

**Following Generative AI Down the Rabbit Hole:  
Redefining Copyright's Boundaries in the Age of Human-Machine Collaborations**

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# Following Generative AI Down the Rabbit Hole

Redefining Copyright's Boundaries in the Age  
of Human-Machine Collaborations



SARIY K. MIZRAHI

*For my parents, who always wanted a doctor in the family.*

*For Aylon, who got me through this journey with his endless supply of humour, creative counsel,  
and blue slushies in the dead of winter.*

*&*

*For Shira, Shlomo, and Adi, who kept me grounded with love, laughter, and dance parties.*

## Acknowledgements

This journey has been a long one, simultaneously arduous and awe-inspiring. It saw me through the purchase of my first home, the birth of my three wonderful children, and the loss of many who were beloved to me. It brought me moments of wonder and excitement, but also ones filled with incredible frustration. It presented me with the many challenges of trying to be mommy, academic, employee, and professor in a single breath, all the while remaining steadfast on my path. So, it's no wonder that my dissertation is so profoundly inspired by the nature of community, for I owe a great deal to the vast one that saw me through this formidable voyage.

As I reflect on the important role that so many people have played in bringing this work to fruition, I see flashbacks of pivotal moments that I now know were instrumental to shaping the analysis I set forth in these pages. When I started out, I intended to write about the copyright implications of cloud computing. With time, however, I realized that there was so much about the intersection between copyright and artificial intelligence that I found fascinating. By this point, I was two years into my doctorate and torn about which direction to pursue. Professor Michael Geist, one of my co-advisors, could see my struggle. I'll never forget his words to me: it would be a shame to spend the next several years working on something you're less passionate about. And so, I made my choice. The rest, as they say, is history. Thank you, Professor Geist, for guiding me throughout every step of this grueling process, for always taking the time to help me work through my ideas, and for providing the insightful feedback I needed to see them through. Your incredible mentorship over these years not only helped me grow as an academic, but also as a person, and I am so grateful to you for your unwavering devotion and support.

Professor Jeremy de Beer, my other co-advisor, similarly nurtured my growth as a researcher. It was early on in my doctorate when I met with him to discuss potential theoretical frameworks for my thesis, and I was at a loss. I knew I wanted to adopt a perspective that differed from traditional copyright theories, but I wasn't sure where to turn. It was Professor de Beer who showed me the way, though I didn't quite realize it at the time. As usual, I'd left his office with more questions than answers, as well as a very long reading list. Buried within that list was Abraham Drassinower's *What's Wrong With Copying?*, which, as you'll find in Chapter 2, became central to my analysis. Thank you, Professor de Beer, for always pushing my intellectual boundaries. Leaving our meetings with more questions than answers came to be one of the things I cherished most about having you as an advisor. And it's because you always asked the right questions – the ones that made me reconsider everything, but that also helped me discover new paths to follow. I owe so much of my intellectual journey to your valuable insight, and I am tremendously grateful to you for your extraordinary dedication and guidance.

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Over as many years as it took me to get here, however, there are also countless others that played key roles in helping me work through the thoughts brought to the fore in my dissertation. Whether it was my thesis examination committee members – Professors David Fewer, Florian Martin-Bariteau, Graham Reynolds, and Amy Salyzyn – who provided such thoughtful feedback and asked truly insightful questions that pushed my reflection further; serendipitous conversations with Professors Carys Craig, Karine Gentelet, and especially Nicolas Vermeys whose invaluable advice and unfailing support throughout the years of my academic career truly mean the world to me; discussions that arose when I presented my work at conferences like RightsCon, WeRobot, and *Rencontres jeunes chercheurs droit et numérique*, not the least of which include ones with Laura Garcia, Clémence Varin and Kate Darling; interviews with AI artists Adam Basanta and Pindar van Arman; and even class discussions with the students in my Internet and Big Data Law course at Carleton University, among so many others. I owe a lot to our exchanges and the role they played in helping me develop my ideas over the years. And with a bustling household and three young children, pursuing a doctorate would not have been feasible without the generous financial support I received from the Social Sciences and Humanities Research Council’s Joseph-Armand Bombardier Canada Graduate Scholarship, as well as the University of Ottawa’s Admission’s Scholarship and the Ontario Graduate Scholarship. Not only did these funds allow me to pursue my research, publish numerous papers, and present at conferences, but they also backed the maternity leaves that allowed me to be there for my infants unconditionally.

But the support I received throughout this entire process extends far beyond the academic community alone. My mother has been instrumental to my journey. She shlepped with me to Ottawa when I was pregnant and couldn’t make the drive alone. She picked my kids up from school on a dime. She babysat them before every major assignment I had to submit. She even helped me take care of them when they were sick so I could meet my deadlines. And there was so much more in between. Thank you, Ima, for everything. I’m truly grateful for all your sacrifices – not only throughout the years of my doctoral studies, but always. And my father – the reason I find myself on this path at all. I had just barely completed my master’s when he hit me with “nu, when are you going to go for your PhD?” I answered never. And here we are. Thank you, Aba, for always encouraging me and pushing me to grow. This is your success as much as mine.

In addition to my parents, I am so fortunate to have many people in my village upon whom I could rely throughout the years. To my sisters, thank you for your constant support; for helping with my kids when Mummy couldn’t; for always lending a listening ear, no matter what, and giving me the kind of advice that only you could give. To my twelve amazing nieces and nephews, I treasure all the movie nights, cocktail parties, and late-night chats more than you will ever know. I’m so grateful to you for bringing so many joyful moments into my life. And to my brilliant nephew, Noah Verret, graphic artist extraordinaire – thank you so much for what turned out to be the most amazing cover art I ever could have imagined for my dissertation. You brought my vision to life, and I appreciate your dedication, hard work, and artistry more than words can express.

And then there are those that were there for the good, the bad, and the ugly. To my amazing husband, Aylon. What words are there for a partner who supports every one of my crazy ideas? You might have challenged my more outlandish ones, but you always stood by me no matter what. And without your sacrifices, I never would have reached this point. You woke up for the kids every weekend so I'd have the brain power to work on my thesis. You rearranged your work schedule whenever I needed. You trekked in the middle of all kinds of awful weather to get me that blue slushie, or chocolate bar, or pastry I was craving. You helped me build so many of the ideas sprinkled throughout my dissertation; there is a piece of you on almost every page of this manuscript, especially the funny ones. I could not have gotten through this intense voyage without you, or your incredible sense of humour. Thank you so much for always holding down the fort and doing everything you could just to help make my dreams come true. And to my three wonderful children, thank you for somehow always managing to bring me back down to earth when life's challenges got the better of me. Your cuddles, dance parties, and little personalities mean more to me than anything in this world. I feel so blessed that I get to be your mother.

## Abstract\*

In a world where human creativity intertwines with the power of artificial intelligence, the very essence of authorship is being called into question. Originally conceived of as a dialogic relation between authors and pre-existing culture, the insertion of generative AI within the creative realm has introduced a new web of nested relationships – between human authors, AI, and its developers – that are redefining the ontology of authorship; reshaping how we both pursue and produce knowledge.

And while the *question du jour* might be whether copyright *could* recognize the human-machine collaborations that arise from these interactions, a far better one is whether it *should*. Our position should not be based on whether such creations fulfill what have become the very minimal requirements for enjoying copyright protection. Nor should it be founded on whether these creations draw on unauthorized copies of pre-existing works. Rather, it should rest on whether human-machine collaborations pursue the dialogic qualities that copyright as a construct was designed to promote.

This inquiry, however, necessarily requires a deep examination into copyright doctrine as it now stands; a reimagination of copyright's most intrinsic principles through a dialogic lens. And that's precisely where I commence my journey down the human-machine collaboration rabbit hole. I begin by reframing copyright's approach to originality and infringement from a dialogic perspective, identifying creative autonomy as copyright's central governing principle and laying the groundwork for a more nuanced understanding of authorship in the digital age. I then build upon this conceptual framework, exploring the barriers to creative autonomy arising from the various relationships that culminate in human-machine collaborations. By elucidating copyright's role in shaping the power dynamics inherent in these relations, I conclude by illustrating how reimaging copyright's boundaries can go a long way in attenuating many of generative AI's impediments to creative autonomy; in embracing a more inclusive vision of authorship that permits all forms of creativity to flourish on the peripheries of cultural officialdom.

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\* Brought to you by a Sarit-ChatGPT collaboration. Don't worry, the rest of the dissertation is all me. Or is it?

## Table of Contents

<b>Acknowledgements</b> .....	iv
<b>Abstract</b> .....	vii
<b>List of Figures</b> .....	x
<b>Chapter 1 Welcome to Wonderland: Exploring the World of Human-Machine Collaborations</b> .....	1
<b>Part I And Way Down We Go: Setting the Background for What’s to Come</b> .....	32
<b>Chapter 2 Every Adventure Requires a First Step: A Dialogic Theory of Copyright</b> .....	37
2.1 <i>Come Roll in All the Discourse All Around You, And for Once Never Wonder What It’s Worth: The Problem with Thinking of Copyright in Terms of Justifications</i> .....	40
2.2 <i>It’s The Dialogic Circle, And It Moves Us All: The Purpose of Copyright</i> .....	55
2.3 <i>Look at This Trove, Treasures Untold, How Many Wonders Can One Creation Hold?: Creativity as Meaning-Making and Authorship as a Communicative Act</i> .....	71
<b>Chapter 3 But First, Let’s Have Our Tea: The Evolution of Computational Creativity</b> ...	100
3.1 <i>Everybody’s Pickin’ Up on That AI Beat: Making Generative AI Available to the Masses</i> .....	105
3.2 <i>Don’t Know if I’m Inspired or Intrigued, But I’m Somewhere in the Zone: The Intersection Between Copyright and Artificial Intelligence</i> .....	128
3.3 <i>Imagination is the Only Weapon in the War Against Reality: Situating Human-Machine Collaborations Within the Context of Knowledge-Building Activities</i> .....	146
<b>Part II Curiouser and Curiouser: Originality and Authorship in Copyright and Human-Machine Collaborations</b> .....	152
<b>Chapter 4 All I Know is I Won’t Go Speechless: Genuine Dialogue and Creative Autonomy as Central to Authorship</b> .....	158
4.1 <i>But the Thingamabob That Does the Job is Dialogue: Originality and Creativity as Relational</i> .....	161
4.2 <i>When Will My Reflections Show Who I Am Inside?: Autonomous Self-Expression as the Nature of Copyright Subject-Matter</i> .....	169
4.3 <i>Just Because It’s What’s Done, Doesn’t Mean It’s What Should be Done: Recontextualizing the Notion of Infringement</i> .....	187

<b>Chapter 5 The World Has Somehow Shifted, All at Once Everything is Different: Exploring the Barriers to Creative Autonomy in Human-Machine Collaborations .....</b>	<b>208</b>
5.1 <i>If You Walk the Footsteps of a Stranger, You’ll Learn Things You Never Knew You Never Knew: How Generative AI Redefines the Relationship Between Authors and Pre- Existing Knowledge.....</i>	213
5.2 <i>I Can Open Your Eyes, Take You Wonder by Wonder: Breaking Down the Newfound Relationship Between Authors, Generative Algorithms and their Developers .....</i>	221
5.3 <i>Generative AI and Control Over Authorship: The Impacts of the Service Provider/User Relationship on Authorial Autonomy .....</i>	237
<b>Chapter 6 Fairfarren Wonderland: Enhancing Creative Autonomy in the Age of Human- Machine Collaborations .....</b>	<b>257</b>
6.1 <i>Gotta Keep, One Jump Ahead of the Uses, That’s All, And That’s No Joke: Copyright’s Encroachment on Non-Uses as an Impediment to Creative Autonomy .....</i>	262
6.2 <i>Have Faith in Your Dreams and Someday, Your Creativity Will be Legitimate Too: The Copying Involved in AI Development as Falling Outside of Copyright’s Purview .....</i>	273
6.3 <i>Can AI Compel Speech?: Criteria for Epistemic Infringement in the Use of Generative Algorithms .....</i>	281
<b>Bibliography .....</b>	<b>302</b>

## List of Figures

Figure 2.1: Creative Class Picture .....	84
Figure 3.1: Choosing Score Parameters in Amper Music.....	118
Figure 3.2: Creative Editing in Amper Music .....	119
Figure 3.3: Images Generated With Deep Dream Generator’s CNN .....	121
Figure 3.4: Images Generated with Adaptive-Style-Transfer.....	122
Figure 4.1: Disney v Air Pirates Funnies.....	199
Figure 4.2: Rogers v Koons .....	200
Figure 5.1: A Sarit-AI Collaboration .....	227
Figure 6.1: Tarkay vs Patricia.....	296
Figure 6.2: Sam Yang vs. Generative AI.....	297
Figure 6.3: A Taxonomy of Copyright in Human-Machine Collaborations .....	301

## Chapter 1 Welcome to Wonderland: Exploring the World of Human-Machine Collaborations

It was the year 2023 when ChatGPT took the world by storm. This powerful generative artificial intelligence (AI) chatbot could respond to your every whim. Want a poem that's a cross between the styles of John Keats and Homer Simpson? Nine stanzas coming instantaneously your way.<sup>1</sup> Fancy a steampunk Greek comedy set in a post-apocalyptic world? Easy as pie, just tell it when to stop.<sup>2</sup> Need a ground-breaking scientific theory to help you solve the mystery of orphan socks? No problem.<sup>3</sup> It's too bad I couldn't get it to write this dissertation for me. Or did I? I guess you'll have to read on to judge for yourself. Though if you'd rather be sure before committing, you could always plug my words into one of the many AI text classifiers recently launched to flag prose originating from ChatGPT. Then again, when I inserted text that this chatbot *did* produce

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<sup>1</sup> ChatGPT, online: <<https://chat.openai.com/>> (Prompt: "Write me a poem that's a cross between the styles of John Keats and Homer Simpson." Generated text: "Oh, Homer Simpson, thou noblest oaf of Springfield, / D'oh! A cry that rings through ages past and yields, / Thy hapless antics, a comedy profound, / Entwined with Keats' verse, where beauty's found. / [...] Ode to a Jelly-Filled, Glazed Delight, / Thou sugary orb, my appetite's kite, / Thy sprinkled top, a vibrant galaxy, / With every bite, my soul dances in glee. [...]").

<sup>2</sup> ChatGPT, *ibid* (Prompt: "Write a steampunk Greek comedy set in a post-apocalyptic world. Max 500 words." Generated text: "In a post-apocalyptic wasteland where gears clashed with crumbling ruins, the gods of ancient Greece found themselves in a most peculiar situation. The mighty Mount Olympus had been reduced to a steampunk paradise amidst the remnants of a shattered world. Hermes, the messenger of the gods, wearing his goggles and leather flying cap, embarked on an extraordinary mission. He was tasked by Zeus, the rule of Olympus, to restore the laughter and mirth that had been lost in the desolate landscape. Hermes assembled a motley crew of mythical misfits, including Hephaestus, the inventor with a penchant for steam-powered contraptions; Athena, the sharp-witted strategist with a stylish brass armor; and Dionysus, the wine-soaked reveler with an everlasting flask. [...]").

<sup>3</sup> ChatGPT, *ibid* (Prompt: "Create a ground-breaking scientific theory to solve the mystery of orphan socks." Generated text: "Title: 'The Orphan Sock Paradox Theory: A Quantum-Entanglement Hypothesis.' The mystery of orphan socks has baffled humanity for centuries, leaving us questioning the very fabric of our reality. Where do those missing socks vanish to, and why do they leave their counterparts behind? [...] During the wash cycle, the turbulent water, combined with the rhythmic spinning motion, acts as a catalyst, creating a unique quantum entanglement between each pair of socks. This entanglement imbues the socks with a hidden property – an invisible bond that transcends spatial dimensions. [...] When the socks are removed from the washing machine, they enter a state of superposition – simultaneously existing in both a paired and unpaired state. Herein lies the paradox: When we observe the socks, their quantum state collapses, causing a spontaneous separation [...]").

into one such tool, it concluded that the excerpt was very unlikely to have been AI-generated, so you might never know for certain.<sup>4</sup>

ChatGPT is just the latest in a long line of creative algorithms capable of independently producing anything from poems<sup>5</sup> to novels,<sup>6</sup> as well as musical compositions<sup>7</sup> and works of art<sup>8</sup> – all with a certain level of proficiency that would have any human doubting that they were AI-generated.<sup>9</sup> In June 2016, Benjamin the algorithm independently generated *Sunspring*,<sup>10</sup> a rather thought-provoking science fiction film. Not only did it spin a spell-binding “tale of romance and murder, set in a dark future world,”<sup>11</sup> but it even incorporated an original score “with a pop song Benjamin composed after learning from a corpus of 30,000 other pop songs.”<sup>12</sup> This film is remarkable, not just because it was produced by an algorithm, but because it was noteworthy enough to place top ten in Sci-Fi London’s annual film festival – an impressive accolade indeed.

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<sup>4</sup> See e.g. Xavier Harding, “Did ChatGPT Write This? Here’s How To Tell” (14 April 2023), online: <[https://foundation.mozilla.org/en/blog/how-to-tell-chat-gpt-generated-text/#:~:text=You%20can%20detect%20Chat%20GPT,company%20that%20made%20Chat%20GPT.](https://foundation.mozilla.org/en/blog/how-to-tell-chat-gpt-generated-text/#:~:text=You%20can%20detect%20Chat%20GPT,company%20that%20made%20Chat%20GPT.;)>; Justin Gluska, “How To Check If Something Was Written with AI” (3 May 2023), online: <<https://goldpenguin.org/blog/check-for-ai-content/#:~:text=GLTR%20is%20currently%20the%20most,3%20or%20GPT%2D4%20content.>>.

<sup>5</sup> See e.g. Dan Robitzski, “This AI wrote a poem that’s good enough to make you think it’s human” *We Forum* (30 April 2018), <https://www.weforum.org/agenda/2018/04/artificial-intelligence-writes-bad-poems-just-like-an-angsty-teen>>.

<sup>6</sup> See e.g. Natalie Shoemaker, “Japanese AI Writes a Novel, Nearly Wins Literary Award” *Big Think* (24 March 2016), online: <<https://bigthink.com/natalie-shoemaker/a-japanese-ai-wrote-a-novel-almost-wins-literary-award>>.

<sup>7</sup> See e.g. Dani Deahl, “How AI-Generated Music Is Changing The Way Hits Are Made” *The Verge* (31 August 2018), <https://www.theverge.com/2018/8/31/17777008/artificial-intelligence-taryn-southern-amper-music>.

<sup>8</sup> See e.g. Marc Prats Quintana, *The Artificially Intelligent Painting Robot PIX18: An Investigation of Man-Machine Artistic Equivalence* (Master’s Thesis, Leiden University Faculty of Humanities, 2019) [unpublished].

<sup>9</sup> See e.g. Alex Hern, “New AI fake text generator may be too dangerous to release, say creators” *The Guardian* (14 February 2019), online <<https://www.theguardian.com/technology/2019/feb/14/elon-musk-backed-ai-writes-convincing-news-fiction>>.

<sup>10</sup> See Ars Technica, “Sunspring” (9 June 2016), online (video): *YouTube* <[www.youtube.com/watch?v=LY7x2Ihqjmc&feature=youtu.be](http://www.youtube.com/watch?v=LY7x2Ihqjmc&feature=youtu.be)>.

<sup>11</sup> Annalee Newitz, “Movie Written by algorithm turns out to be hilarious and intense” (9 June 2016), online: *Ars Technica* <<https://arstechnica.com/gaming/2016/06/an-ai-wrote-this-movie-and-its-strangely-moving/>>.

<sup>12</sup> *Ibid.*

In December 2018, however, an even more surprising event took place: an AI-generated artwork was sold at Christie's auction house for a whopping \$432,500. Entitled the *Portrait of Edmond Belamy*, it “depicts a portly gentleman, possibly French and – to judge by his dark frockcoat and plain white collar – a man of the church. The work appears unfinished: the facial features are somewhat indistinct and there are blank areas of canvas. Oddly, the whole composition is displaced slightly to the north-west.”<sup>13</sup> Its unusual depiction doesn't detract from its artistic merit, however. Its blurriness appears purposeful with the strange angle of the portrait seemingly intentional. It's difficult to fathom just by looking at it that it was machine-generated.

Perhaps the most shocking of all the algorithmic triumphs that have permeated the media in recent years, however, is when German artist Boris Eldagsen withdrew his acceptance of the award he received for his photographic submission at the Sony World Photography Award 2023, revealing that the image he entered in fact owed its origin to artificial intelligence.<sup>14</sup> “How many of you knew or suspected that it was AI-generated?” Eldagsen stated on his website. “Something about this doesn't feel right, does it? AI images and photography should not compete with each other in an award like this. They are different entities. AI is not photography.”<sup>15</sup> This revelation shook the art world, spurring discussions about whether AI in photography has quite simply gone too far; whether its increasing sophistication risks ruining this artform for us all by causing us to question whether what looks like a real moment frozen in time is little more than an algorithmic production.

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<sup>13</sup> Christie's, “Is artificial intelligence set to become art's next medium?” (12 December 2018), online: *Christie's* <[www.christies.com/features/A-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx](http://www.christies.com/features/A-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx)>.

<sup>14</sup> Boris Eldagsen, “Statement 12.4.23: REFUSAL OF THE PRIZE of the Sony World Photography Awards Open Competition / Creative Category at the London Award Ceremony” (12 April 2023), online: <<https://www.eldagsen.com/sony-world-photography-awards-2023/>>.

<sup>15</sup> *Ibid.*

These are just a few examples in a long list of rather remarkable algorithmic creations that have come to the fore in recent years. And they've been accompanied by an artists-versus-machines discourse;<sup>16</sup> one characterized by the fear that generative algorithms will entirely displace human authors, with author Noam Chomsky going as far as claiming that generative algorithms like ChatGPT are the 'banality of evil.'<sup>17</sup> Parallel to these doomsday accounts is copyright doctrine's attempts to place this kind of sophisticated content within its existing framework. Given the increasingly advanced nature of machines' creative expressions, copyright scholars have essentially taken to questioning whether fully machine-generated content could enjoy copyright protection given that they *prima facie* satisfy copyright's low originality threshold.<sup>18</sup>

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<sup>16</sup> Will Bedingfield, "Musicians, Machines, and the AI-Powered Future of Sound" (16 March 2023), online: *Wired* <<https://www.wired.co.uk/article/generative-ai-music>>.

<sup>17</sup> Noam Chomsky, "Noam Chomsky: The False Promise of ChatGPT" (8 March 2023), online: <<https://www.nytimes.com/2023/03/08/opinion/noam-chomsky-chatgpt-ai.html>>.

<sup>18</sup> See Tim W Dornis, "Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine" (2020) *Yale JL & Tech* 1; Samantha Fink Hedrick, "I Think, Therefore I Create: Claiming Copyright in the Outputs of Algorithms" (2019) 8:2 *New York U J of Intellectual Property & Entertainment L (JIPEL)* 324; Atilla Kasap, "Copyright and Creativity Artificial Intelligence (AI) Systems: A Twenty-First Century Approach to Authorship of AI-Generated Works in the United States" (2019) 19:4 *Wake Forest J of Bus & Intellectual Property L* 335; Shlomit Yanisky-Ravid & Luis Antonio Velez-Hernandez, "Copyrightability of Artworks Produced by Creative Robots and Originality: The Formality-Objective Model" (2018) 19 *Minn JL Sci & Tech* 1; Nina I Brown, "Artificial Authors: A Case For Copyright In Computer-Generated Works" (2018) 20:1 *Colum Sci & Tech L Rev* 1; Jared Vasconcellos Grubow, "O.K. Computer: The Devolution of Human Creativity and Granting Musical Copyrights to Artificially Intelligent Joint Authors" (2018) 40:1 *Cardozo L Rev* 387; Daryl Lim, "AI & IP: Innovation & Creativity in an Age of Accelerated Change" (2018) 52:3 *Akron L Rev* 813; Kalin Hristov, "Artificial Intelligence and the Copyright Dilemma" (2017) 57:3 *IDEA: The J of the Franklin Pierce Center for IP* 431; Pierre-Luc Racine, "Fostering Expressive Knowledge: The Copyrightability of Computer-Generated Works in Canada" (2020) 60:3 *IDEA: The L Rev of the Franklin Pierce Center for IP* 544; Robert Yu, "The Machine Author: What Level of Copyright Protection is Appropriate for Fully Independent Computer-Generated Works?" (2017) 165 *U Pa L Rev* 1241; Robert C Denicola, "Ex Machina: Copyright Protection for Computer-Generated Works" (2016) 69:1 *Rutgers U L Rev* 251; James Grimmelmann, "There's No Such Thing as a Computer-Authored Work – And It's a Good Thing, Too" (2016) 39 *Colum J L & Arts* 403 [Grimmelmann, Computer-Authored Work]; Annemarie Bridy, "Coding Creativity: Copyright and the Artificially Intelligent Author" (2012) *Stan Tech L Rev* 5 [Bridy, Coding Creativity]; Evan H Farr, "Copyrightability of Computer-Created Works" (1989) 15 *Rutgers Computer & Tech LJ* 63; Pamela Samuelson, "Allocating Ownership Rights in Computer-Generated Works" (1985) 47 *U Pitt L Rev* 1185 [Samuelson, Allocating Ownership].

But while copyright scholarship has been overwhelmingly preoccupied with this issue, it has largely overlooked one that's far timelier; one that artists, authors, and musicians face on a daily basis: how should copyright conceive of creators who surrender their supremacy over the works of their minds by delegating a number of their creative choices to machines? How should works borne of human creativity mixed with automated input – that owe their origin to both man and machine – be placed within the copyright narrative? In effect, while the current media frenzy has centered on the anxieties of artists, authors, and musicians who fear that generative AI will spell the end of human creativity, a majority of creators are in fact exploring how AI and humans might collaborate rather than compete.<sup>19</sup> “Creativity is not a unified thing,” notes researcher Oded Ben Tal. “It includes inspiration and innovation and craft and technique and graft. And there is no reason why computers cannot be involved in that situation in a way that is helpful.”<sup>20</sup>

Published author Sigal Samuel turned to ChatGPT's predecessor, GPT-2, to assist her in penning her next novel. These kinds of creative algorithms, advances mathematician Marcus du Sautoy, can help us “push ourselves in interesting ways as the AI becomes partner or tool to extend our own creativity. [Authors] get so stuck in ways of thinking and sometimes [they] need something to kick [them] out of that. AI can help [them] behave less like machines and more like creative humans.”<sup>21</sup> And that's precisely what GPT-2 did for Samuel's writing. Hindered by writers' block, she inputted a few sentences into the program and the algorithm then built on her ideas by generating raw, strangely moving and sometimes amusing prose that she likely wouldn't have come up with on her own. While she didn't incorporate any of them into her novel verbatim,

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<sup>19</sup> Bedingfield, *supra* note 16.

<sup>20</sup> *Ibid.*

<sup>21</sup> Sigal Samuel, “How I'm using AI to write my next novel: Try out this new AI tool. It just might make your writing more creative” *Vox* (30 August 2019), online: <<https://www.vox.com/future-perfect/2019/8/30/20840194/ai-art-fiction-writing-language-gpt-2>>.

they helped her explore new avenues within her creative process that she never would have considered before.

Pindar Van Arman is a computer security contractor by day and artist by night. But with a full-time job and a growing family, the chaos of everyday life often gets in the way of his painting. Rather than give up on his passion, however, he decided to put his knowledge of coding to good use: he built BitPaintr the robot, capable of painting portraits with a brush on canvas. “It paints using a mix of its own artificial intelligence and my artistic direction,”<sup>22</sup> notes Van Arman. This robot essentially completes all the underlayers of Van Arman’s paintings so that he doesn’t have to dedicate his limited time to carrying out this groundwork himself. “I needed an assistant,” he explains, “something to help me paint faster and better. And I thought if it could do the first seven hours of work and just leave me the last fun, interesting, creative one hour, I would be set.”<sup>23</sup> It was such that Van Arman embarked on his path of human-machine collaboration and the rest, as they say, is history.

Holly Herndon, an avant-pop musician, collaborated with several technologists to develop the neural network dubbed Spawn. Their aim? To see if artificial intelligence and humans, “working together as peers, [can] create something genuinely new.”<sup>24</sup> And create something new they did. Trained on datasets of her own speaking and singing voice, the algorithm collaborated with Herndon and her six-member vocal ensemble in the production of their newest album, *PROTO*. This software, Herndon clarified, acts “as a member of the ensemble rather than its

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<sup>22</sup> Pindar Van Arman, “bitPaintr – A Portrait Painting Robot” (18 November 2016), online:

<<https://www.kickstarter.com/projects/396659733/bitpaintr-a-portrait-painting-robot-by-pindar-van>>.

<sup>23</sup> Pindar Van Arman, “Cloud Painter and BitPaintr – Pindar Van Arman’s Painting Robots” *YouTube* (4 September 2017), online: <<https://www.youtube.com/watch?v=7zgtkJEwaCs>>.

<sup>24</sup> Rob Arcand, “The Artists Using Artificial Intelligence to Dream Up the Future of Music” *Spin* (4 June 2019), online: <<https://www.spin.com/2019/06/ai-music-artificial-intelligence-feature-holly-herndon-yacht/>>.

omniscient director. Spawn doesn't dictate the shapes of the compositions, but it does make choices about how to play them – choices that human musicians may not have made on their own.”<sup>25</sup> The software, in this sense, adds intriguing layers to the musical composition, helping to shape – but not single-handedly define – the outcome. The contributions of both Herndon and Spawn are, in this sense, so intertwined that it's difficult to tell where her input ends and the algorithm's begins, and vice versa.

But incorporating artificial intelligence into the creative process – as partner and collaborator – inevitably creates social struggles that fundamentally challenge copyright's long-standing conceptions surrounding the ontology of authorship.<sup>26</sup> It wasn't too long ago that I was sitting at the airport in earshot of three professors from different universities regaling one another about the internal faculty meetings they'd recently had regarding how they could heretofore know, with any measure of certainty, whether the work students submit reflects their own knowledge as opposed to the machine learning capabilities of ChatGPT; whether or not students are the authors of their own assignments. What I found quite telling about this discussion was not the variety of proposed solutions, regardless of how intriguing they were. Rather, it was how quickly a single chatbot could shift the focus of student-professor discourse, indeed, of discourse in general. Inserting algorithms into a realm that was one reserved strictly to humans inevitably changes the nature and substance of our social dialogue. My dissertation charts precisely what these changes are, and how they are simultaneously shaped and defined by our copyright narrative.

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<sup>25</sup> *Ibid.*

<sup>26</sup> Jack B Balkin, “The Path of Robotics Law” (2015) 6 *The Circuit* 45 at 50 [Balkin, Robotics Law]; See also Margot E Kaminski, “Authorship, Disrupted: AI Authors in Copyright and First Amendment Law” (2017) 51 *University of California, Davis* 589 at 592-3; Meg Leta Jones, “Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw” (8 Jun 2017), online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2981855](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2981855)>.

Rather than approaching this analysis based on the assumption that generative algorithms are inherently disruptive to our creative landscape, however, I examine whether AI-as-collaborator is compatible with copyright's purpose.<sup>27</sup> Although the substance of copyright's primary objective is a topic of fierce debate,<sup>28</sup> it's generally uncontested that "one of the central purposes of [copyright] is to construct a scarcity (or rivalrousness) that allows a price to be taken and knowledge to be exchanged in market mechanisms to further social efficiency."<sup>29</sup> There are three propositions that follow from this definition. First, knowledge is created through a process of edification and reflection; we learn from existing works, contemplating them and all the while expanding our own mental faculties. Second, the ideas and expressions borne from this process of knowledge pursuit are exchanged by way of a social dialogue; we engage with existing works by using them as building-blocks for our own creations, which we then communicate to the public in a way that invites a dialogue surrounding the ideas we express. Third, it's this discourse that serves to advance social efficiency.<sup>30</sup> The capacity to participate in the social dialogue is thus essential to advancing copyright's goal of knowledge exchange, making it a necessary quality to qualify for copyright authorship.

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<sup>27</sup> See Kaminski, *ibid* at 592-3; See also Jones, *ibid*.

<sup>28</sup> See generally Peter Drahos, *A Philosophy of Intellectual Property* (Australia: ANU Press, 2016); Robert P Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) [Merges, Justifying IP]; Christopher May & Susan K Sell, *Intellectual Property Rights: A Critical History* (Colorado: Lynne Rienner Publishers, 2006); Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 UOLTJ 315 at 335 [Gervais, Purpose of Copyright].

<sup>29</sup> May & Sell, *ibid* at 22.

<sup>30</sup> Niva Elkin-Koren, "Copyright Law and Social Dialogue on the Information Superhighway: The Case against Copyright Liability of Bulletin Board Operators" (1995) 13 Cardozo Arts & Ent LJ 345 at 400 [Elkin-Koren, Information Superhighway]; See also Carys J Craig, "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law" (2007) 15:2 Journal of Gender, Social Policy & the Law 207 [Craig, Reconstructing the Author-Self]; Abraham Drassinower, *What's Wrong with Copying?* (Cambridge: Harvard University Press, 2015) [Drassinower, WWWC]; Lior Zemer, "Copyright, Otherness and Dialogue" (2016) 29 IPJ 155 [Zemer, Copyright, Otherness, Dialogue].

Copyright's evolution over the years, however, has placed many obstacles in the path of this kind of fortuitous dialogue. In order to determine how integrating artificial intelligence into the creative process might impact authors' ability to participate in and contribute to this discourse, it's therefore necessary to first address the dialogic barriers inherent in copyright's intrinsic principles. And I do so by underscoring both the social, historical, and cultural contexts surrounding copyright law, effectively drawing out how best to endorse the values that copyright was constructed to promote. In this sense, despite following a doctrinal research method,<sup>31</sup> my analysis is grounded in a functionalist comparative law methodology.<sup>32</sup> This approach emphasizes “[le] fait que tout droit est un phénomène culturel et que les règles de droit ne peuvent jamais être considérées indépendamment du contexte historique, social, économique, psychologique et politique [...]”;<sup>33</sup> Essentially, “cette méthode fonctionnelle [...] permet d’atteindre [...] le système dans son homogénéité, dans son esprit, dans ce qu’on a justement appelé sa ‘mentalité.’”<sup>34</sup>

By examining the social, historical, and cultural contexts surrounding the various copyright traditions that have so strongly influenced Canada's own regime – namely those of England, France, and the United States – I look to where we've been in order to determine where we *should*

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<sup>31</sup> To this effect, my research will have regard to both primary and secondary legal materials. The relevant case law and legislation will essentially be gleaned from the secondary resources, all of which were found using four online databases for legal articles (HeinOnline, SSRN, Google Scholar as well as the University of Ottawa's Brian Dickson Law Library's Online Database) using the broadest search terms possible while still being reasonable (for example, “artificial intelligence”/robots AND “copyright” for Part I of my dissertation, and “copyright” AND “contract” for Part 3 of my dissertation). All the results were reviewed and only the relevant articles used for the purposes of this research (articles were assessed for relevance on a case-by-case basis and only those that had sufficient relevance to copyright and various aspects of my subject (i.e., copyright and AI, authorship, or other copyright principles) were ultimately used). To ensure that all my bases were covered, I also reviewed the sources cited in each of those articles to pinpoint any additional sources that I had not already come across. Each of these additional articles, as well as the sources they cited, were then also reviewed and any resources I had not already discovered were reviewed as well.

<sup>32</sup> See Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1977); Ralf Michaels, “The Functional Method of Comparative Law” in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 337.

<sup>33</sup> Konrad Zweigert, “Des solutions identiques par des voies différentes” (1966) 18 RIDC 5 at 13 f.

<sup>34</sup> Marc Ancel, “Le problème de la comparabilité et la méthode fonctionnelle en droit comparé” in Ronald H Graveson, Karl F Kreuzer, Andre Tunc & Konrad Zweigert, *Festschrift für Imre Zajtay* (Tübingen: Mohr Siebeck, 1982) 1 at 4.

be going. This is especially critical at the intersection between artificial intelligence and copyright, where the former possesses many qualities that challenge the latter's core tenets; that build on and add to the networks of nested relationships that characterize copyright as a harbinger of dialogue.<sup>35</sup> It's only in addressing the various forces at play in copyright's evolution that we can account for this complicated web of influences in a way that permits creativity to flourish. Once the flaws in the structure of these relationships are laid bare, we'll be far better placed to assess the ability of human-machine collaborations to achieve the dialogic purpose at copyright's core; to pinpoint whether, and under what circumstances, integrating AI within the creative process might negate or foster our societal meaning-making process.

It's in this vein that I begin, in Part I, by setting the background for what's to come. My second chapter, "Every Adventure Requires a First Step: A Dialogic Theory of Copyright," accomplishes two tasks. First and foremost, drawing on the historical and cultural contexts surrounding copyright's conception, it identifies copyright's core purpose as dialogic in nature. Second, it sets out dialogic theory as the foundation for my analysis. Being an unusual choice for a theoretical framework, I commence my discussion by justifying why I didn't opt for a more traditional copyright theory to animate my discussion. There is, in effect, no great shortage of philosophical underpinnings for copyright. John Locke's labour theory justifies copyright in terms of entitlements to the fruits of our labour.<sup>36</sup> Georg Hegel's personality theory maintains that we have a right to all that with which our personality has joined.<sup>37</sup> Jeremy Bentham's utilitarianism

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<sup>35</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 120 [Nedelsky, Law's Relations].

<sup>36</sup> John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1970) [Locke, Two Treatises].

<sup>37</sup> Georg Friedrich von Hegel, *Hegel's Philosophy of Right* (Oxford: TM Knox translators, 1952) (1821).

argues in favour of copyright due to its (alleged) ability to promote social progress by incentivizing creativity.<sup>38</sup> And these are but the most common of copyright's philosophical underpinnings.

The reason I take issue with each one of them, however, is because they all approach copyright in terms of *justifications* – an outlook that I find problematic for two reasons. First, by primarily seeking to defend copyright as necessary to creative culture, they build on the premise that – but for copyright – creativity would be nonexistent. Second, and inextricably linked to the first, is that this rationale consistently favours the rights and interests of some actors over others, essentially overlooking that copyright is the exception rather than the rule. From this perspective, all these philosophical underpinnings have – in one way or another – contributed to the expansion of copyright; to the evolution of a creative culture that hinders dialogue rather than enriches it.

Drawing lessons from the flaws inherent in these approaches, I proceed by justifying (for lack of a better word) why approaching copyright in terms of its *purpose* is a far more suitable means of ensuring that this body of law doesn't overstep its bounds. Through a rich historical account of its conception in both civil and common law traditions, I identify copyright's underlying purpose as primarily dialogic in nature. Whether it's the British copyright or the French *droit d'auteur*, copyright's fundamental goal at the outset was to promote a rich and abundant social dialogue through encouraging society's pursuit of knowledge and intellectual enlightenment. Acknowledging that the purpose of copyright is, however, a subject of never-ending controversy, I proceed by elucidating why I think it ought to be fixed to a historical anchor.

It is, after all, entirely possible that the purpose of copyright *was* one thing, but that it has evolved, diversified, or fragmented throughout the years. There's no question that it's in the spirit

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<sup>38</sup> Jeremy Bentham, *The Principles of Morals and Legislation* 1 n. 1 (Illinois: Prime, 1998) (1823).

of the law to alter over time, to respond to the changing nature of society. When it comes to copyright, however, I'm less inclined to be persuaded by this argument. The reason is quite simply because the point at which copyright's very purpose changed from a dialogic one to one that hinders serendipitous discourse can be traced directly back to the introduction of the elusive concept of balance within its doctrine. And this approach, I elucidate, has done little more than create a value paradigm preventing the juridical ordering of the relationship between creators and users; producing an artificial hierarchy that undermines the balance principle's very attempt to ground copyright as a construct.

After illustrating how prioritizing a dialogic vision of copyright can avoid a similar fate, I conclude this second chapter by introducing a definition of authorship that aligns with this very purpose; one that's divorced from what this term has come to embody in copyright rhetoric. It's undeniable that the figure of the romantic author lies at the normative heart of our conception of copyright.<sup>39</sup> Copyright law, as it was first enacted, is "historically and culturally contingent on the idea of the author as an individual creative personality, a solitary originator of stylistically consistent works."<sup>40</sup> Initially being used to describe works infused with creative genius, all references to authorial "originality" were essentially an endorsement of this romantic vision of authorship. Its unrealistic portrayal of authorial works as creations *ex nihilo* aside,<sup>41</sup> this perception

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<sup>39</sup> Oren Bracha, "The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright" (2008) 118 Yale LJ 187 at 188 [Bracha, Ideology of Authorship].

<sup>40</sup> Bridy, Coding Creativity, *supra* note 18 at para 7.

<sup>41</sup> See below, Chapter 2 for further discussion regarding the problematic nature of romantic notions of authorship; for the present purposes, suffice to say that it promotes an unrealistic vision of originality that neglects to consider the fact that all authorial works are ultimately products of those that preceded them. By depicting authors as creative geniuses who express themselves in isolation from the remainder of society, the romantic vision of authorship cannot account for all the ways in which culture is created and knowledge is pursued.

of authorship prompted many to insist upon the importance of an elevated originality threshold during the early days of copyright.<sup>42</sup>

Over time, ‘originality’ came to encompass what we view as entitled to copyright protection. In contrast to the connotation that was initially afforded to the term, however, it’s now being used to instill copyright in individuals from whom content originated,<sup>43</sup> with little emphasis on the level of creativity imbued in such works.<sup>44</sup> In fact, Canadian copyright law doesn’t demand demonstrable creativity at all, with its originality principle requiring nothing more than skill and judgment. With skill being defined as “the use of one’s knowledge, developed aptitude or practised ability in producing the work,”<sup>45</sup> and judgment meaning “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the works,”<sup>46</sup> originality “can mean everything from truly novel [...] to a much more pedestrian not expressly copied.”<sup>47</sup> This lowering of the threshold necessary to be eligible for copyright protection has made it difficult to equate originality in its normative sense to demonstrable authorship. Reduced to mere process and actions, the modern conception of originality belittles what’s involved in the enterprise of authorship and ultimately protects a good number of works that don’t merit enjoying the benefits of copyright. Suffice to say, our current understanding of original expression has become far removed from copyright’s ideals.

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<sup>42</sup> See Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press: Cambridge, 1993) at 6 [Rose, Authors and Owners].

<sup>43</sup> Jane C Ginsburg, “The Concept of Authorship in Comparative Copyright Law” (2003) 52 DePaul L Rev 1063 at 1066 [Ginsburg, Concept of Authorship].

<sup>44</sup> See Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790-1909* (New York: Cambridge University Press, 2016) [Bracha, Owning Ideas].

<sup>45</sup> *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339 at para. 16.

<sup>46</sup> *Ibid.*

<sup>47</sup> Laura J Murray & Samuel E Trosow, *Canadian Copyright: A Citizen’s Guide* (Toronto: Between the Lines, 2013) at 40.

With our modern conception of originality no longer being synonymous with authorship, I proceed by presenting a theory of authorship that's segregated from originality as we have come to understand it. Known as the communicative act theory, it was established by Abraham Drassinower in 2015<sup>48</sup> and it offers a dialogic conception of copyright that serves as the theoretical framework for my dissertation. His theory considers works of authorship to be communicative acts through which authors – speaking in their own words – participate in the social dialogue; stimulate progress in the sciences and the arts by engaging in discourse with authors of the past. Being among the first dissertations to adopt Drassinower's theory as its theoretical framework, my thesis is novel not only in its subject matter but also in its foundational analysis. It demonstrates how this theory can serve to inform copyright's approach to AI's integration within the creative process by providing a dialogic lens through which to examine whether, or under what circumstances, human-machine collaborations *should* qualify as works of authorship; whether, or under what conditions, the algorithm's input is likely to transform the work into something other than the author 'speaking in her own words.'

But to answer this question in any comprehensive sense, I must set the technological stage for this discussion by first examining precisely how AI is being incorporated into the creative realm. To this effect, my third chapter, "But First, Let's Have Our Tea: The Evolution of Computational Creativity," provides a detailed description of the intersection between artificial intelligence and creativity. I begin by tracing the evolution of AI, from its conception through to its incorporation into the creative realm. Despite how it's typified in popular culture, artificial intelligence (the real thing, as opposed to the dystopian tales of overlord robots that have permeated

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<sup>48</sup> Drassinower, WWWC, *supra* note 30.

society for time immemorial)<sup>49</sup> is not a new concept. Conceived in the summer of 1956 at a workshop hosted by Dartmouth College, it has since undergone periods of hype and high hopes followed by ones of setbacks and disappointments.<sup>50</sup>

Nearly seven decades later, artificial intelligence is once again experiencing a surge. This one, however, is unlike any other. Primarily responsible for this growth is that we're finally endowed with the technology necessary to exploit artificial intelligence to a far greater extent than ever before. Up until the late nineties, computers with the storage and power necessary to run artificial intelligence programs were "expensive to develop, validate, and keep updated, and were generally cumbersome to use."<sup>51</sup> That's not to mention that they could only run a single program at a time. Now, everything we require to run AI programs is available at our very fingertips through easily accessible online platforms.

But beyond this ease of access, the interconnected nature of modern technology has also resulted in the ability to produce, store, and use the colossal amounts of data – known colloquially as Big Data – required to train machine learning algorithms. And it's this very development that makes generative AI possible. By drawing on the vast amounts of digital information that characterize our current reality, algorithms can now 'learn' from practically any aspect of pre-existing culture – be it books, songs, artwork, or even inane threads on Reddit, among many others. By deducing the underlying rules or trends inherent in both language and the arts, these algorithms can then generate new creative works. And use of such programs within the creative realm is limitless. While some can produce entirely 'original' creative works at the mere click of the button,

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<sup>49</sup> See e.g. Karel Čapek, *Rossum's Universal Robots* (1921); Isaac Asimov, *iRobot* (New York: Bantam, 1950); see also Nick Bostrom, *Artificial Superintelligence: Paths, Dangers and Strategies* (Oxford: Oxford University Press, 2014) at 6.

<sup>50</sup> Bostrom, *ibid* at 6.

<sup>51</sup> *Ibid* at 8-9.

others can collaborate with human authors to push the boundaries of the latter's own creativity in previously inconceivable ways.

Given all their unique possibilities, creators of all kinds are increasingly being drawn to incorporating AI programs into their creative processes. While some – like Van Arman and Herndon<sup>52</sup> – have taken it upon themselves to develop their own personal programs to this effect, the vast majority of artists, musicians, and authors lack the necessary skillset permitting them to engage in this endeavour. That doesn't mean, however, that they remain at a loss. In recent years, Big Tech companies have developed a variety of generative AI programs and rendered them available to everyday users through easily accessible online platforms. Such programs include Google Magenta, IBM Watson, Amper Music, AIVA Music, and most recently ChatGPT, to name but a few. Accessible at creators' very fingertips through devices as small and portable as tablets, I examine how the growing incorporation of AI into works of authorship impacts authors' creative processes in unprecedented ways; influences their creative choices by interacting with their creations throughout every step of their development.

From the moment it became clear that artificial intelligence could contribute to the creative realm, questions began arising surrounding its copyright implications. And I proceed by providing an overview of existing scholarship on these queries. To date, these analyses have revolved around two main themes. The first is whether *fully* machine generated content could be deemed an original work and, hence, be eligible for copyright protection. Opinions on this issue vary greatly. Given the increasing sophistication of machine-generated content, several scholars have posited that such creations should be entitled to copyright protection because they *prima facie* satisfy copyright's

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<sup>52</sup> See above, p. 3-4.

low originality threshold.<sup>53</sup> A small minority maintains the opposite, claiming instead that extending copyright protection to algorithmic creations isn't justified because they don't pursue the dialogic purpose that this legislation was designed to promote.<sup>54</sup>

The second issue that has arisen at the intersection between AI and copyright surrounds the notion of infringement. And the queries at this juncture are twofold. First and foremost: who should be held responsible when a creative algorithm produces an output that's a direct reproduction of a pre-existing work? The likelihood of this happening, it's understood, is relatively slim, though not impossible. It was discovered in October 2022, for instance, that GitHub's Copilot – an AI-powered coding assistant – reproduced large chunks of copyrighted code without the attribution required by its open-source license<sup>55</sup> leading to its pursuit for breach of license, among other things.<sup>56</sup> Although we're still awaiting a judicial decision on the foundations of the case, the United States District Court for the Northern District of California recently denied defendants' motion to dismiss this particular claim which might be indicative of its view that AI developers ought to be held liable for infringements committed by their programs.<sup>57</sup> And many copyright scholars appear to agree with this position. Maintaining that AI programs are merely agents or instruments of the people that create them, it's believed that these individuals should be held accountable for

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<sup>53</sup> See Kaminski, *supra* note 26; Dornis, *supra* note 18; Fink Hedrick, *supra* note 18; Kasap, *supra* note 18; Yanisky-Ravid & Velez-Hernandez, *supra* note 18; Brown, *supra* note 18; Vasconcellos Grubow, *supra* note 18; Lim, *supra* note 18; Hristov, *supra* note 18; Racine, *supra* note 18; Yu, *supra* note 18; Denicola, *supra* note 18; Grimmelmann, Computer-Authored Work, *supra* note 18; Bridy, Coding Creativity, *supra* note 18; Farr, *supra* note 18; Samuelson, Allocating Ownership, *supra* note 18.

<sup>54</sup> See e.g. Carys Craig & Ian Kerr, "The Death of the AI Author" (2021) 52:1 OLR 31; Sarit K Mizrahi, "Faux-riginality in an Age of Mass Production: Why Copyright Should Not Protect Machine-Generated Content" (2020) 33:1 IPJ 59 [Mizrahi, Faux-riginality].

<sup>55</sup> Steven Vaughan-Nichols, "Sure, GitHub's AI-assisted Copilot writes code for you, but is it legal or ethical?" (8 July 2022), online: *The Verge* <<https://www.zdnet.com/article/is-github-copilots-code-legal-ethically-right/>>.

<sup>56</sup> James Vincent, "The lawsuit that could rewrite the rules of AI copyright" (8 November 2022), online: *The Verge* <<https://www.theverge.com/2022/11/8/23446821/microsoft-openai-github-copilot-class-action-lawsuit-ai-copyright-violation-training-data>> [Vincent, Rules of AI copyright].

<sup>57</sup> *J Doe et al v Github Inc et al*, "Order Granting in Part and Denying in Part Motions to Dismiss", online: <<https://storage.courtlistener.com/recap/gov.uscourts.cand.403220/gov.uscourts.cand.403220.95.0.pdf>>.

algorithmic actions that violate the law.<sup>58</sup> Opposed to the strict liability regime that this would create, however, others have suggested that a portion of the payment received by programmers for uses of AI programs should be forwarded to the machine to create a fund that would serve as an insurance policy against liability claims.<sup>59</sup>

Second, given that machine learning algorithms – which make up the overwhelming majority of creative algorithms currently in use – are trained on pre-existing works, many have interrogated whether this process ought to amount to infringement where the works in question are copyright protected. Scholarly opinions on this subject diverge considerably. Some maintain that, because machine learning algorithms use works in novel ways and on a much greater scale, they should not enjoy a freedom under copyright that human readers do not.<sup>60</sup> Others hold that copyright should incorporate a text and data mining exception to ensure that machine learning algorithms can be developed without unnecessary hindrances.<sup>61</sup> And others still consider that, because most forms of machine learning involve purely technical uses that don't employ the works in their communicative capacity, they ought to fall outside of copyright's ambit entirely.<sup>62</sup>

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<sup>58</sup> David C Vladeck, "Machines Without Principals: Liability Rules and Artificial Intelligence" (2014) 89 *Washington Law Review* 117 at 121; see also Shlomit Yanisky-Ravid, "Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era – The Human-Like Authors are Already Here – a New Model" (2017) *Mich St L Rev* 659 at 705-7 [Yanisky-Ravid, *Generating Rembrandt*].

<sup>59</sup> Andreas Matthias, *Automaten als Träger von Rechten: Plädoyer für eine Gesetzänderung* (Germany: Humboldt Universität, 2007) at 113-4.

<sup>60</sup> James Grimmelmann, "Copyright for Literate Robots" (2016) 101 *Iowa Law Review* 657 at 661 [Grimmelmann, *Literate Robots*].

<sup>61</sup> See e.g. Carys Craig, Bitá Amani, Sarah Bannerman et al, "Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things: Submission by IP Scholars on Copyright and Artificial Intelligence" (26 September 2021) at 5-15, online: <<https://www.uwindsor.ca/law/2021-10-19/iot-ai>>; Michael Geist, "Why Copyright Law Poses a Barrier to Canada's Artificial Intelligence Ambitions" *Michael Geist Blog* (18 May 2017), online: <<http://www.michaelgeist.ca/2017/05/copyright-law-poses-barrier-canadas-artificial-intelligence-ambitions/>> [Geist, *Barrier to AI*].

<sup>62</sup> See e.g. Benjamin LW Sobel, "Artificial Intelligence's Fair Use Crisis" (2017) 41:1 *Colum J L&Arts* 45; Lim, *supra* note 18; Michael W Carroll, "Copyright and the Progress of Science: Why Text and Data Mining Is Lawful" (2019) 53 *University of California, Davis* 893 [Carroll, *Progress of Science*].

After reviewing the literature at the intersection between AI and copyright, I differentiate the questions that have already been addressed from the one that marks the subject of my dissertation. Most existing scholarship examines the copyright issues arising from emergent creativity, where algorithms create independently without any human input beyond the mere click of a button – think here of fully machine-generated content like Benjamin the algorithm’s *Sunspring* or the *Portrait of Edmond Belamy*, discussed above.<sup>63</sup> These are not the forms of creativity I address. The ones I tackle rather involve creators surrendering their supremacy over the works of their minds by delegating a number of their creative choices to machines, essentially affording artificial intelligence the role of content contributor. The works I focus on are those that are borne of human creativity mixed with automated input; that owe their origins to both man and machine. These are the instances of creativity that are more difficult to place within the copyright narrative. With these kinds of collaborations having been largely overlooked by copyright scholarship, my dissertation serves to address this disparity.

I have, to date, come across very few scholarly articles<sup>64</sup> that examine human-machine collaborations within the copyright context. Each one of them, however, adopt an approach that’s fundamentally different from my own. Focusing mainly on the question of attribution, they seek to determine whether copyright could inhere in the human author or the AI developer for works produced in conjunction with the creative algorithm. But while the *question du jour* might be whether copyright *could* recognize human-machine collaborations, a far better one is whether it *should*. Our decision to embrace AI as partner in the creative process, in other words, should not

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<sup>63</sup> See above, p. 3.

<sup>64</sup> See e.g. Christian Hartmann, Jacqueline E M Allan, P Bernt Hugenholtz, João P Quintas & Daniel Gervais, “Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework” (September 2020), online: *European Commission* <<https://ec.europa.eu/digital-single-market/en/news/trends-and-developments-artificial-intelligence-challenges-intellectual-property-rights-0>>; Jane C Ginsburg & Luke Ali Budiardjo, “Authors and Machines” (2019) 34 *Berkeley Tech LJ* 343.

be based on whether works arising from such collaborations fulfill, what's become over time, the very minimal requirements necessary to enjoy copyright protection; whether they merely satisfy the process and actions that have become synonymous with copyright authorship. Rather, it should rest on whether these works possess the dialogic qualities that copyright as a construct was designed to promote. And that's the query my dissertation answers.

This inquiry, however, necessarily requires a deep examination into copyright doctrine as it now stands; a reimagination of copyright's most intrinsic principles, divorcing them from what they've come to embody and conceptualizing them instead from a dialogic lens. Whether it's originality, fair dealing, or infringement, each of these principles, in their own way, contributes to (unnecessarily) limiting the kinds of dialogic encounters that promote progress and the evolution of meaning. Instead of recognizing that creative works are the product of pre-existing culture, the originality principle is founded on notions of romantic authorship that neglect to acknowledge that creative works "are not 'independent creations' and [...] do not originate from the author alone."<sup>65</sup> From this viewpoint, copyright becomes predisposed to diminishing as un-original works that engage in dialogue with pre-existing culture by drawing on the expressions of past authors.

Although fair dealing is designed to extend downstream creators the breathing space necessary to participate in our social dialogue for a variety of purposes – namely research, private study, education, parody, satire, criticism or review and news reporting<sup>66</sup> – it instead limits their

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<sup>65</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 228; see also Bracha, *Ideology of Authorship*, *supra* note 39; Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17:4 *Eighteenth-Century Studies* 425 [Woodmansee, *Genius and Copyright*]; James Boyle, "The Search for an Author: Shakespeare and the Framers" (1988) 37 *Am U L Rev* 625 [Boyle, *Search for Author*]; Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of Authorship" (1991) 1991:2 *Duke LJ* 455 [Jaszi, *Metamorphoses of Authorship*]; James Boyle, "A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading" (1992) 80:6 *Cal Law Rev* 1413 [Boyle, *Law and Information*]; Mark A Lemley, "Romantic Authorship and the Rhetoric of Property" (1997) 75 *Tex L Rev* 873 [Lemley, *Romantic Authorship*].

<sup>66</sup> *Copyright Act*, RSC 1985, c C-42, s 29, 29.1 & 29.2.; In assessing whether a dealing is fair, the following factors must be considered: "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing;

conditions for response to pre-defined strict criteria that serve to contradict this feat rather than promote it.<sup>67</sup> And the principle of infringement contributes to this dilemma by making the fair dealing exception necessary in the first place through its tendency to label as illegitimate any works that are *prima facie* similar to a pre-existing one, regardless of whether the downstream author's own contribution is evident; regardless of whether she has 'copied' subconsciously but has no recollection of the pre-existing work she supposedly drew from.

