Custom Homes, LLC, 691 F.3d 182, 186 (2d Cir. 2012); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

[251] *See Skidmore*, 952 F.3d at 1065-66 (citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

[252] *See Skidmore*, 952 F.3d at 1064; *see also Scholz Design, Inc.*, 691 F.3d at 186; *see also Feist Publ'ns, Inc.*, 499 U.S. at 361.

infringement; there is only liability for human involvement.[253] This would deter any illogical arguments an infringer might make to escape liability, like the machine being sentient and solely at fault.[254]

The substantial similarity test should be codified, but it only needs to be limited to copyright infringement using AI.[255] The following proposed language would codify the substantial similarity test and address the concerns of the Circuits in their rejections to use the test:[256] "Exclusively in a copyright infringement claim involving a work generated by AI, if the AI possesses in its database of existing works then a high degree of access is presumed, and a claimant of copyright infringement need not prove that the copyrighted work and allegedly infringing work are *substantially* similar, only that the works are similar," and "In this subsection, 'access' means that a copyrighted work is available without great difficulty to view."[257] It is very important that the test be codified because substantial similarity is where the AI derivative causes the most problems in an infringement analysis.[258] The most important part to be codified is the Inverse Ratio Rule.[259] Codifying it would resolve the circuit courts' concerns and make the substantial similarity test for proving copyright infringement using AI much easier for plaintiffs.[260]

IV. CONCLUSION

Ultimately, the purpose of the Copyright Act and the intellectual property clause of the Constitution should remain paramount to society: public access to creative works and encouragement for creatives to make such work for the public to enjoy without fear.[261] But in order to do this, protections need to be implemented before AI improves to the point where the Jimmys of the world start to suffer at the hands of the Craigs. Not to mention, implementing legislation for these anticipatory problems the Courts will likely face will make it easier for the judiciary to rule consistently and correctly. Amending the Copyright Act to assign liability for those who use AI to harm creatives and protect innocent users of AI is the best way to achieve the purpose of the Act and still keep up with modern technological innovations, just as Congress did before in 1992 and 1998.

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[253] *See* ZIRPOLI, *supra* note 124, at 2; *see also* Syed, *supra* note 173.

[254] *See* ZIRPOLI, *supra* note 124, at 2; *see also* Syed, *supra* note 173.

[255] *See Skidmore*, 952 F.3d at 1064.

[256] *See id.* at 1068-69; *see id.* at 1068 (citing Aronoff, *supra* note 167).

[257] *See Skidmore*, 952 F.3d at 1065-66 (citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

[258] *See Skidmore*, 952 F.3d at 1064; *see also* 17 U.S.C. § 106; *see also Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82.

[259] *See Skidmore*, 952 F.3d at 1065-66 (citing *Three Boys Music Corp.*, 212 F.3d at 485).

[260] *See Circular 14: Copyright in Derivative Works and Compilations*, *supra* note 82.

[261] *See What is the Purpose of Copyright Law*, *supra* note 11; *It Begins with a Spark*, *supra* note 13.