Each one of copyright's core principles are, in this sense, anti-dialogic in their own way; tilted more towards protecting 'original' authors' despotic dominion over their own works than promoting a creative culture capable of generating the sort of enlightened discourse that copyright was wont to promote. Determining whether or not human-machine collaborations *should* enjoy copyright protection therefore involves reframing the elements that ground copyright as a construct in order to imbue it with the coherence it lacks, reimagining copyright's core principles in a way that promotes dialogue rather than hinders it. It's only in so doing that we'll be better placed to objectively examine whether, or under what circumstances, human-machine collaborations fulfill copyright's basic principles in a fashion that contributes to its underlying dialogic purpose; in a manner that, in fact, merits copyright protection.

From this perspective, I dedicate the second part of my dissertation to reconceptualizing copyright's intrinsic principles, effectively examining human-machine collaborations through this

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(4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases." (*CCH Canadian Ltd v Law Society of Upper Canada*, *supra* note 45, at para 53).

<sup>67</sup> See Elizabeth L Rosenblatt, "Fair Use as Resistance" (2019) 9 UC Irvine L Rev 377 [Rosenblatt, Fair Use as Resistance] at 389 (fair use "[entails] permission from authority to repurpose [...] symbols, but only within certain authority-defined parameters."); Carys Craig, "Transforming 'Total Concept and Feel': Dialogic Creativity and Copyright's Substantial Similarity Doctrine" (2021) 38:3 Cardozo Arts & Ent LJ 603, 616 [Craig, Total Concept and Feel] ("fair uses occur with the blessing of the dominant social order [...], [t]hey are protected (or tolerated) by social and legal expectations only within their established constraints).

lens in order to elucidate the conditions under which they should qualify as works of authorship. I commence, in chapter 4, “All I know is I Won’t Go Speechless: Genuine Dialogue and Creative Autonomy as Central to Authorship,” by reimagining both originality and infringement from a dialogic lens. And I do so by identifying the specificity of works of authorship as communicative acts in a way that existing approaches to originality have so far failed to accomplish, essentially reconsidering the harm that copyright was designed to target. I begin by reframing debates surrounding creativity in terms of the social dialogue, effectively contextualizing Drassinower’s approach to originality as ‘speaking in one’s own words’ by drawing on a vision of creativity as relational; as a dialogic process that arises from communicating with society at large and cultural artifacts in particular.

I proceed by building on this conception of originality to identify the specificity of copyright subject-matter. Differently from Drassinower who identifies it as ‘speech,’ however, I proceed by illustrating that not *all* speech leads to the sort of genuine social dialogue that duly promulgates copyright’s goals of progress and enlightenment. Rather, it’s only speech that mediates the relationship between both the authorial ‘self’ and the ‘other’ as embodied by pre-existing culture that achieves this feat; speech that acknowledges the ‘other’ in search of the ‘self.’ What this approach exemplifies, I demonstrate, is that copyright subject-matter can best be understood as a particular form of self-expression – an utterance that both recognizes the importance of the ‘other’ while asserting the creative autonomy of the ‘self.’

It’s this assertion of creative autonomy, I conclude, that ought to guide the principle of independent creation. Recognizing that it’s not inherently impossible for an author to have *independently* created a work that’s identical to that of another, this principle acts as a defense that “gives rise not to a finding of infringement, but to a finding that two independent copyrights arise

over two distinct works.”<sup>68</sup> Establishing independent creation is no easy feat, however, and requires the secondary author to unequivocally illustrate that she didn’t copy the pre-existing work (which is nigh on impossible given the ease with which creative works can be accessed in the digital age).

But the lens of creative autonomy, I suggest, can reinvigorate the defense of independent creation. Rather than predicating a work’s originality on a negative construal of independent creation as merely ‘not copied,’ it should instead be based on a positive construal of this requirement as a manifestation of creative autonomy. This approach offers a way of assessing independent creation in a fashion that avoids stripping a work of its value simply because it shares elements in common with a pre-existing work. It promotes a deeper examination into a work’s contribution to the social dialogue before it’s prematurely written off as infringing. A work may very well be substantially similar on its face, but that shouldn’t be taken to mean that it offers nothing to the cultural conversation or to societal enlightenment as core values of copyright.

Acknowledging that independent creation and copying are not mutually exclusive, however, necessarily requires a newfound approach to infringement – one that’s based on the principle of *equal* authorship rather than on the perceived harm of ‘copying’ or ‘using;’ one that embraces creative autonomy as copyright’s central governing principle. And I proceed by elucidating just such an approach. I begin by drawing on Drassinower’s premise that copying is *not* the harm targeted by copyright. It’s rather *compelling* authors’ speech, he maintains, that characterizes this mischief; publishing an author’s speech without her authorization such that her autonomy as a speaker – that her choice to speak or not to speak *her very own words* – is violated.<sup>69</sup>

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<sup>68</sup> Drassinower, WWWC, *supra* note 30 at 57-8.

<sup>69</sup> Drassinower, WWWC, *supra* note 30 at 120.

But it's important to recognize, I note, that not *all* unauthorized publications of an author's *words* will necessarily compel her speech. Indeed, whether speech can be classified as compelled depends very much upon its context; its message; its meaning. A follow-on author can speak in her own words while copying those of another by placing them in a new light that alters their connotation.<sup>70</sup> Such copies do not compel the speech of the originating author because they are saying something different entirely; they're advancing a new and different *meaning* despite the identity of their *words*.<sup>71</sup>

And in assessing this alternate meaning, I advance, we should take downstream authors' subjective intent into account. Doing so will not only better position copyright to fulfill its dialogic purpose, but it will also be far less likely to run afoul of our free speech rights. Rather than immediately reducing downstream authors to infringers, we should extend them the opportunity to contextualize their use; endow them with the right to establish that their expression – though substantially similar – seeks to advance a different message than the original by taking active steps to differentiate the former from the latter. Not only does this approach provide the doctrinal backdrop for increasing the conditions under which courts find for independent creation rather than infringement, but it equally extends deference to downstream authors' own creative autonomy, acknowledging them as independent thinkers and authors in their own right – regardless of whether or not their chosen form of creativity is copy-based.

I then proceed in chapter 5, “The World Has Somehow Shifted, All at Once Everything is Different: Exploring the Barriers to Creative Autonomy in Human-Machine Collaborations,” to

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<sup>70</sup> See e.g. Robert H Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work” (1993) 68:2 Chicago-Kent L Rev 725; see also Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998) [Coombe, Cultural Life].

<sup>71</sup> Rotstein, *ibid*; Coombe, Cultural Life, *ibid*.

examine these kinds of works through a dialogic lens, determining whether, and under what circumstances, they possess the dialogic qualities previously identified as necessary to be recognized as original works of authorship in their own right. And I do so by illuminating generative AI's capacity to reshape the semantic web of relations that culminate in genuine dialogue, in works of authorship. Authors "are not simply self-made;"<sup>72</sup> they are, instead, "constituted by networks of nested relationships"<sup>73</sup> – relations between their 'selves' and 'others' – that inform their creative endeavours and contribute to their self-actualization. While 'others' are conventionally understood as being 'authors of the past,' the insertion of algorithms within the creative process both shifts and broadens the scope of these relations, effectively redefining the nature of the community that gives rise to works of authorship.

From this perspective, I begin by examining the first two sets of new relations: those between authors and pre-existing culture, as well as those between authors, creative algorithms, and their developers (where the authors themselves aren't the ones who create the algorithm). Though developers are technically authors in their own right, it's essential to recognize that creative algorithms offer authors of literary, artistic, and musical works an opportunity to engage directly with (and not just be passive users of) code, and by extension its developers, in ways that didn't previously exist. But while increasing the scope of relations opened to authors, algorithms could simultaneously decrease authors' ability – and sometimes even their desire – to relate to the 'others' upon whose works algorithms are trained; to engage with pre-existing culture.

In this regard, pursuing knowledge through the intermediation of an algorithm changes the building-blocks of knowledge that culminate in creativity, and in so doing it fundamentally

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<sup>72</sup> Nedelsky, *Law's Relations*, *supra* note 35 at 120.

<sup>73</sup> Ian Kerr, "Schrödinger's Robot: Privacy in Uncertain States" (2019) 20:1 *Theoretical Inquiries in Law* 123 at 130 [Kerr, *Schrödinger's Robot*].

challenges our long-standing conceptions surrounding the ontology of authorship. If creativity *is* how authors engage in genuine dialogue with ‘others,’ it’s crucial to examine how algorithms’ capacity to simultaneously establish new connections and sever others might impede authors’ ability to achieve this feat. And this chapter engages in this analysis by considering not only the value of this semantic web of relationships to the practice of authorship, but also whether or under what circumstances this interference might hinder author-users’ creative autonomy.

I then turn to the third new relation borne from the incorporation of algorithms within the creative process: that between author-users and generative AI service providers. Authors who are tech savvy enough to create their own algorithms usually run them via online platforms, often lacking sufficient computing power to do so on their own devices. Authors who lack these skills tend instead to turn to generative AI service offerings, made widely accessible through online fora.<sup>74</sup> But authors’ use of these platforms is predicated on their acceptance of non-negotiable standard form contracts that require them to click away a measure of their control over the works of their minds.

Included amongst these agreements’ provisions is often one that obliges author-users to extend generative AI providers a non-exclusive license over the content created with or through the services. This type of clause effectively displaces copyright law, creating a private ordering system that neither permits nor promotes authorial independence.<sup>75</sup> The *Copyright Act* essentially empowers authors with the ability to assign their exclusive rights to reproduce,<sup>76</sup> adapt,<sup>77</sup> or

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<sup>74</sup> See below, Chapter 3.

<sup>75</sup> See Niva Elkin-Koren, “Copyrights in Cyberspace: Rights Without Laws” (1998) 73 Chi-Kent L Rev 1155 [Elkin-Koren, Copyrights in Cyberspace].

<sup>76</sup> *Copyright Act*, *supra* note 66, s 3(1)(a).

<sup>77</sup> *Ibid.*, s 3(1)(b), (c) & (e).

communicate<sup>78</sup> their creative works (among others<sup>79</sup>), which would otherwise remain in their domain until 70 years after their death.<sup>80</sup> The standard form contracts that govern the relationship between author-users and generative AI providers, however, pre-emptively accord the latter entity non-exclusive rights to make indiscriminate use of the content created with or through their services. In so doing, they compel authors' speech in unprecedented ways, stripping authors of their choice over *when*, *if*, and *how* to speak before they've even decided to release their speech to the public – a choice that remains foundational to copyright's paradigm and to authors' autonomy as speaking beings.

And these limits on authorial autonomy are further exacerbated by the privacy policies imposed upon author-users by generative AI providers, requiring the former to assent to ubiquitous surveillance throughout their use of these services. From as far back as biblical times, however, society has recognized the value of privacy to our self-expression, autonomy, and personhood.<sup>81</sup> These important ties are rooted in an “understanding that it is only away from the public eye – given space to make mistakes and take risks – where we can discover our unique personalities.”<sup>82</sup> But the generative AI platforms used to collaborate with creative algorithms deny authors this important breathing space by submitting them to consistent oversight. And in so doing, they not

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<sup>78</sup> *Ibid.*, s 3(1)(f).

<sup>79</sup> *Ibid.*, s 3(1)

<sup>80</sup> *Ibid.*, s 6.

<sup>81</sup> In a famous passage, the seer Balaam – who was hired by the Moabite King to curse the Jewish people – hailed them instead: “How fair are your tents, O Jacob; your encampments, O Israel.” According to the rabbis of antiquity, Balaam’s praise of the Israelites’ tents is meant to convey his admiration over how they were arranged – no door or window of one tent directly faced those of another, such that dwellers never had to be concerned over the prying eyes of their neighbours. “This teaching,” writes Rabbi Arthur Weiner, “reminds us that we need a place where we can do things and even say things which would not necessarily be as acceptable if we were to conduct those same actions or conversation in the public realm” (Rabbi Arthur Weiner, “Balak: The Blessing and Beauty of Privacy” (21 July 2016), online: *Jewish Standard* <<https://jewishstandard.timesofisrael.com/balak-the-blessing-and-beauty-of-privacy/>>).

<sup>82</sup> Rabbi Dr Ari Berman, “What Jewish Tradition Teaches Us About Data Privacy” (12 August 2019), online: *Forbes* <<https://www.forbes.com/sites/startupnationcentral/2019/08/12/what-jewish-tradition-teaches-us-about-data-privacy/?sh=a68075251bc3>>.

only stifle the development of the ‘self’ meant to be expressed in creative works, but they equally limit opportunities for genuine dialogue *by, for, and through* the ‘other.’ An author cannot grant another a share in her being if she isn’t free to assert her ‘self.’<sup>83</sup>

But just because generative algorithms in their current service models are likely incapable of offering creators an environment favourable to the kind of rich and abundant social dialogue that copyright as a construct was designed to promote, doesn’t mean that all is lost. Rather, these risks could very well be attenuated by redefining the boundaries of our shared creative spaces; by acknowledging the key role that copyright has played in shaping the various networks of nested relationships that have arisen at the intersection between creativity and artificial intelligence. Once we pinpoint copyright’s role in apportioning power in the creative realm, we’ll be far better placed to identify the solutions necessary to rectify the limitations on author-users’ creative autonomy in their engagement with generative AI platforms.

And this is precisely what I achieve in the final chapter of my dissertation. I do so by providing the foundation necessary for recalibrating the networks of nested relationships that have intervened at the intersection between the creative realm and generative AI; for shaping these relationships in ways better capable of fostering the creative autonomy of generative AI author-users. And it does so by laying bare the power dynamics inherent in the fourth and final relationship that intervenes at this juncture: that between algorithm developers and copyright law itself. I begin from the premise that the restrictions imposed on author-users’ creative autonomy exposed in the previous chapter are, in large part, a direct by-product of copyright’s refusal to recognize the legitimacy of the processes involved in AI development. Sure, the *Copyright Act* extends

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<sup>83</sup> Martin Buber, “The Friend as Thou” in David L Norton & Mary F Kille, eds, *Philosophies of Love*, 2<sup>nd</sup> ed (New Jersey: Rowman & Allanheld, 1983) 253 at 257 [Buber, Friend as Thou].

protection to computer programs,<sup>84</sup> but this provision doesn't go far enough to permit the extensive copying at the very heart of AI development – at least not where that content is copyrighted.

Developing generative AI, however, is no easy feat. It relies on the use of massive troves of information – or Big Data – to enable the algorithmic training that makes their creative expression possible. Short of a specific (and broad) exemption,<sup>85</sup> many developers seeking to draw on protected content to train their algorithms find themselves on uncertain ground. With the cost of licensing the colossal amounts of data necessary for machine learning being both prohibitive and unnecessarily cumbersome for most, developers reticent of having their creations delegitimized for reasons of infringement turn to one of two other sources of training data. The first is made up of easily available and legally low risk works.<sup>86</sup> But given the limited nature of this kind of data, those developers in the position to do so instead impose non-negotiable contracts

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<sup>84</sup> *Copyright Act*, *supra* note 66, s 3(1)(h).

<sup>85</sup> Several jurisdictions worldwide have developed a text-and-data-mining exception within their copyright legislation, but they've been limited to specific purposes. The United Kingdom, for instance, permits copies of works to be made 'for text and data analysis' for the purposes of *non-commercial research* alone and only where that user has *lawful access* to the content in question (see *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, Official Journal L 167, 22/06/2001, art 5.3 (a)). France has created a similar exception, available only for *public research* purposes and limited to data *included in or associated with scientific publications* (see *Code de la Propriété Intellectuelle*, art L 122-5, 10o). For its part, while the European Union permits text and data mining for the purposes of scientific research, it equally extends a very limited exception permitting anyone to engage in these activities *unless the rightsholder contracts out* of such use (see *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, arts 3 & 4). Though many Canadians have advocated for a text-and-data-mining exception for both commercial and non-commercial purposes over the years, the federal government has largely remained mute on the subject (see Craig, Amani, Bannerman et al, *supra* note 61; Michael Geist, "Want to Keep Canadian AI Thriving?: Create a Copyright Exception for Informational Analysis" *Michael Geist Blog* (18 October 2018), online: <<http://www.michaelgeist.ca/2018/10/elementaicopyright/>> [Geist, Canadian AI Thriving]).

<sup>86</sup> Such data includes, for instance, a corpus of 1.6 million email exchanges of former Enron employees freely available online in machine-readable format. Being orphan works that are still *technically* copyright protected, they nonetheless pose a negligible legal risk because the likelihood that the employees in question will sue for infringement is exceedingly low. Also featuring prominently in this category of datasets are public domain and Creative Commons-licensed works, which fall outside the ambit of traditional copyright protection and therefore aren't fraught with the usual kinds of infringement concerns. (See Amanda Levendowski, "How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem" (2018) 93 *Washington Law Review* 579 at 610).

on their users that permit them to employ the material created by these individuals – ranging anywhere from simple e-mails to entire manuscripts – for machine learning purposes.<sup>87</sup>

To foster a more equitable relationship between generative AI author-users and service providers – to ensure that author-users’ are, inasmuch as possible, able to retain their creative autonomy in these environments – copyright must develop an approach to machine learning that doesn’t classify as unlawful the copying necessary for this process. It’s only in recognizing AI developers as authors in their own right – in legitimatizing the building-blocks of their creations – that they’ll be free to use whatever content they see fit in the production of their creations, rather than having to rely on substandard data sources that ultimately limit author-users’ autonomy. And it’s precisely at this juncture that my epistemic theory of infringement comes into play, illustrating the very limited situations in which the development and use of generative AI could even be considered as compelling the speech of pre-existing authors.

In no longer depicting as illegitimate the kind of copying involved in machine learning processes, I conclude, copyright becomes far better placed to juridically order the various relationships at play within our digital creative spaces. By extending algorithm developers the freedom to copy protected content for algorithmic training purposes, it recognizes the equal autonomy of all creators regardless of the building-blocks required for their engagement in the social dialogue. And in so doing, it can proceed to confine the extent to which non-negotiable standard form contracts can deviate from copyright – can create a private-ordering system that

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<sup>87</sup> Jorden Woods, “Blockchain: Rebalancing & Amplifying the Power of AI and Machine Learning (ML)” *Cryptoracle* (13 June 2018), online: < <https://medium.com/crypto-oracle/blockchain-rebalancing-amplifying-the-power-of-ai-and-machine-learning-ml-af95616e9ad9>>.

limits author-users' autonomy – without placing developers in a position that deprives them of the data they require to produce machine learning algorithms.

It's such that, through the lens of these newfound 'networks of nested relationships,' I illuminate the potential impacts of creative algorithms on authorship as a practice; on creativity and authorial autonomy as core values of copyright. I ponder human-machine collaborations beyond mere assessments of their *prima facie* creativity, instead contemplating their ability to act as expressions of the 'self' *by, for, and through* the 'other.' In elucidating the myriad of ways in which the practice of authorship might be influenced by the introduction of new actors into the creative community, I explore whether, and under what conditions, engaging in genuine dialogue is possible in this new and emerging context; whether, and under what circumstances, these creations might be recognized as authentic works of authorship. And in so doing, I reimagine the anatomy of our shared creative spaces in terms that respect the equal autonomy of each and every author; that favour the kind of abundant creativity that often acts as a precondition for the sort of rich and diverse social dialogue that spans the ages and unites us all.

## **Part I            And Way Down We Go: Setting the Background for What's to Come**

Walt Disney's Mickey and Minnie Mouse have long been the quintessential couple, shaping the lives of children worldwide for nearly a century. My own kids have been no exception. From the books I read them, to the clothes they wear, and the television shows they watch – these two infamous mice remain a constant fixture in both my kids' edification and in their play, striking at the very heart of their creative pursuits. Mickey and Minnie have triggered my kids' imaginations in unprecedented ways. Not only do my children dress up as these two animations, dramatically play-acting all kinds of adorable scenes, but they engage in elaborate storytelling featuring these two inimitable mice.

Mickey and Minnie, however, contribute far more than just the building-blocks of creativity. They represent a shared cultural symbol that provides the foundation for mutual understanding, effectively endowing children with the tools they require to relate to those around them. Whenever one of my daughter's best friends are sick, she draws them gleeful pictures of Mickey and Minnie 'to make them feel better.' Being known and reified by children everywhere, these characters often act as a source of comfort for them in difficult situations. Only a few months ago, when my son was undergoing a minor surgical procedure, I handed him his little Mickey doll – dressed up in a hospital gown just like him – that he accepted with a stoic look on his face and bravely clutched in his arms until the anaesthesia took hold.

Mickey and Minnie thus serve multiple purposes in society, each of which play a core role in advancing the goals of copyright as a construct. They impart knowledge and stimulate creativity, their unerring presence in so many different capacities throughout our formative years serving to shape our identity in the fashion that cultural artifacts are wont to do. By acting as a shared cultural symbol, these cartoons offer members of society a unified ground with which to relate to those

around them that extends far beyond their childhood years. Rather, they grow into adulthood still wishing to engage with these characters – reimagining them in new capacities and scenarios, adding an additional layer of analysis to their cultural importance, and engaging in a genuine social dialogue that seeks to further develop the meaning of these two infamous mice in newly creative and interesting ways.

Take, for instance, the Air Pirates – a group of cartoonists famous for having created two issues of an underground comic dubbed *Air Pirates Funnies* depicting Mickey, Minnie and their gang engaging in adult behaviours.<sup>88</sup> The aim of these satirical productions was not merely to reimagine these well-known characters as highly sexualized drug consumers, but it was rather to critique “American culture that they regarded as unduly conformist and hypocritical.”<sup>89</sup> Through parody, the Air Pirates sought to expand the meaning of these cartoons beyond the connotations afforded to them by Walt Disney Productions itself. But the latter would have none of it, ultimately pursuing the former for copyright infringement. In the American 9<sup>th</sup> Circuit Court of Appeals’ decision surrounding these events, the Air Pirates’ comics could not be saved under a fair use defense. Finding that Air Pirates copied more elements than was absolutely necessary to ‘conjure up’ the cartoons being parodied,<sup>90</sup> the Court ruled in favour of Walt Disney Productions.

The implications of this case go far beyond the solidification of copyright protection, and strike at the very heart of the meaning-making process that copyright is geared towards

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<sup>88</sup> My Comic Shop, “Air Pirates Funnies (1971) comic books,” online: <<https://www.mycomicshop.com/search?TID=691541>>.

<sup>89</sup> Oren Bracha & Talha Syed, “Beyond Efficiency: Consequence-Sensitive Theories of Copyright” (2014) 29:1 BTLJ 229 at 259; see also Harriet L Oler, “Copyright for Characters: The Search for Statutory and State Law Protection” (1974) 16:1 PTC J Res & Ed 1; Terence Chua, *Messing With the Mouse”: Copyright, Parody and the Countercultural Wars in Walt Disney v. The Air Pirates* (Masters of Arts Thesis, University of Georgia, 2005) [unpublished].

<sup>90</sup> *Walt Disney Productions v The Air Pirates et al*, 581 F.2d 751 (1978) at 758.

encouraging.<sup>91</sup> Air Pirates comics could not have more clearly been a satire, but despite the novel and uncharacteristic scenarios in which Disney's animations were depicted, the cartoonists in question were enjoined from their own creative participation in the social dialogue. Being Disney's *original* creations, any derivative uses of Mickey, Minnie and their gang remain within his exclusive control. The practical consequences of this extensive power to command any uses made of his own original creations is that Disney not only possesses control over his own works in their entirety, but he equally enjoys the capacity to regulate the *evolution* of their *meaning* in society. By controlling the meaning of certain cultural artifacts, copyright owners effectively stagnate the evolution of knowledge by preventing others from putting these shared cultural symbols to use in their own creations.<sup>92</sup>

Partially responsible for this barrier to accessing the meaning-making process is that copyright law has, since its inception, developed in a way that is entirely disconnected from its central maxim. Rather than simply being *the exception*, copyright seems to have become *the rule*.<sup>93</sup> And this predicament is a direct by-product of copyright's consistent reliance on theories that seek to justify why the rights of some should be prioritized over those of others. Rather than more appropriately depicting authors and users as merely two sides of the same coin – recognizing that all authors are themselves users and vice versa – copyright pits these two actors against each other.

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<sup>91</sup> See e.g. Rosemary J Coombe, "Objects of Property and Subject of Politics: Intellectual Property Laws and Democratic Dialogue" (1991) 69 Texas L Rev 1853 [Coombe, Objects of Property]; Michal Shur-Ofry, "Popularity as a Factor in Copyright Law" (2009) 59 U Toronto LJ 525 [Shur-Ofry, Popularity]; Madhavi Sunder, "IP<sup>3</sup>" (2006) 59 Stan L Rev 257; Neil Weinstock Netanel, "Copyright and a Democratic Civil Society" (1996) 106 Yale L J 283 [Weinstock Netanel, Democratic Civil Society].

<sup>92</sup> See Coombe, Objects of Property, *ibid*; Coombe, Cultural Life, *supra* note 70; Drucilla Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133:2 U Penn L Rev 291 [Cornell, Modern/Postmodern]; Julie E Cohen, "Creativity and Culture in Copyright Theory" (2007) 40:3 UC Davis L Rev 1151 [Cohen, Creativity and Culture].

<sup>93</sup> See below, Chapter 2, Section 2.3.3.

And the natural consequences of this predicament are twofold. On the one hand, it forces users to consistently defend the legitimacy of their uses. On the other, it limits their serendipitous access to culture in ways that negate the knowledge-based activities copyright was designed to promote. For copyright to truly foster progress, it must move towards a far more realistic vision of creativity; one whose first instinct is to *include* rather than *exclude* all kinds of creators, regardless of the building-blocks that form the foundation of their contributions to society's meaning-making process. It's the very tendency to classify so many 'copies' as unauthorized, and therefore infringing, that acts as an impediment to copyright's goals; that's now proving a barrier to the kind of growth that could be nurtured by the copy-based technology that is artificial intelligence.

This inclination also places an obstacle in the paths of those authors who would turn to generative AI to enhance their own creative tendencies. If these algorithms are the products of unauthorized copying, so too must their output be characterized as mere derivatives of these same unlawful reproductions. But this view is unnecessarily one-dimensional. It seeks to prevent authors' creative works from being misused by algorithms but doesn't account for all the ways in which copies are the foundation of genuine creativity. In order to assess whether the human-machine collaborations that mark the subject of my dissertation can be considered works of authorship in their own right – as opposed to mere byproducts of unauthorized copying – it's therefore crucial to adopt a vision of copyright that's capable of objectively identifying which kinds of copies truly embody the harm that copyright was meant to target; which ones demonstrably detract from a creations' originality and which ones don't. Otherwise, my dissertation would be over before it has even begun.

In this vein, I begin chapter 2 by illustrating the convoluted path that contributed to copyright's transition towards the rule rather than the exception. It began with copyright's reliance

on theories that seek to justify why the rights of some should be prioritized over those of others. And these approaches effectively provided the foundation for introducing the notion of balance within copyright doctrine – a development that further distanced copyright from its central maxim. By drawing on copyright’s evolution throughout history, I demonstrate why reverting to the dialogic purpose that initially undergirded this construct is far better placed to recentering copyright in a fashion more likely to permit creativity to flourish.

I then dedicate chapter 3 to a rich historical account of the intersection between artificial intelligence and creative culture – both within and outside of copyright doctrine – ultimately illustrating that the incorporation of generative algorithms within the creative process is far from the simplistic, derivative practice that it’s often depicted as being in copyright rhetoric. That the output of these algorithms might be the product of unauthorized copying should not put a premature end to the analysis. Rather, I maintain, we must go a step further and account for all that occurs prior to and following the incorporation of generative algorithms within authors’ creative processes before hastily concluding to their illegitimacy under copyright.

## Chapter 2 Every Adventure Requires a First Step: A Dialogic Theory of Copyright

Copyright is the exception, not the rule. Somewhere along the way, however, copyright policy has lost sight of the significance of this adage. It began by extending the duration of copyright protection from a maximum of 28 years<sup>94</sup> to the life of the author plus 70 years.<sup>95</sup> And rather than being limited to controlling *literal* reproductions of their works,<sup>96</sup> authors eventually became entitled to prevent others from adapting, translating, dramatizing, publicly performing, or otherwise transforming their works into new ones.<sup>97</sup> Over time, authors' exclusive rights essentially became synonymous with the privilege to control (practically) all instances of value. It's therefore no surprise that each new technological development that merely 'uses' copyrighted works is embroiled in consistent lobbying surrounding how copyright law should be adapted in order to ensure that these 'uses' remain within authors' dominion.<sup>98</sup>

And digital technologies have been no exception. The Internet's commercialization was characterized by significant debates about whether or not the temporary copies necessary to enable browsing fall within copyright's ambit, with the government eventually deciding to except this kind of use.<sup>99</sup> Not 20 years later, the Supreme Court of Canada was met with a demand to approve

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<sup>94</sup> *Act for the Encouragement of Learning* 1709, 8 Anne, ch 19.

<sup>95</sup> *Copyright Act*, *supra* note 66.

<sup>96</sup> See *Gyles v Wilcox* (1740) 26 Eng Rep 489 at 490 (Ch.) ("abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is [shown] in them"); *Matthewson v Stockdale*, (1806) 33 Eng Rep 103 (Ch.) 105; 12 Ves Jun. 270 at 275 (noting that it's non-infringing to improve upon an original); *Sayre v Moore*, (1785) 102 Eng. Rep. 139 (K.B.) (holding that defendant's improvements on elements of a navigation map were non-infringing), cited in *Cary v Longman* (1801) 120 Eng Rep 138 (KB) 139 nb; *Stowe v Thomas*, 23 F. Cas. 201 (CCED Pa 1853) (No. 13,514) (holding that an unauthorized translation of *Uncle Tom's Cabin* is non-infringing); see also Robert Maugham, *A Treatise on the Law of Literary Property* (Cambridge: Cambridge University Press, 1828) at 126; Richard Godson, *A Practical Treatise on the Law of Patents for Inventions and of Copyright* (London: Rayner and Hodges, 1823) at 215.

<sup>97</sup> *Copyright Act*, *supra* note 66, s 3(1).

<sup>98</sup> See Gervais, Purpose of Copyright, *supra* note 28 at 335; Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin Books, 2004) [Lessig, Free Culture].

<sup>99</sup> Jessica Litman, "Reforming Information Law in Copyright's Image" (1997) 22:3 *Reforming Information Law* 587 at 605 [Litman, *Reforming Information Law*]; see below, Chapter 6 about the negative implications of this exception for future technologies.

additional tariffs for songs that were made available for 30 second song previews.<sup>100</sup> Concluding that this kind of use is undertaken for the purposes of research, the Court held that it qualifies as a fair dealing and rejected the claim. And it wasn't long before this case that lengthy negotiations were underway surrounding the wisdom of prohibiting the circumventions of digital locks for copyrighted content. Those in favour claimed them to be a necessary evil towards ensuring the protection of creators' rights in the digital era. Those against argued that their use couldn't be justified given the negative effects of these measures on fair dealing and users' rights. We all know how that ended.<sup>101</sup>

These are merely a few examples of a long line of inquiries surrounding the implications of digital copyright that have preoccupied society over the past few decades. Although delineating a clear framework for digital copyright might certainly be necessary, one of the unfortunate byproducts of this process has been considerable copyright expansion. In effect, the one thing that most (though, admittedly, not all)<sup>102</sup> these debates have in common is that they are borne from attempts to increase creators' rights. Partially responsible for this dilemma is that copyright law has, since its inception, developed in a way that is entirely disconnected from its central maxim; rather than simply being the exception, copyright seems to have become the rule.

Equally to blame for this predicament is the uncertainty surrounding what copyright is actually meant to protect; what uses or what intellectual endeavours. Identifying copyright's underlying purpose – and giving renewed meaning to its central adage – might better position us to answer this crucial question. It would also offer the necessary basis for assessing whether, and

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<sup>100</sup> *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36.

<sup>101</sup> *Copyright Act*, *supra* note 66, s 41.1.

<sup>102</sup> There are some exceptions developed to enhance user's rights, like the User-Generated Content exception (*Copyright Act*, *ibid*, s 29.21), for example.

under what conditions, human-machine collaborations could be considered genuine works of authorship rather than prematurely classifying them as mere products of unauthorized copying. It's therefore this inquiry that marks the undertaking of this chapter.

I begin from the acknowledgment that the foundation of copyright's purpose is a topic of fierce debate, often designated differently depending on which philosophical underpinning for copyright is being adhered to. But while these narratives claim to be rooted in copyright's purpose, a closer look reveals that they're instead merely grounded in attempts to justify copyright's necessity; to rationalize why the rights and interests of certain actors should be prioritized over those others. And, as I illustrate, this very practice has proven to be the basis of much of the copyright expansion we've seen over the years. Thinking of copyright in terms of its purpose, I maintain, offers a far more suitable approach; one capable of reverting copyright back to the exception rather than the rule.

By offering a rich historical account of copyright, I effectively weed out its underlying purpose as dialogic in nature and justify (for lack of a better word) why this initial objective should be prioritized; why it's better placed to lend credence to copyright's fundamental maxim. I then dedicate the remainder of this chapter to illustrating how copyright as a construct has become disconnected from its underlying purpose, ultimately defining a vision of authorship capable of advancing the social dialogue rather than permitting society's meaning-making process to be controlled by a select few. And I achieve this feat by drawing on Abraham Drassinower's communicative act theory, an approach rooted firmly in a dialogic vision of copyright that acts as the theoretical framework for my dissertation.

2.1 *Come Roll in All the Discourse All Around You, And for Once Never Wonder What It's Worth: The Problem with Thinking of Copyright in Terms of Justifications*

Copyright is often characterized as a legal fiction that instills property rights in creative works to enable their commodification; to promote the progress of science and the arts. Although this narrative's aim is to facilitate society's ability to think of 'intellectual' property in more tangible terms, it has also placed this body of law in the unenviable position of consistently having to justify itself;<sup>103</sup> to rationalize why and to what extent the exclusive rights endowed to authors are essential to ensure the pursuit of knowledge. The natural by-product of this justificatory approach, however, is that it's often employed to defend the ever-growing dominion of authors with little attention given to the necessity of limiting their rights to that which is strictly necessary to stimulate cultural development.

This trend exists across all the main philosophical underpinnings conventionally used to legitimize and support copyright law.<sup>104</sup> Whether it's natural rights theory – which is itself partially grounded in both labour theory and personality theory – or utilitarianism, each one of these theories are rooted in a rationale that has largely contributed to transforming copyright from the exception to the rule. In briefly engaging with each one of these theories, I illustrate how they are ill-fitted to a rich and diverse creative landscape; how their tendency to think of copyright in terms of justifications is a fundamentally flawed approach that leads to copyright expansion, effectively negating – rather than bolstering – this body of law's ability to permit creativity to flourish.

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<sup>103</sup> See e.g. Merges, Justifying IP, *supra* note 28.

<sup>104</sup> May & Sell, *supra* note 28 at 20.

### 2.1.1 Labour Theory

John Locke's labour theory has had an enormous influence on the copyright narrative. To best understand his theory – and why its extension to copyright can be somewhat contradictory – it's important to situate it in the politically charged climate in which it was conceived.<sup>105</sup> Around the year 1680, English politics was dominated by religious sectarianism.<sup>106</sup> At the time, Locke was in the employ of Lord Shaftesbury, who was at the heart of the Exclusion Crisis, seeking to prevent King Charles II's Catholic brother, James II, from ascending the throne.<sup>107</sup> Although his Exclusion Bill passed in the Commons, the King's strong opposition to it resulted in its repeated rejection in the House of Lords.<sup>108</sup>

The King's continuous dismissal of the will of the people prompted the gentry's substantial negative sentiments towards the crown in the years prior to the Glorious Revolution of 1688. To combat the gentry's outrage, and to provide them with an account that would prevent their continuing "explicit and self-conscious resistance to the sovereign,"<sup>109</sup> Sir Robert Filmer penned a staunch defense of the monarchy in his seminal work *Patriarcha*, published posthumously in 1680.<sup>110</sup> According to Filmer's account,

[...] the landed gentry's continued wealth depended on maintaining the King's authority. Relying on Scripture, Filmer argues that God created the entire world and gave it to one man, Adam. Over the course of human history, Adam's private dominion was partitioned by various kings who retained Adam's paternal jurisdiction, empowering them to allocate property based on a system of feudal entitlement. According to Filmer, maintaining exclusive ownership would be impossible without the centralized power of a monarch because to exclude others from land claimed as property, the property owner would require consent from all humans on Earth. Thus,

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<sup>105</sup> Alexander D Northover, "'Enough and as Good' in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine" (2016) 65:5 Emory LJ 1363, online: <<https://law.emory.edu/elj/content/volume-65/issue-5/comments/enough-good-commons-lockean-theory-copyright-merger-doctrine.html>>.

<sup>106</sup> *Ibid.*

<sup>107</sup> Stanford Encyclopedia of Philosophy, "John Locke," online: <<https://plato.stanford.edu/entries/locke/>>.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

Filmer surmised that any title to property is both morally and practically contingent on the monarchy's divine authority and power.<sup>111</sup>

It was based on this background that Locke developed his *Two Treatises of Government*, which sought to refute Filmer's position by persuading the gentry "that there could be reason for rebellion which could make it neither blasphemous or suicidal"<sup>112</sup> to their own property interests, effectively providing them with "a coherent basis for moral autonomy."<sup>113</sup> In his attempt to achieve this feat, Locke sought to demonstrate that "one's color of title to property can be discerned independent of royal decree. Like his rival, Locke begins his analysis of private property with a biblical account of the time prior to civilization, which he calls the state of nature. Locke, however, devises a way that individuals so situated could acquire property rights without requiring direct consent from anyone."<sup>114</sup>

As Locke tells it, God gifted the earth to humankind, not one of which "originally [has] a private Dominion, exclusive of the rest of Mankind, in any [part of the earth or its products]."<sup>115</sup> In the same breath, however, Locke recognizes that the earth and all its bounty were "given to Men for the Support and Comfort of their being."<sup>116</sup> From this vantage point, Locke suggests that if we understand the purpose of God's gift as instrumental to our survival, then there must forcibly be a way to appropriate earthly products "before they can be of any use, or at all beneficial, to any particular Man."<sup>117</sup> In an effort to rebut Filmer's claim that the King's consent is necessary prior

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<sup>111</sup> Northover, *supra* note 105.

<sup>112</sup> John Dunn, *The Political Thought of John Locke*, (Cambridge: Cambridge University Press, 1969) at 49.

<sup>113</sup> *Ibid* at 50.

<sup>114</sup> Northover, *supra* note 105.

<sup>115</sup> Locke, *Two Treatises*, *supra* note 36, Second Treatise, s 26.

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid*.

to appropriation, Locke notes that “[i]f [consent of all mankind] was necessary, Man had starved, notwithstanding the Plenty God had given him.”<sup>118</sup>

This perspective effectively makes it possible to embark on the logical path that justifies the “act of appropriation [giving] rise to the specific institution of ownership we call property.”<sup>119</sup>

It’s at this juncture that Locke introduces the notion of labour:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body and the Work of his Hands, we may say, are properly his. Whatsoever, then, he removes out of the State that Nature hath provided and left it in, he hath mixed his Labour with it, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other Men.<sup>120</sup>

In this manner, Locke establishes that common ownership of the earth’s bounty is the default state of nature, but that a person’s effort is sufficient to alter this default condition and enable self-appropriation.<sup>121</sup> The reason a person’s effort invokes a property right, Locke states, is because “this ‘labour’ being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to [...]”<sup>122</sup> Locke therefore suggests that, if a person owns his body, he must also own the products of his body’s labour. The moment his labour is mixed with something from the state of nature, he possesses a legitimate claim to ownership<sup>123</sup> that is limited only by two important caveats: there must be “enough and as good left in common for others”<sup>124</sup>

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<sup>118</sup> *Ibid.*, s 28.

<sup>119</sup> Merges, Justifying IP, *supra* note 28 at 34.

<sup>120</sup> Locke, *supra* note 36, s 27.

<sup>121</sup> Merges, Justifying IP, *supra* note 28 at 35.

<sup>122</sup> Locke, *supra* note 36, s 27.

<sup>123</sup> Merges, Justifying IP, *supra* note 28 at 35.

<sup>124</sup> Locke, *supra* note 36, s 27.

and no one should appropriate any more than he can “make use of to any advantage of life before it spoils.”<sup>125</sup>

Locke’s theory, which was primarily developed to negate the validity of an absolute monarchy, speaks of appropriating earthly products for the purposes of survival, so how does this translate in terms of copyright? This, too, is more easily understood when viewed in light of Locke’s staunch defense of authorial rights, spanning from around 1695 until the passing of England’s first copyright law in 1709, which was strongly influenced by his ruminations. Locke unequivocally supported the wide proliferation of creative works, to avoid “inhibiting communal knowledge and progress”<sup>126</sup> and to encourage “authors’ abilities to create derivative works.”<sup>127</sup> He argued that man “should have liberty to print whatever he would speak”<sup>128</sup> in an effort to enable the expansion of knowledge, but that this freedom should be curtailed by strong authorial rights. Most notably, Locke was a staunch proponent of restricting those rights temporally, essentially arguing that “it may be reasonable to limit their property to a certain number of years after the death of the author or the first printing of the book, as, suppose, fifty or seventy years.”<sup>129</sup>

Locke’s musings on authorial rights have been considered by several scholars as compatible with his labour theory.<sup>130</sup> His work in this regard is thought to support “the proposition that the product of an author’s mental labor is her property, to which she has a natural right. Locke’s interest in creating a limited copyright term that promotes a robust public domain resonates well with the contextualist emphasis on the social duties imposed by Locke’s limiting

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<sup>125</sup> *Ibid.*

<sup>126</sup> Northover, *supra* note 105.

<sup>127</sup> *Ibid.*

<sup>128</sup> John Locke, *Anno 14<sup>o</sup> car. 2. cap. XXXIII*, in Peter King, ed, *The Life of John Locke* (Thoemmes Press, 1991) 375 at 376 [Locke, Anno 14].

<sup>129</sup> *Ibid* at 387.

<sup>130</sup> See e.g. Lior Zemer, “*The Making of a New Copyright Lockean*” (2006) 29 Harv JL & Pub Pol’y 891 at 908 [Zemer, New Copyright].

provisos.”<sup>131</sup> While this may be, labour theory’s application to copyright is not without scholarly objections. That Locke developed his theory in view of supporting the gentry’s sole claim to their property, independent of the crown, cannot be overlooked. Disjoining labour theory from the historical context surrounding its conception to apply it within the realm of copyright law is like trying to fit a square peg into a round hole; it simply doesn’t work.

The aim of copyright law is to offer a sort of structure that enables the propertization of nonrivalrous creative works in view of ensuring the expansion of and access to knowledge. Labour theory’s purpose, on the other hand, is to validate distinctive property rights in rivalrous tangible goods. In other words, whereas copyright seeks to bolster the proliferation of knowledge, Locke’s theory adopts a theological connection between labour and property that serves purely private interests. As law professor Peter Drahos points out, “[p]roperty for Locke serves personality” rather than the greater good,<sup>132</sup> and requires too much logical maneuvering to be applicable to copyright. The reluctance of certain scholars to extend labour theory to copyright therefore stems from the view that it’s difficult to apply the latter as a justification for the former when their respective purposes are so vastly opposed.

Essentially, applied to its logical end, labour theory “carries the ‘threat of copyright expansionism.’”<sup>133</sup> Locke’s theory maintains that anyone who mixes their labour with something pre-existing is entitled to own the entirety of the work rather than solely the value added. While this might be a logical outcome for *tangible* property – as one cannot separate what has since been

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<sup>131</sup> Northover, *supra* note 105.

<sup>132</sup> Peter Drahos, “Hegel: The Spirit of Intellectual Property”, in Peter Drahos, *A Philosophy of Intellectual Property*, online: <<http://press-files.anu.edu.au/downloads/press/n1902/html/ch04.xhtml>>.

<sup>133</sup> Conor Shevlin, “The Difficulties in Finding a Single Theory to Fully Justify Copyright” (2015) 3:1 North East L Rev 49 at 49-50; see also *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.*, [1964] 1 WLR 273 (HL) 294 (Pearce LJ).

joined – it makes little sense when applied to *intellectual* property. Physical property can exist in isolation from other pre-existing tangible goods, but intellectual property is necessarily a product of all the creative works that precede it; it builds upon this pre-existing dialogue and cannot be understood in isolation from the important context it provides.

But rather than acknowledging this crucial element, labour theory’s application to copyright rests on segregating ‘new’ works from pre-existing ones rather than recognizing that they are simply two parts of a whole. It’s impossible to *add* value if there is not already a knowledge base to which it might be added, and “[t]he fact that most contributors are not present to receive their fair share is not a reason to attribute the entire market value to the final contributor. Locke’s theory fails to justify ownership of the whole commodity.”<sup>134</sup> This theory essentially disadvantages all those who do not possess the natural talent to impose their labour on intellectual commodities by depriving them of access to works they might have otherwise enjoyed or drawn inspiration from but for a talented person’s decision to add value and appropriate the entire knowledge base to which she contributed.<sup>135</sup>

### 2.1.2 Personality Theory

Georg Hegel’s personality theory, which rests on the notion of property’s links with the self, is often deployed to further support Locke’s labour theory.<sup>136</sup> But “[u]nlike Locke,” writes Drahos, “Hegel is not primarily interested in defending a particular normative structure of community [...]. Instead his aim is to reveal the role that community plays in the evolution of individual freedom.”<sup>137</sup> Based on the notion that property ownership is the primary expression of

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<sup>134</sup> Shevlin, *ibid* at 50.

<sup>135</sup> Stewart E Sterk, “Rhetoric and Reality in Copyright Law” (1996) 94 Mich LR 1197 at 1236-7

<sup>136</sup> May & Sell, *supra* note 28 at 20-21.

<sup>137</sup> Drahos, *supra* note 132.

freedom, Hegel's theory establishes an intrinsic link between these two concepts with manifestations of personality being the glue that holds them together. For him,

having at least a minimal amount of private property is essential to the development and maintenance of the capacities and self-understandings which make up free personality. Hegel insists that it is only in possession of property that I 'become an actual will' or 'give my will existence.' 'Property,' he claims, 'is a possession which belongs to me as a certain person, and in which my person as such comes into existence, into reality.' 'The rational aspect of property,' he adds, 'is to be found...in the superseding of mere subjectivity of personality. Not until he has property does the person exist as reason.'<sup>138</sup>

Copyright's link between personality and *intellectual* property was borne from Hegel's assertion that property is the embodiment of personality and, more generally, from the recognition that creative works play a crucial role "in helping develop an individual's sense of personhood and self-actualization."<sup>139</sup> This claim fuels the argument that authorial and artistic expression is the epitome of personification; it is an external manifestation of oneself. Most importantly, it has served as the foundation for copyright's moral rights that accord authors with privileges to certain aspects of their works that are perpetual, inalienable and, in some jurisdictions (though not in Canada),<sup>140</sup> imprescriptible, preventing these rights from being assigned, waived or contractually derogated from in any way.

This extension of Hegel's personality theory to copyright effectively catalyzed the creation of a system that places a very strong emphasis on creators' rights – a system based on which creators' intellectual efforts are rewarded so strongly that their rights cannot be alienated even once their works are released into the public sphere. The view that creators possess continuous interests in these manifestations of their personality is then further propelled to justify why it

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<sup>138</sup> Alan Patten, "Hegel's Justification of Private Property" (1995) 16:4 *History of Political Thought* 576 at 577-8.

<sup>139</sup> Christopher S Yoo, "Rethinking Copyright and Personhood" (2019) *University of Illinois Law Review* 1039 at 1039.

<sup>140</sup> Most notably, France.

remains possible for authors to retain their exclusive right to reproduce further copies of their works despite having already released them into the public sphere.<sup>141</sup>

As Peter Drahos points out, however, this extension of Hegel's personality theory to justify copyright protection entirely misconstrues the latter's philosophy by "[assuming] that justification rather than explanation is Hegel's primary aim."<sup>142</sup> For Hegel,

property [...] is part of the explanation for the way personality begins to actualise itself in the world. In order to achieve this end individuals have the right of placing their 'will into any and everything.' Hegel's explanation of this process is a highly functional one. Will finds itself in the world, subject to mechanism. Artistic forms and objects have no privileged status in this respect. The imposition of artistic form is simply one means by which we can take possession of something. Personality is not a springboard, at least for Hegel, for special rights for artists and other creators.<sup>143</sup>

Like the inconsistencies displayed when extending Locke's theory to justify copyright, the mobilization of personality theory to this same end is equally unfitting. This theory has been used to support strong moral rights, when it's rather more adept at "[offering] the possibility of a potent critique of authors' rights systems."<sup>144</sup> Hegel's theory essentially views property ownership as an important aspect of self-actualization, which in turn allows individuals to experience freedom. Nowhere does he indicate, however, that some peoples' freedoms and rights should be stronger than others; that artists and authors should enjoy more rights above and beyond other members of society simply because they have joined their personality with an *intellectual* property rather than a tangible one.<sup>145</sup>

This position becomes clear through the manner in which Hegel addresses intellectual creations. He does not deny the importance of establishing a property interest in "[m]ental

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<sup>141</sup> Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 Georgetown LJ 287, online: <<https://cyber.harvard.edu/IPCoop/88hugh2.html>>.

<sup>142</sup> Drahos, *supra* note 132.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

aptitudes, erudition, artistic skill, even things ecclesiastical [...], inventions, and so forth.”<sup>146</sup> He recognizes that the human propensity for developing intellectual creations will lead to questions regarding “whether the artist, scholar, &c., is from the legal point of view in possession of his art, erudition, ability to preach a sermon, sing a mass, &c., that is, whether such attainments are ‘things.’”<sup>147</sup> He acknowledges the importance of this question because “while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it.”<sup>148</sup>

Rather than challenging his view that those pursuing intellectual endeavours need not necessarily enjoy stronger property rights than others, Hegel explains his position by clearly separating between the *ideas* expressed in a creative work and the *physical* materialization of that work. While “[a]ttainments, erudition, talents, and so forth, are, of course, owned by free mind and are some thing internal and not external to it,” Hegel advances, “by expressing them it may embody them in something external and alienate them [...], and in this way they are put in the category of things.”<sup>149</sup> Questions of property for intellectual creations therefore only arise when they are transitioned from mental property into outward expression. In these cases, Hegel maintains that the author only has the right to control further copies made of her work for the purposes of distribution, but that any copy duly purchased by an individual remains the property of that person. Moreover, he asserts that society itself has the right to the ideas contained within the work once it’s released into the public sphere, as those ideas have been alienated through their physical expression and dissemination.<sup>150</sup>

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<sup>146</sup> Hegel, *supra* note 37, at para 43.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid* at para 68-9.

Instead of providing a basis for our modern account of moral rights, Hegel's position merely offers a structure for the juridical ordering of the relationship between authors and users. In this light, extending Hegel's philosophy to justify a personhood-based theory of copyright "would be based on a fundamental misunderstanding of Hegel's view of the relationship between property and personality."<sup>151</sup> Rather than "establishing a special bond between a person and an external object,"<sup>152</sup> Hegel maintains that "the purpose of property is to define a person's relationship vis-à-vis the external world and other individuals so as not to remain merely abstract. In other words, property develops personality not by defining a person's relationship with an object but rather by structuring their relationships with other people."<sup>153</sup> As with Locke's labour theory, Hegel's personality theory also had to be adapted in order to fit with copyright doctrine. This modification, while seemingly slight, is not entirely in line with the theory in question such that its application within the field of copyright can similarly lead to copyright expansion.

In effect, personality theory's extension to copyright is "inhibited by a failure to convincingly establish that a sufficient number of works constitute an embodiment of an author's personality. It is unclear how much creative work is intended to constitute even self-expression, let alone a broader notion of personality. Creativity is often an escape from personality rather than an incorporation of it."<sup>154</sup> By taking for granted that a creator's personality is ingrained in every work, the application of Hegel's theory to copyright places such a significant emphasis on protecting authors that users are often left by the wayside.

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<sup>151</sup> Yoo, *supra* note 139, at 1050.

<sup>152</sup> *Ibid* at 1052.

<sup>153</sup> *Ibid*.

<sup>154</sup> Shevlin, *supra* note 133, at 53; See also, M Spence, "Justifying Copyright" in D McLean & K Schubert, eds, *Dear Images: Art, Culture and Copyright* (2<sup>nd</sup> ed, Ridinghouse, 2002) at 288; Thomas Stearns Eliot, *The Sacred Wood: Essays on Poetry and Criticism* (London: Methuen & Co, 1920).

Moreover, while personality theory's extension to the realm of copyright holds that authors "have a strong interest in continuing sovereignty over their expression,"<sup>155</sup> rarely does it recognize that "once an author has publicly expressed his work, that work takes on a life of its own as further communication of the work does not involve the individual."<sup>156</sup> Endowing an author with the power to prohibit the reproduction of any portion of her work amounts to granting the author the right to control the evolution of its meaning, leaving little consideration for the users who might want to build on that work by highlighting it in new and interesting contexts.<sup>157</sup>

### 2.1.3 Utilitarianism

Of all the theories traditionally used to legitimize copyright as a construct, utilitarianism is the only one that's not a property theory at heart. Rather, it's a moral philosophy that "[views] reason as the means by which to advance the end of utility."<sup>158</sup> According to Jeremy Bentham, one of the forefathers of utilitarianism, the only way to ensure that decisions remain objective is by founding them on reason rather than sympathy, antipathy, or mere feelings. In this sense, utilitarianism is truly a product of the Enlightenment period in which it was conceived – a period typified by its captivation with reason, which was thought to be achieved through measurements, observations, and calculations.<sup>159</sup>

Enlightenment thinkers were consumed with the desire to measure things that wouldn't normally be quantifiable. Primary amongst them was happiness, which preoccupied the mind of American founder Thomas Jefferson who considered the pursuit of happiness to be a right that's

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<sup>155</sup> Neil Weinstock Netanel, "Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation" (1993) 24 Rutgers LJ 347 at 400 [Weinstock Netanel, Copyright Alienability].

<sup>156</sup> Shevlin, *supra* note 133, at 53; see also Lloyd Weinreb, "Copyright for Functional Expression" (1998) 111 Harv L Rev 1149 at 1222.

<sup>157</sup> Shevlin, *ibid*; see also Weinreb, *ibid*.

<sup>158</sup> Sara K Stadler, "Forging a Truly Utilitarian Copyright" (2006) 91:2 Iowa L Rev 609 at 625.

<sup>159</sup> *Ibid*.

both “inherent and inalienable”<sup>160</sup> and therefore constitutionally protected. Although the ‘pursuit of happiness’ may, to us, sound like a selfish undertaking, “that phrase had an entirely different meaning to Enlightenment thinkers, who posited ‘[t]he good of others,’ that is a *societal* happiness, as ‘the end of moral actions.’ The ‘moral sense’ was about ‘benevolence’ and ‘sociability,’ not selfishness. Reason, that unfeeling faculty, merely served as the means to this end.”<sup>161</sup>

In stark contrast to Locke’s labour theory, the idea that a person owns his own body and could appropriate property by mixing his labour with it made little sense to Enlightenment thinkers for whom “[r]ule over oneself was thought to be ‘absurd’; as Jefferson wrote: ‘To ourselves, in strict language, we can owe no duties...’ In his view, egoism was ‘the sole antagonist of virtue, leading us constantly by our propensities to self-gratification in violation of our moral duties to others.’ Jefferson would have viewed an egocentric individualism as a weak foundation on which to build a society.”<sup>162</sup>

In this sense, the pursuit of societal happiness could only be achieved through applying the principle of utility. Defined by Bentham as one that “approves or disapproves of any action, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question,”<sup>163</sup> the principle of utility only favours actions that achieve the former feat. It’s equally on this principle of utility that American copyright is founded. As Jefferson wrote, works of authorship “cannot, in nature, be a subject of property” and the decision to consider them as such can only be “as an encouragement to men to pursue ideas which may

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<sup>160</sup> See Thomas Jefferson, *A Declaration by the Representatives of the United States of America, in General Congress Assembled*, in Thomas Jefferson: Writings (1984) at 19.

<sup>161</sup> Stadler, *supra* note 158, at 626.

<sup>162</sup> *Ibid.*

<sup>163</sup> Bentham, *supra* note 38, at 9.

produce utility.”<sup>164</sup> For utilitarianism, ownership of products of the mind is therefore not a God given natural right, but rather a right bestowed upon authors by society for its own benefit.<sup>165</sup>

It was such that the United States’ utilitarian theory of copyright was born and entrenched into the American constitution, “securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” in order “[t]o promote the progress of science and useful arts.”<sup>166</sup> In this vein, this theory effectively asserts that intellectual property protection offers the necessary encouragement that drives social progress. It’s centered on the premise that, without such protections, people would have little incentive to advance the world’s knowledge database.<sup>167</sup>

True to its aim of producing utility, however, this theory is equally based on the caveat that copyright policy must ideally attempt to strike a balance between the exclusive rights it offers creators to reward their intellectual efforts and stimulate progress, and the need to ensure that the public has access to these works so that they may both enjoy them and further contribute to societal advancement.<sup>168</sup> In this sense, copyright protection is “judged by its effects on the *mass* of men.”<sup>169</sup> The balance to be prioritized is therefore one capable of ensuring that the majority of society can and will participate in cultural development.

The utilitarian approach is, in this sense, problematic on two fronts. First and foremost, it takes for granted that incentives are necessary to encourage creators’ development of new works,

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<sup>164</sup> Letter from Thomas Jefferson to Isaac McPherson (13 August 1813), online: <[http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_8s12.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html)>.

<sup>165</sup> *Ibid.*

<sup>166</sup> US Const art I, § 8, cl 8.

<sup>167</sup> May & Sell, *supra* note 28 at 22.

<sup>168</sup> William Fisher, “Theories of Intellectual Property” in Stephen Munzer, ed, *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 1 at 1.

<sup>169</sup> Garry Wills, *Inventing America: Jefferson’s Declaration of Independence* (1978) at 158 (emphasis added).

neglecting to acknowledge that creativity was already an integral part of humanity long before copyright was even a construct. From the first cave paintings dating back to nearly 65,000 years ago,<sup>170</sup> to William Shakespeare’s seminal works, among many others, artistic expression has been a consistent feature in society throughout the ages, regardless of whether authors were offered any legal incentives to pursue such activities. Copyright regimes based on utilitarian justifications therefore “embrace legal exclusivity without a careful examination [...] into the range of powerful non-economic motivations that compel creative efforts.”<sup>171</sup> Mistakenly founded on the belief that “the more extensive copyright protection is, the greater the incentive to create,”<sup>172</sup> this instrumentalist approach effectively provides rife breeding grounds for copyright expansion.<sup>173</sup>

Second, despite Enlightenment thinkers having grounded this approach in reason, it neglects to consider aspects centering on fairness and equity that we now recognize as crucial to a free and democratic society. The copyright regime may well enable the *mass* of men to access and learn from works of art and intellect, but they had long remained inaccessible to certain minorities. Until the adoption of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, for example, the visually impaired were prohibited from adapting works in order to consume them. They might not make up the mass of men, but their rights to culture and knowledge should not be neglected merely because they are

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<sup>170</sup> D L Hoffmann, C D Standish, M Garcia-Diez et. al., “U-Th Dating of Carbonate Crusts Reveals Neandertal Origin of Iberian Cave Art” (2018) 359 *Science* 912; Dirk L Hoffmann, Diego E Angelucci, Valentín Villaverde et. al., “Symbolic Use of Marine Shells and Mineral Pigments by Iberian Neandertals 115,000 Years Ago” (2018) 4:2 *Science Advances* 1.

<sup>171</sup> Aaron Perzanowski & Kate Darling, *Creativity Without Law: Challenging the Assumptions of Intellectual Property*, (New York: New York University Press, 2017) at 2.

<sup>172</sup> William M Landes & Richard A Posner, “Indefinitely Renewable Copyright” (2003) 70 *Chicago LR* 471 at 474.

<sup>173</sup> Drassinower, WWWC, *supra* note 30 at 5 (“[u]nder the aegis of instrumentalism, the object of theoretical attention is not the lawfulness of lawful copying but its efficiency. This is why instrumentalism can conceive a copyright law devoid of lawful copying. Indeed, nothing in the instrumentalist calculus prevents the postulation of copyright expansion *as* efficiency. Of course, there is nothing necessarily wrong with that. But, as a theory of copyright law, instrumentalism is by no means a self-evident choice, certainly not an obvious starting-point to voice concerns about copyright expansion.”).

a small societal minority. “[T]here is no moral outweighing,” notes philosopher Robert Nozick, “of one of our lives by others so as to lead to a greater overall *social* good. [...] There is no justified sacrifice of some of us for others.”<sup>174</sup>

By concentrating only on benefiting the majority of society, the utilitarian theory of copyright makes unfounded assumptions about what drives progress. Progress isn’t bred from rendering knowledge accessible to the mass of men. Democratic societies are rather based on the understanding that *all* citizens deserve to be informed; to have access to the cultural artifacts necessary to participate in our societal discourse. Making this right available to the majority alone risks promoting cultural hegemony by diminishing the voices of minorities in society’s narrative – a result that seems entirely contradictory to any modern notion of progress. By seeking to justify why one group’s rights should override another’s, this approach effectively pits authors and users against each other rather than more appropriately depicting them as two sides of the same coin. As the remainder of this chapter will illustrate, however, grounding our approach to copyright in the purpose it was conceived to promote may very well go a long way in remedying this issue.

## 2.2 *It’s The Dialogic Circle, And It Moves Us All: The Purpose of Copyright*

Copyright’s reliance on theoretical frameworks that seek to justify why the rights of some ought to be prioritized over those of others has effectively provided the foundation for copyright expansion. Rather than limiting itself to organizing our creative culture in ways that promote the kind of knowledge pursuit it was conceived to encourage, copyright instead began concentrating more heavily on striking a ‘balance’ between the rights of authors and users. Balance in copyright, however, is merely an illusion. And the prioritization of this concept within copyright rhetoric has

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<sup>174</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 33.

done little more than create a value paradigm that has prevented the juridical ordering of the relationship between creators and users.<sup>175</sup>

The constant search for this elusive balance has created somewhat of a power struggle at the heart of copyright, often placing users in the unenviable position of consistently having to defend their place within the cultural discourse. If there's one thing about this domain that's *not* debatable, however, it's that copyright is the exception and not the rule. In tracing copyright's purpose back to its historical roots – back to a time before the concept of balance upended our understanding of this construct – I offer renewed force to this adage and re-establish its importance within our copyright narrative.

It's in this vein that I continue my journey down the copyright rabbit hole, affixing its purpose to the reason for its conception in the common law and civilian traditions, both of which have had an influence on our Canadian understanding of copyright. I tell the tale of both England's and France's transitions from cultures of intellectual oppression to those of enlightenment, eventually culminating in common law copyright and the civilian *droit d'auteur*. In using these historical perspectives to pinpoint copyright's purpose in both these traditions, I ultimately demonstrate that their goals were not so vastly different at the outset. By outlining how the tenuous concept of balance upended copyright's initial aim, I then illustrate how this notion is quite simply incapable of grounding copyright as a construct. Rather, it's copyright's historical purpose, I conclude, that's far more adept at achieving this feat.

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<sup>175</sup> Teresa Scassa, "Interests in the Balance" in Michael Geist, ed, *In the Public Interest* (Toronto: Irwin Law, 2005) 41 at 42 [Scassa, Interests in the Balance].

### 2.2.1 Copyright in the Common Law Tradition

Common law copyright was borne from strong objections to the system of censorship that ruled before it. Long established in British society, “[t]he roots of censorship lay far back in the Middle Ages, in two separate but related codes. On the one hand, the law of the church forbade the teaching of heretical doctrine, [and on] the other hand stood the law of treason.”<sup>176</sup> Amongst the statutes constituting the latter was one unequivocally prohibiting any open abuse of the king, either in speech or in writing, calling for the imprisonment of any person whose slanderous remarks or sideways gossip should cause discord between the king and his people.<sup>177</sup> By forcing “the unquestioning acquiescence in the will of the ruler and the *status quo*,”<sup>178</sup> early British society was based on an ideal of harmony that denied people the option of any open public opposition and established the breeding grounds for rampant censorship.

Enter the printing press in 1476, “and soon afterward the Crown began to take an acute interest in this dangerous art and to assert prerogative rights regarding it.”<sup>179</sup> This invention threatened the authority of the Crown in unprecedented ways, essentially motivating the creation of prototypical copyright.<sup>180</sup> Monarchs feared that the increasing expansion of printing as a commercial sector would eventually lead to the development of an industry whose primary concern was printing high selling content, regardless of whether or not it dissented from the Crown.<sup>181</sup> The ease with which content could be printed and disseminated to a wide audience, and the lack of any

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<sup>176</sup> D M Loades, “The Theory and Practice of Censorship in Sixteenth-Century England” in *Transactions of the Royal Historical Society* (Cambridge: Cambridge University Press, 1973) 141 at 142.

<sup>177</sup> *Ibid* at 143.

<sup>178</sup> *Ibid* at 141.

<sup>179</sup> Benjamin Kaplan, *An Unhurried View of Copyright* (New Jersey: The Lawbook Exchange, 2008) at 3.

<sup>180</sup> Oren Bracha, “Early American Printing Privileges: The Ambivalent Origins of Authors’ Copyright in America” in Ronan Deazley, Martin Kretschmer & Lionel Bently, eds, *Privilege and Property: Essays on the History of Copyright* (Cambridge: OpenBook Publishers, 2010) 89 at 90 [Bracha, Printing Privileges].

<sup>181</sup> May & Sell, *supra* note 28 at 88.

oversight upon its scope and significance, essentially jeopardized the harmony that the Crown had fought so hard to uphold. In her fear that societal upheaval would ensue if she were to lose her power to quash all public dissension, Mary Tudor's court "organized this new industry [...] into a guild-monopoly by the grant of a monopoly in 1557 to the English Stationers' Company. To allow [the queen's] court to suppress publication of seditious material, the company was given the power to search any printers' or booksellers' premises for unauthorized works."<sup>182</sup>

These restrictive monopolies were, however, unable to keep up with the increasing demand for printed works. This reality eventually gave way to the development of the illicit book market, which printed counterfeit editions of books by replicating the lay-out, names and details of the company that held the monopoly. The expansion of the illegal book market triggered Queen Elizabeth to require "that all publications be licensed, a form of control that would be utilized and refined considerably over the next century."<sup>183</sup> Armed with this new licensing system, copyright at this early stage served to reinforce the continued reign of censorship, "seldom [enforcing] the protection of a particular text, but rather of the guild members' right to publish free from the competition of other printers."<sup>184</sup>

Censorship and copyright remained deeply intertwined until the adoption of the Statute of Anne, which essentially "marked the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation."<sup>185</sup> Copyright generated from society's deep seeded need to ensure access to knowledge and the free flow of information, which were often negated by stationers' monopolies. By introducing a limited term, the Statute of Anne

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<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid* at 89.

<sup>184</sup> *Ibid.*

<sup>185</sup> Rose, Authors and Owners, *supra* note 42, at 48.

eliminated the monopolies that had predominated the literary market up until that point in time. But, more interesting, is that this Statute shifted the narrative that had so far prevailed by focusing on *authors* rather than stationers. The recognition of the former, however, was less an acknowledgement of authors' rights and more a strategy used to pacify stationers' severe opposition to this change. As Lyman A. Patterson suggests,

[e]mphasis on the authors in the Statute of Anne implying that the statutory copyright was an author's copyright was more a matter of form than of substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. Although the author had never held copyright, his interest was always promoted by the stationers as a means to their end. Their arguments had been, essentially, that without order in the trade provided by copyright, publishers would not publish books, and therefore would not pay authors for their manuscripts. The draftsmen of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against monopoly.<sup>186</sup>

This backdrop demonstrates that authorial rights were not necessarily central to copyright's purpose at its inception, but rather a manner of pursuing its ultimate goal. And the Statute of Anne was unequivocal about its true purpose. “[I]nstead of presenting itself as primarily an act to prevent abuses,” observes English professor Mark Rose, “the Statute of Anne presents itself as affirmative legislation designed, as the title states, for ‘the encouragement of learning’. This is a phrase with a distinguished history, one that echoes, among other things, the title of Francis Bacon’s *Advancement of Learning* (1605) and Milton’s comment in *Areopagitica* that licensing constitutes ‘the greatest discouragement and affront that can be offered to learning.’”<sup>187</sup> Not only did early copyright limit the quantity and quality of information available to the public, but it also

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<sup>186</sup> Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt UP, 1968) at 147.

<sup>187</sup> Mark Rose, “The Public Sphere and the Emergence of Copyright: *Areopagitica*, the Stationers’ Company, and the Statute of Anne” in Ronan Deazley, Martin Kretschmer & Lionel Bently, eds, *Privilege and Property: Essays on the History of Copyright* (Cambridge: OpenBook Publishers, 2010) 67 at 83 [Rose, Public Sphere].

significantly restricted the possibility for many authors' works to be published and proliferated. By encouraging learning, the Statute of Anne was a big first step in reversing these problems.

By centering itself on this notion of knowledge pursuit, the Statute of Anne essentially put an end to both the systems of censorship and stationers' monopolies that previously governed the creative industry, "[encouraging authors] to bring the fruits of their efforts into the public forum on no other authority but that of their reason, their learning and their deliberation."<sup>188</sup> The Statute recognizes that, in order to learn, people must possess unfettered access to the works of prior creators and must enjoy the freedom to communicate their thoughts through written prose or works of art without being encumbered by a fear of retribution. It therefore took the necessary steps to make this possible.

In adopting this approach, the Statute of Anne essentially establishes knowledge-building activities as copyright's central purpose, with its aim being "to stimulate study and speech, to encourage the proliferation of discourse in the public sphere."<sup>189</sup> By urging people to communicate the expression of their ideas with one another, copyright effectively creates this public discourse that is so characteristic of society. The promotion of this social dialogue not only enables people to exchange ideas, but it also further contributes to the ongoing evolution of the world's knowledge database and, more generally, to progress.

### 2.2.2 The Civilian *Droit d'auteur*

Although Canadian copyright is based primarily on the common law tradition, what with having been under British rule for the better part of a century, it did borrow some elements from the civilian tradition – not the least of which is its moral rights provisions which effectively

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<sup>188</sup> *Ibid* at 84.

<sup>189</sup> *Ibid* at 83.

recognize authors' natural rights in their creations. It's therefore instructive to my discussion surrounding copyright's purpose to trace the history of France's *droit d'auteur* as well. Literally translating to 'authors' rights,' the civilian approach is very author-centric. Yet, although *droit d'auteur* and common law copyright are often considered to be diametrically opposed in their methods – the former attached to a natural rights vision of authorship and the latter considered as a policy instrument that promotes the public interest – both regimes owe their origins to the same phenomena.<sup>190</sup>

*Droit d'auteur* equally arose out of strong objections to the system of censorship that had previously ruled. Differently from its British counterpart, however, France enjoyed the freedom to reproduce texts at will prior to the invention of the printing press.<sup>191</sup> Censorship was only introduced into French society less than a hundred years after Gutenberg's invention made its appearance,<sup>192</sup> when it became clear to the monarchy that the printing press could foster public dissension by enabling the wide dissemination of texts that openly opposed the king. Booksellers therefore had to be granted a privilege in order to print and disseminate texts, and the king would only accord these privileges for content that met his strict criteria.<sup>193</sup>

To ensure his continued control over ideas, however, the king only granted these privileges to Parisian booksellers,<sup>194</sup> for fear that he would be unable to control the dissemination of ideas by booksellers located in provinces outside of his place of residence. As such, by the second half of

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<sup>190</sup> Alain Strowel, "Le droit d'auteur et le copyright entre histoire et nature" in Philippe Gérard, François Ost and Michel Van de Kerchove, eds, *Images et usages de la nature en droit* (Brussels: Presses de l'Université Saint-Louis, 1993) 289 at 289.

<sup>191</sup> *Statuta Universitatis Paris. De librariis et stationariis*, 4 décembre 1316, in *Chartularium Universitatis Parisiensis*, Paris, 1891, 2, p. 190.

<sup>192</sup> Decrusy, Isambert, Jourdan, *Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la Révolution de 1789* (Paris: Belin-Leprieur, 1821-1833) at 210.

<sup>193</sup> *Ibid.*

<sup>194</sup> Eugène Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation* (Paris : Imprimerie et Librairie générale de jurisprudence, 1908) at 8.

the seventeenth century, the French book trade was monopolised by Parisian booksellers – a reality that did not sit well with the booksellers in surrounding provinces who, in the eighteenth century, began to openly contest this disparity. It was thus in 1725 that the monarchy revoked all abusive privileges held by Parisian booksellers. In response, the latter – taking a similar stance to that of the British stationers – sought to challenge this order by “[articulating] the notion of the author as the natural owner of his intellectual work”<sup>195</sup> in an “[attempt] to bolster their dominance of the market.”<sup>196</sup> It’s only the author, they argued, who has the capacity to grant or revoke a printing privilege given that she is the sole proprietor of her work.

In this vein, the Parisian booksellers’ legal representative, Louis d’Héricourt, drew on the works of John Locke to introduce the notion that “a Manuscript [...] is so much the property of its Author, that it is no more permissible to deprive him of it than it is to deprive him of money, goods, or even land since, as we have observed, it is the fruit of his personal labour, which he must be at liberty to dispose of as he pleases.”<sup>197</sup> His aim in introducing this notion was to oppose the king’s privilege system, effectively going on to point out that “if the Author is the owner indefinitely and therefore the sole master of his Work, only he [...] may legitimately transfer it to another person, and relinquish his rights to it in favour of that person: thus the King, having no right to the Work for as long as the Author is alive [...], is unable to transfer it by means of a Privilege to anyone, without the consent of its rightful owner.”<sup>198</sup> He therefore introduced the notion of a work as an

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<sup>195</sup> Laurent Pfister, “Author and Work in the French Print Privileges System: Some Milestones” in Ronan Deazley, Martin Kretschmer & Lionel Bently, eds, *Privilege and Property: Essays on the History of Copyright* (Cambridge: Open Book Publishers, 2010) 115 at para 18.

<sup>196</sup> *Ibid.*

<sup>197</sup> Louis d’Héricourt, “Memorandum (1725-1726)”, *Primary Sources Copyright* p. 2, online: <[http://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation\\_f\\_1725b&pagenumber=1\\_2&imagesize=small#TranslationDisplay](http://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_f_1725b&pagenumber=1_2&imagesize=small#TranslationDisplay)>.

<sup>198</sup> Louis d’Héricourt, “Memorandum (1725-1726)”, *Primary Sources Copyright* p. 3, online: <[https://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation\\_f\\_1725b&pagenumber=1\\_3&imagesize=small#TranslationDisplay](https://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_f_1725b&pagenumber=1_3&imagesize=small#TranslationDisplay)>.

author's property in an effort "to assist [the Parisian booksellers] in defending their privileges against interference from both provincial competition and the State – a conceptual Trojan horse employed to secure their existing monopoly of the market."<sup>199</sup>

What's noteworthy about this development is that prior to the introduction of these author-centric ideas by the Parisian booksellers, the French privilege system – known as the *ancien régime* – was relatively indifferent to authors. Although authors were sometimes entitled to defend their privileges,<sup>200</sup> they were generally forced to sell it to booksellers and were therefore prevented from exercising any of the rights attached to the privilege themselves.<sup>201</sup> More significantly, however, is that prior to the Parisian booksellers' attempts to attach property to creative works, the *ancien régime* considered property and publication to be incompatible. In effect, "the written work was predominantly conceived of as an action – an act of speech – and not as a thing."<sup>202</sup> In this sense, it was maintained that once a work was published – once expression was set free – it was gifted to the public and no longer considered as within the author's dominion.<sup>203</sup> Members of society were therefore free to draw on published works as the basis for their own expression; to build upon pre-existing culture through communicative acts of their own.

From this perspective, the Parisian booksellers' introduction of the author as owner of her intellectual work stood in stark opposition to the vision that dominated French society until the eighteenth century. And it was for this reason that the provincial booksellers' representative, Jean-François Gaultier, unequivocally rejected the attempts of the Parisian booksellers to introduce the

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<sup>199</sup> Pfister, *supra* note 195, at para 17.

<sup>200</sup> *Ibid* at paras 7-9.

<sup>201</sup> *Lettres patentes du Roy pour le règlement des libraires, imprimeurs et relieurs de la ville de Paris*, Bibliothèque nationale de France, Manus. Fçs 22061, n° 69, art 14.

<sup>202</sup> Pfister, *supra* note 195, at para 14.

<sup>203</sup> See Natalie Zemon Davis, "Beyond the Market: Books as Gifts in Sixteenth-century France" (1983) 33 *Transactions of the Royal Historical Society* 69.

notion of literary property into the French system.<sup>204</sup> In reiterating the *ancien régime*'s approach towards authors, he maintained that

a man of genius is guided by the desire to educate and instruct his fellow man. When he communicates his thoughts to society, an author does so in exchange for goods that society has already provided for him. For this contribution to public instruction he will be able to receive a reward – a privilege – but a privilege that is necessarily temporary in nature. That is, it is for the king to limit the duration of these exclusive privileges in order to preserve a public domain, a condition of competition, the free circulation of ideas, and the progress of Enlightenment.<sup>205</sup>

In response to these debates, the monarchy decided to reform the privilege system through two decrees issued by the Royal Council in 1777 and 1778.<sup>206</sup> Although these decrees maintained the privilege system to enable the State's continued control over the book trade, they also recognized the supremacy of authors' rights in their works,<sup>207</sup> effectively maintaining that authors retain control over their works even once they sign a publishing contract.<sup>208</sup> This author-centric vision was short-lived, however, and effectively saw significant change with the abolition of the privilege system in 1789.

In 1793, a new legal regime was created – one that was “less favourable for the author than the royal decrees of 1777 and 1778, but nevertheless one that was founded upon property, as well as one that sought to strike a balance between private and general interests, between private and public property, and between the exclusive rights of the author and his beneficiaries and the freedom of the public to make use of and exploit published works.”<sup>209</sup> Being the first to expressly

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<sup>204</sup> Jean-François Gaultier, *Mémoire à consulter, pour les Libraires et Imprimeurs de Lyon, Rouen, Toulouse, Marseille et Nismes, concernant les privilèges de librairie et continuation d'iceux*, Bibliothèque nationale de France, Manus. Fçs. 22073, n. 144.

<sup>205</sup> Pfister, *supra* note 195, at para 22.

<sup>206</sup> Arrêt du Conseil du 30 août 1777, portant règlement sur la durée des privilèges, in Decrusy, Isambert, Jourdan, eds, *supra* note 192, p. 110.

<sup>207</sup> *French Decree of 30 August 1777, on the duration of privileges, Paris (1777), Primary Sources on Copyright 1450-1900*, online: <[http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_f\\_1777a](http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1777a)>.

<sup>208</sup> Pfister, *supra* note 195, at para 28.

<sup>209</sup> *Ibid* at para 29.

recognize the supremacy of the public domain, the law of 1793 moderated authors' dominion over their works in order to enable the public's use of pre-existing culture as inspiration for its own expression. The law was, in this sense, quite revolutionary. Not only did it recognize the moral rights of authors, but "this individualization of the 'author' was tempered by the recognition of the author as a *servant* of the public domain [...]. Hence, although according these rights to authors for their lifetime, public *enlightenment* was to be encouraged by a revocation of these rights on death."<sup>210</sup>

Thus, similar to the Statute of Anne, the French *droit d'auteur* as initially conceived in the law of 1793 viewed authors' rights merely as a tool for enabling the public's enlightenment and the pursuit of knowledge. By recognizing the importance of the public domain within the French system, *droit d'auteur* essentially adopts a similar stance to that of Jean-François Gaultier, while simultaneously acknowledging the importance of recognizing authors' rights. In effect, this law maintains that authors who communicate their thoughts are entitled to enjoy a reward for their contribution to society's edification, but that these privileges must be limited "in order to preserve a public domain, a condition of competition, the free circulation of ideas, and the progress of Enlightenment."<sup>211</sup> The fact that *droit d'auteur* put an end to authors' rights upon their death is very telling regarding the prominent status they afforded to the public domain.

Despite the discrepancies between common law copyright and civilian *droit d'auteur* in their development over time, both traditions therefore had very similar goals at the outset. Both established knowledge-building activities as central to their purpose, essentially rewarding authors for communicating their works to the public in the aim of further contributing to society's

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<sup>210</sup> May & Sell, *supra* note 28 at 103.

<sup>211</sup> Pfister, *supra* note 195, at para 22.

knowledge database. By encouraging this sort of communication, the aim was to foster a public discourse that would further society's enlightenment. Although pursuit of the social dialogue is a clear goal of the Statute of Anne, its importance is even more explicit in the French *droit d'auteur*. In maintaining that authors are *servants* of the public domain, *droit d'auteur* recognized authorial works and the public domain as two sides of the same coin, and therefore authors and users as equal participants in a mutual social discourse.

### 2.2.3 How the Concept of Balance Upended Copyright's Purpose

Both common law copyright and the civilian *droit d'auteur* therefore evolved from a system of censorship and culminated in the desire to promote a rich and diverse social dialogue. In this light, we're left to wonder how copyright became so disconnected from its historical purpose to end up where it is today – a regime characterized by constant power struggles, copywars, and copyright expansion, rather than one that creates an environment characterized by mutual and reciprocal engagements in the social dialogue. Is it possible that copyright's purpose *was* one thing, but that it has evolved, diversified, or fragmented? Or is it rather more likely that copyright doctrine took a wrong – and rather misinformed – turn somewhere along the way?

I'm more inclined towards the latter position, and mostly because the point at which copyright doctrine took a turn for the worse can be pinpointed to a mere 63 years after the adoption of the Statute of Anne, when the concept of the public interest was introduced as the guiding factor of copyright. "Copyright protection has consistently expanded since the landmark decision of the House of Lords in *Donaldson v. Beckett*," writes Drassinower, which "affirmed the still prevailing view that copyright law is not a juridical recognition of rights inherent in the act of authorship but

rather a policy instrument designed to promote the public interest in creativity.”<sup>212</sup> And the court did so by maintaining that copyright must “guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”<sup>213</sup>

This instrumentalist vision of copyright effectively introduced the concept of balance as the most efficient way of promoting the public interest – on the one hand, ensuring that incentives are provided to authors to enhance creativity and, on the other, that said creativity should be widely disseminated and accessible to the public. In the famous words of Justice Binnie of the Supreme Court of Canada – whose decision in *Théberge v Galerie d’Art du Petit Champlain* effectively incorporated this concept of balance into our own copyright regime – “[t]he *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the art and intellect and obtaining a just reward for the creator [...]”<sup>214</sup>

In this view, Drassinower emphasizes that “the public interest is thus neither about incentives alone nor about dissemination, but rather about the balance between them. Balance is what would be most efficient from the standpoint of the public interest. The task of copyright law is none other than the achievement of this optimal balance between creators and users, authors and the public domain.”<sup>215</sup> The concept of balance supposedly provides an underlying theory enabling the interpretation of “copyright as a legal regime designed to order the juridical relationship

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<sup>212</sup> Drassinower, WWWC, *supra* note 30 at 147.

<sup>213</sup> *Sayre v Moore*, *supra* note 96.

<sup>214</sup> *Théberge v Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34.

<sup>215</sup> Drassinower, WWWC, *supra* note 30 at 3.

between creators and users of [...] works of authorship.”<sup>216</sup> Balance apparently “serves as a hermeneutic guide. That is, it provides the basic structure presiding over the interpretation of statutory provisions, all of which ought to be interpreted with an eye to the ‘balance’ that defines their meaning and purpose.”<sup>217</sup>

While pursuing the meaning and purpose of copyright might require that a balance be established between creators and users, however, balance cannot itself act as this meaning or purpose because it’s simply incapable of grounding copyright as a construct. The concept of balance assists us in “[determining] who should get the [value authors generate], whether it should fall within the domain of the author, or that of the user.”<sup>218</sup> This notion does not, however, “distinguish between kinds of value”<sup>219</sup> nor does it “affirm the specificity of authorship.”<sup>220</sup>

It’s rather the principle of originality that achieves this feat. And the function of this notion in copyright is to identify works that satisfy a certain value threshold sufficient to be considered a work of authorship. It’s “[t]he doctrine of originality [that] makes determinations regarding what gets on the copyright balance to begin with. [...] In other words, the originality standard is not the result of the balancing process. Rather, it is prior to and independent of that balancing. The standard of originality specifies what kind of weights or values get on the balance to begin with,”<sup>221</sup> and the concept of balance is responsible for distributing this value between authors and users.

The notion of balance is so vague, however, that it provides us with little direction about *how* to distribute this value. “Even if it is widely accepted that copyright law should balance the

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<sup>216</sup> Abraham Drassinower, “From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law” (2009) 34:4 Journal of Corporation Law 991 at 993 [Drassinower, Distribution to Dialogue].

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid* at 999.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid* at 997.

interests of creators and users (and perhaps society as well, depending on the articulation of the formula),” advances law professor Teresa Scassa, “there is no common consensus as to what constitutes those interests or who represents them.”<sup>222</sup> The interests of users, for example, are often painted as merely involving the consumption of works – an approach that fails to consider how they frequently engage in transformative acts that result in the creation of new works as well.<sup>223</sup> The interests of creators, on the other hand, are portrayed as being directly linked to copyright’s incentive to create, which isn’t always the case.<sup>224</sup>

In this sense, not only is the notion of balance incapable of anchoring copyright, but it also creates a value paradigm that “[construes] authorship as value-origination, of the “work” as an instance of value, of the public domain as a depository of commodities to be freely consumed by users, and, no less importantly, of the expansion of the public domain as a decrease in the price that the public must pay for the production of works of authorship.”<sup>225</sup> When value is shifted to users, in other words, authors pay the price. By opposing authors and users, the concept of balance is essentially responsible for the creation of an artificial hierarchy at the very heart of copyright doctrine – one that portrays authors as needing ‘protection’ from users who merely consume works without contributing anything to the discourse.

And in so doing, this approach serves to polarize these two actors rather than properly depict them as two parts of a whole. From this perspective, “integration properly so-called can never occur. And that is because once value-balancing is the ordering mechanism, then the relation

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<sup>222</sup> Scassa, *Interests in the Balance*, *supra* note 175, at 46.

<sup>223</sup> *Ibid* at 59-60.

<sup>224</sup> There are numerous examples to this effect, such as academics whose main goal in writing scholarly articles is to obtain tenure or promotion rather than royalties. There are many other cases where copyrighted works are developed in the context of employment, where the actual creator does not enjoy copyright but is rather incentivized by salary and benefits. In many other cases, production hasn’t ceased even where copyright protection remains uncertain for particular types of works, such as compilations of facts or machine-generated content, etc. (See, *ibid* at 53-4).

<sup>225</sup> Drassinower, *Distribution to Dialogue*, *supra* note 216 at 1001.

between authors and users is but a perennial struggle for value, such that claims of authors are but minimizations of the value entitlements of users,”<sup>226</sup> and vice versa. It’s therefore crucial to separate between the notion of balancing interests as a theory of copyright, which is untenable, and the notion of balancing interests as a means of ensuring that copyright’s core purpose is ultimately being pursued.

We cannot forget that authors were once merely users themselves; it’s in the very nature of cultural discourse to draw from and contribute to that which came before. What copyright needs is an overarching principle that properly recognizes creators and users – works of authorship and the public domain – as two sides of the same coin. Unless copyright stops “[framing] the struggle between authors and users as a matter of mere and sheer value,”<sup>227</sup> it will never be capable of “ordering [...] the juridical relationship between authors and users”<sup>228</sup> as two participants in the same discourse. For copyright to effectively pursue its goal of promoting a rich and diverse social dialogue capable of duly promoting progress, however, authorship must first be grasped in its nature as something more than mere value-origination.<sup>229</sup>

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<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*; see also Julie E Cohen, “Chapter 4: Decentering Creativity” in Julie E Cohen, *Configuring the Networked Self*, at 18, online: <<http://juliecohen.com/wp-content/uploads/2018/07/CohenCNSCh4.pdf>> [Cohen, Chapter 4] (“It is therefore correct to say that copyright requires a balancing act, but the decentered model of creativity prompts us to redescribe what copyright balances. What is required is not a balance between present authors and the abstract “public,” nor between valuable entitlement and ephemeral “deadweight loss,” both formulations that encourage would-be balancers to equate relative concreteness with relative importance. Balance also does not refer merely to a process by which the claims of competing interest groups are aired en route to striking a deal. As Robert Burrell and Allison Coleman have trenchantly observed, references to balancing in copyright rhetoric contain a “semantic ambiguity” that results in a slippage between notions of balance as process and notions of balance as correct result. The notion of balance that I mean to invoke is substantive and concerns the ways in which copyright’s goal of creating economic fixity must accommodate its mission to foster cultural play”).

### 2.3 *Look at This Trove, Treasures Untold, How Many Wonders Can One Creation Hold?: Creativity as Meaning-Making and Authorship as a Communicative Act*

The question then remains: how should we understand authorship in a manner that fulfills copyright's purpose? Unfortunately, "copyright doctrine on authorship [...] is surprisingly sparse. Few judicial decisions address what authorship means, or who is an author. Fewer laws define authorship."<sup>230</sup> Yet, despite the uncertainty that surrounds this notion, authorship has long been equated to demonstrable originality.<sup>231</sup> Indeed, most copyright acts worldwide specifically set out 'original works' as the subject-matter of their protection. But rather than adopting a firm stance on the matter, these acts left the notion of 'originality' largely undefined.<sup>232</sup> It's such that the evolution of this concept took on a life of its own over the years since copyright's inception.<sup>233</sup>

Originality, as it was initially conceived, rested heavily on the notion of romantic authorship – a concept which predominated copyright discourse in the eighteenth century. It effectively came to establish this "paradigmatic image of the author [as] an intellectual genius who introduces a radically new creation into the world."<sup>234</sup> It's only in meeting this level of originality that a creator was deemed to enter into the realm of authors. Having been supported by many, this

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<sup>230</sup> Ginsburg, *Concept of Authorship*, *supra* note 43, at 1066.

<sup>231</sup> Bracha, *Owning Ideas*, *supra* note 44, at 64; see also, William Wordsworth, "Essay, Supplementary to the Preface" in Paul M Zall, ed, *Literary Criticism of William Wordsworth* (Lincoln: University of Nebraska Press, 1966) 158 at 184; Woodmansee, *Genius and Copyright*, *supra* note 65 at 427.

<sup>232</sup> See, e.g. Gideon Parchomovsky & Alex Stein, "Originality" (2009) 95 *Virginia L Rev* 1505; Brian L Frye, "Against Creativity" (2017) 11:1 *NYU J L & Lib* 426; Laura A Heymann, "A Tale of (at Least) Two Authors: Focusing Copyright Law on Process over Product" (2009) 34 *J Corp L* 1009; Diane Leenheer Zimmerman, "It's an Original: In Pursuit of Copyright's Elusive Essence" (2005) 28 *Colum JL & Arts* 187; Roberta Rosenthal Kwall, "Originality in Context" (2007) 44:4 *Symposium House L Rev* 871; William W Fisher III, "Recalibrating Originality" (2016) 54:2 *Houston L Rev* 437; Russ VerSteeg, "Rethinking Originality" (1993) 34 *Wm & Mary L Rev* 801 [VerSteeg, *Rethinking Originality*]; Samson Vermont, "The Sine Qua Non of Copyright is Uniqueness, Not Originality" (2002) 20 *Tex Intell Prop LJ* 327; Ryan Littrell, "Toward a Stricter Originality Standard for Copyright Law" (2002) 43:1 *BC L Rev* 193.

<sup>233</sup> Bracha, *Owning Ideas*, *supra* note 44, at 64; see also, Wordsworth, *supra* note 231 at 184; Woodmansee, *Genius and Copyright*, *supra* note 65, at 427.

<sup>234</sup> Bracha, *Owning Ideas*, *ibid*; see also Wordsworth, *ibid* at 184; Woodmansee, *Genius and Copyright*, *ibid* at 427.

elevated threshold for originality continued to reign in copyright discourse until the early twentieth century.<sup>235</sup>

Yet, despite all that was initially comprehended in this term, the concretization of originality as a legal principle of copyright followed a complicated and illogical path, driven by the interests, ideologies, and conflicting values of various private parties.<sup>236</sup> And one of the primary reasons that defining originality in copyright law has proven such a contentious issue is because it effectively acts as the entry point for a work's protection. Set the bar too high, and fewer creations enjoy the benefits of copyright; less rightsholders are able to monetize on creativity. Set the bar too low, and too many works cross that threshold, thus impoverishing the public domain. Not wishing to make this choice, the vast majority of legislatures worldwide have instead left it up to the judiciary to determine the metes and bounds of what originality entails.

Although all adopting distinct approaches, judiciaries across the spectrum have been reticent to place the bar too high.<sup>237</sup> Their refusal to demand an elevated level of creativity was borne from their hesitation to assess the creative merit of works of authorship, and understandably so. The fear is that courts will impose their own subjective interpretations of creativity and exclude from copyright works that likely should have been duly acknowledged. In the famous words of Justice Holmes:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had

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<sup>235</sup> Bracha, *Owning Ideas*, *ibid* at 56 and 64; see also Wordsworth, *ibid*; Woodmansee, *Genius and Copyright*, *ibid*.

<sup>236</sup> Bracha, *Owning Ideas*, *ibid*, at 55-6.

<sup>237</sup> For a general overview, see Elizabeth F Judge and Daniel Gervais, "Of Silos and Constellations: Comparing Notions of Originality in Copyright Law" (2009) 27 *Cardozo Arts & Ent LJ* 375; Daniel J Gervais, "Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law" (2002) 49 *J Copyright Society of the USA* 949 [Gervais, *Feist Goes Global*]; Howard B Abrams, "Originality and Creativity in Copyright Law" (1992) 55:2 *L & Contemp Probs* 3.

learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.<sup>238</sup>

There isn't much that all copyright scholars agree on, but one thing that hardly anyone will contest is that "there is not sufficient disciplinary consensus in aesthetics to provide legal certainty."<sup>239</sup> More importantly, placing it within judges' dominion to decide what ought to be labelled as culturally valuable is perilous, in the sense that it endows the courts with an overly extensive power of legitimization over works of art and the intellect.<sup>240</sup> It's precisely for this reason that courts "struggled mightily to articulate neutral, process-based models of progress that manage simultaneously to avoid enshrining particular criteria of artistic and intellectual merit and to ensure that the 'best' artistic and intellectual outputs will succeed."<sup>241</sup>

Following this logic, courts have tended to opt for originality thresholds that, rather than relying on aesthetics, assess a work based on certain objective criteria. The problem with this approach, however, is that originality as it is has come to be understood in copyright law is now incapable of identifying the specificity of works of authorship; unable to differentiate between those works that duly contribute to the social dialogue and those that do little to advance society's meaning-making process. And the reason for this deficiency is because – rather than reflecting the paradigmatic image of authorship based on which copyright was initially conceived – the legal doctrines that enshrined the concept of 'originality' "were far removed from the abstract ideal of authorship, not just as an imperfect implementation but as the embodiment of a competing set of

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<sup>238</sup> *Bleistein v Donaldson Lithographing Co*, 188 U.S. 239 at 251-2 (1903).

<sup>239</sup> Erlend Lavik & Stef van Gompel, "On the Prospects of Raising the Originality Requirement in Copyright Law: Perspectives from the Humanities" (2013) 60:3 *J of the Copyright Society of the USA* 387 at 410.

<sup>240</sup> *Ibid* at 432.

<sup>241</sup> Cohen, *Creativity and Culture*, *supra* note 92 at 1162.

ideals. Thus [...] copyright law came to elevate original authorship to an unprecedented status, while at the same time extending copyright to works far removed from that ideal [...].”<sup>242</sup>

The originality principle has, in other words, morphed into something that’s no longer synonymous with authorship. In this light, I begin this section by providing an overview of originality thresholds worldwide, essentially identifying the challenge of locating the social dialogue in the types of works habitually recognized as ‘creative’ by the objective originality assessments that have been prioritized in copyright law. I illustrate how these approaches are contradictory in nature; they simultaneously raise works of authorship to unrealistic and romantic heights, while equally being mobilized in favour of recognizing even the most mundane of works; works that do little to contribute to our cultural discourse.

I then proceed by elucidating how the romantic vision of authorship underlying the originality principle is unable to ground copyright as a construct. Its failure to account for all the ways in which culture is created and knowledge is pursued erects barriers that foreclose ubiquitous participation in the social dialogue. In so doing, I depict the threats this approach poses to society’s meaning-making process – to authors’ freedom to pursue their own creativity and engage in dialogue with their predecessors. I conclude by offering an account of authorship that’s segregated from the notion of originality as we have come to understand it, setting forth law professor Abraham Drassinower’s communicative act theory – which views originality as an author speaking in her own words and works of authorship as communicative acts – as the theoretical framework for my analysis to come.

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<sup>242</sup> Bracha, *Owning Ideas*, *supra* note 44 at 56.

### 2.3.1 Don't Spend Your Time Looking Around for Something You Want That Can't Be

#### Found: The Challenge of Locating the Social Dialogue in Works Recognized as Original

Originality thresholds worldwide all seemingly have one thing in common: they lack the qualities necessary to identify the specificity of works of authorship. A prime manifestation of this default is their inability to differentiate between purely utilitarian works and works of demonstrable *authorship*. In comparison to the latter, the former don't have creativity as their main object but are rather primarily functional or useful in some way.<sup>243</sup> In other words, originality as it stands lacks the substance necessary to distinguish between works that advance the social dialogue – and promote the kind of progress and societal enlightenment that necessarily flows from cultural discourse – and those that simply don't. And this shortcoming can be seen in all originality thresholds across the spectrum, regardless of whether the 'sweat of the brow' or 'creativity' school is adhered to. While the former maintains that labour or effort is sufficient for a finding of originality – even in the absence of creativity – the latter rests on the notion that no work can be deemed original unless it exhibits at least minimal creativity.<sup>244</sup>

The 'sweat of the brow' threshold originates from the English copyright tradition, harkening back to the House of Lords' seminal decision in *Walter v Lane*.<sup>245</sup> In this case, the majority of the court held that the verbatim account taken by reporters from *The Times* of a series of speeches given by the Earl of Rosebery are to be considered works of authorship in their own right. The reason, the majority claimed, is because accurately transcribing the speeches rested on

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<sup>243</sup> Teresa Scassa, "A Comment on the Supreme Court of Canada's Decision in CCH Canadian Limited et al. v. Law Society of Upper Canada" (2004) 3:2 CJLT 89 at 91 [Scassa, SCC's Decision in CCH].

<sup>244</sup> Abraham Drassinower, "Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law" (2003) 1 UOLTJ 105 at 107 [Drassinower, Sweat of the Brow].

<sup>245</sup> *Walter v Lane*, [1900] AC 539; see also *Morris v Ashbee*, [1868] 7 Eq 34; *Kelly v Morris*, 1866 1 Eq 697; see also Drassinower, Sweat of the Brow, *ibid* at 112-6; Carys J Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest" (2005) 2:2 UOLTJ 425 at 442-4 [Craig, Evolution of Originality].

a process involving sufficient ‘skill, labour, and capital’<sup>246</sup> for the resulting work to enjoy the benefits of copyright. In other words, utterances don’t necessarily need to *originate* from the person whose labour results in their fixation in tangible form. Rather, “an ‘author,’ may come into existence *without producing any original matter of his own.*”<sup>247</sup>

Based on this view, it’s therefore possible for someone to be labelled an ‘author’ without ever having truly produced a ‘work of authorship;’ it rewards their labour, not in the *development* of a work, but merely in its *production*. And the majority’s decision in this vein was motivated by two primary factors. First, the consideration that it would be a grievous injustice to “[permit] one man to make profit and to appropriate to himself the labour, skill, and capital of another.”<sup>248</sup> Second, the view that the accurate reporting of a speech ought to be protectable under copyright because its dissemination is *useful* to society. In taking this tack, the majority’s decision increases the scope of a work’s protection – simultaneously recognizing the ‘harms’ of misappropriation and the ‘benefits’ of utility – in ways that go beyond what copyright law was constructed to protect.<sup>249</sup>

But as Julie Cohen warns, “courts [...] should not attempt to close gaps in the structure of copyright out of misplaced sympathy [...], but instead should exercise restraint.”<sup>250</sup> This kind of restraint, however, remains absent in *Walter v Lane*, where the majority judges turn to justifications *outside* of copyright to recognize works under the aegis of this legislation that have little to do with advancing the social dialogue.<sup>251</sup> But the British judiciary wouldn’t be swayed, and it was such

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<sup>246</sup> *Walter v Lane*, *ibid* at 545 (Earl of Halsbury).

<sup>247</sup> *Ibid* at 553-5 [emphasis added].

<sup>248</sup> *Ibid* at 545.

<sup>249</sup> Cohen, *Creativity and Culture*, *supra* note 92 at 1197 (warning that “courts [...] should not attempt to close gaps in the structure of copyright out of misplaced sympathy [...], but instead should exercise restraint”).

<sup>250</sup> *Ibid*.

<sup>251</sup> And this position is precisely the one adopted by Lord Robertson in his dissent, noting that the majority’s decision extends too much weight to external factors in a way that obfuscates what’s really at play here. It’s not about depriving society of these useful ‘works’ by ‘misappropriating’ the labour of another; it’s about *authorship*. Emphasizing how the reports in question “present the speaker’s thoughts untingered by the slightest trace or colour

that their chosen originality threshold got anchored in the ‘sweat of the brow’ model. So long as a work ‘originates’ from its creator’s ‘skill and labour,’<sup>252</sup> the originality threshold is satisfied, and the work is considered protectable under British copyright law – regardless of whether or not it embodies the author’s own contribution to the social discourse.<sup>253</sup>

A number of Commonwealth countries have been guided by this same approach, most notably Ireland, Singapore,<sup>254</sup> South Africa,<sup>255</sup> New Zealand<sup>256</sup> and Australia.<sup>257</sup> Canada has, however, somewhat stood apart. Following an ongoing debate between the ‘sweat of the brow’ and ‘creativity’ schools of thought, the Supreme Court of Canada finally settled on the substance of the originality principle in their seminal decision in *CCH Canadian v Law Society of Upper Canada*.<sup>258</sup> According to a unanimous Court, a work’s originality is predicated on the exercise of

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of the reporter’s mind” (*Walter v Lane*, *supra* note 245 at 561), he goes on to note that he “fail[s] entirely to see how, in the widest sense of the term ‘author,’ we are in the region of authorship”<sup>251</sup> (*Ibid*). This mere effort that the other judges are weighing heavily in favour of protecting, Lord Robertson notes, is an endeavour easily replaced by a machine (*ibid*). It is not industriousness, he advances, but rather *original thought* that is the subject-matter of copyright (*Ibid*, at 561).

<sup>252</sup> *Univ of London Press, Ltd v Univ Tutorial Press, Ltd*, [1916] 2 Ch 601 at 608 (reiterating that “[t]he word original does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought. The Act [requires] that the work not be copied from another work – that it should originate from the author.”); This concept was further developed in *Ladbroke (Football), Ltd v William Hill (Football), Ltd*, *supra* note 133 at 469.

<sup>253</sup> *Express Newspapers Plc v News (U.K.) Ltd.*, [1990] FSR 359 (Ch D); Having been part of the European Union, British courts had begun integrating the European Court of Justice’s approach to originality, which I discuss below (see *The Newspaper Licensing Agency Limited and others v Meltwater Holding BV and others*, [2010] EWHC 3099 (Ch); *SAS Institute Inc v World Programming Ltd*, [2010] EWHC 1829 (Ch)). Although now technically part of the British Common Law, it is likely that the United Kingdom’s originality threshold will remain ‘sweat of the brow’ since it is no longer obliged to harmonize with EU law (see Luke McDonagh, “UK Patent Law and Copyright Law after Brexit: Potential Consequences” (2017), online: *British Institute of International and Comparative Law* <[www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.3\\_0.pdf](http://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.3_0.pdf)>).

<sup>254</sup> See Susanna HS Leong, “Legal Protection of Factual Compilations and Databases: Rethinking the Copyright Protection Model in Singapore” (2002) 5 J World Intell Prop 1047 at 1048.

<sup>255</sup> *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) at 40 (S Mr), online: <<http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/2006/40.html&query=Brewers%20Marketing%20Intelligence>>; *Biotech Laboratories (Pty) Ltd v Beecham Group Plc and another* 2002 SA 11 (SCA) at para 8 (S Mr), online: <<http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/2002/11.html&query=Biotech%20Laboratories>>.

<sup>256</sup> *Wham-O Mfg. Co. v Lincoln Indus.*, [1984] 1 N.Z.L.R. 641 (C.A.); *Henkel KGAA v Holdfast N.Z. Ltd.*, [2006] N.Z.S.C. 102, 37 (S.C.).

<sup>257</sup> *Sands & McDougall Proprietary Ltd. v Robinson*, (1917) 23 C.L.R. 49 (Austl.); *Desktop Mktg Sys Party Ltd v Telstra Corp*, [2002] F.C.A.F.C. 112 (Austl.).

<sup>258</sup> *CCH Canadian v Law Society of Upper Canada*, *supra* note 45.

skill and judgment, where “skill [means] the use of one’s knowledge, developed aptitude or practised ability in producing the work, [and judgment means] the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.”<sup>259</sup> The Court claims that the approach they adopted offers a unique middle ground between the two originality standards that predominated copyright doctrine at the time – it neither rests entirely on the exertion of mere effort, nor does it demand a level of creativity so high as to prevent too many works from crossing the copyright threshold.

In theory, this approach is meant to establish a balance between remunerating authors for their creative works while not unnecessarily limiting the works available to the public. In practice, however, the Supreme Court of Canada’s application of this threshold on the facts of *CCH Canadian* served to create a precedent for the recognition of purely utilitarian works in a way that leads to results that aren’t so vastly different from those promoted by the approach adopted by the House of Lords in *Walter v Lane*.<sup>260</sup> According to the Court, case headnotes – which include the summary of the case, catchlines, statement of the case, case title, and case information<sup>261</sup> – exhibit a sufficient amount of skill and judgment to be labelled original:

[a]lthough headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The author must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more

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<sup>259</sup> *Ibid* at para 16.

<sup>260</sup> Craig, Evolution of Originality, *supra* note 245 at 443-4 (As Carys Craig advances, the path adopted by the Supreme Court appears to be aligned with Lord Brampton’s position in *Walter v Lane*, such that “the title of ‘author’ and the label ‘original’ [...] flow at least in part from consideration of the public interest served by protecting the work,”<sup>260</sup> regardless of whether we are actually within the realm of genuine authorship.).

<sup>261</sup> *CCH Canadian v Law Society of Upper Canada*, *supra* note 45 at para 29.

than just a mechanical exercise. Thus the headnotes constitute ‘original works’ in which copyright subsists.<sup>262</sup>

On this logic, the threshold for ‘skill and judgment’ is sufficiently low to recognize originality in works that do not contain any of the ‘author’s own expression,’ but are rather merely a reflection of the expressions of others. Instead of contributing to the social dialogue in their own original way, these kinds of works essentially piggyback on the dialogue prompted by the creative works of others without offering any additional input. That isn’t to say that there’s no intellectual labour involved, but rather that it would be difficult to classify the production of these summaries as a creative pursuit because the author’s own original thought is essentially absent.

Although the case headnotes at issue may be useful in many ways – not the least of which is the public interest in rendering judgments more palatable to the general public – their recognition under copyright seems almost contradictory to the Court’s proposition that their chosen threshold is a middle ground between the two originality schools. Based on their application of the ‘skill and judgment’ threshold to the facts of the case, it appears to rest more heavily on the principle of independent creation than on the presence of any of the author’s own original thought or creativity. In this sense, it’s no more able to identify the specificity of authorship than ‘sweat of the brow.’

And the ostensibly more stringent ‘creativity’ standard adopted by our American neighbours hasn’t been any more successful in achieving this feat.<sup>263</sup> The latter’s chosen threshold was set out by the Supreme Court of the United States in their landmark decision in *Feist Publications, Inc v Rural Telephone Service Co.*<sup>264</sup> At issue in this case was the fact that Feist copied information

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<sup>262</sup> *Ibid* at para 30.

<sup>263</sup> Although the Supreme Court of Canada maintains that the originality threshold they adopted is less stringent than that of their American counterparts, for all intents and purposes the two thresholds are quite similar indeed (see Daniel J Gervais & Elizabeth Judge, *Intellectual Property: The Law in Canada* (Toronto: Carswell, 2005) at 23).

<sup>264</sup> *Feist Publications, Inc v Rural Telephone Service Co*, 499 US 340.

from Rural's telephone directories to include in its own directory following Rural's refusal to license them the information. Rural sued for copyright infringement, only to have the Supreme Court rule that the data in their directory is not copyrightable to begin with.

Because ancient conventions dictated its alphabetical arrangement, the Court noted that “[i]t is not only unoriginal. It is practically inevitable.”<sup>265</sup> The decision goes on to specify that originality requires that the author independently create the work and that it display “at least some minimal degree”<sup>266</sup> or “a modicum”<sup>267</sup> of creativity. The Court asserts that, to be original, the creative spark cannot be lacking<sup>268</sup> or be “so trivial as to be virtually non-existent.”<sup>269</sup> It equally specifies that the work cannot be “devoid of even the slightest trace of creativity”<sup>270</sup> if it is to be considered original. But, as law professor Russ VerSteege points out, “[w]ords like ‘degree,’ ‘modicum,’ ‘spark,’ and ‘trace’ are inherently ambiguous and imprecise.”<sup>271</sup>

And because the ‘modicum of creativity’ threshold is so vague, lower courts have struggled with its application. Although aware that originality involves both ‘independent creation’ and some measure of ‘creativity,’ they tend to ignore the latter in their assessments for want of understanding its purpose.<sup>272</sup> The lower courts, lacking sufficient direction and certainty, were effectively guided

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<sup>265</sup> *Ibid* at 362-4 (“there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. It is not only unoriginal, it is practically inevitable.”).

<sup>266</sup> *Ibid* at 345

<sup>267</sup> *Ibid* at 346.

<sup>268</sup> *Ibid* at 359.

<sup>269</sup> *Ibid*.

<sup>270</sup> *Ibid* at 362.

<sup>271</sup> VerSteege, Rethinking Originality, *supra* note 232, at 824.

<sup>272</sup> Frye, *supra* note 232, at 445 ([...] the Court presumably intended the ‘creativity’ requirement to limit the scope of copyright protection by ensuring that copyright cannot protect trivial or banal expressions. Unfortunately, it accomplished exactly the opposite. The Court tried to reconcile the ‘aesthetic nondiscrimination’ doctrine and the ‘creativity’ requirement by requiring only a ‘minimal’ amount of ‘creativity.’ But it set the ‘creativity’ bar so low that essentially anything but a white pages telephone directory qualifies as ‘creative.’ Indeed, even a yellow pages telephone directory is sufficiently ‘creative’ for copyright protection. The Court itself suggested that copyright could protect not only Rural’s yellow pages listings, but also some elements of Rural’s white pages listings that Feist did not copy. Lower courts subsequently held that copyright could protect an ethnic telephone directory and an

by their wish “to prevent market failures for ‘sweat of the brow’ works [and thus broadened] the search for creativity in an effort to maintain the incentive to create works valued by society, such as many maps and compilations that lack the stamp of authorial creativity on their face.”<sup>273</sup>

Similar to the notion of misappropriation that came to colour the British copyright tradition, fear of market failure became the United States’ external guiding force, influencing much of its copyright rhetoric and leading to its recognition of works that are purely utilitarian in nature. It eventually came to pass that, so long as certain elements of a work could be dubbed creative on their face, courts would conclude that the author satisfied the requisite originality threshold regardless of whether or not those works are in fact the result of any creative urge or process.<sup>274</sup> This approach began a trend of examining works in isolation from the process that culminates in their creation.<sup>275</sup> That’s why telephone directories could still be held as creative under the newly

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automobile price guide. If the Court intended the ‘creativity’ requirement to limit the scope of copyrightable subject matter, it failed miserably” (*ibid* at 446-7 Citing *Key Publ’ns v Chinatown Today Pub Ent*, 945 F (2d) 509 (2d Cir 1991) (holding originality of Yellow Pages type directory of Chinese American businesses); *CCC Info Serv v Maclean Hunter Mkt Rep*, 44 F (3d) 61 (2d Cir 1994); *Bell South Advertising & Publishing Corporation v Donnelley Information Publishing*, 933 F (2d) 952, 958 (11th Cir 1999) (holding originality of directory of classified ads based on notion that selection and arrangement of information met the modicum of creativity threshold).); see also Mark K Temin, “The Irrelevance of Creativity: Feist’s Wrong Turn and the Scope of Copyright Protection for Factual Works” (2006) 111 Penn St L Rev 263; Omri Rachum-Twaig, “Recreating Copyright: The Cognitive Process of Creation and Copyright Law” (2017) 27 Fordham Intell Prop Media & Ent LJ 287.

<sup>273</sup> Dennis S Karjala, Copyright and Creativity, (2008) 15 UCLA Ent L Rev 169 at 185; see e.g., *Vargas v Pfizer, Inc.*, 418 F Supp 2d 369 (summary judgment denied) (where the court, examining a one-musical-bar pattern repeated 27 times fulfilled the originality threshold, was more concerned about independent creation rather than whether the creation was too simple to be deemed creative); *CCC Info Serv v Maclean Hunter Mkt Reports, Inc*, *ibid* (recognizing originality in estimates of used car values for being based on professional judgment and expertise); *Marshall & Swift v BS & A Software*, 871 F Supp 952 (cost schedules for real estate tax assessment purposes held to be protected by copyright because selection exhibits creative judgment; using that content to calculate tax assessments via a computer program therefore considered infringing).

<sup>274</sup> Karjala, *ibid*.

<sup>275</sup> A process that is held by many to in fact constitute the text, and therefore be of central importance to assessing originality (see e.g. Mark Rose, “The Author as Proprietor: Donaldson v Becket and the Genealogy of Modern Authorship” (1988) 23 Representations 51 at 78 [Rose, Author as Proprietor]; Jessica Litman, “The Public Domain” (1990) Emory LJ 965 at 1011 [Litman, Public Domain]; Mario J Valdes, “Conclusion,” in *Identity of the Literary Text*, Mario J Valdes & Owen J Miller, eds (1985) at 310 n 10; Owen Miller, “Intertextual Identity,” in Mario J Valdès and Owen Miller, *Identity of the Literary Text* (Toronto: University of Toronto Press, 1985) note 12at 19; Roland Barthes, *Image-Music-Text*, Stephen Heath, trans (New York: Hill and Wang, 1977) at 146 [Barthes, Image-Music-Text]; Robert Wimann, “Textual Identity and Relationship,” in Mario J Valdès and Owen Miller, *Identity of the Literary Text* (Toronto: University of Toronto Press, 1985) at 289; Stanley E Fish, “Dennis Martinez and the Uses of Theory” (1987) 96 Yale LJ 1773; Richard A Posner, “Law and Literature: A Relation Reargued” (1986) 72

defined American standard – because creativity was considered to inhere in the choices made in the work’s appearance, regardless of the fact that such directories are utilitarian rather than creative at their core.

Equating creativity to what appears to be creative choices in the work might be an objective approach to assessing originality, but it is equally overbroad in the sense that creative choices can be deemed to subsist in even the most uncreative of works. For an originality threshold predicated on the existence of creative choices to be successful in properly defining the kinds of endeavours that copyright seeks to protect, the choices that ought to qualify as creative under the law must be clearly delineated.<sup>276</sup> Failure to impose such limitations will likely lead to trends similar to those being faced in other jurisdictions, where courts find creative choices to subsist in even the most utilitarian endeavours; in which the author’s own contribution to the social dialogue is absent.

Paradigmatic of the risks arising from the absence of clear direction under such an approach is the European Union experience, following its adoption – over a decade ago – of creative choices as a critical element for assessing originality under copyright law. In their landmark ruling in *Infopaq International A/S v Danske Dagblades Forening*,<sup>277</sup> the Court of Justice of the European Union<sup>278</sup> held that copyright protection extends to a work that is “original in the sense that it is its author’s *own intellectual creation*.”<sup>279</sup> The Court specifies that an author’s own intellectual creation can only be achieved “through the choice, sequence and combination”<sup>280</sup> of elements that

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Va L Rev 1351; Coombe, *Objects of Property*, *supra* note 92; Wendy J Gordon, “Reality as Artifact: From Feist to Fair Use” (1992) 55 *Law & Contemp Probs* 93; Wendy J Gordon, “Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problems of Private Censorship” (1990) 57 *U Chi L Rev* 1009).

<sup>276</sup> See Stef van Gompel, “Creativity, autonomy and personal touch: A critical appraisal of the CJEU’s originality test for copyright” in Mireille van Eechoud, ed, *The Work of Authorship* (Amsterdam: Amsterdam University Press, 2014).

<sup>277</sup> CJEU Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* (16 July 2009).

<sup>278</sup> Hereafter referred to as ‘CJEU.’

<sup>279</sup> *Ibid* at para 37 [emphasis added].

<sup>280</sup> *Ibid* at para 45.

express her creativity in an original fashion – an approach that has long reigned in several civil law systems throughout Europe, including France, Belgium, Switzerland, and the Netherlands.<sup>281</sup>

Although an intriguing method for objectively measuring creativity, the CJEU’s approach doesn’t provide sufficient details about what’s comprehended in the notion of ‘creative choices,’ and what might serve to *limit* the creativity imbued in a choice. As some have pointed out, many choices that authors make in their works are dictated by profession, custom, convention, or good practice, making it difficult to really pinpoint the author’s own creativity in several circumstances.<sup>282</sup> “The author in whom copyright vests,” writes David Nimmer, “is the one who has injected subjective expression into the mix.”<sup>283</sup> Creative choices, he maintains, are non-existent where a creator, by virtue of her expertise, seeks only to construct the true devoid of any overt manifestation of her partiality.<sup>284</sup>

But subsequent applications of the *Infopaq* decision by the European courts have neglected to articulate the importance of this concept, effectively recognizing creativity in ‘choices’ that are difficult to attribute to the putative author’s subjectivity. The CJEU, for instance, held ordinary school portraits taken by professional photographers as original under their threshold.<sup>285</sup> This decision was based on the Court’s view that such photographs are the product of ‘free and creative

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<sup>281</sup> See Gervais, Feist Goes Global, *supra* note 237 at 970.

<sup>282</sup> See van Gompel, *supra* note 276, at 96-7; See also Denis Barrelet & Willi Egloff, *Le nouveau droit d’auteur: Commentaire de la loi fédérale sur le droit d’auteur et les droits voisins* (Berne: Stämpfli, 1994) at 10-24; David Nimmer, “Copyright in the Dead Sea Scrolls” (2011) 38 :1 Houston LR 1 [Nimmer, Dead Sea] at 117.

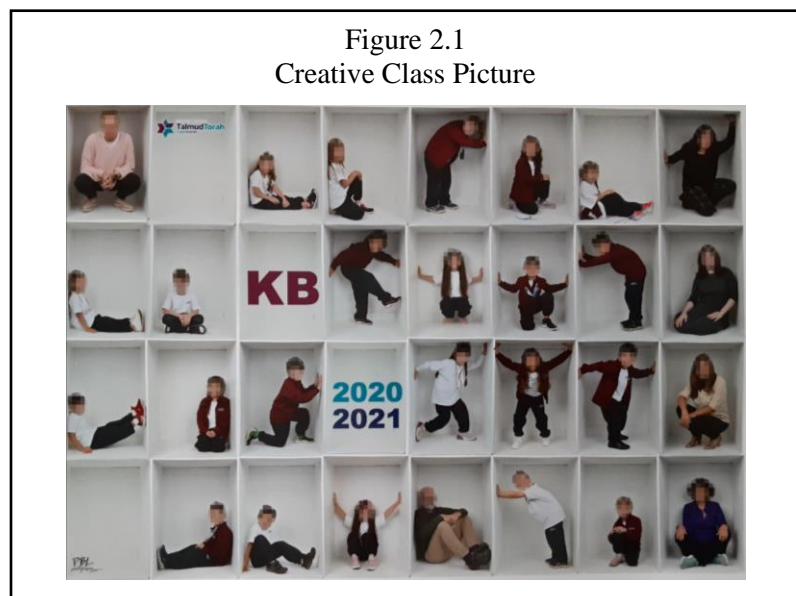
<sup>283</sup> Nimmer, Dead Sea, *ibid* at 117.

<sup>284</sup> *Ibid* (Nimmer is here criticizing the Israeli Supreme Court’s decision in *Elisha Qimron v Hershel Shanks*, recognizing Qimron’s copyright in the reconstruction of ancient scrolls discovered in the Judean desert, where the extent of his ‘creative choices’ was limited two elements, both based on his expertise as a philologist. The first was substituting one letter of the Hebrew language for another in a single word, changing its meaning from ‘light’ to ‘animal hides.’ The second, was choosing to connect some scroll fragments together widthwise as opposed to lengthwise. Neither of these choices were defined by Qimron’s own creativity, but rather by his knowledge of Jewish scripture and his wish to remain true to the objective of the scroll’s initial author. “The job of reconstruction,” writes Nimmer, “might be benefitted by placing oneself in the original author’s shoes, but that is a far cry from exercising one’s own subjectivity to produce new and original material” (*ibid* at 111).)

<sup>285</sup> CJEU case C-145/10 Eva-Maria Painer v Standard Verlags GmbH (1 December 2011).

choices;’ it is the photographer, they claim, that chooses the background, pose, lighting, angle and so on, of the image she captures.<sup>286</sup> What the Court terms ‘creative choices’ in this particular case, however, are ones that are often dictated by the confines of the contract, the wishes of the client, and the rules of the trade. The subjects of her photos were chosen for her, the background is generally selected by the school or the parents, and the pose, lighting, angle and even lens used are governed by the trade.

For a choice to be truly creative under such circumstances, it must be one that’s not influenced by any of these external elements. For instance, my daughter had her school portraits taken and – in addition to the traditional poses – the photographer created a class picture different



from any I have yet to see (see Figure 2.1). Responding to restrictions arising from the COVID-19 pandemic, where children couldn’t stand side by side without wearing masks, the photographer had each child pose in an assortment of interesting positions within a three-

dimensional white box. He then combined all these photos together to create a rather original class picture. Absent such specific demonstrations of creativity, however, it’s difficult to label any of

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<sup>286</sup> *Ibid.*

the ‘choices’ taken in school portraits as truly creative. There’s often little to differentiate one school portrait from another, with the exception of the person whose image is being captured.

Although certainly involving something more than merely alphabetising names to generate a telephone directory, it’s difficult to see how school portraits are any less utilitarian in nature. These photographs are not taken as a result of any creative urge by photographers – any desire to express their original thought – but merely because they were hired by a school to capture the likeness of its students for any number of functional reasons: creation of student ID’s, use in the yearbook, and so on. Even though the EU’s chosen originality threshold holds much promise in its potential to objectively assess originality, its mobilization to recognize creative choices where they remain so limited – including in passport photos and striped wallpaper<sup>287</sup> – leads me to the conclusion that it does not quite live up to its promise.<sup>288</sup>

Originality thresholds worldwide therefore all suffer from a similar deficiency: they are all mobilized to extend copyright protection to works lacking any demonstrable creativity.<sup>289</sup> And they often do so in view of safeguarding values that have little to do with those copyright seeks to promote. Neither the wrongs of misappropriation, nor protecting market value, nor the benefit of the public interest provide a strong enough foundation for rallying copyright law to indulge in the fiction that recognizes purely utilitarian works as sufficiently creative under copyright. It’s

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<sup>287</sup> Bernt Hugenholtz, “Works of Literature, Science and Art” in Bernt Hugenholtz, Antoon A Quaadvlieg & Dirk JG Visser, *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (Amsterdam: Delex, 2012) 33 at 44.

<sup>288</sup> See van Gompel, *supra* note 276, at 95.

<sup>289</sup> Copyright is simply not the right way to address encroachment on the value of non-creative works that nevertheless have value. Other legal avenues are available to address many of the issues that might arise from extracting value from non-copyrightable works, such as unfair competition or unjust enrichment. But even where these protections are not applicable, I would still maintain that it’s unnecessary to protection utilitarian works via copyright. The photographer charged with taking school portraits already received a salary for her endeavours, she doesn’t require copyright protection of those photographs to make a living. Similarly, case headnotes are useful enough on their own – be it to law students or lawyers – that they are likely to be purchased regardless of their copyright status. Because the same can often be said for most utilitarian works, it is both unnecessary and undesirable to expand copyright to include them under its ambit.

undeniable that verbatim transcripts of speeches, case headnotes and the like are the result of a significant amount of intellectual effort – skill, judgment, and labour, if you will – but that does not elevate them from the status of utilitarian works to acts of authorship in the absence of any contribution of the author’s own original thought to the social dialogue. Originality may need to be assessed objectively to avoid the risks portrayed by Justice Holmes, but it shouldn’t be a threshold capable of rewarding creativity where it clearly doesn’t exist.

### 2.3.2 I Won’t be Silent, You Can’t Keep Me Quiet: How Copyright’s Originality Principle Forecloses Dialogue by Limiting ‘Use’

As law professor Jessica Litman succinctly puts it, originality is little more than a conceit.<sup>290</sup> More specifically, it’s a conceit that has backed copyright as a construct into an untenable position. Copyright’s aim is to promote cultural production, yet its originality principle severely restricts the opportunities for achieving this feat. As the primary gateway for triggering authors’ exclusive rights, originality’s recognition of certain works under copyright inevitably serves to deny the originality of others; to limit their engagement with prior works in a way that very much impacts their freedom of expression.<sup>291</sup>

The romantic notion of copyright upon which the originality principle is predicated is partially to blame for this predicament. This approach promulgates the fiction of authors as creators *ex nihilo*. In so doing, it perpetuates the flawed notion of authors who express themselves in isolation from the remainder of society, rather than more accurately depicting them as users of cultural artifacts themselves.<sup>292</sup> By preserving this unrealistic ideal of authorship as being the result

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<sup>290</sup> Litman, Public Domain, *supra* note 275, at 1019.

<sup>291</sup> See, e.g. Graham Reynolds, “Reconsidering Copyright’s Constitutionality” (2016) 53:3 Osgoode Hall LJ 898.

<sup>292</sup> While the place of users is recognized in copyright law generally, the legislation merely presents them as consumers, effectively portraying authors as separate from users rather than presenting them as two sides of the same coin; see e.g. Craig, Reconstructing the Author-Self, *supra* note 30; Coombe, Objects of Property, *supra* note

of creative genius rather than building upon *existing* knowledge, copyright is unable to acknowledge the originality of works that don't necessarily fit into these narrow confines. For this precise reason, copyright's approach to originality has long been contested by post-structural literary theorists, with Roland Barthes' oft-cited powerful words: "*l'écrivain ne peut qu'imiter un geste toujours antérieur, jamais originel ; son seul pouvoir est de mêler les écritures, de les contrarier les unes par les autres, de façon à ne jamais prendre appui sur l'une d'elles.*"<sup>293</sup> It was such that Barthes declared the 'death of the author.'

Although highly criticized, this claim is often misunderstood. It's not meant to advocate for the demise of authorship as a practice, but rather for the downfall of authorship as *monologue*. It is "monological dominance in copyright [that risks impeding] the development of creative personalities and our cultural environment and, consequently, may even limit our basic rights to think and imagine."<sup>294</sup> Barthes' philosophical approach rests instead on the belief that authors should not be endowed with authority over the *meaning* of their texts. Their texts are written in a context that precedes them and their meanings often evolve far beyond what they may have intended. These changes occur based on society's interactions with these works of authorship, on a multiplicity of meanings and signifiers and, more importantly, a cacophony of voices – each one bringing its own perspective to a *dialogue* that spans the ages and unites us all.<sup>295</sup>

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92; Wendy J Gordon, "On Owning Information: Intellectual Property and the Restitutionary Impulse" (1992) 78:1 Virginia Law Rev 149 [Gordon, On Owning Information]; Coombe, Cultural Life, *supra* note 70; Cohen, Creativity and Culture, *supra* note 92.

<sup>293</sup> Roland Barthes, *La mort de l'auteur*, in *Le bruissement de la langue, Essais critiques IV* (Paris: Seuil, 1984) 62 at 62 [Barthes, La mort]; the English translation does not do this excerpt justice, which is why I have cited it in its original French, but – loosely translated – it means "the writer can only imitate prior gestures, never create original ones; his only power is to mix the writings and to compare them, but never to truly build upon any of them."

<sup>294</sup> Lior Zemer, "Dialogical Transactions" (2016) 95 Or L Rev 141 at 186 [Zemer, Dialogical Transactions]; see also Jed Rubenfeld, "The Freedom of Imagination: Copyright's Constitutionality" (2002) 112:1 Yale LJ 1 (arguing that strong copyright limits our freedom of imagination as protected by the First Amendment).

<sup>295</sup> As Michael Holquist advances:

Often represented as a struggle for meaning, this dialogue is restricted by romantic notions of originality that seek to remove cultural artifacts from this struggle “and to declare the author the victor,”<sup>296</sup> effectively endowing copyright owners with indiscriminate control over the creative works that are critical to the meaning-making process.<sup>297</sup> But as law professor Rosemary Coombe advances, “[d]ialogue involves reciprocity in communication: the ability to respond to sign with sign. What meaning does dialogue have when we are bombarded with messages to which we cannot respond, signs and images whose significations cannot be challenged, and contested.”<sup>298</sup> By portraying authors as the primary sources of creative expression,<sup>299</sup> copyright’s view of originality effectively promotes a monologue disguised as a dialogue.<sup>300</sup> In so doing, it quite simply neglects to account for the intricacies of society’s meaning-making process.

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“words in literary texts are active elements in a dialogic exchange taking place on several different levels at the same time [...]. At the highest level of abstraction, this dialogue is between the two tendencies that energize language’s power to mean: the Manichaeian opposition between centrifugal forces that seek to keep things apart, and centripetal forces that work to make things cohere. At another level, it is between language at the level of code, i.e. the level of prescribed meanings (where ‘tree’ means any tree), and language at the level of discourse (where ‘tree’ means *this* tree here and now, with all the cultural associations that cling to trees in this time and in this place). At still another level, simultaneity is a dialogue between different meanings the same word has at different stages in the history of a given national language, and in various situations within the same historical period. And, of course, simultaneity is found in the dialogue between an author, his characters, and his audience, as well as in the dialogue of readers with the characters and their authors.” (See Michael Holquist, *Dialogism: Bakhtin and His World*, 2<sup>nd</sup> ed (New York: Routledge, 2002) at 69.)

The intention and meaning of the author exuded in a text is therefore but a single element, rather than the determining element criticized by Barthes, of texts as part of the social dialogue.

<sup>296</sup> Peter Johnson, “Can You Quote Donald Duck: Intellectual Property in Cyberculture” (2001) 13:2 Yale JL & Human 451 at 567-8.

<sup>297</sup> Shur-Ofry, Popularity, *supra* note 91, at 546-7.

<sup>298</sup> Coombe, Cultural Life, *supra* note 70 at 85.

<sup>299</sup> Lior Zemer, “Multivoiced Authors” (2017) 35:2 Cardozo Arts & Ent LJ 383 at 401 [Zemer, Multivoiced Authors]; see also Per Linell, *Rethinking Language, Mind, and World Dialogically: Interaction and Contextual Theories of Human Sense-Making* (North Carolina: Information Age Publishing, 2009) at 215; Frank C Richardson et al, “Towards a Dialogical Self” (1998) 41 Am Behav Sci 496 at 502 (“[P]ower relations are neither a matter of explicit consent nor violent coercion, but are the myriad ways people are constrained together to act within a particular, ultimately arbitrary system of ‘power/knowledge.’”); Wendy J Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” (2010) 95 Cornell L Rev 463 at 498 [Gordon, Property Right in Self-Expression] (“Some poems, some ideas, some works of art, become ‘part of me’ in such a way that if I cannot use them, I feel I am cut off from part of myself. I would prefer never to have been exposed to them rather than experience that sort of alienation.”).

<sup>300</sup> Zemer, Copyright, Otherness, Dialogue, *supra* note 30 at 171-2 (Discussing how ‘monologue disguised as dialogue’ is a communication where people speak only to be heard, without allowing others the space to respond to

Meaning is not solely represented by cultural officialdom, through which authorities seek to “arrest the inherent semantic flux of discourse and to impose a rigid code of equivalences between ‘language’ and reality.”<sup>301</sup> For meaning to evolve, it requires an equal and opposing force; a creative marketplace that’s “full of unpredictable and centrifugal forces that find expression in satire, parody, irony, quotation, collage, stylization, and polemic [...] as expressed in children’s songs, satire magazines, fanzine writing, [images] of cartoon characters smoking dope or having sex, or parody ads that make serious social commentary on corporate sins.”<sup>302</sup>

With its roots in romantic notions of authorship, however, the originality principle “has given a special place of pride”<sup>303</sup> to works of cultural officialdom – those that “[originate] from either the fertile mind of its maker or as a result of that mind’s interaction with the raw materials of nature.”<sup>304</sup> The result is that ‘derivative’ works that draw from pre-existing culture “have been systematically undervalued in the copyright scheme.”<sup>305</sup> This attitude reflects a value judgment that pits works of ‘genius’ against simple ‘remixes’ and denies the importance of the latter to society’s meaning-making process in a way that limits – both directly and indirectly – the opportunities for author-users to engage in the social dialogue.

Directly, these consequences are felt by downstream creators who are labelled infringers. If their derivative work is *prima facie* substantially similar to a pre-existing one, the former will be labelled infringing regardless of the fact that its *message* may be entirely original to the

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them openly and freely. It is “a solitary and exclusionary experience in the sense that ‘the focus is more on the self than on one’s partner’ (citing Rob Anderson & Kenneth N Cissna, “Martin Buber: Bearing Witness to an Experience” in Hanna Jason, ed, *Philosophical Profiles in the Theory of Communication* (2012) 127 at 135).

<sup>301</sup> Michael Gardiner, *The Dialogics of Critique, M.M. Bakhtin and the Theory of Ideology* (1992) at 177.

<sup>302</sup> Johnson, *supra* note 296 at 567-8; see also Mikhail Bakhtin, *Rabelais and His World*, translated by Helene Iswolsky (Massachusetts: The MIT Press 1968) [Bakhtin, Rabelais].

<sup>303</sup> Peter Jaszi, “Is There Such a Thing as Postmodern Copyright?” (2009) 12 Tul J Tech & Intell Prop 105 at 112-3 [Jaszi, Postmodern Copyright]; see also Jaszi, *Metamorphoses of Authorship*, *supra* note 65, at 460-4.

<sup>304</sup> Jaszi, Postmodern Copyright, *ibid.*

<sup>305</sup> *Ibid.*

downstream creator and relevant to society as a whole. Part of the reason for this impasse is that the derivative's originality is assessed in direct comparison to the pre-existing original work, rather than in light of the place it has carved out for itself in the grand scheme of the social dialogue. By evaluating derivative works in a way that's divorced from the context in which they were created, their contribution to the evolution of meaning is not only denied, but equally stifled.

Take, for instance, the case of *Rogers v Koons*.<sup>306</sup> Jeff Koons created a sculpture that parodied a copyrighted photograph entitled 'Puppies,' which depicted a smiling couple holding eight German shepherd pups in their laps. The sculpture in question replaced the couple's delighted expressions with ones that were confoundedly glazed over and transformed the puppies into identical little robotic companions with matching bulbous noses.<sup>307</sup> Entitled 'String of Puppies,' Koons' sculpture was exhibited in a New York City gallery in 1988 as part of his 'Banality Show,' which aimed to critique the insipid nature of contemporary American culture.<sup>308</sup>

Having caught wind of this sculpture, the original photographer sued for copyright infringement – and the United States Court of Appeals for the Second Circuit ruled in his favour. Having analyzed the 'amount and substantiality' of the copying, the Court concluded that the sculpture was virtually identical to the original photograph. Failing to see any 'comment or criticism' of the original itself in the sculpture, the Court held that Koons has no right to use "another's copyrighted work to make a statement on some aspect of society at large."<sup>309</sup> But what the Court neglects to take into account is that "when an artist places a familiar image in a new

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<sup>306</sup> *Rogers v Koons*, 960 F. 2d 301 (2d Cir. 1992), cert. denied, 506 U.S. 934 (1992).

<sup>307</sup> Johnson, *supra* note 296 at 492.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Rogers v Koons*, *supra* note 306, at 310.

context, the maneuver forces the viewer to reconsider how different contexts affect meaning and to understand that all meaning is socially constructed.”<sup>310</sup>

While assessing a derivative’s originality strictly in terms of its variation from a pre-existing work may very well be an objective approach, it equally denies the important place that context plays in the meaning, and therefore originality, of a work. In some circumstances, contends attorney Robert Rotstein, a change in context may even make it possible to hold as original an *identical* reproduction of a pre-existing work.<sup>311</sup> He offers the example of Andy Warhol to support his claim. If this infamous artist had presented his renowned paintings depicting Campbell Soup cans and Marilyn Monroe alongside an exact replica of Rembrandt’s *Night Watch*, “the cultural significance of the reproduction and the concomitant modulation of cultural convention become evident.”<sup>312</sup> Situating this classical piece in a wholly different context than that foreseen by its originating artist would ask the audience to reassess its cultural views of Rembrandt’s work. More importantly, however, is that the replica advances a meaning that is entirely distinct from his own. Placed in this light, it’s difficult to deny the value and creativity that might subsist in such a reproduction.

What this example illustrates is that a work can be artistically and culturally valuable regardless of whether or not it diverges from prior works;<sup>313</sup> that a work that’s copied and published without the originating author’s consent does not necessarily preclude its contribution to the social dialogue. By concentrating so strongly on a derivative work’s variation from others as a basis for its originality, this copyright principle is applied in a rather arbitrary fashion that denies protection

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<sup>310</sup> Martha Buskirk, “Appropriation Under the Gun” (1992) 80:6 Art In Am 37, quoted in Robert A Gorman & Jane C Ginsburg, *Copyright for the Nineties* (Charlottesville: Michie Co, 1993) at 609.

<sup>311</sup> Rotstein, *supra* note 70, at 753.

<sup>312</sup> *Ibid* at 753-4.

<sup>313</sup> *Ibid* at 754.

to a great deal of works that possess cultural worth.<sup>314</sup> It also offers a skewed vision of the kinds of works that in fact *do* promote progress and favour enlightenment.<sup>315</sup> It need not always be about differences, but rather about similarities in new and ‘original’ contexts.

I have, for instance, borrowed verbatim lyrics from several Disney songs and repurposed them in section titles throughout my dissertation. I do not claim that those words are my own, but I do claim that I have made their *meaning* my own – or rather *extended* their meaning – by placing them in a new and unexpected context. I have appropriated Walt Disney’s songwriters’ expressions and used them to express myself in a context in which they likely never intended their lyrics to be used (let’s hope I get away with it!). My aim in doing so is to demonstrate the cyclical nature of cultural artifacts and their never-ending development of meaning;<sup>316</sup> it’s to emphasize what’s truly important about the kinds of expressions copyright seeks to protect: it’s not originality as in origination of *content*, so much as originality as origination of *meaning* that possesses cultural value.

But by assessing originality in isolation from its contribution to the evolution of meaning, courts provide copyright owners with the legal basis that reinforces their tendency to overestimate the extent of their ownership and to exclude downstream creators from the social dialogue.<sup>317</sup> And they don’t always just wield their exclusive rights to address the potential harms associated with certain uses of their original creations. They do so equally “to ‘fix’ the works’ meaning and prevent

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<sup>314</sup> *Ibid.*

<sup>315</sup> Neil Harris, “Who Owns Our Myths? Heroism and Copyright in an Age of Mass Culture” (1985) 52 Soc Res 241 (elaborating on the influence of parody on convention); Alastair Fowler, *Kinds of Literature: An Introduction to the Theory of Genres and Modes* (Cambridge: Harvard University Press, 1982) at 188-90 (discussing how satire alters genre).

<sup>316</sup> For a brilliant and more in-depth examination of these issues, see Coombe, *Cultural Life*, *supra* note 70.

<sup>317</sup> Elizabeth L Rosenblatt, “Who Will Speak for the Slender Man: Dialogism and Dilemmas in Character Copyright” (2018) 70 Florida L Rev Forum 69 at 76-7 [Rosenblatt, Slender Man].

certain connotations and secondary meanings from being associated with them.”<sup>318</sup> In other words, they exert their exclusive rights to *stagnate* meaning and thwart the originality of others.

Another Court, for example, issued an injunction enjoining a parody of *Gone With the Wind*.<sup>319</sup> Entitled *The Wind Done Gone*, the parody retold this American classic – often criticized for its historical revisionism and glorification of slavery – from the perspective of Scarlett O’Hara’s Black maid. The District Judge refused to legitimize the parody under copyright because, rather than limiting its criticism to the original copyrighted work, *The Wind Done Gone* sought “to criticize the South for its miscegenation, whippings and selling apart familiar.”<sup>320</sup> Although this injunction was quickly lifted on appeal, this line of thinking is yet another demonstration of how the social dialogue stands to suffer due to copyright’s perpetuation of romantic notions of originality that *exclude* rather than *include*.<sup>321</sup> *The Wind Done Gone* is far more than just a parody; it’s an assertion of Black history within a discourse largely dominated by the White upper-class. But because it drew upon a pre-existing work, its own originality was put into question.

It’s in this sense that the originality principle is detrimental to the social dialogue – a discourse which risks cultural hegemony should less-powerful creators continue to be systematically excluded from society’s meaning-making process by copyright owners brandishing their originality.<sup>322</sup> Originality as it now stands in copyright law enables these kinds of injustices by failing to recognize that “creative practice emerges from interactions with cultural landscapes

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<sup>318</sup> Shur-Ofry, *Popularity*, *supra* note 91, at 546-7.

<sup>319</sup> *Suntrust Bank v Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga.), vacated, 252 F.3d 1165 (11th Cir. 2001).

<sup>320</sup> *Ibid* at 1377.

<sup>321</sup> See e.g. Cohen, *Creativity and Culture*, *supra* note 92, at 1198-1205; Rubinfeld, *supra* note 294, at 8-9; Bracha & Syed, *supra* note 89, at 259-60; Anupam Chander & Madhavi Sunder, “Everyone’s a Superhero: A Cultural Theory of ‘Mary Sue’ Fan Fiction as Fair Use” (2007) 95:2 Cal L Rev 597 at 610 at 614-15.

<sup>322</sup> See Yochai Benkler, “Siren Songs and Amish Children: Autonomy, Information, and Law” (2001) 76 NYU Law Rev 23 [Benkler, *Siren Songs*]; Guy Pessach, “Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright’s Diversity Externalities” (2003) 76 S Cal L Rev 1067.

via processes of juxtaposition, iteration, dialogue and experimentation that are both conceptual and physical.”<sup>323</sup> Instead, the works resulting from these kinds of interactions are often denounced as unoriginal and infringing because they don’t fit into the narrow confines of the ideal of romantic authorship perpetuated by copyright’s originality principle. And the social dialogue is much poorer for it.

### 2.3.3 To Infinity and Beyond: Authorship as a Communicative Act

So how do we define ‘authorship’ in a way capable of re-establishing the social dialogue at copyright’s core? A good place to start is by drawing on theories that distance copyright rhetoric from the unrealistic notions of romantic authorship, of creations *ex nihilo*. And law professor Abraham Drassinower’s rights-based, Kantian influenced<sup>324</sup> communicative act theory achieves precisely this feat. It does so by integrating both users and creators as two sides of the same coin, offering a theory of authorship that doesn’t neglect the importance of the public domain. His theory shifts the copyright narrative from one entrenched in a value paradigm and defined by power struggles, to one that’s conceived as a comprehensive mechanism which views creators and users as equal participants in an ongoing communicative discourse.

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<sup>323</sup> Cohen, Chapter 4, *supra* note 229, at 7 (“Culture does not function in the same way that chemistry or physics or electricity functions. If you mix gaseous hydrogen with gaseous oxygen, you will get an explosion and a few drops of water, in exactly predictable amounts, every time. If you mix Homeric epics with the history and folk traditions of the American South, you may get *O Brother, Where Art Thou?* Or *Cold Mountain* or any number of other possible results. The question thus remains: what, if anything, is it possible to say about all that is unpredictable in artistic and intellectual expression? What increases the likelihood that someone will see, hear, or conceptualize the world differently in the first place? A critical ingredient is the scope that networks of cultural production afford for the play of everyday practice, including not only the extent to which they permit purposive creative experimentation but also the extent to which they enable serendipitous access to cultural resources and facilitate unexpected juxtapositions of those resources.” (*ibid* at 11)).

<sup>324</sup> See Immanuel Kant, “On the Wrongfulness of Unauthorized Publication of Books,” in *Practical Philosophy*, trans and ed Mary J Gregor (Cambridge, UK: Cambridge University Press, 1996) at 27-35.

The central proposition of Drassinower's theory is that a work of authorship is a communicative act.<sup>325</sup> This view of authorship rests on copyright's historical purpose, "[proposing] on its basis that 'dialogue,' rather than 'balance,' is a more appropriate metaphor to guide copyright interpretation."<sup>326</sup> Copyright law, Drassinower notes, "protects a work of authorship not as an object of ownership [...] but as an act of communication."<sup>327</sup> He emphasizes the integrity of the work while equally recognizing that "[a]n author is always among other authors. She speaks in a juridical context ensuring conditions for dialogue."<sup>328</sup>

Drassinower's view of the work as a communicative act anchors three additional propositions. First is the simultaneous acknowledgment that originality encompasses the autonomy of an author speaking in her own words and, therefore, that "the depth and wrongfulness of copyright infringement is nothing other than [the] unauthorized use of another's speech to deny her the very autonomy manifested in and through her speech."<sup>329</sup> It's the use of her speech in a way that makes it seem as if she is speaking, while depriving her of her choice of whether or not speak, that effectively amounts to infringement.

Second, "the rights attendant on [each work] must (a) be consistent with the communicative rights of others, especially where such rights require copying of a work for the purposes of responding to its author's communication, and (b) be confined to specifically communicative uses of the work."<sup>330</sup> The former would, for instance, remove from the scope of infringement fan fiction

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<sup>325</sup> Drassinower, WWWC, *supra* note 30 at 111-13; See also Russ VerSteeg, "Defining 'Author' for Purposes of Copyright" (1996) 45 American University Law Review 1323 at 1339 [VerSteeg, Defining Author]; Christopher Buccafusco, "A Theory of Copyright Authorship" (2016) 102 Va L Rev 1229 at 1273.

<sup>326</sup> Drassinower, WWWC, *supra* note 30 at 11.

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid* at 12.

<sup>329</sup> *Ibid* at 113.

<sup>330</sup> *Ibid* at 8.

or appropriation art, as they amount to instances of authorial engagement in their own right.<sup>331</sup> The latter specifies that non-communicative uses (which Drassinower dubs ‘nonuses’) – such as reproductions for Internet browsing, for example – are not the mischief that copyright was designed to target.<sup>332</sup> It’s only the use of a work *as a work* that copyright ought to address.<sup>333</sup>

And third, because of the work’s nature as a communicative act, users are endowed with the *right* to respond to the utterances of their predecessors. This vision of the work as an instance of dialogue – one that not only requires, but essentially demands, users’ response – therefore grounds our conception of users’ rights *as* rights, rather than as mere exceptions. From this perspective, Drassinower specifies that fair dealing

provides that the unauthorized use of another’s expression is lawful where reasonably necessary to one’s own authorial engagement. [...] The limitations that paradigmatic aspects of [...] fair dealing impose on an author’s copyright are neither exceptions nor countervailing weights reflecting extraneous interests, but rather specifications in the systemic articulation of the principle of independent creation. Lawful yet unauthorized copying of another’s expression is constitutive of the very core of copyright law. It affirms and confirms the equal authorship of each and all. Thus, [this theory] offers speech, equality, and dialogue in place of value, efficiency, and balance as guideposts for copyright interpretation.<sup>334</sup>

In this sense, Drassinower’s communicative act theory is “distinct from classic moral rights-based accounts. In Drassinower’s reboot, a communicative lens can save copyright law both from the indeterminacy and potentially retrograde character of a balancing-based instrumentalist account, and from the individualism of moral rights accounts that focus solely on the entitlements of the first author.”<sup>335</sup> Drassinower’s theory serves to piece all the aspects of copyright together into one cohesive whole, essentially reverting to its historical purpose as an instigator of dialogue.

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<sup>331</sup> *Ibid* at 12-13.

<sup>332</sup> *Ibid* at 12-13.

<sup>333</sup> *Ibid* at 13.

<sup>334</sup> *Ibid* at 12.

<sup>335</sup> Lili Levi, “A ‘Third Way’ Out of the Copyright Thicket?” (2015) 29 IPJ 33 at 34.

It shifts our vision of copyright from a consistent tug of war between ‘opposing’ rights, recognizing that “copyright doctrine protects not an author’s absolute rights over her work, as if the author had some kind of despotic dominion over her speech as an imagined object of ownership, but only such rights as are consistent with both the nature of the work as speech and the structure of the dialogue of which the work is but a part.”<sup>336</sup>

Drassinower therefore provides a relational account of copyright that’s less author-centric than other copyright theories – one that reinforces the role of both authors and users as equal participants in “a culture’s conversation with itself about what things are and the way we give them value.”<sup>337</sup> In this sense, Drassinower allows for the integration of both authors and users into a comprehensive system, where these “social agents are engaged in an ongoing process of constructing the meaning of symbols. Through this process social agents give meaning to the objective world and define their own identity. The process of creating and communicating information may thus be perceived as a process of creating meaning.”<sup>338</sup>

By positioning this meaning-making process at the core of authorship as a practice, Drassinower’s theory offers a tremendously useful framework for determining how copyright law should approach novel forms of authorship. It does so by forcing us to ask whether, or how, new kinds of works are able to contribute to the evolution of meaning. And in order to properly situate the use of generative AI within the copyright narrative, this inquiry must be at the forefront of considerations. Rather than relying on *prima facie* demonstrations of creativity as a foundation for copyright’s approach to AI-generated or AI-assisted works, we must dig deeper and question

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<sup>336</sup> Drassinower, WWWC, *supra* note 30 at 9.

<sup>337</sup> JJ Charlesworth, “AI can produce pictures, but can it create art for itself?” *CNN* (10 September 2018), online: <<https://www.cnn.com/style/article/artificial-intelligence-ai-art/index.html>>.

<sup>338</sup> Elkin-Koren, *Information Superhighway*, *supra* note 30 at 400; see also Coombe, *Objects of Property*, *supra* note 92; Gardiner, *supra* note 301.

whether – and under what circumstances – they are more likely to advance or hinder our social dialogue.

In effect, to participate in society’s meaning-making process, one must forcibly *understand* the shared words and symbols that are being used to signify various ideas. As advanced by philosopher Ludwig Wittgenstein, “words only [have] meaning within a sentence, and the sentence only as part of a language, [...] and uses of language are social practices. They get their point from shared needs and interests which are biologically, socially, and historically determined. They are conventional, not natural [...].”<sup>339</sup> Without being immersed in the social practices and cultures that give words and symbols meaning, it’s impossible to truly understand their significance. One must therefore be able to adopt an internal perspective to this discourse in order to contribute to it in any meaningful way.<sup>340</sup>

Artificial intelligence is, however, necessarily external to this dialogue. Not being part of the social practices that imbue words with meaning, it “can neither comprehend nor reproduce the ways in which [this discourse functions] in the lives of [...] members of society.”<sup>341</sup> In this sense, authorship is necessarily a human endeavour, and it’s difficult to conceive of how AI might engage in this practice in a fashion that doesn’t negate our meaning-making process. As law professors Ian Kerr and Carys Craig profoundly remark, “[t]o say authorship is human, that it is fundamentally connected with *humanness*, is not to invoke the romantic author, nor is it to impose a kind of chauvinism that privileges human-produced artifacts over those that are machine-made.

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<sup>339</sup> DJ Schalkwyk, “A Social theory of language: Ludwig Wittgenstein and the current theoretical debate” (1985) 1:2 *Journal of Literary Studies* 43 at 47-48.

<sup>340</sup> Ian Kerr & Carissima Mathen, “Chief Justice John Roberts is a Robot” (Paper delivered at the WeRobot Conference, University of Miami, Florida, 1 April 2014) [unpublished] at 28, online: <<http://robots.law.miami.edu/2014/wp-content/uploads/2013/06/Chief-Justice-John-Roberts-is-a-Robot-March-13-.pdf>>; see also HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994).

<sup>341</sup> Kerr & Mathen, *ibid.*

Rather, it is to say that human communication is the very point of authorship as a social practice – indeed, as a condition of life.”<sup>342</sup>

But while this position might provide a foundation for why copyright shouldn’t recognize *fully*-machine generated content, the question of whether human-machine collaborations should be similarly treated remains far more nuanced. Does the incorporation of algorithmic input into a work detract from its ability to qualify as human communication? Do works produced by someone who *is* immersed in our society alongside an entity who is *not* similarly neglect to advance our meaning-making process? In this respect, Drassinower’s theory provides us with the building-blocks we require to determine how copyright should approach increasing uses of AI within the creative realm; the basis from which to ask the right questions.

And primary amongst them is whether generative AI’s integration into the creative process reduces a work to something merely computational that fails to advance the social dialogue; whether the use of this technology in works’ development relegates these creations to something less than original for failure of the human author to speak in her *own* words. These are the questions that will help us determine whether, and under what circumstances, human-machine collaborations effectively pursue copyright’s purpose. But in order to respond to these queries in any comprehensive sense, we must first look at how exactly AI is being used in the creative realm.

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<sup>342</sup> Craig & Kerr, *supra* note 54 at 86.

### Chapter 3 But First, Let's Have Our Tea: The Evolution of Computational Creativity

Computational creativity has been a guiding force in literature and the arts long before artificial intelligence was even on the horizon. The application of algorithms in the creative realm dates as far back as medieval times,<sup>343</sup> though the most oft-cited example lays in Wolfgang Amadeus Mozart's musical dice game, better known under its German moniker *Musikalisches Würfelspiel*. Developed in 1787, his game is based on a system “where rolls of two six-sided dice randomly selected small sections of music that were then patched together to create a musical piece.”<sup>344</sup> Just like that, Mozart was able to create “45,949,729,863,572,161 different yet similar waltzes”<sup>345</sup> – with only two little dice and an algorithm that didn't rely on any computing device to be executed.

Although the 21<sup>st</sup> century has seen algorithms likened to artificial intelligence, this notion is a fallacy. An algorithm is simply “a process or set of rules to be followed in calculations or other problem-solving operations;”<sup>346</sup> it can be performed manually without necessarily relying on a computer to carry out those instructions. The ability to do so in a way that ultimately leads to a viable creative work, however, is not quite as simple as it sounds. Mozart, for instance, had to choose the musical sequences that would be selected upon each roll of the dice, undoubtedly selecting those he knew would result in waltzes regardless of how they're combined. That, in and

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<sup>343</sup> Marcus du Sautoy, *The Creativity Code: Art and Innovation in the Age of AI* (Cambridge: Harvard University Press, 2019) at 166 & 175.

<sup>344</sup> Jessica Kuo & Horia Margarit, “Experimenting with Algorithmic Composition Techniques” at 1, online: <[http://cs229.stanford.edu/proj2015/131\\_report.pdf](http://cs229.stanford.edu/proj2015/131_report.pdf)>.

<sup>345</sup> *Ibid.*

<sup>346</sup> Google Dictionary, “Algorithm”, online:

<<https://www.google.com/search?q=algorithm+definition&oq=algorithm+definition&aqs=chrome.0.0l8.2382j1j4&sourceid=chrome&ie=UTF-8>>.

of itself, certainly necessitated some measure of creative thought, which equally relied on his breadth of knowledge in the field.

Artist Piet Mondrian’s classic abstractionist paintings offer a similar example. They were produced “according to a set of self-imposed regulations: only straight lines were allowed, which could only meet at right angles and could be depicted only in a palette of red, blue, and yellow (plus black and white).”<sup>347</sup> Yet, this process is not nearly as effortless as it sounds. In his attempt to follow these rules to create artworks in Mondrian’s style, art critic Tom Lubbock illustrated that there’s a great deal more involved in rendering these works aesthetically pleasing than simply following the series of set rules. In effect, “[h]e duly produced several abstractions that looked quite like Mondrian’s works, just not so good. The conclusion appeared to be that Mondrian was adding extra qualities – perhaps subtleties of visual balance and weighting of color – that weren’t formulated in the rules.”<sup>348</sup>

The measure of original thought and expertise involved in developing creative works under a series of self-imposed restrictions is therefore far greater than that required in freestyle productions. Take, for instance, the *Ouvroir de littérature potentielle* method, known better under its acronym Oulipo. Founded in 1960, its aim was “to explore the possibilities of incorporating mathematical structures into literary creation.”<sup>349</sup> One of the most infamous works employing this method is Georges Perec’s *La disparition*<sup>350</sup> – a detective novel written entirely devoid of the letter ‘e’ (which is no easy feat, particularly in the French language). I sat in front of my laptop for nigh

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<sup>347</sup> Martin Gayford, “Robot Art Raises Questions about Human Creativity: What is the potential of machine art, and can it truly be described as creative or imaginative?” *MIT Technology Review* (15 February 2016), online: <<https://www.technologyreview.com/2016/02/15/162067/robot-art-raises-questions-about-human-creativity/>>.

<sup>348</sup> *Ibid.*

<sup>349</sup> Loss Pequeño Glazier, *Digital Poetics: The Making of e-Poetries* (Tuscaloosa: The University of Alabama Press, 2002) at 128.

<sup>350</sup> Georges Perec, *La disparition* (France: Éditions Gallimard, 1969).

on a sixth of an hour trying to string along words without a particular sonant. Suffice to say, applying the Oulipian method using human brain power alone – even with a trusty thesaurus on hand – is far from simple.

Automate that process, however, and suddenly it's easier than snapping your fingers. Viewed in this light, the automation of computational creativity appears to be far less of an accomplishment than adhering to such creative constraints without any technological assistance. While that may be true to some extent, it equally paints a very binary picture of the application of AI in the creative realm – one that depicts two extremes with expressions of human creativity on one end and machine-generated content on the other. It's effectively upon this paradigm that much of the scholarly work at the intersection of artificial intelligence and copyright law is based. It concentrates mostly on the dichotomy between human produced works and what's often referred to as emergent works – those creations that owe their origins entirely to algorithms capable of generating anything from poems<sup>351</sup> and novels,<sup>352</sup> to musical compositions<sup>353</sup> and works of art,<sup>354</sup> all with a certain level of proficiency that would have any human doubting that they were mechanically produced.<sup>355</sup>

In reality, however, there's a vast array of content that falls between these two poles, with the role afforded to artificial intelligence varying across the spectrum. There are those that relegate AI to the role of creative assistant or tool. Some authors use ProWritingAid – an artificially intelligent tool trained on thousands of works of fiction to help them strengthen their writing “with

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<sup>351</sup> See e.g. Robitzski, *supra* note 5.

<sup>352</sup> See e.g. Shoemaker, *supra* note 6.

<sup>353</sup> See e.g. Deahl, *supra* note 7.

<sup>354</sup> See e.g. Prats Quintana, *supra* note 8.

<sup>355</sup> See e.g. Hern, *supra* note 9.

spacing and momentum, dialogue, word choice, and other stylistic issues”<sup>356</sup> to create “‘perfect’ best-selling literary works.”<sup>357</sup> Musicians commonly turn to AI-powered auto-tune programs, not only to mask any off-key singing, but also to produce distinctive vocal styles.<sup>358</sup> Artists use computer-generated imagery, better known under its acronym CGI, to create anything from fractal art to complex three-dimensional virtual worlds, and Academy Award winning films like *Jurassic Park* and *Avatar*.<sup>359</sup> In all of these cases, however, creators remain in control over their productions, never yielding any of their autonomy in the creative process. These kinds of AI programs do little more than endow creators with new-found ways of expressing their ideas and bringing them to fruition, while never breaking the causal connection between an author and her work.

Because they can be analogized to many of the tools that have already received recognition under copyright,<sup>360</sup> these are not the creative uses of artificial intelligence that I address in my dissertation. The ones I tackle rather involve creators surrendering their supremacy over the works of their minds by delegating a number of their creative choices to machines, essentially affording artificial intelligence the role of content contributor. The works I focus on are those that are borne of human creativity mixed with automated input; that owe their origins to both man and machine. These are the instances of creativity that are more difficult to place within the copyright narrative.

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<sup>356</sup> Jennifer Xue, “The Age of the High-Tech Writer: How AI is Changing the Face of Literature” (30 Apr 2018), online: <<https://prowritingaid.com/art/622/The-Age-of-the-High-Tech-Writer%3A-How-AI-is-Changing-the-Face-of-Literature%C2%A0.aspx>>.

<sup>357</sup> *Ibid.*

<sup>358</sup> Robert Brauneis, “Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance” (2014) 17 Tul J of Tech & IP 1 at 28.

<sup>359</sup> Andrew McDonald, “What is CGI (Computer-Generated Imagery) & How Does it Work?” *TheRookies* (April 2020), online: <<https://discover.therookies.co/2020/04/05/what-is-cgi-computer-generated-imagery-how-does-it-work/>>.

<sup>360</sup> These tools are not unlike a camera to a photographer. Copyright has long recognized photography as a form of art as photographers both conceive of their photographs and make creative choices in their creations (See, e.g., *Burrow-Giles Lithographic Co v Sarony*, 111 US 53).

Take, for example, Adam Basanta, a Montreal-based musician who creates sound installations that use a combination of algorithms, microphones, speakers, and a room's acoustics to generate interesting musical compositions. He starts off the process by creating a melodic progression himself, and then uses a Markov chain model to continue that melody. This type of algorithm is stochastic in nature, and is made up of an assortment of rules in the form of a decision tree: go from one note to the next 90% of the time, but skip a note 10% of the time; where you skip a note, play the next note immediately; where you proceed to the next note, you're free to decide how long to wait before playing it. This process introduces a certain element of randomness into the final results, essentially creating variations in rhythm that are further influenced by the acoustics of the room, which determine the time it takes for the sound to travel from the speakers to the microphone.<sup>361</sup>

Both Basanta's and the algorithm's inputs are so interwoven in this process that it's hard to tell which component of the ultimate composition is whose brainchild. The algorithm starts off with a short melody created by Basanta, but the former alters this tune based on a pre-determined set of rules defined by the latter. Although Basanta progressively adjusts the variables of the sound installation until he's happy with the final result, he can never really predict what that will be before the process is complete. Oftentimes, he would not have even considered a number of the combinations generated by the algorithm. In this sense, the contributions of both Basanta and the algorithm are so intertwined that it's difficult to tell where Basanta's input ends and the algorithm's begins, and vice versa. These are the types of collaborations that have been largely overlooked by copyright scholarship, and my dissertation serves to address this disparity.

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<sup>361</sup> Interview of Adam Basanta (18 April 2020).

In this light, I begin this chapter by illustrating how technological advances have amplified the proliferation of AI throughout the creative realm, where musicians, artists and authors alike are increasingly collaborating with artificially intelligent programs in their development of creative works. I proceed by addressing the gap in existing copyright literature in two ways. First, by providing an overview of salient themes already addressed. Second, by illustrating how the binary vision of generative AI that has predominated copyright scholarship has only addressed a limited range of questions that arise from the use of this technology in both literature and the arts. Throughout this process, I simultaneously differentiate the issues already tackled from those surrounding the human-machine collaborations that mark the subject of my thesis. I conclude this chapter by taking my first step in situating these types of works within the copyright narrative.

### *3.1 Everybody's Pickin' Up on That AI Beat: Making Generative AI Available to the Masses*

It all began in 1841, with the advent of the first programmable computer known colloquially as the Analytical Engine. Although the machine itself was developed by Charles Babbage, he built it as more of a sophisticated calculator than what we would now consider a computer. It was rather Ada Lovelace – who worked with him closely – that recognized the potential of its programmable capacity, claiming that the Analytical Engine

might act upon other things besides number, were objects found whose mutual fundamental relations could be expressed by those of the abstract science of operations, and which should be also susceptible of adaptations to the action of the operating notation and mechanism of the engine. Supposing, for instance, that the fundamental relations of pitched sounds in the science of harmony and of musical composition were susceptible of such expression and adaptations, the engine might compose elaborate and scientific pieces of music of any degree of complexity or extent.<sup>362</sup>

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<sup>362</sup> Avery Elizabeth Hurt, *Ada Lovelace: Computer Programmer and Mathematician* (New York: Cavendish Square, 2018) at 69.

Although she had much faith in the capacity of the Analytical Engine, she is equally quite notorious for professing that “[c]omputers will never be creative, for creativity requires *originating* something, and this is something computers just don’t do. Computers do what they are programmed to do, nothing more.”<sup>363</sup> Nevertheless, she wrote the algorithm that served to program the first computing machine, and it was this algorithm that provided the building-blocks for advances in modern artificial intelligence.

It wasn’t until 1950, however, that Lovelace’s pretensions against “thinking machines” would be addressed by renowned computer scientist Alan Turing.<sup>364</sup> Turing did not disagree with Lovelace. For all intents and purposes, machines cannot think – at least not in the way that humans can. What they may be perfectly capable of doing, however, is *imitating* human behaviour. Based on this claim, Turing developed the test that would henceforth be used as a standard for judging a machine’s intelligence. Known as the Turing Test, his proposal was of “an ‘imitation game’ in which an interrogator attempts to determine which of two agents is human and which a machine, based on purely verbal interaction with both. If the interrogator is not able to reliably determine which is human, the machine has passed the test.”<sup>365</sup>

Though on the heels of Turing’s research, the birth of artificial intelligence as a field of study is generally attributed to a two month workshop that took place at Dartmouth College in the summer of 1956,<sup>366</sup> where the term was first coined.<sup>367</sup> The seminar gathered “researchers

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<sup>363</sup> Selmar Bringsjord & David Ferrucci, *Artificial Intelligence and Literary Creativity: Inside the Mind of Brutus, a Storytelling Machine* (New Jersey: Psychology Press, 2013) at xxi.

<sup>364</sup> See Alan M Turing, “Computing Machinery and Intelligence” (1950) 59 *Mind* 433, online: <<https://academic.oup.com/mind/article/LIX/236/433/986238>>.

<sup>365</sup> Stuart Shieber, *The Turing Test: Verbal Behavior as the Hallmark of Intelligence* (Cambridge: MIT Press, 2004) at 7.

<sup>366</sup> Bostrom, *supra* note 49 at 6.

<sup>367</sup> Stuart J Russell & Peter Norvig, *Artificial Intelligence: A Modern Approach*, 3rd ed (India: Pearson Education, 2010) at 17.

interested in automata theory, neural nets, and the study of intelligence.”<sup>368</sup> They proposed an experiment based on “the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it. [Their aim was to attempt] to find how to make machines use language, form abstractions and concepts, solve [the] kinds of problems now reserved for humans, and improve themselves.”<sup>369</sup>

In the nearly seven decades since, the field of artificial intelligence has undergone two periods of extreme hype and high expectations followed by another two periods of setbacks and crushing disappointments, referred to colloquially as AI summers and winters, respectively.<sup>370</sup> Regardless of fluctuations in its progress, however, the advent of artificial intelligence has hailed a new era of computational creativity that has steadily flourished over the past 60 years. AI’s application in this arena has led to progress in the arts, music, and literature, and has even prompted the conception of new genres like electronic pop and generative art, among many others.<sup>371</sup>

But it wasn’t until the recent resurgence of artificial neural networks that the use of this technology became more mainstream in the creative realm. While originally discovered in 1969, the first iterations of these neural nets lacked the computing resources necessary to advance beyond anything primitive.<sup>372</sup> Newly empowered by increases in technological sophistication, however, they became able to learn from the enormous datasets they’re trained on and to increase in

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<sup>368</sup> *Ibid.*

<sup>369</sup> John McCarthy, Marvin L Minsky, Nathaniel Rochester & Claude E Shannon, “A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence” (31 August 1955), online: <<http://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html>>.

<sup>370</sup> Bostrom, *supra* note 49, at 6.

<sup>371</sup> See e.g. Iannis Xenakis, *Formalized Music: Thought and Mathematics in Composition* ed by Sharon Kanach (New York: Pendragon Press, 1992); Chris Garcia, “Harold Cohen and AARON – a 40 year collaboration” *Computer History Museum* (23 August 2016), online: <<https://computerhistory.org/blog/harold-cohen-and-aaron-a-40-year-collaboration/>>; David Cope, “Experiments in Musical Intelligence”, online: <<http://artsites.ucsc.edu/faculty/cope/experiments.htm>>; Kurzweil’s CyberArt Technologies, “Ray Kurzweil’s Cybernetic Poet : HOW IT WORKS”, online: <[http://www.kurzweilcyberart.com/poetry/rkcp\\_how\\_it\\_works.php](http://www.kurzweilcyberart.com/poetry/rkcp_how_it_works.php)>.

<sup>372</sup> Russell & Norvig, *supra* note 367 at 22.

efficiency over time – *without* any human intervention. Rather than having to start from scratch each time they have to solve a new problem, these systems are capable of learning from their past ‘experiences’ and extending that ‘knowledge’ to new problems.<sup>373</sup> They do so, not by relying on programmers to design their decision trees, but rather by gradually building up their own hierarchy of rules as they’re exposed to more and more data.<sup>374</sup>

It’s the power of these newfound AI systems to learn continuously and “to change and adapt to new encounters”<sup>375</sup> that has marked their increasing proliferation throughout society in recent years. With the hype currently surrounding artificial intelligence, it must come as no surprise that we’re well in the midst of an AI summer. We’re now equipped with algorithms that can do anything from translating text into every single one of the world’s languages, to diagnosing patients with various diseases, performing facial recognition – and the list goes on, growing with each passing day. In fact, we’re currently experiencing the longest AI summer that we’ve ever known, and it doesn’t seem to be slowing down in the least.

And the field of AI owes its current success to the exponential growth of the interconnected environments that now characterize modern society. Triggering the creation of “a widespread information infrastructure,”<sup>376</sup> the commercialization of the Internet in the early 1990’s essentially placed unprecedented amounts of data at our fingertips. And the growing number of devices connected to this environment not only render all this data easily accessible to us, but they also

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<sup>373</sup> Bostrom, *supra* note 49 at 10.

<sup>374</sup> du Sautoy, *supra* note 343, at 66.

<sup>375</sup> *Ibid* at 89.

<sup>376</sup> Barry M Leiner, Vinton G Cerf, David D Clark, Robert E Kahn, Leonard Kleinrock, Daniel C Lynch, Jon Postel, Larry G Roberts & Stephen Wolff, “Origins of the Internet” *Internet Society* (1997), online: <<https://www.internetsociety.org/internet/history-internet/brief-history-internet/>>.

contribute to creating *additional* datapoints.<sup>377</sup> With everything from our fridges<sup>378</sup> and other appliances,<sup>379</sup> to our cellular telephones,<sup>380</sup> televisions,<sup>381</sup> cars,<sup>382</sup> watches<sup>383</sup> and even our children's' toys,<sup>384</sup> being linked to the Internet, we're now producing more data in a single day than we ever might have fathomed.<sup>385</sup> And it's this data – known more commonly as Big Data – that makes AI and machine learning possible.

In addition to producing and storing the immense datasets that have contributed heavily to breakthroughs in AI, however, our interconnected environments also make it possible for this technology to become available to the masses. The cost of developing and training AI is very often prohibitive to everyday users, including many artists and authors. They simply don't have access

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<sup>377</sup> Bruce Schneier, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World* (New York: WW Norton & Company, 2015) at 13 [Schneier, *Data and Goliath*].

<sup>378</sup> Donna Tapellini, "Not-So-Smart Samsung Refrigerator Vulnerable to Hacking" *Consumer Reports* (27 August 2015), online: <<https://www.consumerreports.org/cro/topfreezerrefrigerators/smart-refrigerators-privacy->>.

<sup>379</sup> Simone Margaritelli, "The easy way your 'smart' coffee machine could get hacked and ruin your life" *Quartz* (3 February 2017), online: <<https://qz.com/901823/the-easy-way-your-smart-coffee-machine-could-get-hacked-and-ruin-your-life/>>.

<sup>380</sup> Matt Reeder, "Ask an Expert: Stan Matwin on Privacy and Using Smartphones to Track COVID-19" *Dalhousie News* (30 April 2020), online: <<https://www.dal.ca/news/2020/04/30/ask-an-expert--stan-matwin-on-privacy-and-using-smartphones-to-t.html>>.

<sup>381</sup> Steven J Vaughan-Nichols, "FBI Warns About Snoopy Smart TVs Spying on You" *ZDNet* (3 December 2019), online: <<https://www.zdnet.com/article/fbi-warns-about-snoopy-smart-tvs-spying-on-you/>>.

<sup>382</sup> David Booth, "Ransomware: The Future of Car Theft?" *Montreal Gazette* (25 April 2016), online: <<https://www.pressreader.com/canada/ottawa-citizen/20160422/282428463368275>>.

<sup>383</sup> Harsha Vardhan, "Apple iWatch 6: Rumored to Track Sleep, Blood Oxygen Sensor And More" *The Tech Education* (4 May 2020), online: <<https://thetecheducation.com/apple-iwatch-6-rumored-to-track-sleep-blood-oxygen-sensor-and-more/>>.

<sup>384</sup> Emmeline Taylor & Katina Michael, "Smart Toys that are the Stuff of Nightmare" *IEEE Technology and Society Magazine* (March 2016) 8.

<sup>385</sup> Schneier, *Data and Goliath*, *supra* note 377 at 16-7; By the end of 2019, there were 26.66 billion interconnected devices worldwide, and this figure is predicted to reach 75 billion by 2025 (Ana Bera, "80 Insightful Internet of Things Statistics (Infographic)" *SafeatLast* (25 February 2019), online: <<https://safeatlast.co/blog/iot-statistics/#gref>>). Just to put these numbers into perspective: there are 127 *new* devices connected to the Internet *every second* (*ibid*). Data is simply a natural-by-product of all this technology, or, more accurately, "the exhaust of the information age" (Schneier, *Data and Goliath*, *supra* note 377, at 17). By 2010, we had begun generating more data within a single day than we had managed to produce from the beginning of time until the year 2003 (*Ibid* at 18). By 2018 we were creating 2.5 quintillion bytes of data *daily* and that figure is projected to increase to 463 exabytes of data by 2025 (Bernard Marr, "How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read" *Forbes* (21 May 2018), online: <<https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#474a35b060ba>>; Jeff Desjardins, "How Much Data is Generated Each Day?" *Technology* (15 April 2019), online: <<https://www.visualcapitalist.com/how-much-data-is-generated-each-day/>>).

to machines powerful enough to develop and run algorithms, nor do they possess the enormous datasets that these algorithms need to be trained on. The Internet, however, makes it possible to overcome these barriers by allowing those that *do* possess these resources to provision them to users through easily accessible online platforms.

For those artists and authors that have knowledge of coding, the benefits of these online platforms are twofold. First, they host the open-source neural networks that these individuals can adapt in order to harness the power of this technology in their work. Second, these platforms supply creators with powerful virtual machines – outfitted with endless processing power – that they require in order to tweak and run these programs. For those creators that are not well-versed in coding, on the other hand, these platforms host generative AI service offerings that are both intuitive and easy to use. From artists who are familiar with coding, to authors whose knowledge in the field amounts to naught – the sophistication of modern technology has made it such that not one will be deprived of their desire to channel the creative energy of AI in the works of their imagination.

### 3.1.1 Open-Source Neural Networks for Creators Who Can Code

The rise in open-source software over the years has seen individual users increasingly collaborating to build programs that they would have had a difficult time creating solo.<sup>386</sup> Among them are artists, authors and musicians who wish to take advantage of the potential of AI in their creative works but lack the resources necessary to do so. Their ability to access code for neural

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<sup>386</sup> The free and open-source movement – better known under its acronym FOSS – was developed in response to what some considered the unethical by-products of proprietary software, which had long predominated the computer programming industry. The aim of the FOSS movement was to “[subvert] this traditional industry model, by providing access to the original source code for the user. Such access enables further development of the software, amending the existing code or writing new lines of code, for personal or public benefit” (Ian Walden, “Open Source as Philosophy, methodology, and Commerce: Using Law with Attitude” in Noam Shemtov & Ian Walden, eds, *Free and Open Source Software: Policy, Law, and Practice* (Oxford: Oxford University Press, 2013) 1 at 2).

networks through online repositories, like GitHub,<sup>387</sup> GitLab<sup>388</sup> or OpenCV,<sup>389</sup> among many others, makes it possible for them to tweak existing source code to meet their needs with little more than a working knowledge of coding.

Take for example, author Robin Sloan. He taught himself programming language and modified the code of a Recurrent Neural Network (RNN) made available on GitHub by a visiting scientist at Facebook AI research.<sup>390</sup> RNNs “are a powerful set of artificial neural network algorithms especially useful for processing sequential data such as sound [...] or written natural language. [RNNs] include a feedback loop, whereby output [from the first step] is fed back to the net to affect the outcome of [the next step], and so forth for each subsequent step.”<sup>391</sup> Most crucially, RNNs “‘remember’ something about the world, in a loose sense, by modeling the data they are exposed to.”<sup>392</sup> They achieve this feat in a way that produces “dynamic models – i.e. models that change over time – in ways that yield accurate classifications dependent of the context or the examples they’re exposed to.”<sup>393</sup>

Sloan wanted to see what this type of system could do for his writing. His project was inspired by “a vision of typing normally in a text editor and then summoning the help of the RNN with a keystroke.”<sup>394</sup> He specifies, however, that he is “absolutely 100% not talking about an editor that ‘writes for you,’ whatever that means. The world doesn’t need any more dead-eye robo-text. The animating ideas here are augmentation; partnership; call and response. The goal is not to make

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<sup>387</sup> GitHub, online: <<https://github.com/>>.

<sup>388</sup> GitLab, online: <<https://gitlab.com/gitlab-org/gitlab-foss>>.

<sup>389</sup> OpenCV, online: <<https://opencv.org/>>.

<sup>390</sup> Robin Sloan, “Writing with the machine” (May 2016), online: <<https://www.robinsloan.com/notes/writing-with-the-machine/>>.

<sup>391</sup> Chris Nicholson, “Recurrent Networks” *Pathmind* (2019), online: <<https://pathmind.com/wiki/recurrent-network-rnn>>.

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

<sup>394</sup> Sloan, *supra* note 390.

writing ‘easier’; it’s to make it harder. The goal is not to make the resulting text ‘better’; it’s to make it *different* – weirder, with effects maybe not available by other means.”<sup>395</sup>

To accomplish this feat, however, Sloan had to find “non-standard, non-boring datasets”<sup>396</sup> that could train the RNN such that it could be useful within a creative writing setting. To this effect, he used a “corpus [of sci-fi stories] derived from the Internet Archive’s Pulp Magazine Archive: 150MB of *Galaxy* and *IF Magazine*.”<sup>397</sup> Potential copyright issues aside (I’ll discuss those more in chapter 6), he basically created one huge text file by removing all the advertising and noise mixed in with the stories, and even went as far as making this new dataset available online for others to use.<sup>398</sup> This was a grueling process that produced interesting results, which – with Sloan’s limited knowledge on the subject of creating neural networks – likely would not have been possible if it wasn’t for the open source RNN he used as a basis for its creation.

It’s not only lone coders that make their code available via open-source licenses, however. Even tech moguls like Google<sup>399</sup> and IBM<sup>400</sup> have gone this route in recent years. Google Magenta, for example, was founded on the premise “that machine learning can be used to enable and enhance the creative potential of all people.”<sup>401</sup> Its website hosts “demos and apps [that] illustrate the work of many people – *both inside and outside of Google* – [that have built] fun toys, creative applications, research notebooks, and professional-grade tools that will benefit a wide range of users.”<sup>402</sup> Among those applications made by the greater community that are based on Magenta’s

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<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.*

<sup>399</sup> Google Open Source, online: <<https://opensource.google/>>.

<sup>400</sup> Matt Asay, “Why open source could be IBM’s key to future success in the cloud” *TechRepublic* (21 February 2018), online: <<https://www.techrepublic.com/article/why-open-source-could-be-ibms-key-to-future-success-in-the-cloud/>>.

<sup>401</sup> Magenta, “Demos”, online: <<https://magenta.tensorflow.org/demos>>.

<sup>402</sup> *Ibid.*

code is GanHarp, “an experimental musical instrument based on AI-generated sounds,”<sup>403</sup> and Tenori-off, “[a] creative take on a rare electronic sequencer [that uses Magenta’s code] to generate drum patterns when you hit the ‘Improvise’ button.”<sup>404</sup> These are merely two examples of how a single code has been widely transformed by numerous artists to perform fascinating artistic endeavours.

By far the most popular and widely used open-source neural net implementation, however, is Google’s TensorFlow, upon which Magenta itself is based. TensorFlow, which was developed by the Google Brain team, “is an open source library for numerical computation and large-scale machine learning [that] can train and run deep neural networks for handwritten digit classification, image recognition, word embeddings, recurrent neural networks, sequence-to-sequence models for machine translation, [and] natural language processing [...]”<sup>405</sup> As an open-source machine learning framework, TensorFlow has made it much less daunting to dabble in the complex discipline that is deep learning. By making these tools available to musicians, artists, and authors – who lack the resources to develop intricate neural nets autonomously – TensorFlow has been at the heart of much innovation in the world of computational creativity.

Let’s take, for instance, Pindar Van Arman’s latest project, Artronomous. While the earlier iterations of his painting robots generated some phenomenal artwork, Van Arman noticed that its paintings of people were all rather lifeless, featuring empty eyes. He therefore partnered with photographer Kitty Simpson to train a Generative Adversarial Network (GAN) – founded on

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<sup>403</sup> Magenta, “#MadeWithMagenta from the community”, online: <<https://magenta.tensorflow.org/demos/community/>>.

<sup>404</sup> *Ibid.*

<sup>405</sup> Serdar Yegulalp, “What is TensorFlow? The machine learning library explained” *InfoWorld* (18 June 2019), online: <<https://www.infoworld.com/article/3278008/what-is-TensorFlow-the-machine-learning-library-explained.html>>.

Google’s TensorFlow – that would allow his robot to generate more emotive paintings. The reason Van Arman turned to this type of algorithmic architecture is because GANs possess a remarkable ability to imitate data distribution, which means that they “can be taught to create worlds eerily similar to our own in any domain: images, music, speech, prose. They are robot artists in a sense, and their output is impressive – poignant even.”<sup>406</sup>

GANs achieve this feat through two Convolutional Neural Networks (CNNs) that are pitted against one another, hence the adversarial. One of the neural nets is a generator trained to produce output that fools the other neural network, the discriminator, which attempts to differentiate between generated images and real ones from the dataset.<sup>407</sup> By distinguishing between the images, the discriminator pushes the generator to reach its goal of producing “synthetic instances of data that can pass for real data”<sup>408</sup> by providing the adversarial loss – meaning the loss of generated images that don’t come close enough to mimicking the real ones.<sup>409</sup>

Van Arman and Simpson therefore set out to see if the expressive potential of GANs could help their robot produce more sentimental paintings. Simpson has so far taken about 1000 photographs of human faces in black and white, removing all the noise from the background,<sup>410</sup> which have been used to train the GAN to ‘learn’ visual expressions of human emotions. This process ultimately provides the neural network with the building-blocks that “allow it to do something remarkably similar to imagining.”<sup>411</sup> The robot, which is constructed of over two dozen

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<sup>406</sup> Chris Nicholson, “A Beginner’s Guide to Generative Adversarial Networks (GANs)” *Pathmind* (2019), online: <<https://pathmind.com/wiki/generative-adversarial-network-gan>> [Nicholson, GANs].

<sup>407</sup> Yang Chen, Yu-Kun Lai & Yong-Jin Liu, “CartoonGAN: Generative Adversarial Networks for Photo Cartoonization” at 3, online: <[http://openaccess.thecvf.com/content\\_cvpr\\_2018/CameraReady/2205.pdf](http://openaccess.thecvf.com/content_cvpr_2018/CameraReady/2205.pdf)>.

<sup>408</sup> Nicholson, GANs, *supra* note 406.

<sup>409</sup> *Ibid.*

<sup>410</sup> Interview of Pindar Van Arman (30 May 2020).

<sup>411</sup> Artonomous, “The Artists”, online: <<https://artonomo.us/artists>>.

artificially creative algorithms,<sup>412</sup> then paints those visions with a brush on canvas,<sup>413</sup> using the camera that it's equipped with to "step back to analyze the marks [it makes] before making the next brush stroke."<sup>414</sup> The resulting paintings are quite convincingly human.

Not only has TensorFlow enabled the use of machine learning by everyday artists, however, but it has equally facilitated the development of start-ups that likely wouldn't have seen the light of day if they had had to invest in developing their own deep learning algorithms. Among them is AIVA, an artificial intelligence composing emotional soundtrack music.<sup>415</sup> The creators of AIVA used TensorFlow's deep learning framework to train "a deep neural network to understand the art of music composition by reading through a large database of classical partitions written by the most famous composers (Bach, Beethoven, Mozart, etc.). [...] AIVA is capable of capturing concepts of music theory just by doing this acquisition of existing musical works."<sup>416</sup>

It allows its users to compose in pre-defined styles – such as modern cinematic, electronic, or rock – or to compose with influences using songs that they upload to the site, which can even be some of their own work. The composition ultimately generated often requires heavy modifications in order to sound anything like it was professionally made. In this sense, this program acts only as an idea generator. It can help musicians shape new visions and think outside of the box, but it needs to be supervised in order to work efficiently.<sup>417</sup>

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<sup>412</sup> Among them is another one of Google's open source algorithms, StyleTransfer, which is equally based on TensorFlow (Google, "Neural Style Transfer", online: <[https://www.tensorflow.org/tutorials/generative/style\\_transfer](https://www.tensorflow.org/tutorials/generative/style_transfer)>).

<sup>413</sup> Artonomous, *supra* note 411.

<sup>414</sup> *Ibid.*

<sup>415</sup> AIVA, online: <<https://www.aiva.ai/>>.

<sup>416</sup> Nvidia, "AI Composer Creates Music for Films and Games" (16 March 2017), online: <<https://news.developer.nvidia.com/ai-composer-creates-music-for-films-and-games/>>.

<sup>417</sup> AIVA, "Frequently Asked Questions: I am a composer, is AIVA going to replace my profession?", online: <<https://aiva.crisp.help/en/article/i-am-a-composer-is-aiva-going-to-replace-my-profession-1wt6xag/>>.

The greatest thing about AIVA, however, is that it's made available to everyday musicians through a simple Internet connection. In this way, TensorFlow has enabled the creation of AIVA, and AIVA has made its services available to creators who are not well-versed in coding, allowing the latter to generate music hand in hand with artificial intelligence regardless of their lack of technical knowledge. And as I'll discuss in the next section, the increasing availability of these types of services to everyday users through easily accessible online platforms has made it easier than ever to turn to AI for assistance in the development of creative works.

### 3.1.2. Generative AI Services for Creators Who Can't Code

Those musicians, artists, and authors for whom coding is not an option are not left at a disadvantage. In recent years, generative AI services have become available online, essentially empowering creators to draw on this new technology in their pursuit of creative endeavours. This service is available to them in two different formats. The first is through the comfort of their own browsers, where they can easily access AI programs via the Internet. The second is through downloadable program interfaces, which are accessed through the computer's desktop but generally run through virtual machines since any one computer would lack the processing power necessary to do so.

There is a myriad of examples of such service offerings. Deep Dream Generator, for instance, is an online neural network that only requires its users to input an image and play around with a few parameters to wind up with a truly psychedelic twist on their original picture.<sup>418</sup> Another illustration can be found in Google Magenta's standalone program, which is a set of applications that can be downloaded and used to generate variations of drumbeats or melodies based on an

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<sup>418</sup> Deep Dream Generator, online: <<https://deepdreamgenerator.com/>>.

original musical composition.<sup>419</sup> There’s even a piano scribe – available online – which takes recordings of musicians improvising on the piano and uses the power of neural networks to transcribe them into notes.<sup>420</sup>

It has never been so simple to turn to AI for assistance in generating creative works, and that’s exactly what I’m going to demonstrate in the remainder of this section. I took it upon myself to experiment with three different generative AI service offerings. I created a song using Amper Music, I produced images of myself in Pablo Picasso’s distinct style via RunwayML, and I used text-generator GPT-2 – and later ChatGPT – to build on some of my own writing. The following maps out every step of the process and discusses the sophistication of my final results.

#### a. Composing with Amper Music

According to its website, Amper Music is an online service offering “[c]reative AI [that] quickly makes music that fits the exact style, length, and structure [users] want,”<sup>421</sup> which is “[m]ade using [Amper Music’s] proprietary library of live-recorded instrument samples and musician-trained Creative AI.”<sup>422</sup> It’s founded on a rule-based machine learning algorithm, using Amper Music’s machine learning library to compose scores based on specific parameters set by the user. The user then has the freedom to “[interact] with the software by making all the creative decisions based on ideas that the software had generated”<sup>423</sup> – such as changing instruments, tempo, and keys, among others.

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<sup>419</sup> Magenta, “Magenta Studio (Standalone)”, online: <<https://magenta.tensorflow.org/studio/standalone/>>.

<sup>420</sup> Piano Scribe, online: <<https://piano-scribe.glitch.me/>>.

<sup>421</sup> Amper Music, online: <<https://www.ampermusic.com/>>.

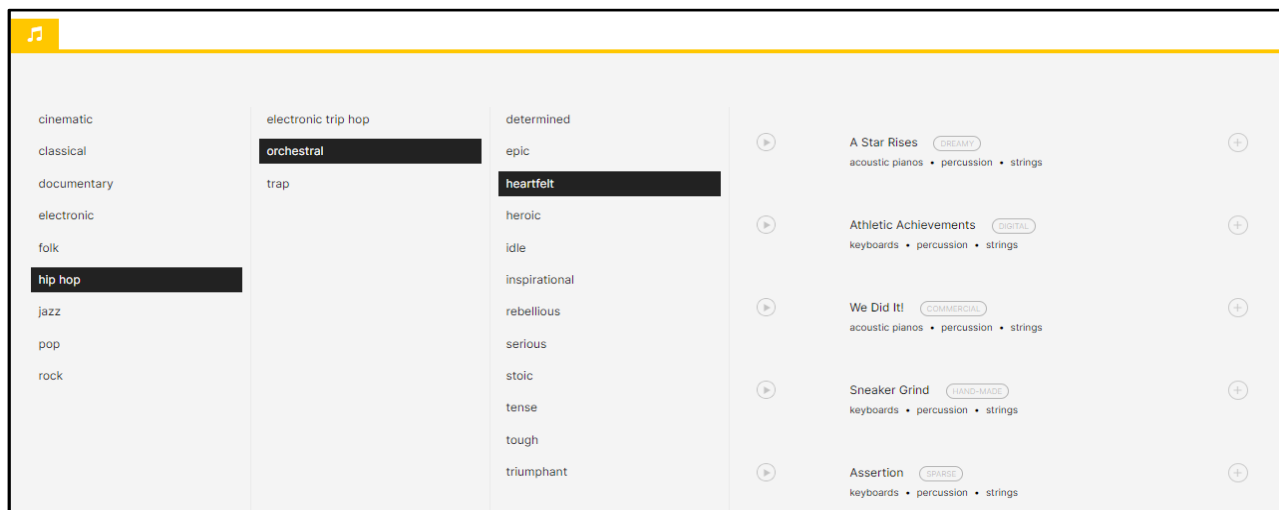
<sup>422</sup> *Ibid.*

<sup>423</sup> Steven Nicholls, Stuart Cunningham & Richard Picking, “Collaborative Artificial Intelligence in Music Production” (2018), online: <<https://dl.acm.org/doi/pdf/10.1145/3243274.3243311>>.

I decided to create an account – which was free of charge – and try it on my own to get a feel for how artists interact with these types of services. I must preface my description of this little experiment by saying that – short of having learned how to play the saxophone for a couple of years in high school – I have zero musical aptitude. I therefore thought it would be interesting to see the type of score that a layperson could create using this service.

Basically, Amper Music provides you with a series of choices you can make about the length, style, and even the *feel* of the music prior to generating a track. I started off with choosing the score’s duration – I could either type it in manually and have the program generate music independently or upload my own video or audio and have the generative AI use that as a basis for the score it produces. I chose the latter option. Not wanting the notes of an existing song to influence the music produced by this generative AI, however, I decided to record myself singing a song acapella (and very off-key) – my daughter’s current favourite, Disney’s Pocahontas “Colours of the Wind” – which I then inputted into the program by dragging it from the file on my desktop into the allotted box in my browser.

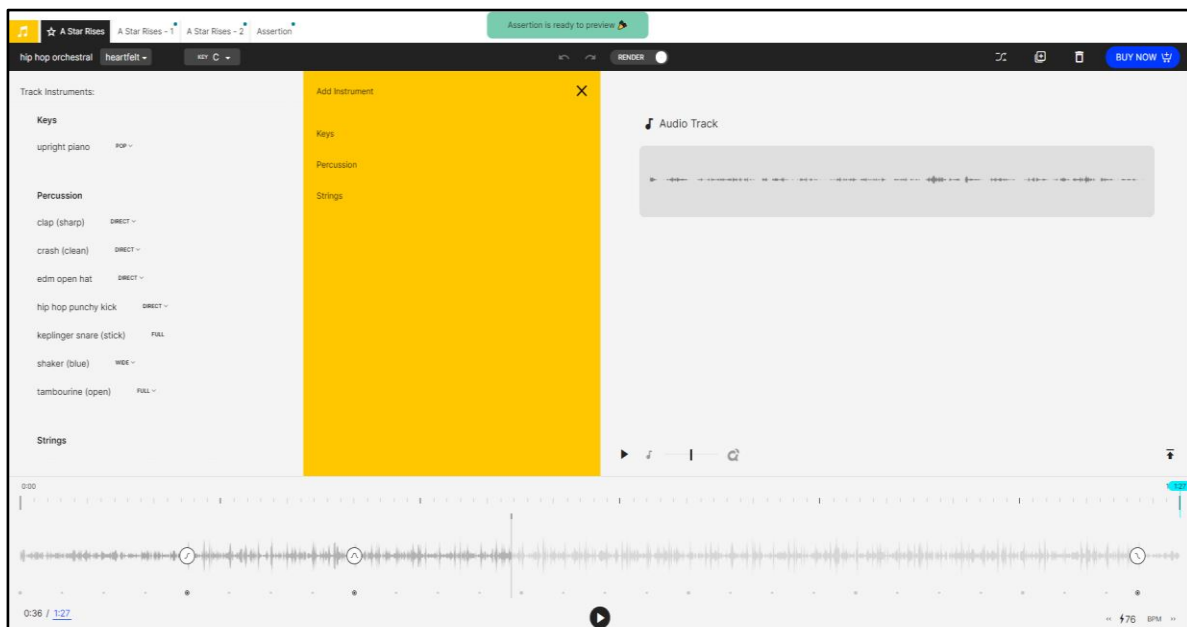
Figure 3.1  
Choosing Score Parameters in Amper Music



Upon clicking next, the ensuing round of choices (see Figure 3.1) required me to first indicate the genre of music I wanted – I went with hip hop. I then had to choose which style of hip hop, so I picked orchestral. The next decision I had to make was what kind of emotion I wanted the score to exude. I opted for heartfelt, because there can never really be enough heartfelt songs in the world! I was then finally presented with my last option: a choice of five musical scores that I could get Amper’s algorithm to compose. I selected “A Star Rises.”

After the song was generated, I clicked on a little yellow tab on the upper left quadrant of the screen, which took me to the editing page that enables users to add layers of different types of instruments in different styles (see Figure 3.2). It was at this point that I listened to the song produced by Amper Music’s algorithm based on my initial track, and it was pretty impressive. Perhaps a touch generic, but I could certainly foresee a musician getting inspired by this song, and maybe adding a few layers of instruments to the base track to create an interesting musical composition with some definite earworm potential.

*Figure 3.2  
Creative Editing in Amper Music*



After the editing process is complete, the user has the option of paying a one-time fee to purchase a track license for the score created. There are several options of tiers available for different types of users, be they everyday users or enterprises, but the costs most applicable to musicians would be \$29 for a personal license<sup>424</sup> or \$399 for a branded content license,<sup>425</sup> depending on the type of musician they are. While “[a]ll licenses [...] are royalty-free, permit global distribution of content, and are valid in perpetuity,”<sup>426</sup> the copyright still appears to be held by Amper Music itself.

#### b. From Camera to Picasso Style Painting

In addition to browser-based user interfaces, generative AI software is also available for download through some service providers. RunwayML is one intriguing example – it’s a platform for publishing and running open-source machine learning models that perform a variety of tasks and can be used in creative projects.<sup>427</sup> It has models to remove backgrounds from photos or estimate the depth of images, as well as ones that enable artists to generate photorealistic images or transform photographs into cartoons. This platform equally presents users with the option of training their own machine learning models using images of their paintings and photographs or even full-length texts of their own written works. In this way, the algorithm can ‘learn’ their particular style and generate images or written prose based on these parameters.

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<sup>424</sup> According to Amper Music’s Website, “[t]his tier is meant for your personal or educational project needs. The licensing does not cover ad spend or promotions. For example, a video made as a hobby” (Amper Music, “FAQ”, online: <<https://www.ampermusic.com/faq/>>).

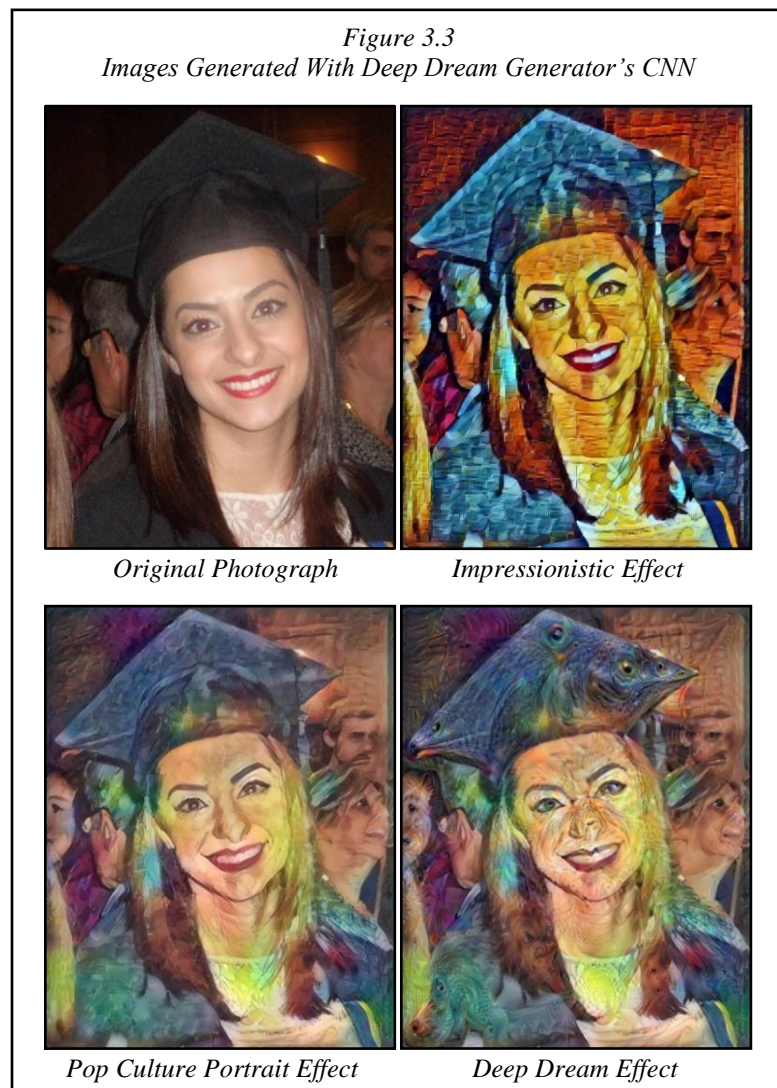
<sup>425</sup> According to Amper Music’s Website, “[t]his tier is meant for professional projects that will be posted on your own social channel or website and can be supported with an ad spend. For example, a YouTube video on your channel” (*Ibid.*)

<sup>426</sup> *Ibid.*

<sup>427</sup> RunwayML, “Machine Learning for Creators,” online: <<https://runwayml.com/>>.

Differently from most desktop software, however, RunwayML requires an Internet connection to function because “[m]any models require computational power beyond what [a single] machine can provide.”<sup>428</sup> As such, most models need to run remotely, which “means that [users are] running [their] selected model on a fast [Graphics Processing Unit] enabled computer in Runway’s cloud infrastructure.”<sup>429</sup> Moreover, contrary to the above described websites that can be used free of charge, this one offers a measured service – charging between \$0.05 and \$0.005 depending on how the platform is being used. Despite being accessible directly from users’ desktops, they nevertheless connect to a virtual machine in order to be able to use these services.

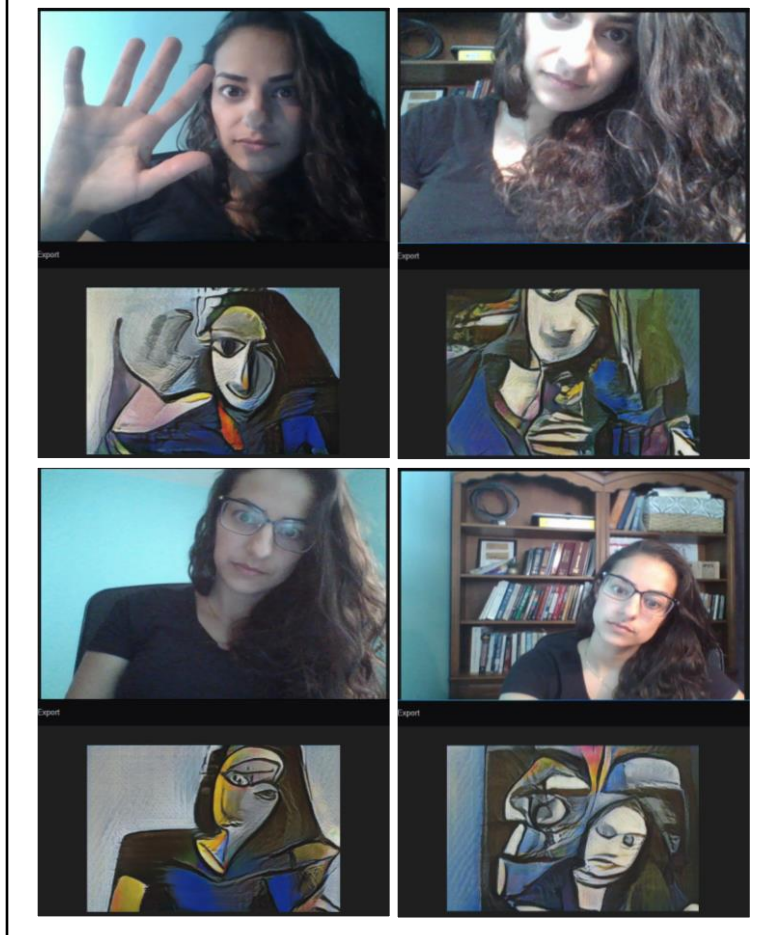
With the \$10 sign-up promotion, I was able to test out one of the many GANs hosted on RunwayML’s platform. They range from ones trained on images of tattoos and pizzas, to others taught using architectural wonders, but I chose one that “repaints



<sup>428</sup> RunwayML, “Run a Model in RunwayML” *YouTube* (23 August 2019), online: <<https://www.youtube.com/watch?v=db1USOwbrPQ>>.

<sup>429</sup> *Ibid.*

Figure 3.4  
 Images Generated with Adaptive-Style-Transfer



images in the styles of famous painters.”<sup>430</sup> Entitled ‘Adaptive-Style-Transfer,’ this algorithm takes a novel approach to rendering images in a particular style. Normally, a single CNN<sup>431</sup> is used to achieve this feat. The problem with this approach, however, is that it does little more “than enhance the photo patterns with surreal effects,”<sup>432</sup> merely superficially altering its appearance (see Figure 3.3).<sup>433</sup>

By harnessing the power of GANs to pit two CNNs against one

another, on the other hand, Adaptive-Style-Transfer is capable of producing remarkably transformational results (see Figure 3.4). This GAN was trained on hundreds of images in the styles of different famous painters such that its generator CNN is able to *independently* produce pictures in those styles in a way that satisfies its discriminator CNN. Most notably, it erases nearly

<sup>430</sup> See Artsiom Sanakoyeu, Dmytro Kotovenko, Sabine Lang & Björn Ommer, “A Style-Aware Content Loss for Real-time HD Style Transfer” (28 July 2018), online: <<https://arxiv.org/pdf/1807.10201.pdf>>.

<sup>431</sup> See above, p. 114.

<sup>432</sup> Sanakoyeu et al, *supra* note 430.

<sup>433</sup> The images in Figure 3.3 were generated using Deep Dream Generator’s CNN (see above, p. 116).

all traces of the input image, rather than merely *superimposing* those styles on any given photograph.

To use it, I first needed to decide whether I wanted to upload a picture or turn on my camera. Wanting to see how it would adapt to various movements, I chose the latter option. I then had to select the painter whose style I wanted my images to emulate. I went with Picasso and then clicked ‘run remotely.’ The results were truly fascinating, with the images generated not only adapting to each of my poses but being entirely transformed by even the smallest movement or adjustment. Something as simple as removing my glasses, putting my hair down as opposed to leaving it up, or changing backgrounds, offered additional ‘shapes’ that the GAN interacted with and completely transformed – whether it’s the volume of my hair in the second image, which was reshaped into what appears to be a staircase with a bouquet of flowers at its precipice, or my book-filled shelves in the last image, which were distorted into what seems like a warped figure.

What’s truly intriguing about these particular uses of generative AI is that artists often use them to produce images with interesting effects that they then manually paint on canvas.<sup>434</sup> In this sense, they use these platforms as ones off which they can bounce ideas and come up with exciting new illustrations that they may otherwise not have thought of on their own, essentially infusing some newfound creativity into their work. Thus, rather than being generators of “stylistically consistent works,”<sup>435</sup> these platforms help artists break free from the monotony of their particular style, by introducing a fresh perspective on what might otherwise have been just another generic creation.

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<sup>434</sup> AI Artists, “Generative Art & Design Guide: Examples, Software and Tools”, online: <<https://aiartists.org/generative-art-design>>.

<sup>435</sup> Bridy, Coding Creativity, *supra* note 18 at para 7.

### c. Creative Writing with OpenAI’s Text Generator

Online platforms for text-generation also serve a similar purpose – helping authors break out of their writers’ block by having AI assist them in building on their prose in ways that they would have had difficulty fathoming. One of the first text-generating algorithms I experimented with was OpenAI’s GPT-2, ChatGPT’s predecessor, which was renowned for having learned some new skills entirely on its own. As its creators noted, “[w]hile GPT-2 was only trained to predict the next word in a text, it surprisingly learned basic competence in some tasks like translating between languages and answering questions. That’s without ever being told that it would be evaluated on those tasks.”<sup>436</sup>

GPT-2’s ability to do so was a direct result of an intriguing AI architecture called a transformer, which is a neural network that combines two types of algorithms. On the one hand, it employs a CNN, which learns from images or texts by assigning a weighted importance to various aspects or objects within the input such that it can differentiate one from the other.<sup>437</sup> On the other hand, it uses attention mechanisms, which have been revolutionary for natural language processing models. These mechanisms basically create matrices<sup>438</sup> that make it possible to calculate the *relationships* between words in a sentence by quantifying “the context that the sentence supplies, and [identifying] which other words supply the *most* context with regard to the word in question.”<sup>439</sup> This process allows these algorithms to generate sentences that actually make sense

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<sup>436</sup> OpenAI, “Talk to Transformer”, online: <<https://talktotransformer.com/>>.

<sup>437</sup> Sumit Saha, “A Comprehensive Guide to Convolutional Neural Networks – the ELI5 way” *Towards Data Science* (15 December 2018), online: <<https://towardsdatascience.com/a-comprehensive-guide-to-convolutional-neural-networks-the-eli5-way-3bd2b1164a53>>.

<sup>438</sup> In this context, a matrix is “a rectangular array of quantities or expressions in rows and columns that is treated as a single entity and manipulated according to particular rules” (Google Dictionary, “matrix”, online: <<https://www.google.com/search?q=definition+of+matrices&oq=definition+of+matrices&aqs=chrome..69i57j0l7.2591j0j4&sourceid=chrome&ie=UTF-8#dobs=matrix>>).

<sup>439</sup> Chris Nicholson, “A Beginner’s Guide to Attention Mechanisms and Memory Networks” *Pathmind* (2019), online: <<https://pathmind.com/wiki/attention-mechanism-memory-network#rnn>>.

without having to be submitted to a supervised learning process – meaning that it’s not necessary for a human to review and rate each one of the algorithm’s outputs to inform its learning process.

This had me wondering how well this platform could write bits of my dissertation for me. So, I made my way to the website, typed a sentence into the text box provided, and clicked complete text. *Text generating algorithms have been invaluable to authors in recent years*, I wrote. The algorithm’s output was something entirely unrelated that had to do with the use of genre descriptions in scientific journals. I therefore clicked on complete text once again, only to receive another couple of paragraphs on a completely different subject. Third time’s a charm, however, and here’s what I ended up with:

They have extended the universe of text that is accessible by professional and amateur writers alike. The present book focuses on combining text-generating algorithms with high-performance computing to improve text generation.

The book describes several text-generating methods including fixed-point cost matrix factorization and gradient-based greedy approaches, and also covers text version algorithms that use an autograd method.

The book presents a set of text-generating algorithms, and an empirical study of their effectiveness, for algorithms developed in the last few years.

While that first sentence could very well be included somewhere in my dissertation, the remaining paragraphs didn’t quite fit the context I was going for (I wrote this whole thing on my own in the end, in case you’re still wondering). Since GPT-2 didn’t cut it for text-generation that could be used for the purposes of academic writing, I decided to try a more creative writing approach: *“I’ve had it,” she said, as she flung her half-eaten apple across the room.* On its first try, the algorithm completed my scenario:

I spotted a yellow Post-It next to my chair, and quickly nibbled on a piece of cornflake-crusting chocolate chip bread.

“No, that one’s mine,” said Sara, with a sweeping gesture to the non-existent original.

“Sara, these are just the usual treats for the anniversary,” I explained.

“Yeah, well, maybe not that usual!”

“Sure it’s usual,” I added, under my breath.

“No, no, it isn’t,” she insisted, defending her home-cooked meals.

I don’t know that this exchange would naturally follow from the line I fed the platform, but that may very well be the point of such a tool for authors – helping them discover alternative options for their writing, while still requiring them to tweak and change it to fit into the desired context.

GPT-2’s replacement by ChatGPT, however, has me questioning how much tweaking might really be necessary anymore. The differences between the two are palpable. When met with a somewhat adapted prompt to the one I fed GPT-2, ChatGPT produced text that could easily have been included in my introduction at the very least. *Write an academic article about how text generating algorithms have become invaluable to authors in recent years*, I instructed. “The emergence of text generating algorithms,” ChatGPT responded, “has revolutionized the writing landscape, offering authors a powerful toolkit to augment their creative process.” “Text generating algorithms provide authors with a rich source of inspiration by generating ideas, plot points, and character concepts,” it continued. “Authors often struggle with the initial stages of writing, but text generating algorithms can assist by generating outlines and rough drafts. [They] can help authors structure their work and provide a starting point for further refinement.” Although I’d like to think that my own writing is somewhat more engaging than that of ChatGPT, some of this output is eerily similar to my opening lines of this very section.

But it wasn’t until I plugged my second prompt into ChatGPT that I really experienced shock and awe at its level of sophistication. *“I’ve had it,” she said, as she flung her half-eaten apple across the room*, I wrote. Rather than building on my sentence alone, as did GPT-2, ChatGPT constructed an entire short story around my prompt:

Sarah sat at her desk, her face etched with frustration as she stared at the blank computer screen. Her writing project had hit a roadblock, and she couldn't find the inspiration to move forward. Sensing her exasperation, her roommate Emily entered the room.

"I've had it," Sarah said, her voice filled with irritation, as she flung her half-eaten apple across the room. The fruit sailed through the air, bouncing off the wall with a resounding thud.

Emily's eyes widened in surprise as she watched the apple's trajectory. "Whoa, easy there, Sarah. What's got you so worked up?"

Sarah slumped back in her chair, her hands resting on her temples. "I just can't seem to get my thoughts in order. This story is going nowhere, and I'm running out of ideas."

Emily crossed the room and perched on the edge of Sarah's desk, offering a sympathetic smile. "Writer's block can be a tough nut to crack, but remember, even the juiciest apples have their core. You'll find your way through it."

Sarah sighed, her frustration mingling with a flicker of hope. "I hope so, Emily. I need to find my inspiration again."

As the half-eaten apple lay forgotten on the floor, Sarah and Emily huddle together, discussing plot twists, character development, and the beauty of the writing process. With renewed determination, Sarah picked up her pen and began to weave her words once more, ready to conquer the challenges ahead.

I don't know about you, but I could certainly see myself continuing to read a novel that opens in this fashion. It's well written, intriguing, descriptive, and possesses all the elements necessary to keep readers engaged.

If this section has made anything apparent, it's that musicians, artists, and authors collaborating with generative AI systems can choose to cede as little or as much of the creative process to the machine as they wish. Sloan and Van Arman's algorithms can be used as creative assistants or as automated generators. Musicians can use Amper Music's algorithm to independently generate a score, or they can be inspired by the tune produced and modify it extensively until it sounds nothing like the original algorithmic creation. They can even go as far as producing exciting musical installations around these compositions, similar to those of Adam Basanta, by creatively incorporating all kinds of media into their performance. The use of artificial

intelligence in the creative realm is both varied and fascinating, eliciting a whole host of works that could be viewed as true collaborations between humans and machines. Contrary to the binary paradigm depicted in much of the existing copyright scholarship, to which I will now turn, there is therefore no defined line between creative works generated by humans and those produced by machines.

### 3.2 *Don't Know if I'm Inspired or Intrigued, But I'm Somewhere in the Zone: The Intersection Between Copyright and Artificial Intelligence*

We currently find ourselves at the dawn of the fourth industrial revolution. If history has taught us anything, it's that technological change is accompanied by much societal upheaval. The field of copyright has been no stranger to the turmoil resulting from such innovations. From the printing press to the Internet and everything in between, the methods used to develop and disseminate creative works have vastly evolved over the centuries. With each shift, our copyright ideals have been called into question and widely debated. The introduction of artificial intelligence has been no exception; copyright must once again adapt itself in response to a new technology that impacts this regime in different ways.

The discussion surrounding the intersection between artificial intelligence and copyright goes as far back as the mid 1960's, when the US Register of Copyrights was confronted with its first-ever computer-generated work.<sup>440</sup> This event triggered a discussion surrounding how copyright ownership should be allocated for such novel 'works'<sup>441</sup> – an issue that has received

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<sup>440</sup> See US, Copyright Office, *Sixty-Eighth Annual Report of the Register of Copyrights* (Washington, DC: US Government Printing Office, 1966) at 5.

<sup>441</sup> See Samuelson, *Allocating Ownership*, *supra* note 18; US, National Commission on New Technological Uses of Copyrighted Works, *Final Report* (Washington, DC: US Government Printing Office, 1979); US Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* (Washington, DC: US Government Printing Office, 1986) at 69-73; Karl F Milde, Jr, "Can a Computer Be an 'Author' or an

renewed attention in light of modern advances in machine learning.<sup>442</sup> The current scholarly debate on the subject revolves around three main themes. The first addresses whether machine-generated content can be considered original in the sense copyright accords to the term. The second line of inquiry focuses on whether such content is or ought to be eligible for copyright protection. The third concentrates on whether machines being trained on copyrighted datasets amounts to infringement, particularly where those algorithms are then mobilized to produce creative content.

### 3.2.1 It's Time to See What I Can do, To Test the Limits and Break Through: Artificial Intelligence, Creativity, and Copyright Protection

Nearly all of the scholarly articles that examine AI's creative potential refer strictly to content that is independently generated by a machine, with no human input. On this subject, Bruce Boyden notes that artificial intelligence “[destabilizes] copyright law’s approach to authorship by obscuring the connection between the creative process and the work.”<sup>443</sup> Some scholars adhere to the view that this “threatens originality doctrine’s assumption that almost everything is adequately creative”<sup>444</sup> since “one can no longer assume that any variations in a work stem from a human author’s hand.”<sup>445</sup> Others question, however, whether machine-generated content can be considered as sufficiently original to qualify for copyright protection.

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‘Inventor’?” (1969) 51 J Pat Off Soc’y 378; Timothy L Butler, “Can a Computer Be an Author? Copyright Aspects of Artificial Intelligence” (1982) 4 Comm/Ent L Symp 707.

<sup>442</sup> See e.g., Ginsburg & Budiardjo, *supra* note 64; Grimmelmann, Computer-Authored Work, *supra* note 18; Denicola, *supra* note 18; Yanisky-Ravid & Velez-Hernandez, *supra* note 18; Bridy, Coding Creativity, *supra* note 18; Kaminski, *supra* note 26; Annemarie Bridy, “The Evolution of Authorship: Work Made by Code” (2016) 39 Colum JL & Arts 395 [Bridy, Evolution of Authorship]; Bruce E Boyden, “Emergent Works” (2016) 39 Colum JL & Arts 377; Jean-Marc Deltorn & Franck Macrez, “Authorship in the Age of Machine Learning and Artificial Intelligence” (2018) Center for Int’l Intellectual Prop Studies, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3261329](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261329)>.

<sup>443</sup> Boyden, *ibid* at 380.

<sup>444</sup> Kaminski, *supra* note 26 at 603.

<sup>445</sup> *Ibid*.

Pamela Samuelson, for example, maintains that copyright's low originality threshold makes it such that any machine that independently makes choices in its output could be considered original, but only in the limited sense of the content owing its origins to the machine.<sup>446</sup> Similarly, Kirk Sigmon advances that a machine's output may be considered original inasmuch as it qualifies as an independent work, since an "algorithm cannot deliberately or accidentally duplicate copyrighted works unless programmed to do so."<sup>447</sup> He notes, however, that an independent creation is not sufficient to import originality. To be original, a machine must be capable of "intelligently [generating] a poem from a dictionary list of words using various evaluative subalgorithms to determine the quality of a sentence or phrase."<sup>448</sup> An algorithm that "blindly generates every possible permutation of a type of creative work"<sup>449</sup> in a purely mechanical fashion,<sup>450</sup> on the other hand, cannot possibly meet copyright's originality threshold.

In a sense, this line of reasoning maintains that some measure of skill and judgment must be present for machine-generated content to be considered original, effectively approaching the Canadian definition of the term.<sup>451</sup> However, whereas Sigmon seems to believe that algorithms can carry out these tasks, not all scholars necessarily agree. James Wagner, for instance, questions whether machines "can be said to actually be applying skill or judgment, or merely imitating skill and judgment based on the programming it initially acquired from the skill and judgment of the programmer."<sup>452</sup> In support of his position, he invokes the "Chinese room argument," which "posits

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<sup>446</sup> Samuelson, *Allocating Ownership*, *supra* note 18 at 1199.

<sup>447</sup> Kirk Sigmon, "How to Kill Copyright: A Brute-Force Approach to Content Creation" (2013) 14 *Wake Forest J Bus & Intell Prop L* 26 at 44; see also Yanisky-Ravid, *Generating Rembrandt*, *supra* note 58.

<sup>448</sup> Sigmon, *ibid* at 46.

<sup>449</sup> *Ibid*.

<sup>450</sup> Woodrow Barfield, "Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars" (2006) 39 *Akron L Rev* 649 at 665.

<sup>451</sup> *CCH Canadian Ltd v Law Society of Upper Canada*, *supra* note 45.

<sup>452</sup> James Wagner, "Rise of the Artificial Intelligence Author" (2017) 75 *Advocated (Vancouver)* 527 at 531.

that an AI program [...] always lacks understanding of the meaning of the output it is creating, as it lacks the ability to assign values or judgment to the symbols it processes.”<sup>453</sup>

Not all scholars, however, see this possible scenario as negating the copyright protection of machine-generated content. Annemarie Bridy, for example, suggests that as long as algorithmic output can mimic human creativity such that it’s impossible for us to differentiate between the two, it’s safe to say that it’s creative or at least exhibits creativity in a sense that can be protected under copyright.<sup>454</sup> Jane Ginsburg and Luke Budiardjo, on the other hand, caution against “[reasoning] backward from the apparent equivalence of the output to assume equivalence of the creative processes.”<sup>455</sup> According to them, “[a]ny apparent ‘creativity’ in a machine’s output is directly attributable either to the code written by the programmers who designed and trained the machine, or to the instructions provided by the users who operate the machine.”<sup>456</sup> In this sense, the authors maintain that (with few exceptions) machine-generated content is entitled to copyright protection, not because of the apparent creativity of its output, but rather because the creative process has been defined by the human who created or used the machine and the development of that process is what remains of import to copyright law.

In evoking that the execution of a creative work necessarily depends on a defined method, this position neglects to consider how the incorporation of a machine into the creative process affects *human* creativity in the sense that goes beyond mere procedure and actions. Ginsburg and Budiardjo raise the interesting point that creators’ initial conception of a work can change over time as a result of certain unforeseeable forces – like a lightning bolt at the exact moment a

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<sup>453</sup> *Ibid.*

<sup>454</sup> Bridy, *Evolution of Authorship*, *supra* note 442 at 399.

<sup>455</sup> Ginsburg & Budiardjo, *supra* note 64, at 402.

<sup>456</sup> *Ibid.*

photograph is shot – without their lack of anticipation necessarily detracting from their creativity in the end result. This analogy, however, does not intuitively superimpose itself to situations where creators intentionally turn to artificially intelligent programs to assist in their development of creative works. In this light, an additional investigation into whether or how human authors’ collaborations with machines ought to affect the originality that inheres in a work is necessary, and my dissertation fills this gap in existing literature.

### 3.2.2 Till We Find Our Place on the Path Unwinding: Copyright Protection of Machine-Generated Content

One of the most impactful lines in Samuelson’s oft-cited article is that “[o]nly those stuck in the doctrinal mud could even think that computers could be ‘authors.’”<sup>457</sup> In other words, demonstrations of originality don’t necessarily import authorship. As Ginsburg and Budiardjo point out, however, the right question under the circumstances is not whether machines can be authors, but rather “[i]f machines are not the ‘authors’ of their outputs, then one must ask whether the humans who design and operate those machines are the authors of those outputs.”<sup>458</sup> Further, as James Grimmelmann suggests, “[i]f an author, for her own convenience, decides to automate some of the steps by programming a computer, copyright should not look any less generously upon her.”<sup>459</sup>

In this regard, a variety of approaches have been suggested through which copyright for machine-generated content could be attributed to programmers or users, or jointly to both of them.<sup>460</sup> For some authors, this determination will turn on the extent of each of their contributions

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<sup>457</sup> Samuelson, *Allocating Ownership*, *supra* note 18 at 1200.

<sup>458</sup> Ginsburg & Budiardjo, *supra* note 64, at 408.

<sup>459</sup> Grimmelmann, *Computer-Authored Work*, *supra* note 18 at 408.

<sup>460</sup> See e.g. Hedrick, *supra* note 18; Kasap, *supra* note 18; Brown, *supra* note 18; Vasconcellos Grubow, *supra* note 18; Lim, *supra* note 18; Hristov, *supra* note 18; Racine, *supra* note 18; Denicola, *supra* note 18.

to the machine's output. For example, Evan Farr considers that where "the user has little or no control over the final output, the user is not the author because it is not the user's idea being expressed. Although the user has the idea of producing a work at a given point in time, all the elements that go into the finished work are supplied by the programmer and arranged by the program."<sup>461</sup> As such, he maintains that because the programmer "is the one who supplies the vocabulary lists and the grammatical and syntactical rules that enable the program to produce its output,"<sup>462</sup> then copyright should subsist in the programmer.

Other scholars who have followed the same logical path as Farr reach a different conclusion, however. In John Haugeland's view, despite the programmer having supplied the machine with the tools it requires to create, if the content created cannot be *predicted* by the programmer then there is no basis upon which copyright should subsist in that individual for the machine-generated content.<sup>463</sup> In a similar vein, Bruce Boyden suggests that this determination should stem from whether a user or programmer is able to foresee what content will be generated by the machine, such that the author can establish that it "includes a meaning or message that the author wishes to convey to his or her audience."<sup>464</sup>

Conversely, Samuelson claims that copyright should subsist in the user of the machine. Her rationale is based primarily on a utilitarian argument. In effect, she maintains that the programmer will have already received some reward from the user enabling this individual to use the program, either through purchase or license agreement. As such, it is thus "not unfair in these circumstances to give some rights to a person who uses the work for its intended purposes of

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<sup>461</sup> Farr, *supra* note 18 at 74.

<sup>462</sup> *Ibid* at 73.

<sup>463</sup> John Haugeland, *Artificial Intelligence: The Very Idea* (Cambridge: MIT Press, 1985) at 12.

<sup>464</sup> Boyden, *supra* note 442, at 393.

creating additional works.”<sup>465</sup> Building on this position, Bridy asserts that the work made for hire exception could be extended to enable copyright protection of such material to be enjoyed by the person who undertakes the arrangements necessary for the work’s creation,<sup>466</sup> essentially leading to a similar result as that established in several common law countries through legislation.<sup>467</sup>

That said, Samuelson does specify one caveat to her position that copyright ought to subsist in the machine’s user: any work generated consisting of a substantial amount of the program’s original code should either be considered as a ‘copy’ or a ‘derivative work’ of the program itself, thus instilling the *programmer* with the right to control its dissemination.<sup>468</sup> Aside from this exceptional circumstance, she suggests that, given the low threshold for originality, “there would seem no insuperable difficulty with designating the user of a generator program as the author of a work generated by the program even if all the user did was type the word ‘compose.’”<sup>469</sup>

Ginsburg, on the other hand, holds the opposite view, essentially cautioning against the vanishing principle of authorship. According to her,

If the human intervention in producing these outputs does not exceed requesting the computer to generate a literary, artistic or musical composition of a particular style or genre, one may properly consider these works to be “computer-generated” because the human users do not contribute sufficient “intellectual creation” to meet minimum standards of authorship under the Berne Convention. Offline, merely giving a command does not make one an ‘author’: Pope Julius II may have commissioned the painting of the ceiling of the Sistine Chapel; from a Berne perspective (at the very least), the author of the frescos remains Michelangelo. Were a future Julius IV to instruct a computer to interrogate its comprehensive

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<sup>465</sup> Samuelson, Allocating Ownership, *supra* note 18 at 1203; see also Denicola, *supra* note 18.

<sup>466</sup> Bridy, Evolution of Authorship, *supra* note 442 at 400; see also Kaminski, *supra* note 26 at 602.

<sup>467</sup> See, for e.g. New Zealand Copyright Act 1994 cl 5(2)(a) (N.Z.); United Kingdom Copyright, Designs and Patents Act, 1988, c 1, ss 9(3); Hong Kong Copyright Ordinance (2007) Cap 528, ss 11(3); Indian Copyright Act, ss 2(d)(vi), Acts of Parliament, 1957.

<sup>468</sup> Samuelson, Allocating Ownership, *supra* note 18 at 1192.

<sup>469</sup> *Ibid* at 1203.

database of religious art to devise and paint a sequence of Old Testament scenes, that Julius would no more be the author of the output than was his forebear.<sup>470</sup>

In light of this reasoning, she maintains that – at least for the purposes of international copyright commitments – “Berne members incur no obligation to protect purely computer-generated works even if their countries of origin choose to cover them by copyright.”<sup>471</sup>

The approaches discussed so far are intriguing, but as Daniel Gervais points out, they all create a binary paradigm where “[e]ither the machine is seen as a mere tool for a human user, in which case the user is the author of any copyrightable subject matter produced; or the machine only generates content as it had been programmed to do, so that the programmer is considered the author of this (predictable) output.”<sup>472</sup> In light of the increasing sophistication of machine learning, however, Gervais advances that this “paradigm is a poor reflection of the technological picture painted by AI because AI machines have a degree of autonomy. [...] The automated decision-making feature of deep learning machines, in contrast to the two sides of the old paradigm, adds unpredictability – but not randomness – and in doing so it breaks the causal link between humans (the author of the code or the user of the machine) and the output.”<sup>473</sup>

Gervais essentially illuminates an important gap in the literature that had long predominated scholarly debates at the intersection between copyright and AI. They were characterized by the widespread view that, in light of machines’ capacity to produce creative works

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<sup>470</sup> Jane C Ginsburg, “People Not Machines: Authorship and What It Means in the Berne Convention” (2018) 49 IIC 131 at 134 [Ginsburg, People Not Machines].

<sup>471</sup> *Ibid* at 135; see also Garrett Huson, “I, Copyright” (2018) 35:2 Santa Clara Comp & High Tech LJ 54 (advocating for placing machine-generated content in the public domain as machines lack the necessary intent to create works of authorship); Mizrahi, Faux-riginality, *supra* note 54 (similarly arguing for the inclusion of machine-generated content within the public domain, but rather from the perspective of machines being unable to participate in the social dialogue).

<sup>472</sup> Daniel Gervais, “The Machine as Author” (2020) 105 Iowa Law Review 2053 at 2069 [Gervais, Machine as Author].

<sup>473</sup> *Ibid*.

that are indistinguishable from those of humans, machine-generated content should – one way or another – be entitled to copyright protection because it ostensibly satisfies copyright’s low originality threshold. What few scholars did, however, is seriously contemplate whether these imitations of authorship are the types of works that copyright even *ought* to promote in light of the inherent characteristics of copyright authors. Even Ginsburg, in her eloquent opposition to the prevailing view, doesn’t quite address *why* she thinks these works shouldn’t enjoy copyright protection.<sup>474</sup>

It wasn’t until Carys Craig and Ian Kerr’s article<sup>475</sup> that this gap in the literature was addressed. While not all scholars will agree with their underlying view, they provide a coherent basis for their rejection of the copyrightability of machine-generated content. Their position is based on what an author must *be* rather than what an author must *do*.<sup>476</sup> They contend that

the very idea of ‘AI authorship’ is oxymoronic. Contrary to what many of today’s commentators appear to imply, [they] believe the threshold for attributing authorship does *not* depend on the evolution or state of the art in AI or robotics. Instead, [they] suggest that the very notion of ‘AI authorship’ rests on a category mistake: it is not an

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<sup>474</sup> Ginsburg, *People Not Machines*, *supra* note 470.

<sup>475</sup> Craig & Kerr, *supra* note 54.

<sup>476</sup> Their article was followed succinctly by that of Gervais (*Gervais, Machine as Author*, *supra* note 472), which equally advocates for eschewing this notion that fully machine-generated content is copyrightable, but from an inherently different perspective. Gervais rather bases his view on the position that the creative process is *human* in nature. He begins by founding his opinion on two notions linked to copyright’s origins, which he maintains that machines cannot uphold. The first, is that copyright is based on the romantic conception of the author, which a machine (at least at the moment) cannot be. The second, is that copyright protection was offered to authors as a result of the increasing liability attached to the written word (primarily in cases of defamation). It was therefore thought as justified to offer authors rights that would temper these responsibilities. Since machines cannot assume this responsibility, however, Gervais maintains that they should neither enjoy the rights bestowed upon authors in compensation for this increased liability. He further reinforces his view by maintaining that “[a]utonomous and ultimately unpredictable choices [...] made *by the machine* [...] do not cause or generate the type of originality required to obtain copyright protection” (at 2099). In his view, originality arises when creative choices are made, and “a choice *is creative if made independently by the author and that is not dictated by the function of the work, the method or technique used, or by applicable standards or relevant good practice*” (at 2090-1). In light of this definition, Gervais states that “[a]ppplied to determine whether machine productions are creative because they *look like* they result from a creative process, the test leads to a negative answer” (at 2092). In this sense, although reaching the same conclusion as Craig and Kerr, Gervais assesses authorship based on what an author must *do*, rather than on what an author must *be*.

error about the current or potential capacities, capabilities, intelligence or sophistication of machines; rather it is an error about the ontology of authorship.<sup>477</sup>

They go on to note that the “ontological question [...] requires an account of authorship that is relational; it necessitates a vision of authorship as a dialogic and communicative act that is inherently social, with the cultivation of selfhood and social relations as the entire point of the practice.”<sup>478</sup> To them, it is “human communication [that] is the very point of authorship as a social practice; indeed, as a condition of life.”<sup>479</sup>

My dissertation adopts a very similar approach to that of Craig and Kerr, but rather than examining *fully* machine-generated content – which has no place in this dialogic notion of copyright – I examine human-machine collaborations in light of whether the incorporation of AI into the creative process alters the dialogic nature of the resulting work. While these types of partially machine-generated works have been examined in Ginsburg and Budiardjo’s article,<sup>480</sup> they assess the copyrightability of resulting collaborations based on the extent of the human author’s role in the conception and execution of the work. As they advance,

[t]he conclusion that a machine is partially-generative (and thus that the designer of the machine cannot claim sole authorship of the resulting works) does not necessarily mean that the user of the machine is the author of the resulting work. One might safely conclude that the user of such a machine conceived of the resulting work, because the user provides some unanticipated contribution to the machine to create the result (otherwise, the machine would be fully-generative and authorship of the result would go to the machine’s designer). But conception supplies only half of the authorship equation. The user of such a machine can claim authorship of the result only if that user sufficiently controlled the process through which the work came into being. If the user does control this process, then the user has both conceived of and executed the resulting work, and is therefore the sole author of the resulting work just like the user of an ‘ordinary tool.’<sup>481</sup>

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<sup>477</sup> Craig & Kerr, *supra* note 54 at 42.

<sup>478</sup> *Ibid* at 7.

<sup>479</sup> *Ibid* at 42.

<sup>480</sup> Ginsburg & Budiardjo, *supra* note 64.

<sup>481</sup> *Ibid* at 431.

In this sense, their assessment of whether human-machine collaborations ought to enjoy copyright protection is based on process and actions rather than on the dialogic nature of creative works. Although they maintain that, for the execution requirement to be satisfied, the person claiming authorship had to have controlled the steps that “lead to the *manifestation of the key expressive elements of the work*,”<sup>482</sup> even these elements are examined in light of *actions* taken by the human contributor. To Ginsburg and Budiardjo, these actions must surpass a certain threshold for the individual to have controlled the execution of the work. In other words, they view authorship as a series of actions through which a person’s expression is executed.<sup>483</sup>

My dissertation, on the other hand, adopts an inherently different approach to assessing partially-generative works. I effectively address how the incorporation of machines into the creative process might impact creative works’ contribution to the social dialogue. My claim is rather that it’s not necessarily just about how much the human author’s actions contribute to the execution of the work, but about whether the resulting work is ultimately in the human author’s own words. By construing a work as the contribution of an author’s voice to the cultural conversation, I apply to these collaborations a vision of authorship that is relational; one that is based on more than just processes and actions.

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<sup>482</sup> *Ibid* at 437.

<sup>483</sup> Gervais’s article (Machine as Author, *supra* note 472) adopts a similar approach but rather with regards to fully machine-generated content. He essentially suggests that courts should

look for causation, and in this case specifically, *the causation of originality*. Here, this means identifying the cause of the choices that ‘look like’ they might be creative and thus generative of originality.

To draw an analogy with product liability law, the type of causation required is specific to the work at hand, not general. The question, in other words, is not whether a particular AI machine can *generally* cause creative ‘look-alikes’ to be produced, but rather whether it caused the choices that make a *specific production* look like an original work of authorship. If choices embedded in the machine’s output are those of human programmers or users [...], then the choices are creative and the production is protected [...]. If not, the production is beyond the autonomy threshold and the choices are not creative from the perspective of copyright law. Autonomous and ultimately unpredictable choices (even if some sort of broad ‘range’ of predictability can be established) made *by the machine*, in other words, do not cause or generate the type of originality required to obtain copyright protection.

### 3.2.3 No Right, No Wrong, No Rules for Me: Machine Learning as Copyright Infringement?

Concerns over copyright infringement by machines have been subject to consistent debates since their ability to ‘learn’ has been exponentially refined. Because their training relies on enormous datasets that often include copyrighted works, many scholars have questioned their place within the copyright narrative. As Grimmelmann notes, artificially intelligent programs challenge the precepts of the traditional copyright regime in two ways: “[q]ualitatively, they make it possible to use works in new ways; quantitatively, they make it possible to use works on a much greater scale.”<sup>484</sup> These capabilities have caused a tension at the heart of copyright law, where “[u]ses involving robot readers are fast-tracked for fair use,” while “[u]ses involving human readers receive close and exacting scrutiny to make sure that no market belonging to the copyright owner is being pre-empted.”<sup>485</sup> As Grimmelmann notes, “there is something unsettling about a rule of law that regulates humans and gives robots free rein”<sup>486</sup> – an approach which he claims could result in any number of undesirable outcomes.

Conversely, other scholars adopt a more nuanced perspective in examining the bulk reading that enables machine learning, essentially hinging their analysis on the *types* of uses being made by algorithmic processes.<sup>487</sup> Benjamin Sobel, for instance, maintains that most forms of machine learning involve purely technical uses that do not ‘use’ works in their communicative capacity – ‘non-uses,’ as Drassinower would call them. Having no expressive purpose, the “massive, unauthorized copying undertaken by computers,”<sup>488</sup> Sobel notes, is likely to be excused by the doctrine of non-expressive fair use based on two premises. First, “machinery cannot, by itself,

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<sup>484</sup> Grimmelmann, *Literate Robots*, *supra* note 60, at 661.

<sup>485</sup> *Ibid* at 667.

<sup>486</sup> *Ibid* at 674.

<sup>487</sup> See e.g. Sobel, *supra* note 62; Lim, *supra* note 18; Carroll, *Progress of Science*, *supra* note 62.

<sup>488</sup> Sobel, *ibid* at 57.

consume copyrighted expression in an infringing manner. Accordingly, the mechanical ingestion of works is a non-expressive purpose [...].”<sup>489</sup> Second, “these uses do not affect works’ potential markets in a way that is material to copyright law, because copyright owners’ entitlements do not encompass the non-expressive components of their works – the very components with which computerized analysis engages, and from which it can derive value.”<sup>490</sup>

Although a good argument could be made that Canada’s fair dealing provision could support a similar position, its exhaustive nature “creates uncertainty about the legal implications of key analytical techniques, such as text and data mining and machine learning, that are foundational to the development of AI.”<sup>491</sup> The lack of certainty surrounding the extent to which copyrighted datasets might be used to train algorithms without running afoul of fair dealing has prompted a movement supporting the development of copyright exceptions to enable machine learning processes. The fear is that Canada will remain at a disadvantage if it neglects to take legislative steps addressing copyright law’s barriers to machine learning.<sup>492</sup> The concern is primarily that valuable innovations in the field of artificial intelligence will halt in our country, with those that do enforce machine learning exceptions becoming the jurisdictions of choice for future research in this domain.<sup>493</sup>

In this regard, the solutions often advocated for by Canadian technology groups and scholars alike tend to be threefold in nature. The first involves the inclusion of “informational analysis” as a recognized fair dealing purpose.<sup>494</sup> The second suggests emulating the U.S. fair use

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<sup>489</sup> *Ibid.*

<sup>490</sup> *Ibid.*

<sup>491</sup> Geist, Canadian AI Thriving, *supra* note 85.

<sup>492</sup> Geist, Barrier to AI, *supra* note 61.

<sup>493</sup> Sobel, *supra* note 62, at 45.

<sup>494</sup> Geist, Canadian AI Thriving, *supra* note 85.

model, which would, as Michael Geist notes, “[make] the current list of fair dealing purposes illustrative rather than exhaustive. The U.S. exception is open to any purpose, as striking a fair balance depends upon the *use* of the work, not the *purpose* of the copying.”<sup>495</sup> Lastly, many are equally in favour of following in the steps of other countries that have adopted specific exceptions to enable both text and data mining as well as the informational analysis of copyrighted works.<sup>496</sup>

That said, among the text and data mining exceptions that have been enforced in other jurisdictions, only the one adopted by Japan in fact offers the legal certainty sought to truly enable unrestricted advances in machine learning. Its provision “permits all users of data to carry out machine learning, for any purpose – whether commercial or research. The exception is also technology-neutral, in the sense that users are allowed to engage in any type of ‘exploitation’ that is necessary to carry out machine learning.”<sup>497</sup>

The two exceptions adopted by the European Union,<sup>498</sup> on the other hand, only provide research organizations and cultural heritage institutions with the unequivocal right to use copyrighted content in algorithmic training for the purposes of scientific research. While other organizations are entitled to do the same, their right remains dependant on copyright holders, who may choose to opt-out of this provision and maintain the right to license or forbid use of their works for the purposes of algorithmic training. Similarly, the United Kingdom introduced a text and data mining exception permitting reproductions of copyrighted material to be made in view of carrying out computational analyses – strictly for the purposes of non-commercial research.<sup>499</sup> As

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<sup>495</sup> *Ibid.*

<sup>496</sup> *Ibid.*

<sup>497</sup> Eloise Chin, “Robot vs Rightsholder: Machine Learning and Copyright in the Film and Television Industries” (2019) 115 Intellectual Property Forum 23 at 29-30.

<sup>498</sup> *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, s 3-4.

<sup>499</sup> *Copyright, Designs and Patents Act 1988* (UK), c 48, s 29A (introduced by the *Copyright and Related Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014*, SI 2014/1372).

such, “any use of copyrighted information by businesses, including startups, to create algorithms on the basis of which artificial intelligence can be trained, can still be labeled infringing.”<sup>500</sup>

This lack of certainty in most jurisdictions worldwide has placed a number of machine learning developers in somewhat of a precarious position. As Eloise Chin notes, “[o]rdinarily, a data miner could obtain a licence from the copyright holder, granting him or her permission to reproduce copyright material. However, because data mining requires the reproduction of large quantities of data, the creation of a licensing market for data mining is impractical. The transaction costs of acquiring a licence for every item of data used in the mining process would be unreasonably high. Thus, a licensing solution is generally not seen as a viable [option] [...]”<sup>501</sup> This predicament has driven the industry to acquire training data in a different fashion: by using standard form contracts to gain non-exclusive licenses over all the copyrightable and non-copyrightable data generated by its end users. As I will discuss in further detail in chapter 5, the privacy implications of this practice are significant, submitting end users to a kind of ubiquitous surveillance that has often been associated with chilled speech and limited knowledge proliferation.<sup>502</sup>

Moreover, this use of consumer data by machine learning developers has also somewhat upended copyright’s traditional narrative, no longer simply involving the juridical ordering of the relationship between users and rightsholders alone. Instead, there are now a number of other actors

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<sup>500</sup> Christophe Geiger & Elena Izyumenko, “Towards a European Fair Use Grounded in Freedom of Expression” (2019) 35:1 Am U Int L Rev 1 at 18.

<sup>501</sup> Chin, *supra* note 497, at 26.

<sup>502</sup> See e.g. Niva Elkin-Koren, “After Twenty Years: Revisiting Copyright Liability of Online Intermediaries” in Susy Frankel & Daniel Gervais eds, *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge: Cambridge University Press, 2014) 29 at 38 [Elkin-Koren, Revisiting Copyright Liability]; Jack M Balkin, “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society” (2004) 79:1 NYU L Rev 1 [Balkin, Digital Speech]; Julie E Cohen, “A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace” (1996) 28 Conn L Rev 981 [Cohen, Right to Read].

to consider as well. As Sobel notes, “[t]oday’s ordinary end users are not passive consumers of others’ intellectual property. Rather, they create troves of text, images, video, and other data that they can license to large companies in exchange for gratis services. Powerful technology companies are now users of copyrighted material, and the companies’ end users are the rights holders.”<sup>503</sup> At the same time, we mustn’t forget that these powerful technology companies are themselves developers of machine learning algorithms, and thus creators in their own right. This new model for engaging in creativity coupled with the production of new types of works has increased the diversity of the relationships that copyright is called upon to manage.

And this network of relationships is further exacerbated when generative AI is added into the mix. Machine learning as fair use is often predicated on the notion that algorithms merely analyze data without using ‘works’ as ‘works.’ But as Sobel points out, there is substantially less clarity surrounding whether the *expressive* machine learning at issue in my dissertation could fall within the boundaries of fair use.<sup>504</sup> When it comes to computational creativity, machines learn from an existing corpus of works in view of creating new ones. While some authors claim that an “algorithm cannot deliberately or accidentally duplicate copyrighted works unless programmed to do so,”<sup>505</sup> such is not always the case. As Sobel notes, “[e]ven if a model was not intentionally built to mimic a copyrighted work, it could still end up doing so to an infringing degree.”<sup>506</sup> This possibility exists when machine learning models are ‘overfitted,’ meaning that they are *too* tailored to the data they’ve been trained on such that any output they may generate is substantially similar to the works in their dataset.<sup>507</sup>

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<sup>503</sup> Sobel, *supra* note 62, at 85.

<sup>504</sup> *Ibid* at 57.

<sup>505</sup> Sigmon, *supra* note 447, at 44; *see also* Yanisky-Ravid, Generating Rembrandt, *supra* note 58.

<sup>506</sup> Sobel, *supra* note 62, at 64.

<sup>507</sup> du Sautoy, *supra* note 343, at 69.

In this light, Sobel maintains that “[e]merging applications of machine learning challenge [the premise] of non-expressive [fair] use.”<sup>508</sup> To begin, he advances that “machine learning gives computers the ability to derive valuable information from the way authors express ideas. Instead of merely deriving facts about a work, they may be able to glean value from a work’s expressive aspects; as a result, these uses of machine learning may no longer qualify as non-expressive in character.”<sup>509</sup> Moreover, “machine learning technology could present a new type of threat to markets for authorial expression: rather than merely supplanting the market for individual works, expressive machine learning could also supersede human authors by replacing them with cheaper, more efficient automata.”<sup>510</sup>

While Sobel brings up crucial points, his analysis is centered on the use of algorithms to produce *fully* machine-generated content, leading him to the conclusion that fair use is incapable of excusing expressive machine learning. Although I agree with him on that front, his framing of the issue in this fashion excludes human-machine collaborations from this narrative. In this sense, two important aspects meriting attention remain unaddressed by current literature. First, it doesn’t examine all the manners in which this technology can foster new forms of creativity that might contribute to the cultural discourse in an unprecedented fashion. Second, it doesn’t address whether authors’ enjoyment of fair use rights might extend to their use of generative AI within their own work. Particularly, whether their use of this technology is transformative in a way that ought to be recognized by copyright.

In weighing in on this issue from a dialogic perspective, my dissertation offers important insight into how copyright has shaped, and might contribute to juridically ordering, the

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<sup>508</sup> Sobel, *supra* note 62, at 57.

<sup>509</sup> *Ibid.*

<sup>510</sup> *Ibid.*

complicated web of relationships that arise from the incorporation of generative AI into the creative sphere. If works of authorship consist of communicative acts and copyright's ultimate goal is to promote this rich social dialogue between *people*, can algorithms even infringe copyright since – being external to our social and cultural discourse<sup>511</sup> – they cannot partake in this conversation?

Although my phrasing might lead to the conclusion that the response to this query is a resounding no, there is in fact much more to answering this question than meets the eye. It involves examining the *kind* of copyrighted data that machines are 'learning' from – copyrighted works that have already been communicated to the public as opposed to copyrighted works that end users are still in the process of creating – based on the potential effects that this use can have on the social dialogue. While 'reading' and 'learning' machines may in most circumstances not use 'works' as 'works,' their potential to chill speech by submitting creative end users to persistent surveillance is a notion that merits further investigation prior to settling on precisely how copyright should approach this sort of use.

A balance must therefore be struck, but it's a delicate one. As my dissertation advances, it relies on a more expansive vision of users' rights, on tougher standards for infringement determinations, and on increasing the scope for the transformative reuse of works by downstream (human) creators. In this sense, my dissertation explores avenues that have yet to be considered by copyright scholarship – ones that leave more space for users to participate in the social dialogue engendered by authors of the past, while simultaneously enabling the incorporation of artificial intelligence into this process.

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<sup>511</sup> See above, Chapter 2.

### 3.3 *Imagination is the Only Weapon in the War Against Reality: Situating Human-Machine Collaborations Within the Context of Knowledge-Building Activities*

While it's undeniable that human-machine collaborations have great creative potential and may even (technically) be eligible to enjoy copyright protection, there remain many questions to ask prior to determining whether – and under what circumstances – they *should*. And while the examples previously offered serve to illustrate that automating certain elements of the production process doesn't necessarily detract from a work's creativity, they stop short of situating the use of generative AI by artists, authors, and musicians within the grander context of the knowledge-building activities that are part and parcel of copyright's dialogic vision. That's where I pick up in this section, effectively setting the stage for the discussions that will animate the analysis to come.

#### 3.3.1 The EyeWriter

Most artists take for granted their perfectly functioning hands that enable their creative activities. But for graffiti writer TEMPTONE, who was diagnosed with ALS in 2003 and has since become completely paralyzed, creating art with his hands is no longer a possibility. In collaboration with several members of various research labs, TEMPTONE is now able to pursue his graffiti passion once again – with his eyes. They essentially created a pair of glasses connected to an algorithm that translates TEMPTONE's eye movements into actual pictures.<sup>512</sup>

This technology represents an algorithmic tool at its finest. It does not offer any content suggestions and makes no attempt to predict TEMPTONE's next moves. It does nothing more than track his eye movements and, in the same way that a pen tracks our hand movements, enables the creation of a concrete piece of artwork arising from his own creative instincts. With algorithmic

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<sup>512</sup> Viktor Bezić, "Algorithmic Beauty: 10 Artists Pushing the Boundaries of Code" *Medium* (28 July 2018), online: <<https://medium.com/feed-fatigue/algorithmic-beauty-10-artists-pushing-the-boundaries-of-code-2d55b58aede4>>.

tools such as these, there can be no question that all the creativity and communicative substance stems from the human artist. The algorithm's only role is reminiscent of that of a paintbrush, pen or typewriter being manipulated by human will.

### 3.3.2 Co-Producing Hits with AI

Taryn Southern, a former American Idol contestant, is a singer, songwriter and YouTuber who has been pursuing a project that is pretty novel in the music realm: she's been collaborating with AI to compose and produce her new album. Despite her obvious talent as a songwriter, "she knew 'very, very little about music theory.' It was a roadblock that frustrated her to no end. 'I'd find a beautiful chord on the piano,' Southern says, 'and I'd write an entire song around that, but then I couldn't get to the next few chords because I just didn't know how to play what I was hearing in my head.'"<sup>513</sup> To compensate for these limitations, she decided to turn to AI for assistance, "putting the sound of her new album into the 'hands' of four AI programs: Amper Music, IBM's Watson Beat, Google's Magenta, and AIVA. Aptly titled 'I Am AI,' the album is the first of its kind to be fully composed with and totally produced by AI."<sup>514</sup> The use of these tools to generate percussion, melodies and chords effectively enables Southern "to iterate with the music and give it feedback and parameters and edit as many times as [she needs]. It still feels like it's [hers] in a sense."<sup>515</sup>

With Southern having "made a lot of [the] creative decisions, including switching instruments, changing the key, and, of course, writing and performing the vocals,"<sup>516</sup> the question remains as to whether or how her use of AI to make up for the knowledge she lacks fits into the

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<sup>513</sup> Deahl, *supra* note 7.

<sup>514</sup> Keith Nelson Jr, "Taryn Southern's New Album is Produced Entirely by AI" *Digital Trends* (20 February 2018), online: <<https://www.digitaltrends.com/music/artificial-intelligence-taryn-southern-album-interview/>>.

<sup>515</sup> Deahl, *supra* note 7.

<sup>516</sup> *Ibid.*

grand scheme of copyright. Can Southern really be seen as pursuing knowledge when – rather than studying the intricacies of music theory – she’s relying on artificial intelligence to do what she unequivocally states she is unable to?

I am not suggesting that every musician should learn music theory simply to be in the position of benefiting from copyright protection, especially when it’s their own creativity that allows them to envision these songs even if they’re unable to set the tune to paper. Rather, the reason I find this line of questioning necessary is because it’s crucial to carefully consider the extent to which we allow generative algorithms to shape our creative pursuits. Whatever we decide, we must ensure that the position adopted neither serves to deprioritize knowledge-building activities, nor our place within the social dialogue.

While the use of AI as a tool to enhance creativity is rife with possibility, it was borne from the attitude that pursuing knowledge that creators lack is simply nonsense standing in the way of achieving what they want. Generative algorithms were effectively created to bypass our knowledge deficiency, with Amper co-founder Michael Hobe claiming that we should think of it “more [as] intelligence augmentation. [A way to] facilitate [our] creative process to cut a lot of the [nonsensical] elements [out] of it. For [him], it’s allowing more people to be creative and then allowing the people who already have some of these creative aspects to really further themselves.”<sup>517</sup>

Although an intriguing and popular point of view, I cannot help but question whether it negates the importance of knowledge pursuit at copyright’s core – it is, after all, education that fosters a rich social dialogue, a cultural conversation about the things that surround us and how we

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<sup>517</sup> *Ibid.*

give them meaning. If we cease learning new things, merely outsourcing what we don't know to a machine, what risks happening to the diversity of societal discourse? It's therefore crucial to look forward to the possible long-term consequences of embracing this type of technology within our creative culture; to carefully consider how we should approach generative algorithms to ensure that knowledge is being pursued and that the social dialogue crucial to copyright's purpose is ultimately being advanced.

### 3.3.3 A Novelist's Right-Hand Algorithm

As author Robin Sloan sits at his computer, he types *The bison are gathered around the canyon* and then the keyboard clicking stops, unable to come up with an ending to his sentence. Rather than pausing to consider what words should follow, “[h]e hits tab. The computer makes a noise like ‘pock,’ analyzes the last few sentences, and adds the phrase ‘by the bare sky.’ Mr. Sloan likes it. ‘That’s kind of fantastic,’ he said. ‘Would I have written ‘bare sky’ by myself? Maybe, maybe not.’”<sup>518</sup>

That finale sets the entire mood of the phrase, with those last four words painting a picture in the reader's mind's eye of bison against a deep, blue horizon. The question is, who is responsible for the sentence's creative edge? Is it Sloan, who started it and then accepted the algorithm's suggestion, or is it the algorithm itself? With the algorithm having been developed by Sloan and perhaps quite attuned to his personality, could it be that this algorithm merely predicted what Sloan might have wanted to say and simply beat him to the punch? Or rather, with Sloan having trained this algorithm on the seminal works of popular authors including John Steinbeck and Dashiell Hammett as well as on old Wired articles, is it possible that these authors might technically be the

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<sup>518</sup> David Streitfeld, “Computer Stories: AI Is Beginning to Assist Novelists” *New York Times* (18 October 2018), <<https://www.nytimes.com/2018/10/18/technology/ai-is-beginning-to-assist-novelists.html>>.

originators of Sloan's phrase? Overarching all of these questions, however, is the following: if the purpose of copyright law is to generate a social dialogue, is the whole point then not for the author to make autonomous choices regarding which words best express her original thought? Is the aim not for authors to think and speak for themselves rather than let their voices be swayed by algorithmic input?

Despite human creativity being consistently likened to an algorithmic process, knowledge pursuit has never been a purely computational endeavour; it has always relied on an endless quest for intellectual stimulation that is largely responsible for promoting the social dialogue underlying copyright's purpose. Neil Postman offers the example of books to illustrate the importance of this process. As he notes,

[b]ooks are an excellent container for the assimilation, quiet scrutiny and organized analysis of information and ideas. It takes time to write a book, and to read one; time to discuss its contents and to make judgments about their merit, including the form of their presentation. A book is an attempt to make thought permanent and to contribute to the great conversation conducted by authors of the past.<sup>519</sup>

It's this act of contemplation – both of pre-existing dialogue and of an author's own contribution to it – that remains crucial to the continuing development of our cultural discourse. Simply hitting the tab button to have an algorithm select the conclusion of one's sentence neither promotes nor requires this kind of reflection.

Postman offers the example of the telegraph to drive his point home, illustrating how technologies that eliminate this important process of deliberation from human communications risk irrevocably altering the nature and substance of our social dialogue. "The value of telegraphy," he writes, "is undermined by applying the test of permanence, continuity or coherence. The

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<sup>519</sup> Neil Postman, *Amusing Ourselves to Death* (New York: Penguin Books, 1985) at 69-70 [Postman, *Amusing Ourselves*].

telegraph is suited only to the flashing of messages, each to be quickly replaced by a more up-to-date message. Facts push other facts into and then out of consciousness at speeds that neither permit nor require evaluation.”<sup>520</sup> In other words, technologies that prioritize rapid content creation, as opposed to the *thoughtful* development of cultural productions, create a disconnect between the act of creation and the process of knowledge pursuit. By enabling the creation of content in a manner that is divorced from this process of reflection, these technologies fail to foster the kind of rich and diverse social dialogue that copyright seeks to promote.

The question, therefore, is whether the integration of algorithms into the creative process reduces the act of knowledge pursuit at its core to something less than the mind-expanding endeavour Postman suggests; something more computational and less intellectually stimulating that fails to advance the social dialogue and may simply not justify copyright protection. In altering how we seek knowledge, do algorithms that assist in the development of creative works diminish the autonomy of human authors and somehow relegate those works to a status that is less likely to be equated to a work of authorship? It’s precisely this question that the next part will address.

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<sup>520</sup> *Ibid.*

## Part II      **Curiouser and Curiouser: Originality and Authorship in Copyright and Human-Machine Collaborations**

It was spring of 2011 when E.L. James' *50 Shades of Grey*<sup>521</sup> took the world by storm. Although far from critically acclaimed – with novelist Salman Rushdie even going as far as saying that he's "never read anything so badly written that got published," and that "[i]t made 'Twilight' look like 'War and Peace'"<sup>522</sup> – this erotic thriller quickly became a bestseller, with two copies being sold every second at its peak.<sup>523</sup> It's a tale of two people from clashing backgrounds: innocent recent college graduate, Anastasia Steele, and billionaire BDSM aficionado, Christian Grey. She wanted to date him, he wanted her to be his submissive, and (spoiler alert) they wound up falling in love after some experimentation in the bedroom.

But its racy storyline isn't the only thing people were talking about. Also making the rounds at the gossip mill was the fact that this novel sprouted from unauthorized fan fiction based on Stephenie Meyer's *Twilight* series.<sup>524</sup> *50 Shades of Grey* drew on the undercurrent of sexual tension that pervaded the vampire romance – Edward's supernatural strength holding him back from getting intimate with his human girlfriend, Bella. Other than this underlying theme, however, the two plots are dissimilar in every possible way (trust me, I've read them both...for research purposes, of course). And yet, because copyright law endows authors with the exclusive right to

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<sup>521</sup> EL James, *50 Shades of Grey* (New York: Vintage Books, 2011).

<sup>522</sup> Chris Irvine, "Sir Salman Rushdie: 'Fifty Shades of Grey makes Twilight look like War and Peace'" *The Telegraph* (9 October 2012), online: <<https://www.telegraph.co.uk/culture/books/booknews/9596577/Sir-Salman-Rushdie-Fifty-Shades-of-Grey-makes-Twilight-look-like-War-and-Peace.html>>.

<sup>523</sup> Sian Cain, "150m Shades of Grey: How the Decade's Runaway Bestseller Changed our Sex Lives" *The Guardian* (15 January 2020), online: <<https://www.theguardian.com/books/2020/jan/15/150m-shades-of-grey-how-the-decades-runaway-bestseller-changed-our-sex-lives>>.

<sup>524</sup> Christina Mulligan, "The Most Scandalous Part of 'Fifty Shades of Grey' isn't the Sex and Bondage" *The Washington Post* (11 February 2015), online: <<https://www.washingtonpost.com/posteverything/wp/2015/02/11/the-most-scandalous-part-of-fifty-shades-of-grey-isnt-the-sex-and-bondage/>>.

create derivative works, the legitimacy of *50 Shades of Grey* under copyright was shrouded in ambiguity.<sup>525</sup>

Often drawing directly on a particular work's characters, settings, and situations in an attempt to rewrite their story, the place of fan fiction within the copyright narrative has always been precarious.<sup>526</sup> These novels do far more than draw inspiration from pre-existing works (in the plural sense); they quite literally appropriate elements from *particular* canonical stories within popular culture to express themselves. Take, for instance, Trekkie Paula Smith. She penned an entire Star Trek story accoutered with everyone's favourite characters, but with one main variation: rather than the usual male at the helm of the starship, a woman now ran the show.<sup>527</sup> Another fan spun the tale of Hermione Granger – not merely a retelling of the infamous *Harry Potter* series from her perspective, but her very own story.<sup>528</sup> What these stories have in common is the fact that, despite the expressions themselves *not* being copied, certain aspects of their works do not quite owe their origin to their author. It's their *originality* under copyright that's being contested.<sup>529</sup>

What, you may ask, does fan fiction have in common with the human-machine collaborations that mark the subject of my dissertation? Because they both incorporate elements that don't entirely owe their origin to their authors, they're both equally cemented in doubts about

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<sup>525</sup> *Ibid.*

<sup>526</sup> See e.g., Rebecca Tushnet, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law" (1997) 17 Loy LA Ent L Rev 651 [Tushnet, Legal Fictions]; Leanne Stendell, "Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction" (2005) 58 SMU Law Rev 1551; Rebecca Katz, "Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada's Copyright Reforms" (2014) 12 CJLT 73.

<sup>527</sup> Paula Smith, "A Trekkie's Tale" (1974), in Camille Bacon-Smith, *Enterprising Women: Television Fandom and the Creation of Popular Myth* (Philadelphia: University of Pennsylvania Press, 1992) 94-5.

<sup>528</sup> Chander & Sunder, *supra* note 321 at 610.

<sup>529</sup> Drassinower, WWWC, *supra* note 30 at 58-9 ("The principle of independent creation establishes, then, that the mere coincidence that my expression happens to be identical to someone else's previously existing expression does not make my expression any less my own. [...] The originality inquiry is not about a work's relation to other works. It is about the relation between author and work. It is literally about origination, about source. The determination that a work is original is a confirmation of the work's origins. The origin of a work – its originality – is its source.")

the *originality* of their expressions. Why, you may also wonder, have I made this parallel? To illustrate that the so-called novel copyright issues raised by the insertion of artificial intelligence into the creative process have, in some form or another, been around for quite some time.

They arise from copyright's "persistent attachment to the vision of authorship as an independent process of original creation."<sup>530</sup> Rather than recognizing that creative works are the product of pre-existing culture, that they "are not 'independent creations' and [...] do not originate from the author alone,"<sup>531</sup> copyright's originality principle continues to perpetuate a romantic vision of the author as a solitary creative genius.<sup>532</sup> While this might explain copyright's relative unwillingness to recognize originality in works like fan fiction that 'borrow' elements from other authors,<sup>533</sup> it does little to clarify why 'works' that are undoubtedly *not* the product of any creative inclination – like telephone directories,<sup>534</sup> betting coupons,<sup>535</sup> and case headnotes<sup>536</sup> – enjoy copyright protection.

"Originality," writes Drassinower, "is the *sine qua non* of copyright protection. Our understanding of originality therefore pervades and permeates our understanding of all aspects of copyright."<sup>537</sup> But originality as it has been conceived in copyright remains somewhat incoherent. It's founded on the notion of romantic authorship, yet acknowledges even the most uncreative of

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<sup>530</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 228.

<sup>531</sup> *Ibid* at 261.

<sup>532</sup> See e.g., Bracha, *Ideology of Authorship*, *supra* note 39; Woodmansee, *Genius and Copyright*, *supra* note 65; Boyle, *Search for Author*, *supra* note 65; Jaszi, *Metamorphoses of Authorship*, *supra* note 65; Boyle, *Law and Information*, *supra* note 65; Lemley, *Romantic Authorship*, *supra* note 65.

<sup>533</sup> See Chander & Sunder, *supra* note 321.

<sup>534</sup> See e.g., *Key Publ'ns v Chinatown Today Pub Ent*, *supra* note 272; *CCC Info Serv v Maclean Hunter Mkt Rep*, *supra* note 272; *Bell South Advertising & Publishing Corporation v Donnelley Information Publishing*, *supra* note 272; *Desktop Mktg Sys Pty Ltd v Telstra Corp*, *supra* note 257.

<sup>535</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, *supra* note 133 (appeal taken from C.A.) (U.K.).

<sup>536</sup> See *CCH Canadian Ltd v Law Society of Upper Canada*, *supra* note 45.

<sup>537</sup> Drassinower, *WWWC*, *supra* note 30 at 18.

endeavours.<sup>538</sup> Its threshold is so low as to rarely require more than even a modicum of creativity, yet it cannot grasp the ingenuity of unique storylines simply because they draw on elements that don't entirely owe their origins to their authors. It's meant to acknowledge works that encourage progress and enlightenment, yet it hinders this pursuit – instead endowing creators with the power to command any uses made of their works and to control the evolution of their meaning in society.<sup>539</sup>

This 'understanding' of originality makes it difficult to assess, with any measure of confidence, whether copyright might be amenable to recognizing human-machine collaborations. While they may *prima facie* appear creative, the insertion of algorithms as partners within the creative process necessarily involves surrendering a certain degree of independence in the work's elaboration. It is, in this sense, difficult to entirely attribute its origin – and therefore its creative elements – to anyone in particular. If fan fiction remains largely unacknowledged as originating from its author despite technically being her original expression, could a work incorporating algorithmic contributions be recognized under copyright even if it doesn't entirely owe its origin to a human author?

This question may be easier to answer in some jurisdictions than in others. The United Kingdom, for instance, has amended its copyright law to attribute authorship for fully machine-

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<sup>538</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 214 (“It is true that copyright does not concern itself with questions of genius, quality, or even creativity: it attaches to the most mundane of works, resists inquiry into the objective value of the author’s contribution, and offers protection to works that demonstrate either the merest spark of creative effort, or sometimes, none at all”).

<sup>539</sup> See e.g., Craig, *Reconstructing the Author-Self*, *ibid*; Coombe, *Objects of Property*, *supra* note 92; Coombe, *Cultural Life*, *supra* note 70; Gordon, *On Owning Information*, *supra* note 292; Keith Aoki, “(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship” (1996) 48 *Stan L Rev* 1293 [Aoki, (Intellectual) Property]; Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain” (1999) 74 *NYU L Rev* 354 [Benkler, *Free as the Air*]; Annemarie Bridy, “Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality” (2019) 9 *UC Irvine L Rev* 293 [Bridy, *Fearless Girl*].

generated content to the person who takes the steps necessary to generate the work.<sup>540</sup> A recent study released by the European Commission supports a similar stance within the European Union. Although specifying the need for humans to play an essential role at the conception stage of the creative process in order to be eligible for copyright protection, the study advances the possibility of protecting certain machine-generated works even in the absence of human input.<sup>541</sup> The United States, on the other hand, has unequivocally rejected instilling copyright in a work produced by any being that isn't human.<sup>542</sup> For its part, Canada has remained largely mute on the subject.<sup>543</sup>

But while the question of the day might be whether copyright *could* recognize originality in human-machine collaborations, a far better one is whether it *should*. And that's the question I seek to answer in this part. This inquiry necessarily requires a deep examination into copyright's intrinsic principles as they now stand, a reframing of the elements that ground these concepts in order to imbue them with the coherence they lack. It's precisely this feat that I achieve in chapter 4. By instead grounding these principles in the notion of creative autonomy, I develop an approach to both originality and infringement that's more tailored to engaging the kind of genuine dialogue critical to our meaning-making process. I then dedicate chapter 5 to examining whether the incorporation of generative algorithms into the creative process erects barriers to achieving this feat; whether, and under what conditions, human-machine collaborations are capable of fostering

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<sup>540</sup> *Copyright, Designs and Patents Act 1988* (UK), c 48, s 9(3).

<sup>541</sup> See Hartmann, Allan, Hugenholtz, Quintas & Gervais, *supra* note 64.

<sup>542</sup> *Naruto et al v Slater*, 888 F.3d 418 (2018) at 420 (“[...] we conclude that this monkey – and all animals, *since they are not human* – lacks statutory standing under the Copyright Act” [emphasis added]).

<sup>543</sup> That said, the *Copyright Act*'s wording lends to a similar conclusion as that upheld in the United States. The law effectively stipulates that “copyright shall subsist in Canada [...] in every original [...] work if [...] the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a country to which this Act extends.” Since machines do not qualify as citizens, subjects, or persons, it is equally unlikely for fully machine-generated content in Canada (see Mark D Penner & Mark Vanderveken, “Part 2: Can Artificial Intelligence be an Author According to Copyright?” (19 July 2018), online: *Fasken* <<https://www.fasken.com/en/knowledge/2018/07/can-ai-be-an-author-according-to-copyright/>>).

the kind of creative autonomy necessary to uphold the richness and diversity of the social dialogue at copyright's core.

## Chapter 4 All I Know is I Won't Go Speechless: Genuine Dialogue and Creative Autonomy as Central to Authorship

Regardless of the threshold favoured,<sup>544</sup> the various approaches to originality within copyright doctrine remain unable to identify the specificity of works of authorship as not only communicative acts, but dialogical ones.<sup>545</sup> The reason for this deficiency is because their specificity cannot be defined in terms of 'originality' alone, particularly in light of how it's been conceived in copyright. Copyright law's approach to originality is simultaneously a threshold and an obstacle; an author's enjoyment of copyright protection is predicated on fulfilling it, but it often acts as a barrier preventing this feat. In this sense, originality as defined in copyright law is contradictory in nature, unable to truly ground copyright as a construct. And it's a problem that occurs on three different but concomitant levels.

First, copyright law's insistence on objectively assessing originality has translated into a refusal to examine the creative process that culminates in a work. Assumed to be intrinsic to the author, it's deemed a factor that doesn't lend to scrutiny. But as Julie Cohen remarks, there is a large body of evidence that points to the fact

that scholarly assumptions about the intrinsic quality of creativity are too hasty. To begin with, that assumption does not match the experience that artists describe at all. Artists may not be able to tell us why they create, but they can tell us a lot about the where, what, who, and how of particular creative processes – where they were in space and time; what they were looking at, reading, and listening to; who they were talking to; and what insights or experiments sprang from those interactions.<sup>546</sup>

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<sup>544</sup> See above, Chapter 2, Section 2.3.1.

<sup>545</sup> Drassinower, WWWC, *supra* note 30 at 84.

<sup>546</sup> Julie E Cohen, "Chapter 3: Copyright, Creativity, and Cultural Progress" in Julie E Cohen, *Configuring the Networked Self*, at 4, online: <<http://juliecohen.com/wp-content/uploads/2018/07/CohenCNSCh3.pdf>> [Cohen, Chapter 3].

Viewed from this perspective, the creative process is a direct result of communicating with both society at large and cultural artifacts in particular. More importantly, this act of communicating necessarily engenders a social dialogue that both underlies and drives creativity.<sup>547</sup> By neglecting to account for the centrality of this dialogue to creative endeavours, originality as it has been conceived in copyright law remains incapable of identifying the specificity of works of authorship.

Second, although copyright subject-matter is often referred to as ‘original expression,’ the emphasis has often been on seeking out the true meaning of originality with little attention being given to distinguishing the kinds of ‘expressions’ that should qualify as original. Rather, ‘expression’ is often defined in terms of ‘originality.’ In other words, if some element of a work can be identified as original, then the expression in question is deemed protectable under copyright. But while all non-copied expressions can be original in the sense generally afforded to the term by copyright law, not all expressions are capable of generating dialogue. In this sense, successfully identifying the specificity of works of authorship in fact rests more heavily on defining the kinds of ‘expressions’ that achieve this feat, with ‘originality’ acting merely as an additional qualifier.

Third, copyright’s approach to the originality principle’s requirement of independent creation obfuscates what’s truly valuable in a work. It predicates a work’s provenance on its variations from pre-existing works, rather than on its own unique contribution to the meaning-making process.<sup>548</sup> This approach ignores the value that may be imparted by the mobilization of existing cultural artifacts towards new ends, deeming such uses infringing based on *prima facie*

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<sup>547</sup> See e.g. Drassinower, WWWC, *supra* note 30; Cohen, Creativity and Culture, *supra* note 92; Zemer, Multivoiced Authors, *supra* note 299; Zemer, Dialogical Transactions, *supra* note 294; Craig, Reconstructing the Author-Self, *supra* note 30.

<sup>548</sup> See Rotstein, *supra* note 70.

similarity.<sup>549</sup> By not looking past these similarities – by neglecting to recognize these works’ contributions to the evolution of meaning – the principle of independent creation as it now stands risks excluding from the social dialogue works that are truly valuable.

In this light, I begin this chapter by reframing debates surrounding creativity in terms of the social dialogue, effectively contextualizing Drassinower’s approach to originality as ‘speaking in one’s own words’ within the bounds of relational creativity. I proceed by building on this vision of originality to identify the specificity of copyright subject-matter. Differently from Drassinower who identifies it as ‘speech,’ however, I proceed by illustrating that not *all* speech leads to the sort of genuine social dialogue that duly promulgates copyright’s goals of progress and enlightenment. Rather, it’s only speech that mediates the relationship between both the authorial ‘self’ and the ‘other’ as embodied by pre-existing culture that achieves this feat; speech that acknowledges the ‘other’ in search of the ‘self.’ What this approach exemplifies, I demonstrate, is that copyright subject-matter can best be understood as a particular form of self-expression<sup>550</sup> – an utterance that both recognizes the importance of the ‘other’ while asserting the creative autonomy of the ‘self.’

It’s this assertion of creative autonomy, I conclude, that ought to guide the principle of independent creation and, therefore, copyright’s approach to infringement. Rather than predicating a work’s originality on a negative construal of independent creation as merely ‘not copied,’ it should be based on a positive construal of this requirement as a manifestation of creative autonomy. This approach offers a way of assessing independent creation in a fashion that avoids

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<sup>549</sup> See e.g. Cohen, *Creativity and Culture*, *supra* note 92, at 1198-1205; Rubinfeld, *supra* note 294, at 8-9; Bracha & Syed, *supra* note 89, at 259-60; Chander & Sunder, *supra* note 321, at 614-15; Shur-Ofry, *Popularity*, *supra* note 91.

<sup>550</sup> Compare CJEU case C-310/17 *Levola Hengelo BV v Smilde Foods BV* (13 November 2018) at paras 36-7 (maintaining that, to be a ‘work’ in the copyright sense, it must be an *expression* of the author’s own intellectual creation as defined by the creative choices she makes; this notion is different from the kind of self-expression I’m advancing in this section as being the subject-matter of copyright).

stripping a work of its value – of reducing it to another act of infringement – simply because it shares elements in common with a pre-existing work. It promotes a deeper examination into a work’s contribution to the social dialogue before it’s prematurely written off as infringing. A work may very well be substantially similar on its face, but that shouldn’t be taken to mean that it offers nothing to the cultural conversation and to societal enlightenment as core values of copyright.

#### 4.1 *But the Thingamabob That Does the Job is Dialogue: Originality and Creativity as Relational*

Current approaches to originality all admit under the aegis of copyright ‘expressions’ that are perhaps communicative, but that equally draw from romantic notions of authorship in ways that impose harsh limits on the ability of downstream creators to engage in a dialogue with these works. Rather than enabling enlightenment and knowledge pursuit, this approach not only constrains the cultural spaces that are critical to achieving copyright’s objectives, but equally limits opportunities to engage in *new* forms of authorship – not the least of which are the human-machine collaborations that mark the subject of my thesis. In order to advance copyright’s goals, originality must therefore be defined in a manner that neither depicts authors as creative geniuses, nor undervalues the contributions of downstream creators – regardless of the medium they employ to engage in their creativity. The question is, how do we achieve this feat?

A good place to begin this inquiry is to disabuse copyright theory of the false author/consumer binary, and recognize authors for what they are: users, or rather *situated users*, as law professor Julie Cohen dubs them.<sup>551</sup> As she observes, authors’ creativity is both informed

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<sup>551</sup> Cohen, *Creativity and Culture*, *supra* note 92 at 1179; see also Julie E Cohen, “The Place of the User in Copyright Law” (2005) 74 *Fordham L Rev* 347 [Cohen, *Place of User*]; Litman, *Public Domain*, *supra* note 275 at 1011 (“My characterization of authorship as a combination of absorption, astigmatism, and amnesia is not intended to diminish its merit. Indeed, my position is that this mixture is precisely the process that yields the works of

and constrained by the particular cultural context in which they're located.<sup>552</sup> On the one hand, their creativity is *informed* by their situatedness in the sense that they appropriate pre-existing cultural material to enable their own contributions. On the other hand, authors' creativity is *constrained* by their situatedness in the sense that their "cultural activities [...] take place within a web of semantic and material entailments. One cannot simply step out of or around the resources, values, and absences within her own culture, but must negotiate one's way through them, following the pathways or 'links' that connect one source to the next."<sup>553</sup> From this perspective, creativity can be seen as a process that "moves in patterns that are both (and sometimes simultaneously) recursive and opportunistic, and supports an understanding of creativity as *relational* at its core."<sup>554</sup>

This relational approach to creativity is firmly rooted in the gift of consciousness. Defined by philosopher Roberto Unger as "the ability to reflect on existence,"<sup>555</sup> consciousness is the deep-seated human characteristic that drives the development of our individuality – our creative selves. On the one hand, our consciousness separates us from the objective world that surrounds us, effectively giving rise to subject-object relations. Referred to by philosopher Martin Buber as 'I-It,'<sup>556</sup> these relations are responsible for how a person experiences the objective world; how she perceives, analyzes, understands, and decrypts her own subjectivity.

The realm of 'It' involves only the consciousness of 'I,' the man who experiences: "For it is 'in him' and not between him and the world that the experience arises. The world has no part in

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authorship we wish to encourage through the copyright law [...]. If this description is accurate, it implies that the romantic model of authorship, taken seriously, would do grave disservice to the authors it seeks to describe.").

<sup>552</sup> But see Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992) (arguing that a similar observation should be upheld in moral philosophy).

<sup>553</sup> Cohen, *Creativity and Culture*, *supra* note 92, at 1179.

<sup>554</sup> *Ibid* [emphasis added].

<sup>555</sup> Roberto Mangabeira Unger, *Knowledge and Politics* (New York: The Free Press, 1975) at 200; see also Cornell, *Modern/Postmodern*, *supra* note 92.

<sup>556</sup> See Martin Buber, *I and Thou*, translated by Ronald Gregor Smith (New York: Scribner Classics, 2000) [Buber, I and Thou].

the experience. It permits itself to be experienced, but has no concern in the matter. For it does nothing to the experience, and the experience does nothing to it.”<sup>557</sup> This observation leads Buber to another, more salient, one: “Man can live continuously and securely in the world of It, but if he only lives in this world he is not a man.”<sup>558</sup> The realm of ‘I-It’ can therefore not account fully for the development of each person’s individuality – for their creative self – but only for the aspect of creativity that is borne from personal experience.

As Unger observes, “[b]ecause man has no predetermined place in nature, he must make a place for himself in it. In doing this, he is not satisfied with treating the natural world as a source of means to the achievement of his ends. He wants to recognize himself as one who belongs to the natural order from which he has been thrown out by the gift of consciousness,”<sup>559</sup> a wish which is “as deeply rooted in the self as the experience of its separation from nature.”<sup>560</sup> In this sense, authors’ consciousness is what triggers the development of their creative selves: “[o]n the one hand, they acknowledge and perpetuate the barrier between the conscious self and the natural world that is the condition of subjectivity. On the other hand, they seek to bridge the gap.”<sup>561</sup>

And authors achieve this feat through the realm of ‘I-Thou’ relations, defined by Buber as direct, reciprocal, and open encounters with others. It is through these encounters, these dialogical processes, that the creative self not only becomes complete,<sup>562</sup> but also carves out each author’s

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<sup>557</sup> *Ibid* at 21.

<sup>558</sup> Maurice S Friedman, *Martin Buber: The Life of Dialogue*, 4<sup>th</sup> ed (New York: Routledge, 2002) at 66.

<sup>559</sup> Unger, *supra* note 555 at 202.

<sup>560</sup> *Ibid*.

<sup>561</sup> *Ibid*.

<sup>562</sup> See e.g. Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) at 138 ([S]elf-constitution takes place in relation to an environment, both of things and of other people.”); Gregory S Alexander, “Property’s End: The Publicness of Private Law Values” (2014) 99 Iowa L Rev 1257 at 1283 (“We need dialogue and interaction with others in order to constitute and to understand ourselves. There is no end to this dialogue, no final self that, once constituted or discovered, remains unchanged.”).

place within the natural world.<sup>563</sup> ‘I-Thou’ relations involve a meeting of the minds between two people, which depends not on “one letting himself go before another, but on his granting to the man to whom he communicates himself a share in his being.”<sup>564</sup> It’s this element of interpersonal and dialogical relations that, for Buber, contextualizes the world of ‘It’ and prompts individualisation.<sup>565</sup>

Creativity as a practice therefore draws from these relations in an attempt to mediate between what Mikhail Bakhtin denotes as the authorial ‘self’ and the ‘other,’<sup>566</sup> which simultaneously influence each other. Differently from the author/consumer dichotomy, this binary serves to more accurately shape copyright rhetoric by offering a holistic view of creativity. It requires that authors acknowledge the impact of other voices on the emergence of their creative ‘selves;’ that they “embrace the other as a partner rather than a trespasser.”<sup>567</sup> At the same time, however, this approach recognizes that creativity cannot be explained in light of the author’s relationship to the ‘other’ alone.<sup>568</sup> Rather, there exists an element of creativity that remains strictly

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<sup>563</sup> See Coombe, *Cultural Life*, *supra* note 70, at 266 (“Dialogue is the activity in which people create their selves and their communities – texts and contexts.”); Johanna Gibson, *Creating Selves: Intellectual Property and the Narration of Culture* (Hampshire: Ashgate Publishing, 2006) at 136 (maintaining that it is through “dialogue with others, through the ‘selves of others’” that the self comes into being).

<sup>564</sup> Buber, *Friend as Thou*, *supra* note 83, at 257.

<sup>565</sup> Bernard J Fleury, *What is Man? Male and Female* (Bloomington: AuthorHouse, 2011) at 86 (“The process of becoming, as proposed by Buber, is the movement between the attitude of I-Thou to I-It and back to I-Thou. The beginning relational level is the relationship of union. Man begins in union, then separates in order to grasp the world of objects, institutions, abstractions and accumulated knowledge.”).

<sup>566</sup> See Mikhail M Bakhtin, *The Dialogic Imagination: Four Essays*, translated by Caryl Emerson & Michael Holquist, Michael Holquist, ed (Austin: University of Texas Press, 1981) [Bakhtin, *Dialogic Imagination*]; Mikhail Bakhtin, *Speech Genres and Other Late Essays*, translated by Vern W. McGee, Caryl Emerson & Michael Holquist, eds (Texas: University of Texas Press, 1986) [Bakhtin, *Speech Genres*]; see also John Dewey, *Art as Experience* (New York: Perigree Books, 934) at 20-35 (advancing that art arises from interactions between the emergent self and outwardly experiences).

<sup>567</sup> Zemer, *Multivoiced Authors*, *supra* note 299 at 396-7 [emphasis added]; see also Shaun Gallagher, “A Philosophical Epilogue on the Question of Autonomy,” in Hubert J M Hermans & Thorsten Gieser, eds, *Handbook of Dialogical Self Theory* (Cambridge: Cambridge University Press, 2011) at 488 (“[Dialogical Self Theory] is able to explain the self only in relation to other, whether that other can be a different person, or a set of persons, or a different person that stands, in some degree, as other to self [...] and ‘otherness in the self.’”).

<sup>568</sup> See Richardson et al, *supra* note 299.

intrinsic to the author: how she *chooses* to navigate her way through this pre-existing culture and relate to the ‘others’ who came before, all the while establishing her authorial ‘self.’<sup>569</sup> In other words, it’s only by relating to ‘others’ that the authorial ‘self’ comes into being.<sup>570</sup>

In this sense, the authorial self is simultaneously composed of internal and external positions,<sup>571</sup> which manifest themselves through a dialogue that occurs on two distinct but interrelated levels. The first reveals the external positions that make up the authorial self. It is a dialogue that takes place between the self (the ‘I’) and the other (the ‘Thou’), between the authorial self and pre-existing culture. It is what law professor Carys Craig refers to as an *interpersonal* dialogue, where the author draws from pre-existing works to communicate her particular meaning.<sup>572</sup>

But this external dialogue is complemented by yet another concomitant one: an *intrapersonal* dialogue<sup>573</sup> – classified as an internal narrative that draws upon personal experience, position and contemplation – that is entirely inherent to the author herself.<sup>574</sup> It’s a combination between the realm of ‘I-It’ and the self’s participation in the sphere of ‘I-Thou’ in a way that leads

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<sup>569</sup> See Cohen, *Creativity and Culture*, *supra* note 92; Buber, *I and Thou*, *supra* note 556; Hubert J M Hermans et al, “The Dialogical Self: Beyond Individualism and Rationalism” (1992) 47 *Am Psychol* 23 [Hermans, *The Dialogical Self*]; Hubert J M Hermans, “Dialogical Self in a Complex World: The Need for Bridging Theories” (2015) 11 *Eur S J Psychol* 1 [Hermans, *Dialogical Self in a Complex World*].

<sup>570</sup> Zemer, *Copyright, Otherness, Dialogue*, *supra* note 30 at 171; see also Martin Buber, *I and Thou*, *supra* note 556.

<sup>571</sup> Zemer, *Multivoiced Authors*, *supra* note 299 at 396; see also Evangelia Prokopiou et al, “‘Silent’ Monologues, ‘Loud’ Dialogues and the Emergence of Hibernated I-Positions in the Negotiation of Multivoiced Cultural Identities” (2012) 18 *Culture & Psycho* 494 at 496 (“Internal positions are positions that are perceived by individuals as part of themselves, and external positions are positions that are perceived by individuals as part of the environment [...]. All these internal and external positions are part of the self [...] and their significance is derived from their *mutual transactions over time*.”); Peter T F Raggatt, “Positioning in the Dialogical Self: Recent Advances in Theory Construction,” in Hubert J M Hermans & Thorsten Gieser, eds, *Handbook of Dialogical Self Theory* (Cambridge: Cambridge University Press, 2011) 29 at 42 (Dialogical self theory “can be conceptualized in terms of a set of basic and dynamic elements that are subject to developmental processes, and that these process have, first, social and, later, also (self-)reflexive origins.”).

<sup>572</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 265.

<sup>573</sup> *Ibid.*

<sup>574</sup> See Zemer, *Multivoiced Authors*, *supra* note 299 at 393; see also Richardson et al, *supra* note 299; Hermans, *The Dialogical Self*, *supra* note 569; Hermans, *Dialogical Self in a Complex World*, *supra* note 569; Prokopiou et al, *supra* note 571; Raggatt, *supra* note 571.

to the creation of a ‘dialogical self.’<sup>575</sup> It consists of a dialogue that is composed of multiple ‘I’ positions through which authors must “negotiate internally in order to choose and prioritize which I-position to express.”<sup>576</sup> The author’s mind is rife with intensive interaction between the various internal voices and positions that compose her creative self, that parse through her diverse ideas and debate her every choice before she makes it. The colours she selects, the lines she sketches, and the backgrounds she opts for are all internally negotiated choices upon which the author reflects before deciding how best to construct her ideas in a way that conveys her meaning.<sup>577</sup>

It’s this inner dialogue that effectively constitutes authors’ creative personalities, and it’s a dialogue that necessarily relies on their engagement with an *external* dialogue. It’s through their participation in the latter discourse “that authors themselves can internalize and furnish their personalities with the cultural and social properties necessary to develop their creative personality and its internal voices, and to ground them in tangible expressions.”<sup>578</sup> But this dialogical self is not a self-sufficient construct; it functions alongside all ‘others’ and other ‘selves’ to generate the kinds of mutual relationships that lead to *social* dialogue.<sup>579</sup> These multiple levels of dialogue allow authors to mediate between their ‘selves’ and ‘others’ as well as between their composite

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<sup>575</sup> See Hubert J M Hermans, “The Dialogical Self as a Society of Mind: Introduction” (2002) 12 *Theory & Psycho* 147.

<sup>576</sup> Zemer, *Multivoiced Authors*, *supra* note 299 at 400; see also Dina Nir, “Voicing Inner Conflict: From a Dialogical to a Negotial Self” in Hubert J M Hermans & Thorsten Gieser, eds, *Handbook of Dialogical Self Theory* (Cambridge: Cambridge University Press, 2011) 284; Prokopiou et al, *supra* note 571, at 497 (internal voice “act as characters interacting in a story, unfolding their experiences from their own standpoint while they agree, disagree and negotiate with each other.”); Toon Van Meijl, “Multiculturalism, Multiple Identifications and the Dialogical Self: Shifting Paradigms of Personhood in Sociocultural Anthropology,” in Hubert J M Hermans & Thorsten Gieser, eds, *Handbook of Dialogical Self Theory* (Cambridge: Cambridge University Press, 2011) 105.

<sup>577</sup> Zemer, *Multivoiced Authors*, *ibid* at 393; see also Lior Zemer, *The Idea of Authorship in Copyright* (Hampshire: Ashgate Publishing, 2007) at 102-36 [Zemer, *Idea of Authorship*].

<sup>578</sup> Zemer, *Multivoiced Authors*, *ibid*.

<sup>579</sup> *Ibid* at 399-401.

selves,<sup>580</sup> offering “an account of where creativity comes from that locates creativity in the process of working through culture alongside others who are always already similarly engaged.”<sup>581</sup>

What can be drawn from this notion is that creativity is effectively borne from the interaction between these multiple levels of dialogue, between the author’s emerging creative self and pre-existing (but always evolving) culture.<sup>582</sup> “Every authorial and artistic endeavor,” law professor Lior Zemer observes, “is dialogical. It is dialogical by virtue of the processes taking place *between* authors and the public and *within* the authorial self. A copyrighted work [...] results from the merging together of these dialogical spaces.”<sup>583</sup> In this sense, the creative process *is* how an author engages with the social dialogue, both external and internal; how she rethinks, recombines, transforms, and elaborates on the knowledge of her predecessors to elucidate her contribution to this discourse ‘in her own words.’

Originality then, as Drassinower declares, “*is* this ‘speaking in one’s own words.’ To be an author is to speak in one’s own voice.”<sup>584</sup> It’s for this reason, for example, that two identical works can give rise to two distinct copyrights, so long as they’re each independently created. Drawn from this principle is the conclusion that the originality inquiry must be grounded in the relation between

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<sup>580</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 260 n280 (“Having deconstructed the unity of subjectivity and acknowledged the shifting and multiple nature of the communities within which the fragmented subject is constituted, our capacity to conceive of ourselves as possessing some degree of stable identity seems dependent not just upon dialogic relations with others, but also upon a continuous internal dialogue.”); *Cf* Benhabib, *supra* note 552 at 5 (“The identity of the self is constituted by a narrative unity, which integrates what ‘I’ can do, have done and will accomplish with what you expect of ‘me,’ interpret my acts and intentions to mean, wish for me in the future, etc.”).

<sup>581</sup> Cohen, Chapter 4, *supra* note 229, at 4; see also Craig, *Reconstructing the Author-Self*, *ibid* at 265-6; Litman, *Public Domain*, *supra* note 275, at 1011.

<sup>582</sup> Cohen, Chapter 4, *ibid*.

<sup>583</sup> Zemer, *Multivoiced Authors*, *supra* note 299 at 395; see also Nan D Hunter, “Expressive Identity: Recuperating Dissent for Equality” (2000) 35 *Harv CR-CL L Rev* 1 at 9; Hubert J M Hermans, “The Dialogical Self: Towards a Theory of Personal and Cultural Positioning” (2001) 7 *Culture & Psychol* 243.

<sup>584</sup> Drassinower, *WWWC*, *supra* note 30 at 62.

the author and her work – how *this* author created *that* work – rather than in how her work compares to pre-existing ones.<sup>585</sup>

A natural corollary of this view, observes Drassinower, is that originality ought not to be concerned with “an author’s contribution to existing knowledge, but rather on the form in or through which the author communicates her thinking. [...] What matters is not that the author says something new, but that she speaks in her own words;”<sup>586</sup> that she uses these words to navigate her way through the social dialogue that contextualizes her work. “As a matter of copyright law,” Drassinower remarks, “an author is and must be an author among others. She speaks in a context that ensures conditions for dialogue.”<sup>587</sup>

Originality as ‘speaking in one’s own words’ is therefore based on a more holistic view of creativity that’s better equipped at identifying the specificity of authorship. It sidesteps the need to assess an author’s contribution to existing knowledge *per se*, thus adopting an objective standpoint that eschews the dreaded inquiries into a work’s merit. It avoids the tendency to examine a work’s originality in terms of its similarities to or differences from other works, rather focusing on the author’s relation to her work and how she’s using ‘her own words’ to express herself and work through culture.<sup>588</sup> But most importantly, it achieves all of this while still maintaining a healthy

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<sup>585</sup> *Ibid* at 58.

<sup>586</sup> *Ibid* at 57.

<sup>587</sup> *Ibid* at 56.

<sup>588</sup> In this sense, this approach responds to the critiques of those that object to the postmodern rejection of the romantic conception of authorship. The criticism is often to the effect that the tendency to renounce the importance of romantic authorship neglects to account for authors’ own voice within their works; see *e.g.*, Roberta Rosenthal Kwall, “Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine” (2001) 75:1 S Cal L Rev 1 at 22 (“The postmodern critique of the Romantic view of authorship does indeed have much intuitive appeal. On the other hand, this critique ignores the reality that when an author borrows from the cultural fabric in crafting her work, it is still the unique combination of past efforts and the author’s original contributions that invests the author’s work with its ‘inviolable personality.’ More significantly, by questioning the ability of authors to draw upon personal originality as their creative inspiration, critics of the Romantic view of authorship do not sufficiently account for that ‘still small voice’ inside every author which yearns for freedom. This voice, poignantly expressed in Boggs’ narrative about why creative people are ‘prisoners,’ demonstrates that the

respect for existing knowledge as the *raison d'être* – the contextual backdrop – of an author's speech. In this sense, Drassinower embraces an approach to originality that recognizes authors for what they are: situated users trying to navigate their way through pre-existing culture by mediating between their internal and external dialogues, using their 'own words' to carve out their place in this discourse.<sup>589</sup>

#### 4.2 *When Will My Reflections Show Who I Am Inside?: Autonomous Self-Expression as the Nature of Copyright Subject-Matter*

What flows from this concept of creativity as navigating through dialogue and originality as 'speaking in one's own words,' Drassinower advances, is the nature of copyright subject-matter as speech. Because the creative work arises *from* a relation between people, it is *itself* a relation between people.<sup>590</sup> The author isn't just someone who says something; she's someone who, through her work, addresses others.<sup>591</sup> In responding and speaking to these others,<sup>592</sup> she in turn invites dialogue about her ideas.<sup>593</sup> In other words, authors speak *to* each other dialogically, rather than *at* each other monologically.<sup>594</sup> And it's this *speech* that marks the subject-matter of copyright.

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very process of creation implicates powerful emotions and experiences which are deserving of consideration in a legal system concerned with protecting works of authorship").

<sup>589</sup> To some extent, it might seem like this section elaborates a romanticized view of the author, not so different from longstanding positions on originality. We read so much throughout our lives that we don't always know which aspects of intellectual culture stimulate our present and future works. While the theoretical approach I put forth does make it seem as if authors' sources of inspiration might be obvious when they often do have difficulty pinpointing the source of their inspiration, it rests more strongly on the underlying notion that authors learn from pre-existing culture and that their works are somehow a response to that, even if they can't always identify with specificity what they're responding to. In the famous words of Ralph Waldo Emerson: "I cannot remember the books I've read any more than the meals I have eaten; even so, they have made me." His words exhibit the epitome of the ever-evolving nature of culture, dialogue, and intellectual endeavours; of the creativity that shapes our being and provides the backdrop for our own cultural contributions.

<sup>590</sup> Drassinower, WWWC, *supra* note 30 at 64.

<sup>591</sup> *Ibid.*

<sup>592</sup> *Ibid* at 66.

<sup>593</sup> *Ibid* at 84.

<sup>594</sup> *Ibid* at 66.

But speech is a global term that can encompass any utterance whatsoever. It comes in many forms, not all of which are necessarily dialogic in nature.<sup>595</sup> Rather, the kind of speech that culminates in dialogue rests on “a genuine recognition of the other by each participant to the dialogic event. A genuine dialogue is a conversation of *change*, a purposeful communicative act that *requires* the other for its existence.”<sup>596</sup> By acknowledging the ‘other’ in this way, authentic dialogue does much more than just *create* knowledge by developing society’s understanding of shared words and symbols in a way that contributes to society’s meaning-making process. Rather, it *builds* on the knowledge of others and serves as “a mechanism for creating culture by virtue of connecting the subjective individual consciousness and the socially institutionalized structure of society, which allows cross-cultural communication and learning.”<sup>597</sup> Precisely as a relational act, dialogue transforms the lone being from an isolated entity into a communicative one, exposing the person to ‘others’ in a way that renews her ‘self.’<sup>598</sup>

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<sup>595</sup> See Zemer, Copyright, Otherness, Dialogue, *supra* note 30 at 165-74.

<sup>596</sup> *Ibid* at 168; see also Miller, *supra* note 275, at 14; David Bohm, *Bohm On Dialogue* (Lee Nichol, ed., 1996); Patrick M Jenlink, “The Power of Dialogue in Social Systems” in Patrick M Jenlink & Bela H Banathy, eds, *Dialogue as a Collective Means of Design Conversation* (New York: Springer, 2008) 51 at 53; Martin Buber, *Between Man and Man*, translated by Ronald Gregor-Smith (New York: Routledge, 1965) at 22, 97 [Buber, Between Man] (“There is genuine dialogue – no matter whether spoken or silent – where each of the participants really has in mind the other or others in their present and particular being and turns to them with the intention of establishing a living mutual relation between himself and them. [...] [Authentic dialogue] derives its genuineness only from the consciousness of the element of inclusion.”); Martin Friedman, “Dialogue of Touchstones: An Approach to Communication and Identity” (1976) 2 *Comm* 143 at 152 (“The proper understanding of dialogue includes uniqueness; for it is only in uniqueness that there is real mutuality, presentness, and presence. Dialogue means a mutual sharing in reciprocal presentness of the unique.”).

<sup>597</sup> Zemer, Copyright, Otherness, Dialogue, *ibid* at 169; see also Patrick M Jenlink, “Design Conversation: Future Building and Consciousness Evolving” in Patrick M Jenlink & Bela H Banathy, eds, *Dialogue as a Collective Means of Design Conversation* (New York: Springer, 2008) 159 at 160 (“Dialogue is not something we do or use; it is a relation that we create and sustain by conjoint agreement and through shared discourse. As a relation, dialogue is characterized by inclusion and reciprocal sharing, such that the individual’s become one in and with each other.”); Bakhtin, Speech Genres, *supra* note 566, at 7 (“[O]ur real exterior can be seen and understood only by other people, because they are located outside us in space because they are *others*.”).

<sup>598</sup> Zemer, Copyright, Otherness, Dialogue, *ibid* at 169.

Most importantly, dialogue is a communicative act rooted in *continuity*. It rejects the notion that a text's meaning is "firmly fixed to some romantic original intention."<sup>599</sup> Rather, it embraces the stance that a work's meaning evolves over time, reflecting the more modern anthropological understanding of culture. This approach rejects the static objectification of works of authorship in favour of a recognition of "culture as 'traveling,' engaging 'in both internal and external dialogue' along the way."<sup>600</sup> It's therefore only genuine dialogue that acknowledges the ever-evolving nature of meaning, and which delivers "the intensity and level of interaction necessary for the creative act."<sup>601</sup>

But what category of speech in fact generates this kind of genuine dialogue? Simply labeling it as speech 'in an author's own words' remains ambiguous. It's not sufficiently descriptive to evoke the kind of speech that's embedded in a deep-seated recognition of the 'other.' To this effect, Buber differentiates between writing for the sake of writing, and writing in a way that embodies meaning. Authors who engage in the former "wear themselves out turning all experience to account as public communication [...]. They poison experience, for already while it is taking place, they are dominated by the will to produce. Thus they prostitute their lives [...] for how can they expect to create anything save the artificial and the transitory?"<sup>602</sup> Authors who

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<sup>599</sup> Chander & Sunder, *supra* note 321, at 624.

<sup>600</sup> *Ibid*; see also Madhavi Sunder, "Cultural Dissent" (2001) 54 *Stan L Rev* 495 at 519 (describing "the descriptive shift in anthropologists' understanding of culture – how they have increasingly viewed the static, homogeneous conception of culture as erroneous and the fluid, heterogeneous conception as more apt. In this light, diversity within cultures is not new, but rather, has been newly discovered. Furthermore, the descriptions find that cultural dissent – plurality, or difference within culture – is on the rise, spurred by increased interaction among cultures and the emergence of a greater desire for culture on one's own terms."); Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press: Minnesota, 1996) at 48; Arjun Appadurai & Carol A Breckenridge, "Why Public Culture?" (1988) 1 *Pub Culture* 5 at 7 ("The world which cultural anthropologists have so far taken for granted is in the process of vanishing. More and more societies are characterized by profound internal cultural debates [...]."); James Clifford, *Routes: Travel and Translation in the Late Twentieth Century* (Harvard University Press: Cambridge, 1997) at 43.

<sup>601</sup> Zemer, Copyright, Otherness, Dialogue, *supra* note 30 at 166.

<sup>602</sup> Martin Buber, *Pointing the Way: Collected Essays* (New York: Harper & Brothers, 1957) at 8 [Buber, Pointing the Way].

engage in the latter practice, on the other hand, “[bring] forth a natural creation, in a gradual selective progression from experience to thoughts, from thoughts to words, from words to writing, and from writing to public communication [...]”<sup>603</sup> It’s these works alone that generate genuine dialogue, for it is they that “[give] form to the meaning of being.”<sup>604</sup>

Take, for instance, an author whose novel opens with its protagonist observing an obscure painting at the Metropolitan Museum of Fine Arts. She can begin her chapter in one of two forms. She can string together words in a way that makes sense but does little to ‘give form to the meaning of being’: “Visiting New York City, I found myself at the Met and sat there staring at a painting of a woman on the ocean front during sunset hours. Its proportions were engaging. Six feet by ten feet, it was depicted in a mixture of blues, oranges, beiges, and greens.”

Or rather, it can be more colourful, describing the protagonist’s perceptions and emotions as she engages with this artwork: “I strolled through brilliant New York City, not certain where my feet would take me. Before I knew it, I found myself walking up the imposing steps of the Met. As I wandered aimlessly through the never-ending corridors of this infamous museum, one painting in particular caught my eye. In approaching this massive work of art – that spanned nearly an entire wall of the sizeable gallery – I immediately felt immersed in the scene before me. The woman depicted felt almost life-like, sand stuck to her legs nearly up to her knees, scarf blowing in the tropical wind, with her wistful and adventurous countenance drawing me further into the moment being captured. One of her legs slightly lifted in a forward motion, I could feel her awe, her wonder, her worries, as she eagerly headed towards the shore, looking out onto the horizon, and reveling in the magnificent orange-pink hues of the sunset against a clear blue sky.”

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<sup>603</sup> *Ibid.*

<sup>604</sup> *Ibid* at 10 [emphasis added].

Both of these written forms consist of speech ‘in the author’s own words,’ but the latter is much more likely to draw readers in and generate dialogue. Though exuding some knowledge of written prose, the first form is not engaging in the least. It’s not because it’s bad (or, rather, not quite creative) writing; even badly written works can sometimes engender a dialogue. It’s that it truly is artificial and transitory in every sense of the term; it’s a closed communication that neither promotes nor demands a meeting of the minds. Such writings merely give voice to ‘I-It’ relations, as opposed to giving objective/subjective meaning to ‘I-Thou’ encounters. Being strictly the product of ‘It’ and not ‘Thou,’ these kinds of texts effectively foreclose dialogue. They are a confined instance of speech that neither seeks nor requires continuity.

“In art,” Buber notes, “the act of the being determines the situation in which the form becomes the work. Through the meeting that which confronts me is fulfilled, and enters the world of things, there to be endlessly active, endlessly to become *It*, but also endlessly to become *Thou* again [...]. It is ‘embodied.’”<sup>605</sup> It is through this dialogue with the ‘Thou’ that artists ‘give form to the meaning of being.’<sup>606</sup> This form – the embodied artwork or novel – becomes an object (an ‘It’) once this feat is accomplished, but because it’s the product of an encounter with the ‘Thou,’ it can transition back to a ‘Thou’ for others who may eventually encounter it. The second text in my example, through its expressive, open, and enticing speech, effectively enables precisely this phenomenon. It gives form to the meaning of being through direct and honest prose that invite reciprocity and dialogue in a way that closed communications firmly rooted in the ‘It’ could never achieve.

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<sup>605</sup> Buber, *I and Thou*, *supra* note 556 at 28.

<sup>606</sup> Buber, *Pointing the Way*, *supra* note 602 at 10.

What this example illustrates is that not all speech ‘in an author’s own words’ invites the kind of genuine dialogue that contributes to society’s meaning-making process. Rather, it’s only a particular subset of speech that achieves this feat: self-expression. There is, of course, nothing ground-breaking in this proposition; that self-expression is the subject-matter of copyright is often simply presumed as a natural corollary to the idea-expression dichotomy.<sup>607</sup> Directly flowing from this principle is the merger doctrine, which maintains that an idea that can only be expressed in a limited number of ways cannot enjoy copyright protection, as doing so would extend the copyright holder a monopoly over the idea itself.<sup>608</sup> In other words, if the ways in which an idea can be expressed are finite, it leaves no room for any expression of the ‘self’ and it therefore cannot be eligible for copyright protection.

But in order to accurately identify the specificity of works of authorship, it remains crucial to distinguish between the sort of ‘self-expression’ presently recognized as ‘original’ under copyright and the kind of ‘self-expression’ that generates a genuine dialogue.<sup>609</sup> The former is heavily influenced by personhood theories of copyright, which view authors’ expressions as extensions of their personalities and thus necessarily expressions of the ‘self.’ In this sense, the personhood account conceives of the ‘self’ as self-sufficient. By conceiving of expressions of the ‘self’ as inherent to each author, however, this approach ignores the crucial place of the ‘other’ in this endeavour.

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<sup>607</sup> See e.g., Gordon, Property Right in Self-Expression, *supra* note 299; Jessica Bulman, “Publishing Privacy: Intellectual Property, Self-Expression, and the Victorian Novel” (2003) 26:1 *Hastings Comm & Ent U* 73.

<sup>608</sup> *Delrina Corp v Triolet Systems Inc*, 2002 CanLII 11389 (ON CA) at para 52.

<sup>609</sup> Although many have remarked that self-expression is, in fact, the subject-matter of copyright (see e.g., Gordon, Property Right in Self-Expression, *supra* note 299; Bulman, *supra* note 607), few have actually made the distinction between all the forms of ‘self-expression’ recognized as ‘original’ under copyright and the sort that consists of the kind of expression of the ‘self’ that culminates in a genuine dialogue.

Dialogism, on the other hand, recognizes that the “‘self’ can never be a self-sufficient construct.”<sup>610</sup> Rather, as Bakhtin suggests, the “‘self’ is dialogic, a *relation*.”<sup>611</sup> “I am conscious of myself and become myself only while revealing myself for another, through another, and with the help of another,”<sup>612</sup> Bakhtin writes. Buber similarly observes that “I become through my relation to the *Thou*; as I become *I*, I say *Thou*.”<sup>613</sup> What governs a genuine dialogue then is neither the self-expression of a solitary being nor purely interpersonal relations in the abstract, but rather expressions of the ‘self’ through open and honest engagements of the ‘other.’

In this sense, “who ‘we’ are,” observes philosopher Drucilla Cornell, “is the intersection with otherness.”<sup>614</sup> Our identity is defined by these dialogic encounters with ‘others,’ these exchanges within the social structures that characterize the meaning-making process.<sup>615</sup> “We need dialogue and interaction with others,” law professor Gregory Alexander remarks, “in order to constitute and to understand ourselves. There is no end to this dialogue, no final self that, once constituted or discovered, remains unchanged.”<sup>616</sup> Self-expression in this sense is the product of

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<sup>610</sup> Holquist, *supra* note 295, at 19; see also Aristotle, *The Politics of Aristotle*, translated by Ernest Barker (Oxford: Clarendon Press, 1946) at 6 (“The man who is isolated – who is unable to share in the benefits of political association, or has no need to share because he is already self-sufficient – is no part of the polis, and must therefore be either a beast or a god.”); Josh Chafetz, “The Political Animal and the Ethics of Constitutional Commitment” (2011) 124 Harv L Rev F 1 at 6-7 (building on Aristotle’s proposition, he expresses how our social situation is what must inform our ‘selves’ if we are to partake in societal structures: “Beasts are unable to engage in collective life; gods have no use for it. Only humans stand at the intersection [...]. [T]he virtuous citizen cannot simply practice individual self-rule. He must participate in communal governance, not to look out for his own narrow, animal interests, but rather to engage with his fellow citizens in their joint project of discovering and implementing the best rules to govern their communal life. To withdraw from this project in the pursuit of pure self-interest is bestial; to withdraw from it in the pursuit of self-sufficient contemplation is diving. To engage in it is what alone marks him as human.”).

<sup>611</sup> Holquist, *ibid*.

<sup>612</sup> Bakhtin, Dialogic Imagination, *supra* note 566, at 287.

<sup>613</sup> Martin Buber, *I and Thou*, *supra* note 556 at 26.

<sup>614</sup> Drucilla L. Cornell, “Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation” (1988) 136 U Pa L Rev 1135 at 1227.

<sup>615</sup> Madhavi Sunder, “Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*” (1996) 49:1 Stan L Rev 143 at 170 [Sunder, Authorship and Autonomy].

<sup>616</sup> Alexander, *supra* note 562 at 1283.

an author's dialogue with the 'other' – her connection to the 'Thou' – in her lifelong quest for self-actualization. We cannot understand ourselves as speaking subjects without understanding ourselves as members of a dialogic community, as relational individuals. "We transform speech," Cornell observes, "even as we come to ourselves within it."<sup>617</sup> And we do so by expressing ourselves *by, for and through* the 'other.' All creators are submerged in a world of pre-existing language that requires them to "use words that are already populated with the social intentions of others,"<sup>618</sup> they become authors, Bakhtin asserts, by compelling these words "to serve [their] own new intentions, to serve a second master."<sup>619</sup>

It's such that authors enter "the 'semiotic' realm of meaning-making, the 'fog of symbols'"<sup>620</sup> through which they navigate and with which they define their 'selves.' It's working through and participating in culture, in this sense, that shapes their personalities.<sup>621</sup> This meaning-making process constitutes authors as individual creative selves by allowing them to partake in the evolution of culture through "an interactive cycle of social exchange, social participation and self-formation. We speak and we listen, we send out and we take in. As we do this, we change, we grow, we become something other than we were before, and we make something new out of what existed before."<sup>622</sup> In this crucial sense, it's not *all* self-expression, but rather expressions of the 'self' *by, for and through* the 'other' – using words and symbols that recognize the social intentions of others while simultaneously asserting the author's individual creative self – that leads to the kind of progress and enlightenment that copyright as a construct was designed to promote. It's therefore this understanding of self-expression as the subject-matter of copyright that ought to

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<sup>617</sup> Cornell, *Modern/Postmodern*, *supra* note 92, at 363.

<sup>618</sup> Bakhtin, *Dialogic Imagination*, *supra* note 566, at 299-300.

<sup>619</sup> *Ibid.*

<sup>620</sup> Bracha & Syed, *supra* note 89, at 255.

<sup>621</sup> *Ibid.*

<sup>622</sup> Balkin, *Digital Speech*, *supra* note 502 at 34.

inform how we envision the notion of independent creation; how we define what works are sufficiently ‘original’ to enjoy copyright protection.<sup>623</sup>

Independent creation, however, has always been understood as a negative requirement; so long as a work is *not* copied, it’s deemed independently created. But because questions surrounding independent creation tend to arise only when a work’s *originality* is contested by the author of a pre-existing work, a work’s independent nature is therefore assessed in terms of similarities to and difference from the work of the contesting author.<sup>624</sup> And this approach is problematic on two fronts. First, it bases copyright’s originality principle – and therefore the nature itself of infringement – on an unrealistic dichotomy: copied versus not copied. But whether it’s Plato’s musings on mimesis,<sup>625</sup> Barthes’ ruminations on the death of the author,<sup>626</sup> or judicial opinions in copyright cases,<sup>627</sup> society has long recognized that no work truly owes its origin to

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<sup>623</sup> By simultaneously acknowledging the importance of both the ‘self’ and the ‘other,’ this approach equally addresses the critique that art cannot be viewed as self-expression or self-actualization because construing it as such fails to recognize the place of those that consume culture, unnecessarily depicting them as free riders or superfluous (see Rubinfeld, *supra* note 294, at 34: “To say that art is ‘self-expression’ or ‘self-realization’ is about the most self-centered way of describing what artists do (even if many artists seem determined to bear it out), and it renders [...] altogether too peripheral or secondary what *audiences* do. Am I ‘expressing myself’ or ‘realizing myself’ when I read Keats’s poems? If art is an artist’s self-expression,’ then the audience is essentially a consumer, a voyeur, or, at best, an interpreter of another’s act of self-expression.”).

<sup>624</sup> See *Roth Greeting Cards v United Card Co*, 429 F.2d 1106, 1110 (9<sup>th</sup> Cir 1970); *Comput Assocs Int’l Inc v Altai, Inc*, 982 F.2d 693; *Nichols v Universal Pictures Corp*, 45 F.2d 119 (2d Cir 1930); *Cinar Corporation v Robinson*, [2013] 3 SCR 1168; *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, [2000] UKHL 58, [2000] 1 WLR 2416; But see Craig, Total Concept and Feel, *supra* note 67 (offering a compelling “interpretation of ‘substantial similarity’ that opens up (or at least better guards) space for *creative copying* – that is to say, copying that substantively transforms the original copied work, in its ‘total concept and feel,’ and therefore advances the ultimate goals of the copyright system” (*ibid* at 606). Although the approach suggested still compares between a work and a pre-existing one, this article nonetheless approaches the question from a dialogic lens: “[the] ‘totality’ approach, which compares works holistically and impressionistically, might paradoxically hold the promise of a more discerning infringement doctrine – one that allows us to perceive the plaintiff’s and defendant’s works in dialogic relation to one another, and so to better gauge the defendant’s contribution to the cultural conversation. By asking, first, whether the defendant’s work is substantially similar to, or different from, the plaintiff’s work in its total concept and feel, we can assess whether it is effectively no more than a mere copy, or whether it is more properly regarded as a new text in the utterance chain” (*ibid* at 653)).

<sup>625</sup> See Plato, *The Republic* trans by Benjamin Jowett (London: Arcturus Publishing Limited, 2019) at Books II, III & X.

<sup>626</sup> See Barthes, *La mort*, *supra* note 293.

<sup>627</sup> Cf *Bleistein v Donaldson Lithographing Co*, *supra* note 238 at 250 (J Holmes) (“The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity

anyone in particular. Every creative work is merely an imitation of something pre-existing, and so “[i]t follows that the author’s works are not ‘independent’ creations and they do not originate from authors alone.”<sup>628</sup> In other words, the very fact that elements of a work are ‘copied’ or ‘similar’ to a pre-existing one should not forcibly render it infringing.

Second, this approach to independent creation does not arm us with the analytical foundations that allow for assessing whether or not a creation is independent based on its own merits. This deficiency was, perhaps, never an issue in an analog world where direct (and sometimes indirect) copying from a pre-existing work was the primary basis upon which a work could be stripped of its independent nature. The insertion of algorithms within the creative process, however, presents a new twist that must be considered by the principle of independent creation. Authors incorporating algorithmic contributions within their works may not have copied pre-existing creations in the traditional sense, but they certainly did not create their works entirely independently.

Whether or not such works can be upheld as independently created necessarily relies on a *standalone* element; an element that’s capable of assessing a work’s provenance without having to contrast it with pre-existing works. This element, I posit, is *creative autonomy*.<sup>629</sup> Conceived of

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even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.”)

<sup>628</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 261.

<sup>629</sup> In using the term ‘creative autonomy,’ I specifically differentiate it from approaches to ‘speaker autonomy’ “as a shield around a speaker’s message [that] creates an intellectual property right in culturally contested ideas” (Sunder, *Authorship and Autonomy*, *supra* note 615, at 149-50). My approach to creative autonomy is not meant to reify the author as speaker in a romantic sense, nor to present the speaker as self-made, but rather to situate her more clearly within the networks of social and cultural relationships – the contexts and the social dialogue – that constitute her ‘self.’ In this sense, rather than resting “upon the uneasy and liberal foundations of radical individualism and exclusion,” (*ibid* at 156), the approach to creative autonomy that I favour does precisely the opposite. Its aim is not to “pull speech out of its social context” in a way that “apportions control over identity and meaning with a property-like approach” and endows her with the right to exclude, but rather to assert creative autonomy as an important element that exists within each author and permitting them to be authors among others (*ibid*).

as an exertion of autonomy, the principle of independent creation becomes more grounded in realistic notions of creative pursuits, more rooted in positive demonstrations of authorial independence, and more capable of providing the sort of context that allows for the determination of whether an author is in fact ‘speaking in her own words’ – regardless of whether or not we are in the presence of copying.

That autonomy is an important cornerstone of copyright has long been recognized. It is, in fact, an undercurrent of all of copyright’s major philosophical underpinnings. Locke’s natural rights theory, for instance, maintains that individuals enjoy the personal freedom to *choose* that to which their personal labour is attached, so long as the theory’s two caveats are respected.<sup>630</sup> The personal freedom that anchors Locke’s argument is, in essence, an exertion of autonomy.<sup>631</sup> For his part, Hegel’s<sup>632</sup> theory of property rights is founded on an understanding of the will to self-determine – a will grounded in notions of autonomy – as a fundamental freedom to appropriate through creation.<sup>633</sup> Even utilitarianism, with its emphasis on increased aggregate happiness, seems to have roots in creative autonomy – with a certain measure of self-determination (subject to reasonable limits, of course) generally being considered a precondition to happiness.<sup>634</sup>

Autonomy is similarly central to Drassinower’s communicative act theory. For Drassinower, autonomy acts “as the primary normative ideal of the institution [of copyright], its

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<sup>630</sup> See above, Chapter 2; Mary Gani-Ikilama, “Copyright Theory and a Justificatory Framework for Creative Autonomy in Cultural Industries” (2016) 6:2 *Queen Mary J of Intellectual Property* 154 at 162; see also, Locke, *Two Treatises*, *supra* note 36.

<sup>631</sup> Gani-Ikilama, *ibid* at 162 (“The premise of personal freedom in Locke’s argument already shows theoretical justification for creative autonomy.”); see also, Locke, *Two Treatises*, *ibid*.

<sup>632</sup> See above, Chapter 2.

<sup>633</sup> Gani-Ikilama, *supra* note 630 at 165 (Hegel’s “notions of the fundamental freedom of the will to self determine, and its ability to appropriate by formation, appear to translate directly to the notion of autonomy in creative endeavour.”); see also Hegel, *supra* note 37, at para 7; Simon Frith & Lee Marshall (eds), *Music and Copyright*, 2<sup>nd</sup> ed (Edinburgh: Edinburgh University Press, 2004) at 32.

<sup>634</sup> Gani-Ikilama, *ibid* at 173.

focus [being] on both the dignity of individual authorship and the equality of authors as a collective.”<sup>635</sup> The dignity of individual authorship is sustained, Drassinower posits, by authors’ autonomy as speaking beings.<sup>636</sup> In the same measure as an author’s choice to publish affirms her autonomy as speaker,<sup>637</sup> infringement is compelled speech that strips the author of her autonomy by denying her the choice of whether to speak or not to speak.<sup>638</sup> But Drassinower warns that an author’s choice of whether or not to speak “cannot as a copyright law matter translate into an unencumbered autonomy to restrict unilaterally the conditions under which his work is publicly available.”<sup>639</sup> The limits to what autonomy can permit authors to claim are bound by the equal autonomy of all authors as independent thinkers,<sup>640</sup> as independent participants in a dialogue that unites them all.<sup>641</sup>

Autonomy in all these theories, however, is mobilized to *justify* copyright’s nature as a rivalrous system or users’ rights as a construct that promotes equality among authors. What’s somewhat more distinct about my proposition is that *creative* autonomy – rather than the absence of ‘copying’ – is the notion that ought to ground the principle of independent creation.<sup>642</sup> Generally defined as “authors’ absence of, or ability to grapple with, external pressure to alter their authorial

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<sup>635</sup> Shyamkrishna Balganesh, “The Immanent Rationality of Copyright Law” (2017) 115:6 Mich L Rev 1047 at 1060 (reviewing Drassinower’s book, WWWC, *supra* note 30).

<sup>636</sup> Drassinower, WWWC, *supra* note 30 at 120.

<sup>637</sup> *Ibid* at 178.

<sup>638</sup> *Ibid* at 113.

<sup>639</sup> *Ibid* at 180.

<sup>640</sup> *Ibid* at 179.

<sup>641</sup> *Ibid* at 66.

<sup>642</sup> An approach which has been used in very few cases, and only where holding infringement for substantial similarity would be absurd (see *Krisarts SA v Briarfine Ltd*, 1977 FSR 557 (In response to a plaintiff claiming infringement of his painting of some of London’s most popular views and landmarks, the court wrote: “When one is considering a view of a very well known subject like the Houses of Parliament with Westminster Bridge and part of the Embankment in the foreground, the features in which copyright is going to subsist are very often the choice of viewpoint, the exact balance of foreground features or features in the middle ground and features in the far ground, the figures which are introduced, possibly in the case of a river scene the craft may be on the river and so forth. It is in choices of this character that the person producing the artistic work makes his original contribution.”)).

direction,”<sup>643</sup> creative autonomy is embedded in an author’s ability to *freely* work through culture – to engage in the “collective processes of meaning-making in a society”<sup>644</sup> without unnecessary hindrance.<sup>645</sup> Creative autonomy is effectively “a matter of degree. [Authors] who are able to deliberate with critical insight and self-awareness and to choose from abundant options are highly autonomous. Others – who unthinkingly do whatever others expect of them, or who lack self-restraint, or whose most basic choices are dictated by economic necessity – may not be very autonomous at all.”<sup>646</sup>

There are three important aspects to this link between autonomy and critical self-awareness. The first is that creative autonomy is a necessary component for authors’ expressions of the ‘self;’ it’s “the freedom and ability to construct one’s own narrative and to project this narrative of the self into the world, [through which] the self takes on the role as both actor and author.”<sup>647</sup> The second is that heightened creative autonomy necessarily rests on wide access to ideas and information as well as the liberty to ‘use’ them unreservedly – the denial of which is more threatening to autonomy than restrictions on freedom of action.<sup>648</sup> Without sufficient access to pre-existing works, authors are deprived of the ‘abundant options’ that allow them to exert their

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<sup>643</sup> Gani-Ikilama, *supra* note 630 at 157; see also Robert J Sternberg and Todd I Lubart, “The Concept of Creativity: Prospects and Paradigms” in Robert J Sternberg, ed, *Handbook of Creativity* (Cambridge: Cambridge University Press, 1999) 3 at 10; Keith Negus, “Authorship and the Popular Song” (2011) 92:4 *Music and Letters* 607 at 629.

<sup>644</sup> Balkin, *Digital Speech*, *supra* note 502 at 34.

<sup>645</sup> See Litman, *Public Domain*, *supra* note 275; Coombe, *Objects of Property*, *supra* note 92; Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2001) [Lessig, *Future of Ideas*]; Rosemary J Coombe, “Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders” (1992) 10 *Cardozo Arts & Ent LJ* 365; Rosemary J Coombe, “Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy” (1992) 26 *New Eng L Rev* 1221; Rochelle Cooper Dreyfuss, “Expressive Genericity: Trademarks as Language in the Pepsi Generation” (1990) 65 *Notre Dame L Rev* 397; Niva Elkin-Koren, “Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace” (1996) 14 *Cardozo Arts & Ent LJ* 215 at 272-3 [Elkin-Koren, *Cyberlaw and Social Change*]; David Lange, “At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium” (1992) 55 *Law & Contemp Probs* 139.

<sup>646</sup> Richard H Fallon, Jr, “Two Senses of Autonomy” (1994) 46:4 *Stan LR* 875 at 876-9.

<sup>647</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 261-2.

<sup>648</sup> Fallon, *supra* note 646, at 902.

own autonomy; without their ability to engage with ‘others,’ they are denied the degree of autonomy necessary to express their ‘selves.’ Third, by limiting these liberties, copyright law necessarily restricts authors’ freedom of expression, constraining the kinds of individual expressions that are not only products of autonomy, but critical components of self-actualization.<sup>649</sup>

What can be drawn from this analysis is that creative autonomy, and thus the freedom of expression at its core, is – like creativity – embedded in notions of relationality. “What makes autonomy possible,” writes law professor Jennifer Nedelsky, “is not separation, but relationship. This approach shifts the focus from protection against others” – against ‘copying’ – “to structuring relationships so that they foster autonomy.”<sup>650</sup> In recognizing that “an utterance is never *in itself* originary”<sup>651</sup> – that “[i]t is always an answer to another utterance that precedes it, and is therefore always conditioned by, and in turn qualifies, the prior utterance to a greater or lesser degree”<sup>652</sup> – dialogic theory achieves precisely this feat. It acknowledges that authors are, and must be, interdependent: “the work as utterance necessarily exists in a chain of utterances, incorporating and responding to the proximal and distal *already-spoken*, and anticipating the proximal and distal *not-yet-spoken*.”<sup>653</sup> But because authors are preceded both by a language system that predates

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<sup>649</sup> See Graeme W Austin, “Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace” (2000) 79:3 Or L Rev 575 at 612-4; see also Kent Greenawalt, “Free Speech Justifications” (1989) 89:1 Colum L Rev 119 at 152-3 (“The practice of free speech enhances the lives of those who seek to communicate in various [...] ways. For the speaker, communication is a crucial way to relate to others; it is also an indispensable outlet for emotional feelings and a vital aspect of the development of one’s personality and ideas. The willingness of others to listen to what one has to say generates self-respect. Limits on what people can say curtail all these benefits. [...] Because communication is so closely tied to our thoughts and feelings, suppression of communication is a more serious impingement on our personalities than many other restraints of liberty [...].”).

<sup>650</sup> Jennifer Nedelsky, “Reconceiving Rights as Relationship” (1993) 1:1 Rev Const Stud 1 at 8 [Nedelsky, Reconceiving Rights]; see also Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 Yale J Law & Fem 7 [Nedelsky, Reconceiving Autonomy].

<sup>651</sup> Holquist, *supra* note 295, at 60.

<sup>652</sup> *Ibid.*

<sup>653</sup> Craig, Total Concept and Feel, *supra* note 67 at 41.

them – that is ‘always already there’ – as well as by all of existence, they are required to answer for the particular place they occupy within this structure.<sup>654</sup> And it’s in *how* they answer for it that they must be given the freedom to assert their creative autonomy.

From this lens, “[s]ome of the most basic presuppositions about autonomy shift: dependence is no longer the antithesis of autonomy but a precondition in the relationships [...] that make the development of autonomy possible.”<sup>655</sup> In other words, genuine creative autonomy is “only realizable through the human interactions that allow it to develop and flourish,”<sup>656</sup> and these interactions are necessarily rooted in pre-existing structures that define the social and cultural contexts in which they arise. This interdependence – this situatedness within one’s own culture<sup>657</sup> – is not a limit on authorial autonomy, but rather a necessary prerequisite to it.<sup>658</sup> As Cohen observes, “[a]utonomy is exercised, and self-determination pursued, by working through culture.”<sup>659</sup>

And authors work through culture by engaging in what Bakhtin refers to as ‘speech genres.’<sup>660</sup> Bakhtin separates these genres into three kinds, each characterized by restrictions that vary across the spectrum. The first, is the utterance’s theme. Some themes, like the weather for

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<sup>654</sup> Holquist, *supra* note 295.

<sup>655</sup> Nedelsky, *Reconceiving Rights*, *supra* note 650 at 8.

<sup>656</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 256-7.

<sup>657</sup> See above, p. 166.

<sup>658</sup> Cohen, Chapter 4, *supra* note 229 at 2-3 (“Let us begin by focusing on something that may seem, at first, to be a contradiction in terms: the ubiquity of constraint in the creative process. I do not mean constraint in the sense of coercion or limitation, but rather in the sense of situatedness within one’s own culture. Situatedness, in turn, does not refer to a “situation” in the prescriptive sense (that is, one that might give rise to a legal defense or to an ethical obligation), but more minimally and descriptively to the fact that individuals and groups are located within particular cultural contexts. Each situated self encounters path-dependencies that shape both the content and the material forms of cultural knowledge, and thus shape creative opportunity. Recognizing situatedness does not require submerging the individual irretrievably within the social; creativity has idiosyncratic, internal dimensions as well as external ones. But what is distinct about each individual in relation to the surrounding culture will include differences in situation and the different path-dependencies that result.”)

<sup>659</sup> Cohen, Chapter 4, *ibid* at 19; see also Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2007) [Benkler, *Wealth of Networks*].

<sup>660</sup> Bakhtin, *Speech Genres*, *supra* note 566.

instance, “are typically dealt with in highly standardized ways in which the limits of exhaustiveness are rigidly determined,”<sup>661</sup> therefore leaving little room for expressions of the ‘self,’ for assertions of creative autonomy. Other themes, however, are much less constrictive in nature. Take, for example, romance and mystery. They clearly impose certain artistic conventions on authors, rules that must be followed in order to make a valuable contribution to those conceptual spaces. But authors not only exert their autonomy in *choosing* the theme, they do so equally by making choices within the constraints imposed by the theme.<sup>662</sup> Thus, while authors may not be able to disregard the rules and conventions that define the conceptual spaces of their chosen theme, there remains sufficient creative space for expressions of their ‘selves’ within these confines.<sup>663</sup>

This personal expression is concretized through the second speech genre – the speech plan of the speaker – which “plays a larger role in shaping what gets said.”<sup>664</sup> It’s through this plan that the author decides what she wishes to convey by making certain creative choices instead of others within the creative conventions that define her chosen theme. It’s through this plan that she chooses the medium or format for the work’s fixation and the methods or materials that she’ll use to achieve

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<sup>661</sup> Holquist, *supra* note 295, at 64.

<sup>662</sup> van Gompel, *supra* note 276, at 108 & 110; Linda Candy, “Constraints and Creativity in the Digital Arts” (2007) 40:4 *Leonardo* 366 at 366 (creativity is “a process of exercising free choice in the context of a range of existing constraints”); John Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000) at 180 (qualifying creativity as “working within constraints” and originality as “changing the constraints.” Creativity for Elster is thus easier to attain than originality, which he sets at a higher standard).

<sup>663</sup> van Gompel, *ibid* at 111; see also Steven C Tracy, “The Blues Novel, in Maryemma Graham, ed, *Cambridge Companion to the African American Novel* (Cambridge: Cambridge University Press, 2004) 122 at 124 (Writing about how, although blues music is a very particular genre, “the blues provide a basic structure free enough to accommodate individual temperament, abilities, and creativity. Far from being a limited genre, it provides a structured but expansive place for the individual to relate to and express the community, and for artists to touch home base but still express themselves individually”).

<sup>664</sup> Holquist, *supra* note 295, at 64.

this feat.<sup>665</sup> By making these choices, the author exerts her autonomy – her will – and compels pre-existing words “to serve [her] own new intentions, to serve a second master.”<sup>666</sup>

While this will is further restricted by the third speech genre – the structure an utterance must take to be understood and appropriate in a given context<sup>667</sup> – it still leaves room for authors’ individual style of utterance, which in turn affirms their autonomy. So long as the theme chosen leaves space for expressiveness – for making creative choices – restrictions arising from either language or culture do not undermine authorial autonomy. Rather, they offer authors the tools needed to assert their place within the networks of relations that define culture; the tools necessary for their elaboration of independent works that pursue society’s meaning-making process and are relevant to the social dialogue.

But while a certain measure of interdependence is necessary to sustain creative autonomy, an author’s creation will only be ‘independent’ if she enjoys enough leeway in making the creative choices that culminate in her own ‘original’ contribution to the social dialogue. If, on the other hand, a work’s components leave little or no room for creative choices – like those addressed by copyright’s merger doctrine – an author will be unable to meet this threshold.<sup>668</sup> The same can be

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<sup>665</sup> van Gompel, *supra* note 276, at 112 (“The rules of some genres are more strictly defined than others. In contrast to Western movies, for which there are scores of – more or less – loosely organised conventions (of which usually on part need to be included in a movie to qualify it as a Western), some poetry follows clearly defined rules. To give an example, a sonnet always consists of a fourteen-line verse with a specific metrical structure and a fixed rhyme scheme [...]. Limericks and other verse forms follow similar conventions. The rules of these genres ‘may be so specific as to leave little room or necessity for elaborate rhetorical planning.’” Still, the large variety of poems that are created over the years reveal that these genres leaves ample room for individual expression. (*ibid*, at 111, citing Linda Flower & John R Hayes, “A Cognitive Process Theory of Writing” (1981) 32:4 *College Composition and Communication* 365 at 379); see also Candy, *supra* note 662, at 366 (discussing how creating art in digital environments necessitates a trade-off between aesthetic ambitions and the constraints imposed by digital technology: “The choice of whether to program or to use a software application can be critically to how much the artist has control over the character of the constraints to be specified.” The choice of one medium over another, however, necessarily implies the choice of the constraints that accompany it.).

<sup>666</sup> Bakhtin, *Dialogic Imagination*, *supra* note 566, at 299-300.

<sup>667</sup> This structure “determine[s] the choice of language units (lexical, grammatical) *and* communication units (the composition of the utterance, the speech genres employed.” (Holquist, *supra* note 295, at 65).

<sup>668</sup> van Gompel, *supra* note 276, at 137.

said where authors are inspired by motives other than creativity.<sup>669</sup> Whether it's mere functionality, like in the case of utilitarian works discussed above,<sup>670</sup> or whether the author's choices are influenced or her hand guided by external forces, her autonomy will be diminished. And depending on the extent to which her autonomy is limited, her 'work' may very well be relegated to something other than a work of authorship – regardless of whether or not there is effectively room for creative choices to be made.

Authors, for instance, whose choices are strictly guided by their audience or publisher (who are generally most concerned about a work's marketability) cannot be regarded as making autonomous choices, even though they may 'freely' apply them.<sup>671</sup> These kinds of external considerations that sway the creative choices of the author effectively deprive the work of its independent nature. Stripped of her autonomy to *independently* choose between the various options that present themselves, the author is no longer expressing her 'self' *by, for and through* the 'other.' She's simply expressing what she thinks the 'other' wants, no longer engaging in the kind of 'self-expression' that marks the subject-matter of copyright.

These kinds of communications stand in stark opposition to the sorts of works that draw from pre-existing culture to solidify an author's place in the social dialogue. It's the author's freedom to make creative choices that separates the two; her ability to assert her autonomy, even in the face of well-established creative conventions. What follows is that no creation can be considered independent if it's dictated by 'others' – even where no copying has occurred. Lack of copying, therefore, is a poor measure of independent creation and, consequently, a poor

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<sup>669</sup> *Ibid*, at 137.

<sup>670</sup> See above, Chapter 2, Section 2.3.1.

<sup>671</sup> van Gompel, *supra* note 276, at 116 ("If they are primarily guided by user demands, it cannot truly be upheld that they result from the author's free and creative choices.").

determinant of originality. It's rather creative autonomy, as a foundation for independent creation, that's better adapted to this end. And it's through this lens that we'll be better placed to examine whether, or under what conditions, human-machine collaborations are capable of fulfilling the dialogic purpose at copyright's core. But before we can achieve this feat, it's crucial to first address another aspect of copyright doctrine that often stands in the way of labelling such works as original and autonomous creations: the principle of infringement.

#### 4.3 *Just Because It's What's Done, Doesn't Mean It's What Should be Done:*

##### *Recontextualizing the Notion of Infringement*

Being a copy-based technology, generative AI's use in the elaboration of creative works very often results in these creations being relegated to mere acts of infringement as a matter of copyright law; in having their *originality* contested. If these algorithms feed off unauthorized copies, the thinking often goes, so too must any use of its output amount to little more than violations of pre-existing authors' exclusive rights. And this stance is a direct byproduct of copyright's tendency to construe copying as wrongful *per se*, effectively regarding all 'uses' as within copyright's purview in a way that necessarily creates barriers to users' creative autonomy. In so strongly protecting the despotic dominion of authors, however, copyright quite simply neglects to recognize that there can very often be social value in the kind of 'copying' targeted by its infringement principle.<sup>672</sup>

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<sup>672</sup> Take, for instance, the Free Republic website which published entire newspaper articles on its website and permitted users to annotate them in an effort to shed light on mainstream media's liberal biases. Ultimately sued for copyright infringement by the L.A. Times and The Washington Post, the United States District Court ruled in favour of the media conglomerates. The online market for these articles, the judge maintained, would be adversely affected by the plaintiff's reproductions. The social value imparted by a website that permits individuals to freely express critical commentary of modern media's representation of current events barely figured into the decision. It was the 'market' that featured most prominently, and this reasoning persisted despite Free Republic providing concrete evidence that their site in fact led to increased traffic on plaintiffs' websites (*LA Times v Free Republic*, 2000 US Dist LEXIS 5669).

I needn't look farther than my own home for an example. Many of you are probably familiar with Taio Cruz's 2010 hit *Dynamite*.<sup>673</sup> Well, come Chanukah (or Hanukkah, but let's not get into that age-old debate), not a day goes by where my kids don't have that beat blasting throughout my house. The lyrics accompanying Cruz's famous tune, however, likely won't be recognizable to most of you: "I flip my latkes in the air sometimes/ Sayin' 'ayo, spin the dreidel'/ Just wanna celebrate for all eight nights/ Singin' 'ayo, light the candles.'"<sup>674</sup> Written and recorded by Yeshiva University's a cappella group, *The Maccabeats*, this song has known critical acclaim in Jewish communities around the world. With Cruz's *Dynamite* not meeting the principles of modesty that preside in observant Jewish milieus, *The Maccabeats* offer a version of this song to which their members can connect. Most Orthodox (and not just Hassidic) Jews simply can't relate to 'rocking clubs.' But latkes, dreidels, and the miracle of Chanukah? These signify something to them. And – standing in stark opposition to popular beliefs surrounding the self-sufficiency of Semitic culture in constructing firm, fixed, and authentic identities severed from the influence of modern media<sup>675</sup> – Jewish communities of all factions quite often turn to such transformative creations to relate to (and not segregate themselves entirely from) the diasporic societies in which they live without surrendering the values they hold dear.<sup>676</sup>

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<sup>673</sup> YouTube, "Taio Cruz – Dynamite (Official UK Version)" (16 July 2010), online:

<<https://www.youtube.com/watch?v=Vysgv7qVYTo>>.

<sup>674</sup> YouTube, "The Maccabeats – Candlelight – Hanukkah" (26 November 2010), online:

<<https://www.youtube.com/watch?v=qSJCSR4MuhU>>.

<sup>675</sup> See Robert P Merges, "Locke Remixed ;-)" (2007) 40:30 UC Davis L Rev 1259 at 1264 at 1267-8 [Merges, Locke Remixed] (arguing against a dialogic vision of human rights. "Many people, all around the world," writes Merges, "get along fine with little or no exposure to modern media. [...] There are Amish and Orthodox Jews and Hutterites who voluntarily eschew modern electronics in most forms, including modern music and television. [...] I have seen no research showing that these peoples have no identity, or that they are somehow incompletely formed as human beings. [...] Perhaps media exposure thins out and weakens one's identity. If so, remixing culture is perhaps not an ideal way to construct a firm, fixed, and authentic identity. Unplugging from it might be a better alternative").

<sup>676</sup> See e.g. Gad Elbaz Official, "Gad Elbaz feat. Nissim – Hashem Melech 2.0" (24 January 2016), online:

<[https://www.youtube.com/watch?v=w-Y\\_5brDUSM](https://www.youtube.com/watch?v=w-Y_5brDUSM)> (to the tune of Khaled's popular song *C'est la vie* (Universal Music France, "Khaled – C'est la vie (Clip officiel)" (30 August 2012), online:

<<https://www.youtube.com/watch?v=H7rhMqTQ4WI>>); JEWBELLish, "Turn Down For What – Jewish Version – A Dating Comedy" (12 September 2014), online: <<https://www.youtube.com/watch?v=EGXSCOUaE5w>> (to the

These kinds of uses by everyday users – for whom the costs of licenses are often prohibitive – serve the very important purpose of permitting those that usually find themselves on the outskirts of popular culture to decommoify it “by taking it out of its profit-oriented platform and transforming it [...] into something that has cultural meaning that goes beyond monetary value;”<sup>677</sup> into something that represents their worldviews and actively acknowledges their diversity. More importantly, however, they emphasize that users cannot simply be reduced to a type isolated from the larger context surrounding their use. Some reimagine copyrighted material because popular culture doesn’t represent them.<sup>678</sup> Others do it because they take pleasure in transforming the works of pre-existing authors through the lens of their selves.<sup>679</sup> And others still do it to make some statement about society, politics, or any number of relevant subjects in a fashion to which the public can relate.<sup>680</sup>

Rather than put a premature end to these kinds of dialogic encounters – as it did for *The Maccabeats*, who eventually found themselves on the wrong side of an infringement claim regardless of the social value inherent in their work<sup>681</sup> – our copyright system must be able to accommodate this kind of nuance and recognize its crucial role in preventing cultural hegemony; in creating a sense of belonging for all members of society regardless of their ethnicity, race,

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tune of DJ Snake and Lil Jon’s popular hit *Turn Down For What* (DJ Snake, “DJ Snake, Lil Jon – Turn Down for What” (13 March 2014), online: <<https://www.youtube.com/watch?v=HMUDVMiITOU>>); Aishdotcom, “Rosh Hashanah: Can’t Stop the Feeling” (21 September 2016), online: <<https://www.youtube.com/watch?v=KBTfGXw69HY>> (to the tune of Justin Timberlake’s *Can’t Stop the Feeling* (Justin Timberlake, “CAN’T STOP THE FEELING! (from DreamWorks Animation’s ‘TROLLS’) (Official Video)” (17 May 2016), online: <<https://www.youtube.com/watch?v=ru0K8uYEZWw>>).

<sup>677</sup> Debora Halbert, “Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights” (2009) 11 Vand J Ent Tech L 921 at 940-1.

<sup>678</sup> See e.g. Tushnet, *Legal Fictions*, *supra* note 526; Stendell, *supra* note 526; Katz, *supra* note 526; Chander & Sunder, *supra* note 329, at 610.

<sup>679</sup> See e.g. Tushnet, *Legal Fictions*, *ibid*; Stendell, *ibid*; Katz, *ibid*; Chander & Sunder, *ibid*.

<sup>680</sup> See e.g. Tushnet, *Legal Fictions*, *ibid*; Stendell, *ibid*; Katz, *ibid*; Chander & Sunder, *ibid*.

<sup>681</sup> Mike Masnick, “YouTube Takes Down Chanukkah Parody of Old Town Road...Because It Infringes on A Date?” (26 December 2019), online: *TechDirt* <<https://www.techdirt.com/2019/12/26/youtube-takes-down-chanukkah-parody-old-town-road-because-it-infringes-date/>>.

gender, class, or divergent opinions, among others; in allowing each and every one of us to feel represented within the creative and cultural landscapes that define our everyday lives.

And copyright attempts to achieve this feat through its fair dealing doctrine. Being a legal construct that seeks to level the playing field between original and follow-on authors – to protect the creative spaces that permit downstream creators to relate to pre-existing culture – fair dealing is often depicted as the user’s right *par excellence*. It aims to limit authors’ exclusive rights and to provide users with the breathing room they require to engage in the kind of play that allows them to freely explore their own creativity,<sup>682</sup> codifying their right to engage in dialogue with pre-existing works by classifying their response “not as *excused* infringement but rather as the *absence* of infringement.”<sup>683</sup> Fair dealing, Drassinower tells us, can therefore not be reduced to a mere exception. Rather, it must be viewed as integral to copyright “because it is an immanently driven determination of a work as the speech of an author contemplating another’s response.”<sup>684</sup> In other words, fair dealing’s role is to place authors and users on the same footing; as both intrinsic to and derivative from each other.

But in reality, fair dealing is the antithesis of creative autonomy. Rather than granting downstream creators the status of mutual participants in society’s collective meaning-making process, fair dealing instead limits their conditions for response to pre-defined strict criteria that serve to negate their creative autonomy rather than bolster it;<sup>685</sup> that impose upon follow-on

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<sup>682</sup> Cohen, Chapter 4, *supra* note 229, at 7 (“The question thus remains: what, if anything, is it possible to say about all that is unpredictable in artistic and intellectual expression? What increases the likelihood that someone will see, hear, or conceptualize the world differently in the first place? A critical ingredient is the scope that networks of cultural production afford for the play of everyday practice, including not only the extent to which they permit purposive creative experimentation but also the extent to which they enable serendipitous access to cultural resources and facilitate unexpected juxtapositions of those resources.” (*ibid* at 11))

<sup>683</sup> Drassinower, WWWC, *supra* note 30 at 197.

<sup>684</sup> *Ibid* at 190.

<sup>685</sup> See Rosenblatt, Fair Use as Resistance, *supra* note 67, at 389 (fair use “[entails] permission from authority to repurpose [...] symbols, but only within certain authority-defined parameters.”); Craig, Total Concept and Feel,

creators the burden of proving that their potential use of copyrighted material merits protection as speech. And copyright is the only body of legislation governing speech that frees the party seeking to suppress expression from proving its unprotected nature.<sup>686</sup> It's not the rightsholder that must demonstrate the unfairness of the defendant's use, but rather the defendant that must unequivocally establish its legitimacy.<sup>687</sup> Fair dealing, in other words, consistently places downstream creators on the defensive, "in a role that will forever be subservient to that of the original creator both legally and as a matter of moral discourse."<sup>688</sup> The natural by-product of this artificial hierarchy perpetuated by fair dealing is therefore that original authors enjoy a greater freedom of expression than do downstream creators.

And this situation produces conditions in which genuine dialogue remains difficult to attain. Genuine dialogue essentially relies on the representation of all contributors as mutual participants in society's collective meaning-making process. But the structure itself of fair dealing relegates author-users to the realm of It – characterizing them as mere receivers of content being spoken *at* rather than *to* – unless they can prove why they should enjoy the status of Thou;<sup>689</sup> unless they can justify why they should be endowed with the standing of equal and autonomous contributors to our social discourse. Despite consistently being characterized as an "immanently driven determination of a work as the speech of an author contemplating another's response,"<sup>690</sup>

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*supra* note 67 at 616 ("fair uses occur with the blessing of the dominant social order [...], [t]hey are protected (or tolerated) by social and legal expectations only within their established constraints).

<sup>686</sup> Ned Snow, "Proving Fair Use: Burden of Proof as Burden of Speech" (2010) 31 *Cardozo L Rev* 1781 at 1781-2.

<sup>687</sup> *Ibid* at 1782; see also Alyssa Chavers, "Williams v Gaye: Further Blurring the Lines Between Inspiration and Infringement" (2020) 50 *Golden Gate UL Rev* 3 (arguing that this problem is even more accentuated in music infringement cases where plaintiff's burden of proving substantial similarity is significantly diminished as a result of defendant's access to the plaintiff's song – especially considering access to music has never been easier than in our interconnected world).

<sup>688</sup> Rosenblatt, Fair Use as Resistance, *supra* note 67, at 392.

<sup>689</sup> See above, Chapter 4, Sections 4.1 & 4.2.

<sup>690</sup> Drassinower, WWWC, *supra* note 30 at 190.

fair dealing very often contributes to rendering unfeasible – or at the very least impracticable – this freedom to respond.

Requiring that users defend the fairness of their use, therefore, has had little concrete effect in permitting them to resist the control that original authors possess over the tools of meaning-making,<sup>691</sup> in protecting their right to exert their creative autonomy and engage in equal authorship. And fair dealing is incapable of achieving this feat because its very structure rests on the assumption that downstream authors are guilty until proven innocent. By the time fair dealing comes into play, the downstream author will have already been labelled an infringer. Her only hope is to succeed in defending her dealing as fair.<sup>692</sup> But as a matter of law, her work will never be classified as an independent creation; her work will never be considered as exhibiting the creative autonomy necessary to qualify as truly original.<sup>693</sup>

Rather than leveling the playing field between original and follow-on authors, fair dealing is quite simply the denial of the latter's own creative autonomy. Instead of offering downstream creators the breadth of freedom, abundance, and equality necessary to engage in genuine dialogue, fair dealing's perpetuation of this artificial hierarchy between different kinds of authors demeans

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<sup>691</sup> Rosenblatt, Fair Use as Resistance, *supra* note 67, at 384 (“the law creates and reflects a power dynamic, in which some works are endowed with higher status than others, and the creators of higher status works can ‘own’ and therefore control access to the tools of meaning-making.”); Coombe, Objects of Property, *supra* note 91 at 1866 (“By [...] freezing the connotations of signs and symbols and fencing off fields of cultural meaning with ‘no trespassing’ signs—intellectual property laws may enable certain forms of political practice and constrain others.”); Elkin-Koren, Cyberlaw and Social Change, *supra* note 645 at 232 (“[Law] reflects disparities of power among social agents depending on their ability to control access to sources of signification and dissemination.”).

<sup>692</sup> Craig, Total Concept and Feel, *supra* note 67 at 616 (“the defendant who is forced to rely on a successful fair use defense to avoid infringement liability is already cast on the wrong side of copyright’s moral equation, as the would-be free rider placed in juxtaposition with the plaintiff as meritorious of producer value. On the defensive, by definition, the fair user must excuse their use of the original author’s work, pleading for an exception to be made to the general rule that would render such copying unlawful.”); see also Lydia Pallas Loren, “Fair Use: An Affirmative Defense?” (2015) 90 Wash L Rev 685.

<sup>693</sup> See Carys J Craig, *Copyright, Communication, and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011) at 139.

downstream creations in ways that chill our social discourse, rather than enrich it;<sup>694</sup> that limit follow-on authors' opportunities for exerting their creative autonomy, rather than protect the shared nature of our creative spaces.<sup>695</sup>

And expanding fair dealing won't rectify this situation. It will quite simply increase the situations in which a dealing might be construed as fair, but follow-on authors will still forever be placed in the subservient position of *prima facie* infringers, only saved by their ability to defend the fairness of their dealing.<sup>696</sup> To preserve the conditions necessary for downstream creators to exert their creative autonomy, we require a solution that doesn't deny the legitimacy of their creative choices; one capable of *actually* placing original and follow-on authors on equal footing so that they may each enjoy the unimpeded freedom to exert their creative autonomy in ways that permit them to engage as mutual participants in society's collective meaning-making process. This solution will necessarily require us to reimagine the breathing space extended to downstream creators in a way that circumscribes the conditions under which copyright is permitted to negate follow-on authors' creative autonomy; in a way that limits the situations necessitating recourse to fair dealing.<sup>697</sup>

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<sup>694</sup> Rosenblatt, Fair Use as Resistance, *supra* note 67, at 379 (“the structure of fair use law ultimately reinforces copyright law’s artificial hierarchy of values and creates additional, perhaps even more problematic, discourses regarding the value of fair-use creations and those who make them”).

<sup>695</sup> See Robert Burrell, “Reining in Copyright Law: Is Fair Use the Answer?” (2011) 4 *Intell Prop Q* 361.

<sup>696</sup> Rosenblatt, Fair Use as Resistance, *supra* note 67, at 392 (“fair use law permits the follow-on creator to express herself, but when paired with copyright law’s originality requirement, it places the follow-on creator in a role that will forever be subservient to that of the “original” creator both legally and as a matter of moral discourse.”).

<sup>697</sup> See Craig, Total Concept and Feel, *supra* note 67 at 651 (“With a view to copyright’s history and purpose, as well as the tangled web of copyright infringement authorities, there is ample authority to support this simple but important conclusion: If a defendant’s work is substantially different, in its total concept and feel, from the plaintiff’s work, it is not an infringing copy thereof. A downstream author exercising expressive agency, communicating something new to the public, should not be relegated to the role of infringer or forced to plead a defense—they are engaged not in an act of improper appropriation but in a dialogic act of meaning-making”).

This solution, I propose, involves redefining the metes and bounds of infringement through the lens of creative autonomy – in terms that foster *inclusion* rather than *exclusion*, and that enable all forms of creativity to flourish on the peripheries of cultural officialdom. But how can we envision the notion of infringement in a way that could simultaneously extend deference to the creative autonomy of both authors and ‘users’? Drassinower offers a rather useful basis from which to engage in this reflection. He reminds us that, when it comes to infringement, “[t]he question is not whether the defendant’s copy extracts value from the plaintiff’s labor but whether the impugned copy impinges on the plaintiff’s autonomy as a speaking being. This is the mischief that elevates the infringement inquiry from the physics of mere copying to the jurisprudence of copyright.”<sup>698</sup> Copying, then, is *not* the harm targeted by copyright. It’s rather *compelling* authors’ speech, Drassinower tells us, that characterizes this mischief; using an author’s speech without her authorization such that her autonomy as a speaker – her choice to speak or not to speak *her very own words* – is violated.<sup>699</sup>

But it’s important to recognize that not *all* unauthorized uses of an author’s *words* will necessarily compel her speech. Indeed, whether speech can be classified as compelled depends very much upon its context; its message; its meaning.<sup>700</sup> A follow-on author can speak in her own

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<sup>698</sup> Drassinower, WWWC, *supra* note 30 at 110; see also Kant, *supra* note 324 at 29 (“there are grounds for regarding publication not as dealing with a commodity *in one’s own name*, but as *carrying on an affair in the name* of another, namely the author, and that in this way I can easily and clearly show the wrongfulness of unauthorized publication”).

<sup>699</sup> Drassinower, WWWC *ibid* at 120.

<sup>700</sup> Here, I’m implying that context serves to illuminate the relationship between different instances of dialogue and is often useful in distinguishing the meaning of two utterances that interact with one another (see e.g. David Vaver, *Intellectual Property Law: Copyrights, Patents, Trade-Marks* (Irwin Law: Toronto, 2011) at 186 (“A Decision on substantiality is best reached by considering not only what was taken but the context of the taking, including what the taker did with it.”); see also: Barthes, *Image-Music-Text*, *supra* note 275 at 148 (“a text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, [and] contestation.”); Mikhail M Bakhtin, “The Problem of Speech Genres”, in *Speech Genres and Other Late Essays*, translated by Vern W. McGee, Caryl Emerson & Michael Holquist, eds (Texas: University of Texas Press, 1986) at 93 (“an utterance is a link in the chain of speech communication, and it cannot be broken off from the preceding links that determine it both from within and from without, giving rise within it to unmediated responsive reactions and dialogic reverberations”).

words while copying those of another by placing them in a new light that alters their connotation.<sup>701</sup> Such copies do not compel the speech of the originating author because they are saying something different entirely.<sup>702</sup> The original author can therefore not claim that she's being made to speak against her will because there's no question that this new work is the product of the downstream author's own creative autonomy.

In this sense, infringement isn't about the unauthorized use of the *words* themselves, so much as the unauthorized use of the *speech*. Copyright infringement is, as Drassinower advances, “ventriloquism practiced on an unwilling subject. The infringer speaks not from his mouth but from his belly, making it seem that it is another who speaks. This seeming is the wrong to this other, whose mouth is being moved, so to speak, behind her back.”<sup>703</sup> It is only by adopting the original author's very words to communicate the exact same utterance in a way that makes it seem that *she* is the one doing the speaking – a sort of passing off, to borrow the trademark term – that any unauthorized publication of her speech can deny her the very autonomy it manifests.<sup>704</sup> In other words, the harm targeted by copyright must be understood as use of the *same* speech to express the *same* idea. But where the *same* words are used to convey a *different* message in a *different* context, there is no doubt that the person doing the speaking is someone *other* than the originating author herself, and thus no question that there is an absence of infringement.

Flowing naturally from the work's nature as a communicative act is therefore this crucial notion that it's the message communicated, rather than the substantiality of the copying, that must be at the heart of infringement assessments. It is, in other words, compelling a work's *meaning*,

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<sup>701</sup> See e.g. Rotstein, *supra* note 70; see also Coombe, Cultural Life, *supra* note 70.

<sup>702</sup> Rotstein, *ibid*; Coombe, Cultural Life, *ibid*.

<sup>703</sup> Drassinower, WWWC, *supra* note 30 at 113.

<sup>704</sup> *Ibid* (“The depth of the wrongfulness of copyright infringement is nothing other than this unauthorized use of another's speech to deny her the very autonomy manifested in and through her speech”).

rather than merely using its material form, that best characterizes the presence of infringement; misappropriating its *communicative* significance, rather than its physical embodiment, that qualifies as compelled speech. Because “it is not as a pattern of ink on a page, so to speak, but only as a communicative act that a work falls within the purview of copyright law,”<sup>705</sup> merely copying or using a work’s material form is therefore not sufficient, on its own, to impinge on original authors’ autonomy.<sup>706</sup> And this distinction between a work’s material form and its communicative significance is crucial to ensure that copyright doesn’t overstep its bounds; doesn’t foreclose dialogue by permitting authors to control uses that go far beyond what their autonomy ought to permit them to claim.<sup>707</sup>

Indeed, as speech addressed to another, authors express their selves in ways that invite others to express their selves in return;<sup>708</sup> to build on pre-existing culture by engaging in an ongoing conversation with all those authors that precede them. And if the work is to fulfill its dialogic qualities, these others to whom the speech is directed must not be reduced to a mere It; they must not be construed as simple receivers of expression, as opposed to equal participants in an ongoing dialogue.<sup>709</sup> Downstream creators must rather be acknowledged as Thous, possessing the equal autonomy of independent thinkers and authors in their own right. It’s only in duly recognizing

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<sup>705</sup> *Ibid* at 13.

<sup>706</sup> See Kant, *supra* note 324 at 35 (“the author has [...] an inalienable right (*ius personalissimum*) always *himself* to speak through anyone else, the right, that is, that no one may deliver the same speech to the public other than in his (the author’s) name. But if someone so alters another’s book (abridges it, adds to it, or revises it) that it would even be a wrong to pass it off any longer in the name of the author of the original, then the revision in the editor’s own name is not unauthorized publication and therefore not impermissible. For here another author, through his publisher, carries on with the public a different affair from the first, and therefore does not interfere with him in his affair with the public; he does not represent the first author as speaking through him, but another one”).

<sup>707</sup> See above, Chapter 2.

<sup>708</sup> Drassinower, WWWC, *supra* note 30 at 66.

<sup>709</sup> See e.g. Rosenblatt, Fair Use as Resistance, *supra* note 67, at 381 (“Copyright law defines at least three categories of participants in communicative discourse: an ‘original’ speaker (author, creator, master mind) whose expressions are deemed original and protectable, a ‘derivative’ speaker (copier, infringer, re-creator, fair user) whose expressions are derived from an ‘original’ speaker, and an ‘audience’ (consumer) who merely receives expression. But literary theory highlights important ways in which these categories are at best blurry, and at worst entirely artificial”).

their entitlement to “the conditions for the possibility of responding to the speech of others”<sup>710</sup> that genuine dialogue can be attained.

It’s precisely these conditions that the idea/expression dichotomy seeks to safeguard.<sup>711</sup> And it does so in two separate but intertwined ways. First, by limiting authors’ monopoly to the expression used to manifest a *particular* idea, effectively liberating ideas from copyright and extending downstream creators the freedom to express or develop them anew.<sup>712</sup> But second – and more fundamentally – by acknowledging that expression as the subject-matter of copyright protection is intricately linked to the idea it communicates. And by presenting expression as a vehicle for meaning, the idea/expression dichotomy leaves doctrinal space for the recognition that a specific sequence of words used to convey an alternate meaning ought to amount to a different expression entirely.

And the Supreme Court of Canada has itself opened the doors to just such an infringement standard. “If the differences are so great that the work, viewed as a whole, is not an imitation but rather a new and original work,” wrote Chief Justice McLachlin for a unanimous court in *Cinar Corp. v Robinson*, “then there is *no infringement*.”<sup>713</sup> In other words, the differences between two works may very well support a conclusion that they are not substantially similar when compared as a *whole*.<sup>714</sup> “Canada’s Supreme Court,” notes law professor Carys Craig, “has therefore [...] created space for the conclusion that a work that copies substantial expression from another is

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<sup>710</sup> Drassinower, WWWC, *supra* note 30 at 66.

<sup>711</sup> *Ibid*; See also Craig, Total Concept and Feel, *supra* note 67 at 619.

<sup>712</sup> Craig, Total Concept and Feel, *ibid*; Abraham Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law” (2003) 16 Canadian JL & Juris 3 at 9 [Drassinower, Idea/Expression Dichotomy].

<sup>713</sup> *Cinar Corporation v Robinson*, *supra* note 624, at para 40.

<sup>714</sup> Craig, Total Concept and Feel, *supra* note 67 at 639; see also Cameron J. Hutchison, “Substantial Similarity After *Cinar Corp v Robinson*” (2015) 31 Canadian Intell Prop Rev 3.

nonetheless *not a copy* because of the transformative nature of the copying;” because the downstream creation conveys a new message or meaning despite *prima facie* similarities.

But the question is, how can we objectively assess whether the meaning of the follow-on work is, in fact, different? Drawing on the Supreme Court’s decision in *Cinar v Robinson*, Craig suggests that the two works should be compared *holistically* in order to determine whether their overall aesthetic appeal is substantially similar.<sup>715</sup> If the two works, when perceived as a whole, are markedly different, then we must conclude against infringement and in favour of “a non-infringing new work that is, in its ‘total concept and feel,’ more than merely a colorable imitation of the plaintiff’s work.”<sup>716</sup> By opening the doors to an infringement standard that’s rooted in *inclusion* rather than *exclusion*, this approach seeks to promote a more dialogic vision of copyright.<sup>717</sup> And it does so by providing the analytical tools necessary to differentiate between whether the copying in question in fact negates the pre-existing author’s autonomy by compelling her speech, or whether it is quite simply a manifestation of the downstream author’s own creative autonomy that duly contributes to society’s meaning-making process.

This approach works well in cases where the downstream creation’s alternate meaning is readily apparent. Let’s return to the example of *Air Pirates Funnies*, discussed above.<sup>718</sup> Placing Disney characters in adult situations, the cartoons looked similar enough to Disney’s version but different enough that no one would mistakenly assume that the work originated from Disney itself. Although held as infringing, this is an example of a work that ought to escape such a fate because it advances an entirely different meaning that – in no way – compels Disney’s speech (see Figure

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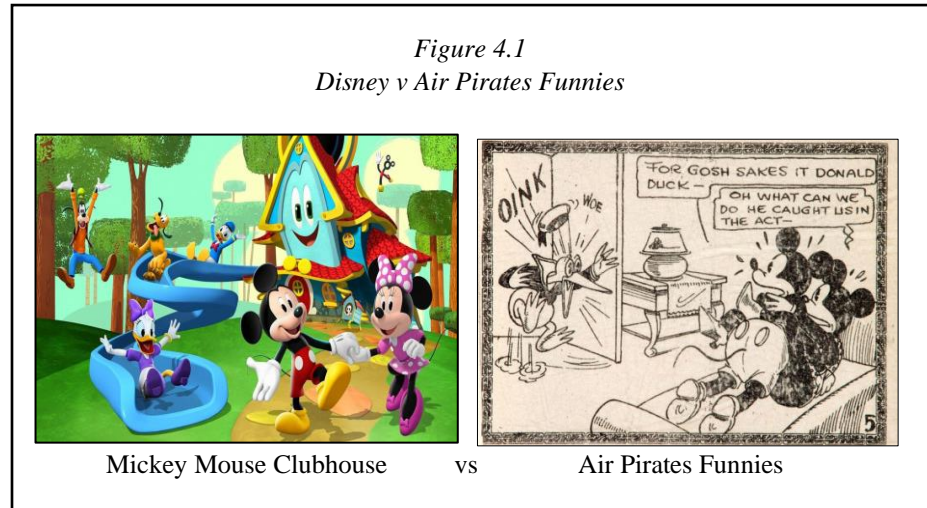
<sup>715</sup> Craig, Total Concept and Feel, *ibid.*

<sup>716</sup> *Ibid* at 646.

<sup>717</sup> *Ibid.*

<sup>718</sup> See above, p. 33.

4.1). A cartoon of a dilapidated Mickey Mouse doing drugs is plainly advancing a different meaning than *Mickey Mouse Clubhouse*. And allowing Disney to



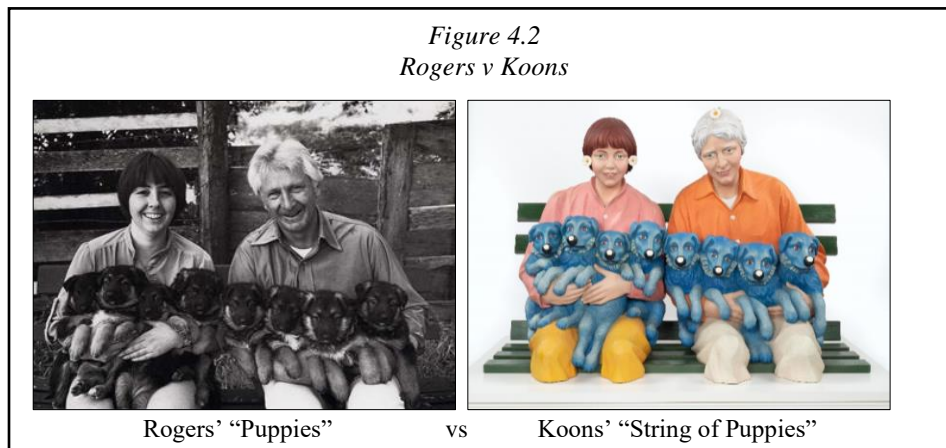
control the evolution of its work's meaning once released into the public sphere goes far beyond what it's autonomy as author ought to permit it to claim.<sup>719</sup>

But what about cases where the different meaning is less blatantly obvious? Let's return, for instance, to the example of *Rogers v Koons*.<sup>720</sup> Koons created a sculpture based on a photograph taken by Rogers of a smiling couple holding a bunch of puppies (see Figure 4.2). The sculpture, however, made the couple's gaze look almost glazed over and turned the puppies into robotic critters with matching bulbous noses. Although seeking to make a statement about society's sheep-like nature, it's undeniable that the alternate meaning of Koons' sculpture is decidedly less striking than that of *Air Pirates Funnies*. While it seems to me very unlikely that the ordinary lay observer would consider one to be a reproduction of the other, comparing Koons' sculpture and Rogers' photograph holistically might nevertheless not lead to the conclusion that the former is *substantially* different on its face.

<sup>719</sup> Craig, *Reconstructing the Author-Self*, *supra* note 30 at 214; Coombe, *Objects of Property*, *supra* note 92; Gordon, *On Owning Information*, *supra* note 292; Aoki, *(Intellectual) Property*, *supra* note 539; Coombe, *Cultural Life*, *supra* note 70; Benkler, *Free as the Air*, *supra* note 539; Bridy, *Fearless Girl*, *supra* note 539.

<sup>720</sup> See above, p. 90.

But does that mean that these classes of works should be immediately written off as infringing? Because *prima facie* substantial similarity doesn't necessarily amount to compelled speech, a good argument can be made for answering this question in the negative. And it stems from our normative understanding of authorship. Although "few judicial decisions address what authorship means, or who is an author [and] [f]ewer laws define authorship,"<sup>721</sup> there have



nevertheless been some notable efforts from scholars trying to identify its nature in copyright law. They have all reached conclusions

that revolve around a single theme: "the *sine qua non* of becoming a 'copyright author' is the act of [communicating] [...] original expression."<sup>722</sup> Acts of authorship lie in a person's "[intent] to produce mental effects in an audience through the fixed, original, and creative selection of elements capable of producing those effects."<sup>723</sup> Linked to this theory is one that holds an author as the person whose message or meaning is conveyed in a given work;<sup>724</sup> the person who – in

<sup>721</sup> Ginsburg, Concept of Authorship, *supra* note 43, at 1066.

<sup>722</sup> VerSteege, Defining Author, *supra* note 325, at 1339; see also Drassinower, WWWC, *supra* note 30 at 111-13.

<sup>723</sup> Buccafusco, *supra* note 325, at 1273 (though, in line with post-modern literary critiques, this article notes that *what* the author intended doesn't matter; all that is relevant is *that* she intended to produce a work of authorship: "the intentions that matter at this point of the inquiry are creators' categorial intentions to produce mental effects, not their intentions about the specific effects they intended. To determine whether a given text is the writing of an author, copyright law need not concern itself with what someone thinks he has authored; it only needs to be concerned with whether he deemed himself as authoring."); see also Drassinower, WWWC, *supra* note 30 at 8.

<sup>724</sup> See Boyden, *supra* note 442 at 393.

Bakhtinian terms – imbues pre-existing words with her own communicative intention, to service her own ends.<sup>725</sup>

Acts of authorship therefore seemingly rest on two distinct elements of intent: the intent to express a particular idea as well as the intent to communicate that expression to the public.<sup>726</sup> Where there is a good faith intent to engage in society’s meaning-making process, in other words, there exists an act of authorship. And where an act of authorship lies, there must necessarily be an absence of infringement. How, then, can we decide that a work is infringing based solely on its objective similarity to a pre-existing one? How can we conclude that a work is *not* an act of authorship – *not* an independent creation – without extending the appropriate deference to downstream authors’ own creative autonomy, to the *authorial intent* that gave rise to their productions?

Although copyright is often framed as “an *absolute right* to prevent others from copying [an] original collocation of words or notes,”<sup>727</sup> the validity of our Canadian copyright system relies on its ability to illustrate that any limitations it imposes upon our freedom of expression are “demonstrably justified in a free and democratic society;”<sup>728</sup> that the measures it adopts are *reasonable* in light of the ends it’s trying to achieve. But copyright’s imposition of a strict liability standard in cases of objective similarity negates its very purpose by denying authors’ autonomy throughout their creative process, effectively limiting their opportunities for knowledge pursuit,

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<sup>725</sup> Rosenblatt, Fair Use as Resistance, *supra* note 67 at 381; see also Mikhail Bakhtin, “Discourse in the Novel” in Julie Rivkin and Michael Ryan, eds, *Literary Theory: An Anthology* (New Jersey: Blackwell Publishing, 1998) 674 at 677 [Bakhtin, Discourse].

<sup>726</sup> But see Russ VerSteeg, “Intent, Originality, Creativity and Joint Authorship” (2002) 68 Brook L Rev 123 at 133-4 at 133-4 [VerSteeg, Intent] (“although an intent to copy generally indicates that there is no originality, an intent to author does not always prove originality”); Ginsburg, Concept of Authorship, *supra* note 43, at 1087 (“Intent, I suggest, does not make a contributor more or less creative, but it may supply a means to sort out the equities of ownership in cases in which more than one contender is vying for authorship status”).

<sup>727</sup> *Fred Fisher, Inc v Dillingham*, 298 F 145 (USDC 2<sup>nd</sup> Cir) at 147.

<sup>728</sup> *Canadian Charter of Rights and Freedoms*, s 1.

self-expression, and active engagement in the social dialogue.<sup>729</sup> And by refusing to permit authors to contextualize their use of pre-existing works – by ignoring that the same words can be used to different ends – copyright effectively imposes an unreasonable limit on our freedom of expression. For its approach to infringement to be in line with both our right to free speech and our normative conception of authorship, it should therefore leave room for the consideration of downstream creators’ subjective intent once objective similarity is established.

Although this approach might seem outlandish considering that courts have for decades insisted that “[n]either intention nor knowledge is a necessary ingredient in the cause of action for copyright infringement,”<sup>730</sup> the importance of culpability to a charge of infringement can be traced as far back as the Statute of Anne.<sup>731</sup> According to this statute, strict liability was only imposed upon booksellers, printers, and importers who “printed, reprinted or imported” or “caused to be printed, reprinted or imported” copyrighted works without their authors’ consent.<sup>732</sup> But where booksellers merely sold, published or “expose[d] to sale” works that were printed or reprinted without authorial consent, their liability hinged on their *knowledge* of the work’s nature as

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<sup>729</sup> Dane S Ciolino & Erin A Donelon, “Questioning Strict Liability in Copyright” (2002) 54:2 Rutgers LR 351.

<sup>730</sup> *Shewan v Canada (Attorney General)* 87 CPR (3d) 475; see also *Francis Day and Hunter, Ltd v Twentieth Century Fox Corp*, 1939 CanLII 276 (UK JCPC), [1940] AC 112 (“Once the two elements of sufficient objective similarity and causal connection are established, it is no defence that the defendant was unaware (and could not have been aware) that what he was doing infringed the copyright in the plaintiff’s work.”); *Buck v Jewell-LaSalle Realty Co*, 283 U.S. 191, 198 (1931) (“Intention to infringe is not essential under the Act.”); *Shapiro, Bernstein & Co v HL Green Co*, 316 F.2d 304, 308 (2d Cir 1963) (“While there have been some complaints concerning the harshness of the principle of strict liability in copyright law [...] courts have consistently refused to honor the defense of absence of knowledge or intention.”); *A Press Ass’n v Daily Story Publ’g Co*, 120 F 766, 769 (7th Cir 1902) (“It is not material, we think, that the appellant in publishing this copyrighted story was not aware that the story was protected by copyright. It published at its peril, and ignorance will not avail.”); *Lawrence v Dana*, 15 F Cas 26, 60 (CCD Mass 1869) (No 8, 136) (“Evidence of innocent intention may have a bearing upon the question of ‘fair use’ [...] but it cannot be admitted that it is a legal defence where it appears that the party setting it up has invaded a copyright.”).

<sup>731</sup> See Ciolino & Donelon, *supra* note 729 at 359-61; see also Eva E Subotnik, “Intent in Fair Use” (2014) 18:4 Lewis & Clark LR 935.

<sup>732</sup> *Act for the Encouragement of Learning*, *supra* note 102.

infringing.<sup>733</sup> The original copyright act therefore only imposed limits on *intentional piracy*, not downstream creativity.

Indeed, the importance of intent in infringement flows naturally from its very nature as compelled speech. One cannot compel the speech of another *unintentionally*. It's only when a downstream creator purposely exercises the original author's prerogative to speak her own words in pursuit of her own meaning that we're in the presence of infringement.<sup>734</sup> But where this follow-on author copies with the intention of signifying something else entirely, the imposition of strict liability once evidence of substantial similarity is established is itself a wrong to follow-on authors' autonomy as speaking beings;<sup>735</sup> an unreasonable limit on their freedom of expression.<sup>736</sup> To avoid running afoul of our free speech rights, follow-on authors should be extended the opportunity to contextualize their use; to establish that their expression – though substantially similar – seeks to advance a different message than the original by taking active steps to differentiate the former from the latter. Where they can convince a judge on the balance of probabilities that their creative choices sought to differentiate their work from that of their predecessor's by advancing an alternate meaning, their follow-on creation ought to be held as non-infringing; their use ought to be considered reasonable.

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<sup>733</sup> *Ibid.*

<sup>734</sup> Drassinower, WWWC, *supra* note 30 at 178.

<sup>735</sup> See e.g. Amy B Cohen, "Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity (1987) 20 UC Davis L Rev 719 [Cohen, Masking Decisionmaking]; Nicole Lieberman, "Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law" (2016) 6 NYU J Intell Prop & Ent L 91.

<sup>736</sup> See e.g., Reynolds, *supra* note 291; David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55:2 U Toronto Fac L Rev 175; Jane Bailey, "Deflating the Michelin Man" in Michael Geist, ed, *In the Public Interest* (Toronto: Irwin Law, 2005) [Bailey, Deflating]; Carys J Craig, "Putting Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" (2006) 56:1 U Toronto LJ 75 [Craig, Communication]; Bitu Amani, "Copyright and Freedom of Expression: Fair Dealing Between Work and Play" in Rosemary J Coombe, Darren Wershler & Martin Zellinger, eds, *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press, 2013) [Amani, Between Work and Play].

This approach draws on 19<sup>th</sup> century copyright case law, where courts resolved claims of intentional copying for works that were similar but not identical by examining whether the defendant acted in bad faith when imitating the plaintiff’s work. Courts routinely considered whether the differences between two works were genuine or merely colourable,<sup>737</sup> defined by the first edition of *Black’s Law Dictionary* as “[that] which makes no real or substantial change, but is introduced only as a subterfuge or means of evading [...] copyright law.”<sup>738</sup> Differences that only proved to be colourable were often held by courts as “evidence of the consciousness of [the defendant], that something was needed to avoid the otherwise inevitable conclusion, that in [creating her work] she was interfering with and pirating on the prior exclusive right of [the plaintiff].”<sup>739</sup> Merely colourable alterations, in other words, were indicative of a knowing copyist; of one who acted with bad intentions by “not only [being] aware of her potential infringement but [also taking] steps to try to conceal it.”<sup>740</sup> But where the differences between the two works were

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<sup>737</sup> R. Anthony Reese, “Innocent Infringement in US Copyright Law: A History” (2007) 30:2 Colum J L & the Arts 133 at 162; see also *Millar v Taylor*, (1769) 4 Burr 2303 (K.B.); *Sayre v Moore*, *supra* note 96, 139 (“In all these cases the question of fact to come to a jury, is, whether the alteration be colorable or not. There must be such a similitude as to make it probable and reasonable to suppose, that one is a transcript of the other, and nothing more than a transcript [...] But upon a question of this nature the jury will decide, whether it be a servile imitation or not.”); *Cary v Kearsley*, (1802) 170 Eng Rep 679, 680 (K.B.) (Ellenborough, LJ) (examining whether the defendant’s changes were done to improve on the work for the public interest or were “taken colourable, merely with a view to steal the copyright of the plaintiff”); *Emerson v Davies*, 8 F Cas 615, 623 (CCD Mass 1845) (No 4,436); *Blunt v Patten*, 3 F. Cas 763, 765 (CCSDNY 1828) (No 1,580) (“[I]f there was some small variance [between the two works], it would be a proper subject of inquiry whether the alteration was not merely colorable.”); *Martinetti v Maguire*, 16 F Cas 920, 920-21 (CCD Cal. 1867) (No 9,173) (defendant’s work “was a mere colorable imitation or copy” of plaintiff’s work); *Daly v Palmer*, 6 F Cas 1132, 1138 (CCSDNY 1868) (No. 3,552) (“It is hardly possible that the resemblances [between the parties’ plays] are accidental, and that the differences are not merely colorable, with a view to disguise the plagiarism.”); *Drury v Ewing*, 7 F Cas 1113, 1117 (CCSD Ohio 1862) (No. 4,095) (“It can not be doubted that [the defendant] has adopted all the essential parts of Mrs. Drury’s system, and that so far as there are any apparent alterations they are colorable and evasive.”); *Webb v Powers*, 29 F Cas 511, 519 (CCD Mass 1847) (No 17,323) at 518 (“The substance, the staple of the book, is then truly original, and not colorably so [...]”).

<sup>738</sup> *Black’s Law Dictionary* (1<sup>st</sup> ed, 1891) 223 [emphasis added].

<sup>739</sup> *Drury v Ewing*, *supra* note 737.

<sup>740</sup> Reese, *supra* note 737 at 163; see also *Bartlett v Crittenden*, 2 F Cas 967, 969 (CCD Ohio 1849) (No. 1,076) (“the discrepancies that appear only show the intent of the copyist”); *Emerson v Davies*, *supra* note 737, (“the question then comes to this, whether he has, in substance, copied these pages, in plan, method, arrangement, illustrations and tables, from the plaintiff’s work, with merely colorable alterations and devices to disguise the copy, or whether the resemblances are merely accidental”); *Lawrence v Dana*, *supra* note 730, 59-60 (CCD Mass. 1869) (No. 8,136) (copying qualifies as infringement where it involves imitating a work “with more or less colorable

genuine – where reasonable steps were taken to improve on the work in the public interest<sup>741</sup> – the defendant’s good faith rescued her from a finding of infringement.

And even in more modern copyright case law, assessing the intent behind authors’ creative choices to determine the existence of a new work isn’t a foreign concept. Courts have, for example, consistently examined this element when considering the copyrightability of derivative works.<sup>742</sup> When analyzing claims that one work is derivative of another, for instance, courts often attempt to break down *why* the author made the adaptations she did. If the changes she made were influenced by mundane concerns such as manufacturing ease or cost, her work won’t be considered sufficiently original to support copyright even where substantial variations were made.<sup>743</sup> Where authors are motivated to alter the work based on their artistic or aesthetic judgment, however, courts are more inclined to recognize its copyrightability as a derivative creation.<sup>744</sup> Creating a legitimate derivative work thus demands evidence of artistic skill and subjective judgment that goes beyond mere effort, special training, or physical ability.<sup>745</sup> The intent behind authors’

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alterations to disguise the source from which the material was derived.”); *Daly v Palmer*, *supra* note 737, at 1138 (“It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable, with a view to disguise the plagiarism. The true test of whether there is piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff’s work.”); *Drury v Ewing*, *supra* note 737, at 1117 (“It can not be doubted that [the defendant] has adopted all the essential parts of Mrs. Drury’s system, and that so far as there are any apparent alterations they are colorable and evasive.”); *Folsom v Marsh*, 9 F Cas 342, 344 (C.C.D. Mass. 1875) (No 4,901) (“[I]n cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions [...]”).

<sup>741</sup> See e.g., *Cary v Kearsley*, *supra* note 737, at 680.

<sup>742</sup> See *Ciolino & Donelon*, *supra* note 729 at 397.

<sup>743</sup> See, e.g., *Gardenia Flowers, Inc v Joseph Markovitz, Inc*, 280 F Supp 776, 781 (S.D.N.Y. 1968) (“The degree of creativity necessary to define objects as works of art is not supplied through innovations which are solely utilitarian or mechanical... [t]hus the fact that... certain practical features... facilitated their assembly and eliminated the need for certain manufacturing operations, does not overcome the absence of creativity inherent in the arrangements.”); *Durham Indus, Inc v Tomy Corp*, 630 F.2d 905, 910 (2d Cir 1980) (noting that “mere reproduction of a work [...] in a different medium, or by the demonstration of some ‘physical’ as opposed to ‘artistic’ skill” is not sufficient to satisfy the originality requirement).

<sup>744</sup> See e.g. *L Batlin & Son, Inc v Snyder*, 536 F.2d 486, 491 (2d Cir 1976) (concluding that physical skill or special training, as opposed to aesthetic choices, is not sufficient to satisfy the originality requirement).

<sup>745</sup> *Ibid*; see also *Ciolino & Donelon*, *supra* note 729 at 397.

aesthetic choices therefore plays a large role in determining whether their derivative work will enjoy copyright's benefits.

Given the role that intent plays in recognizing new, copyrightable works, it might therefore be possible to acknowledge the legitimacy of a downstream creation where its author is capable of proving that the alterations she made to the original were not merely colourable; that she took reasonable steps to alter its meaning through the skill and judgment involved in her creative choices (a sort of reverse originality test, if you will). Let's examine how this approach might function in practice by returning to the example of *Rogers v Koons*. Koons insisted that the intention behind his copying was little more than social criticism, asserting that "the mass production of commodities and media images has caused a deterioration in the quality of society."<sup>746</sup> His aim, in other words, was to "comment critically both on the incorporated object and the political and economic system that created it."<sup>747</sup> But along with his stated intention, there was also evidence that Koons told the artisan who executed his porcelain work to remain faithful to the photograph when creating the sculpture. Koons' production notes included instructions such as: "puppies need detail in fur. Details – Just Like Photo!;" "keep man in angle of photo – mild lean to side & mildly forward – same for woman;" "Girl's nose is too small. Please make larger as per photo."<sup>748</sup>

From this perspective, it becomes somewhat difficult to determine whether Koons' sculpture is a truly infringing copy or could in fact qualify as advancing a new meaning. At the same time, however, this evidence was examined in isolation from the reasons behind these instructions. Perhaps Koons' goal in copying Rogers' photo so closely was to conjure up the

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<sup>746</sup> *Rogers v Koons*, *supra* note 306, at 309.

<sup>747</sup> *Ibid.*

<sup>748</sup> *Ibid* at 305.

original so that people could place his work in its pre-existing context and be more likely to decipher its alternate meaning. Perhaps he believed that the changes he made in the content, colouring, and medium would be enough to ensure that the lay observer wouldn't confuse the provenance of his sculpture. There could have been any number of reasons that might have revealed *why* Koons felt these aesthetic choices were necessary or believed that he took reasonable steps to make more than just colourable alterations, and *how* they in fact advanced a different meaning than Rogers' photo.

Whether inquiring into Koons' intent might have freed him from infringement liability, we'll never know. It would inevitably come down to his credibility as a witness, especially given the extensive evidence of his intent to copy. But ensuring that copyright doesn't unnecessarily stifle his speech means permitting him to – at the very least – contextualize the reasons behind his aesthetic choices.<sup>749</sup> For copyright to be in line with our freedom of expression, in other words, it must change the infringement narrative from *prima facie* similarities that are too significant, to *contextualized* differences that are sufficient to distinguish the two works. And we can only establish the latter by making room for the defendant's subjective intent within the infringement analysis. Doing so will ultimately make it possible to truly reveal whether, through her skill and judgment, the downstream author took reasonable measures to exert the creative choices necessary to pursue a new meaning; whether she did, in fact, compel her predecessor's speech or not. More importantly, however, doing so will ensure that copyright is capable of permitting all forms of creativity to flourish on the peripheries of cultural officialdom – be they 'original' or copy-based.

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<sup>749</sup> See e.g. Vaver, *supra* note 700, at 186 (“A Decision on substantiality is best reached by considering not only what was taken but the context of the taking, including what the taker did with it.”); see also Craig, Total Concept and Feel, *supra* note 67; Litman, Public Domain, *supra* note 275; Olufunmilayo B Arewa, “The Freedom to Copy: Copyright, Creation, and Context” (2007) 41 UC Davis LJ 477.

**Chapter 5    The World Has Somehow Shifted, All at Once Everything is Different:  
Exploring the Barriers to Creative Autonomy in Human-Machine  
Collaborations**

Plato's *Phaedrus* tells the legend of Thamus, King of Egypt, and Theuth, one of the land's many ancient gods. Although the father of arithmetic, geometry, astronomy, draughts and dice, the latter's greatest discovery was the use of letters. Appearing before Thamus, the deity presented his many inventions in the hopes that they might be inured to the benefit of the Egyptian people. When the time came to introduce letters, Theuth proudly declared it to be his most useful innovation by far, claiming that it would "make the Egyptians wiser and give them better memories; it is a specific both for the memory and for the wit."<sup>751</sup> Thamus' response, however, was somewhat less enthusiastic about the boons of writing to society:

O most ingenious Theuth, the parent or inventor of an art is not always the best judge of the utility or inutility of his own inventions to the users of them. And in this instance, you who are the father of letters, from a paternal love of your own children have been led to attribute to them a quality which they cannot have; for this discovery of yours will create forgetfulness in the learners' souls, because they will not use their memories; they will trust the external written characters and not remember of themselves. The specific which you have discovered is an aid not to memory, but to reminiscence, and you give your disciples not truth, but only the semblance of truth; they will be hearers of many things and will have learned nothing; they will appear to be omniscient and will generally know nothing; they will be tiresome company, having the show of wisdom without the reality.<sup>752</sup>

Of course, we know now that Thamus' portrayal of the written word wasn't entirely accurate; writing may very well have damaged memory and forged false wisdom in some, but it has also borne society immense and irrefutable benefits. Thamus' error, then, was not in his

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<sup>751</sup> Benjamin Jowett, *The Dialogues of Plato in Five Volumes*, 3<sup>rd</sup> ed (Oxford: Oxford University Press, 1892), Vol 1 at 483-489.

<sup>752</sup> *Ibid.*

recognition that writing is likely to be accompanied by some burdens, but rather in his refusal to acknowledge that it may equally have its advantages. “We may learn from this,” writes Neil Postman, “that it is a mistake to suppose that any technological innovation has a one-sided effect. Every technology is both a burden and a blessing; not either-or, but this-and-that.”<sup>753</sup>

And generative algorithms are no different. They, too, are accompanied by both burdens and blessings. On the one hand, they act to enhance authors’ creative horizons in highly inspired and previously inconceivable ways. Algorithms encourage authors to pursue creative avenues that the latter likely would have never otherwise considered. They expose authors to new ideas, images, and sequences, revealing nuances and notions drawn from their training data seldom captured by authors’ human senses. And their computational ‘vision’ can, on occasion, even help authors break free from the constraints of their own creative boundaries, allowing their creativity to flourish in ways that can often be truly empowering. Creative algorithms have the capacity to spur authors’ imagination, to increase their opportunities for ingenuity, and, ultimately, to contribute towards enriching our social dialogue.

On the other hand, however, creative algorithms could fundamentally change the nature of our creative landscape, redefining what we mean by ‘knowledge,’ ‘art,’ ‘music,’ and ‘literature’ in ways whose implications we’ve yet to fully seize. “[I]t is a certainty,” writes Postman, “that radical technologies create new definitions of old terms, and that this process takes place without our being fully conscious of it. Thus, it is insidious and dangerous, quite different from the process whereby new technologies introduce new terms to the language.”<sup>754</sup> And the reason it poses such

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<sup>753</sup> Neil Postman, *Technopoly: The Surrender of Culture to Technology* (New York: Alfred A Knopf, 1993) at 4-5 [Postman, *Technopoly*].

<sup>754</sup> *Ibid* at 8; see also Marshall McLuhan, *Understanding Media: The Extensions of Man* (Cambridge: MIT Press, 1994) at 17 (“The electric technology is within the gates and we are numb, deaf, blind and mute about its encounter with the Gutenberg technology, on and through which the American way of life was formed”).

an increased threat is because it acts to modify old words whose meanings are ingrained in the very fabric of our society. What we once meant by ‘information’ shifted with the advent of the telegraph and the penny press, and then once more with the invention of the computer. What we once meant by ‘political debate,’ ‘news,’ and ‘public opinion’ changed with the introduction of the television to the masses, and then again with the proliferation of social media platforms. “Such changes occur quickly, surely, and, in a sense, silently,”<sup>755</sup> writes Postman. “The old words still look the same, are still used in the same kinds of sentences. But they do not have the same meanings; in some cases, they have opposite meanings. And this is what Thamus wishes to teach us – that technology imperiously commandeers our most important terminology. It redefines ‘freedom,’ ‘truth,’ ‘intelligence,’ ‘fact,’ ‘wisdom,’ ‘history’ – all the words we live by. And it does not pause to tell us. And we do not pause to ask.”<sup>756</sup>

Heeding Postman’s implicit advice, I pause to ask whether or how creative algorithms might act to transform our vision of ‘creativity;’ to shift what we mean by ‘authorship;’ to impact authors’ identities and influence the development of their ‘selves.’ And I do so by illuminating this technology’s potential to “alter the nature of community [as] the arena in which thoughts develop;”<sup>757</sup> to reshape the semantic web of relations that culminate in works of authorship. Authors “are not simply self-made;”<sup>758</sup> they are, instead, “constituted by networks of nested relationships”<sup>759</sup> – relations between their ‘selves’ and ‘others’ – that inform their creative endeavours and contribute to their self-actualization. While ‘others’ are conventionally understood as being ‘authors of the past’ the insertion of algorithms within the creative process both shifts and

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<sup>755</sup> Postman, *Technopoly*, *ibid* at 8.

<sup>756</sup> *Ibid* at 8-9.

<sup>757</sup> *Ibid* at 20.

<sup>758</sup> Nedelsky, *Law’s Relations*, *supra* note 35 at 120.

<sup>759</sup> Kerr, *Schrödinger’s Robot*, *supra* note 73.

broadens the scope of these relations, effectively redefining the nature of the ‘community’ that gives rise to works of authorship.

The first relation is that between authors and pre-existing knowledge. While not new in the strict sense of the term, the insertion of generative AI into the creative process serves to redefine the very nature of this relationship; to segregate the act of creation from the process of knowledge pursuit, the latter no longer forcibly being necessary to accomplish the former. They can, in this respect, impact how authors who incorporate algorithms into their creative processes pursue knowledge, if at all. While some authors employ these technologies to engage with pre-existing culture in novel ways, others use them to bypass this process entirely. In this sense, creative algorithms have the propensity to shift what we mean by ‘knowledge;’ “to alter the structure of our interests: the things we think *about*,”<sup>760</sup> and to “alter the character of our symbols: the things we think *with*.”<sup>761</sup> Authors who once sought to learn from the brainchildren of their predecessors might now be more inclined to ponder the relevance of machine-generated content. Authors who once engaged with the traditional building-blocks of knowledge to form the basis of their own creations may instead rely on algorithmic output to achieve this feat. In this sense, creative algorithms have the potential to foster a society in which knowledge of pre-existing culture is no longer foundational to creativity. It’s therefore crucial to investigate whether the incorporation of generative algorithms into the creative realm is more likely to promote or hinder the pursuit of knowledge central to copyright’s purpose.

The second set of new relations are those between authors and creative algorithms, as well as among authors and algorithm developers (where the authors themselves aren’t the ones who

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<sup>760</sup> Postman, *Technopoly*, *supra* note 753 at 20.

<sup>761</sup> *Ibid.*

create the algorithm). Though developers are technically authors in their own right, it's essential to recognize that creative algorithms offer authors of literary, artistic, and musical works an opportunity to engage directly with (and not just be passive users of) code, and by extension its developers, in ways that didn't previously exist. But while increasing the scope of relations opened to authors, algorithms could simultaneously decrease authors' ability – and sometimes even their desire – to relate to the 'others' upon whose works algorithms are trained. If creativity *is* how authors engage in genuine dialogue with 'others,' it's crucial to examine how algorithms' capacity to simultaneously establish new connections and sever others might impede authors' ability to achieve this feat. And this analysis must rest not only on the value of this semantic web of relationships to the practice of authorship, but also on how this interference might impede creative autonomy.

And the third new relation borne from the incorporation of algorithms within the creative process is between authors and service providers. Authors who are tech savvy enough to create their own algorithms usually run them in virtual machines hosted by their service provider of choice, often lacking sufficient computing power to do so on their own devices. Authors who lack these skills tend instead to turn to generative AI service offerings, made widely accessible through online platforms.<sup>762</sup> But authors' use of these services is predicated on their acceptance of standard form contracts – agreements which contain clauses that significantly deviate from copyright; that curb authors' exclusive rights and subject them to ubiquitous surveillance. These contracts effectively submit authors to asymmetrical power relations that implicate providers within the creative process in highly unique and unprecedented ways; ways that limit authors' control over the works of their minds and may even go as far as restricting their freedom of expression. People's

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<sup>762</sup> See above, Chapter 3, Section 3.1.3.2.

“autonomy can thrive or wither,” writes Jennifer Nedelsky, “depending on the structures of relationships they are embedded in.”<sup>763</sup> With the relations that subsist between author-users and service providers being far from balanced, it’s vital to explore whether creative autonomy is more likely to flourish or diminish under such conditions.

It’s through the lens of these newfound ‘networks of nested relationships’ – their structures and implications – that this chapter illuminates the potential impacts of creative algorithms on authorship as a practice, on creativity and authorial autonomy as core values of copyright. It ponders human-machine collaborations beyond mere assessments of their *prima facie* creativity, instead contemplating their ability to act as expressions of the ‘self’ *by, for, and through* the ‘other.’ In elucidating the myriad of ways in which the practice of authorship might be influenced by the introduction of new actors into the creative ‘community,’ this chapter explores whether, and under what conditions, engaging in genuine dialogue is possible in this new and emerging context; whether, and under what circumstances, the blessings outweigh the burdens such that these creations might be recognized as authentic works of authorship.

5.1 *If You Walk the Footsteps of a Stranger, You’ll Learn Things You Never Knew You Never Knew: How Generative AI Redefines the Relationship Between Authors and Pre-Existing Knowledge*

In his book *The Sociological Imagination*, Charles Wright Mills makes an observation that’s just as salient now as it was when he penned it in 1959:

In our time, must we not face the possibility that the human mind as a social fact might be deteriorating in quality and cultural level, and yet not many would notice it because of the overwhelming accumulation of technological gadgets? Is not that one meaning of rationality without reason? Of human alienation? Of the absence of any free role for

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<sup>763</sup> Nedelsky, *Law’s Relations*, *supra* note 35 at 39.

reason in human affairs? The accumulation of gadgets hides these meanings: Those who use these devices do not understand them; those who invent them do not understand much else. That is why we may not, without great ambiguity, use technological abundance as the index of human quality and cultural progress.<sup>764</sup>

Support for the veracity of this statement can be found in every facet of our digital world. The near ubiquitous use of algorithms to run our social and political structures has proven to reduce our quality of life as much as it has improved it, to impede our cultural progress as much as it has advanced it.<sup>765</sup> Algorithms have offered us new and widely available fora to express ourselves, but they are equally responsible for quelling our speech, often without good reason.<sup>766</sup> Algorithms have made it such that an era's worth of information is literally available at our fingertips, but they equally control the data accessible to us in ways that impact our identities.<sup>767</sup> For good or ill, algorithms have the power to shape our experiences and to influence – or even constrict – our worldviews.<sup>768</sup>

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<sup>764</sup> Charles Wright Mills, *The Sociological Imagination*, 2<sup>nd</sup> ed (New York: Oxford University Press, 2000) at 175.

<sup>765</sup> See, e.g. Filippo A Raso, Hannah Hilgoss, Vivek Krishnamurthy, Christopher Bavitz & Levin Kim, "Artificial Intelligence & Human Rights: Opportunities & Risks" (25 September 2018), online: *Berkman Klein Center for Internet & Society* <<https://dash.harvard.edu/handle/1/38021439>>; Access Now, "Human Rights in the Age of Artificial Intelligence" (2018), online: <<https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf>>.

<sup>766</sup> See, e.g. Jillian C York, *Silicon Values: The Future of Speech Under Surveillance Capitalism* (Brooklyn: Verso, 2021) at 168-80; Shoshana Zuboff, *The Age of Surveillance Capitalism* (New York: Public Affairs, 2019) [Zuboff, *Surveillance Capitalism*]; Jack M Balkin, "Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation" (2018) 51 UC Davis L Rev 1149; Stuart Minor Benjamin, "Algorithms and Speech" (2013) 161:6 UPenn LR 1445.

<sup>767</sup> See, e.g. Tracey Follows, *The Future of You: Can Your Identity Survive 21<sup>st</sup>-Century Technology?* (London: Elliot & Thompson, 2021); Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Massachusetts: Harvard University Press, 2015) [Pasquale, *Black Box*]; Michal S Gal, "Algorithmic Challenges to Autonomous Choice" (2018) 25 Mich Telecomm & Tech L Rev 59; Mireille Hildebrandt, "Profiling and the Rule of Law" (2008) 1 IDIS 55 [Hildebrandt, *Profiling*].

<sup>768</sup> See, e.g. Follows, *ibid*; Julie E Cohen, "Chapter 2: From the Virtual to the Ordinary: Networked Space, Networked Bodies, and the Play of Everyday Practice" in Julie E Cohen, *Configuring the networked Self*, at 5, online: <<http://juliecohen.com/wp-content/uploads/2018/07/CohenCNSCh2.pdf>> [Cohen, Chapter 2]; Shoshana Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilization" (2015) 30 *Journal of Information Technology* 75; Michele Willson, "Algorithms (and the) everyday" (2016) *Information, Communication & Society* 1.

In this sense, Mills is absolutely correct. Technological abundance is no more an indication of human quality and cultural progress than the law is always synonymous with justice. But what are – and have long been – considered indices of societal evolution are reason, critical thinking, and the pursuit of knowledge.<sup>769</sup> And it’s precisely these elements that copyright seeks to advance in its quest for progress. Copyright was, after all, borne in an era that emphasized the importance of knowledge pursuit; a period that gave rise to new conceptions of knowledge and intelligence as artifacts of reason and enlightenment, and by extension to contemporary forms of public discourse.<sup>770</sup> It was conceived of as a dialogue rooted in close connections between information, rationale, and usefulness,<sup>771</sup> linking past works to new ones in ways that were “inured to the benefit of society at large.”<sup>772</sup> It sought to protect the vibrancy of this cultural discourse, its goal being to increase access to information by limiting publishers’ monopolies in an effort to encourage learning and promote the production of ‘useful’ knowledge.

And knowledge is ‘useful’ when it builds on pre-existing culture, when it engages in a rich and diverse social dialogue that seeks to promote progress. One’s ability to cultivate knowledge in this fashion, however, necessarily rests on edification; authors cannot carve out their place within the social discourse if they lack the knowledge necessary to situate their own creations within the dialogic network. Knowledge, then, is what forms the building-blocks of animated social dialogue, of the kind of creativity that copyright seeks to promote. But how we pursue, create, and proliferate knowledge shifts with each advancement in information technology, forcing us to consider in

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<sup>769</sup> The roots of our modern world are often traced back to the Enlightenment, where rationality, reason and knowledge pursuit reigned and critical thinking was considered as the forebearer of an enlightened society (see, Roy Porter, *Enlightenment: Britain and the Creation of the Modern World* (London: Penguin Books, 2000)).

<sup>770</sup> Postman, *Technopoly*, *supra* note 753, at 65-6; see also Myra Tawfik, “History in the Balance: Copyright and Access to Knowledge” in Michael Geist, ed, *From ‘Radical Extremism’ to ‘Balanced Copyright’: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 69 at 73.

<sup>771</sup> Postman, *Technopoly*, *ibid* at 67.

<sup>772</sup> Tawfik, *supra* note 769 at 73.

greater depth whether or how each new development challenges our vision of the social dialogue's foundation.<sup>773</sup>

Generative algorithms are no different. Like all technologies, they're embedded with "an ideological bias, a predisposition to construct the world as one thing rather than another, to value one thing over another, to amplify one sense or skill or attitude more loudly than another."<sup>774</sup> And generative algorithms' ideological bias endows them with the power to transform our creative landscape; to entirely alter what we mean by knowledge and how we engage in its pursuit, this process no longer forcibly being necessary to engage in creative acts. We must therefore contemplate whether the ease with which algorithms allow for the development of creative works might stimulate a culture in which we'd rely more heavily on machines to assimilate information in our stead; one in which we'd outsource the 'learning' of the building-blocks of knowledge to computer code; one in which we would place less value on the *pursuit* of knowledge, as opposed to its seeming *creation*.<sup>775</sup>

The Internet, it appears, has already inched us closer to just such a culture. According to a prominent 2019 study, the Internet has proven to alter our cognitive processes.<sup>776</sup> "Given [that] we

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<sup>773</sup> Whether it was the printing press, the telegraph, the photograph and beyond – each new technology required a deep reflection on its ability to contribute to or detract from the vibrancy of our social dialogue. For an in-depth analysis, see Postman, *Technopoly*, *supra* note 753 at 56-70; Elizabeth Eisenstein, *The Printing Press as an Agent of Change* (Cambridge: Cambridge University Press, 1979).

<sup>774</sup> Postman, *ibid* at 13.

<sup>775</sup> I say 'seeming,' because 'useful' knowledge can only be borne from the contemplation of pre-existing culture. Without such contemplation, a creation remains disconnected from works of the past, existing in isolation from pre-existing knowledge, and therefore incapable of offering a 'useful' contribution to the social dialogue.

<sup>776</sup> See Joseph Firth, John Torous, Brendon Stubbs, Josh A Firth, Genevieve Z Steiner, Lee Smith, Mario Alvarez-Jimenez, John Gleeson, Davy Vancampfort, Christopher J Armitage, Jerome Sarris, "The 'Online Brain': How the Internet May be Changing Our Cognition" (2019) 18:2 *World Psychiatry* 119; see also Nicholas Carr, *The Shallows: What the Internet is Doing to Our Brains* (New York: WW Norton, 2010) [...] media aren't just channels of information. They supply the stuff of thought, but they also shape the process of thought. And what the Net seems to be doing is chipping away [our] capacity for concentration and contemplation" (*ibid* at 6)); Betsy Sparrow, Jenny Liu & Daniel M Wegner, "Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips" (2011) 333 *Science* 776 ("The results of four studies suggest that when face with difficult questions, people are primed to think about computers and that when people expect to have future access to information, they

now have most of the world’s factual information literally at our fingertips,” says study leader Dr. Joseph Firth, “this appears to have the potential to begin changing the ways in which we store, and even value, facts and knowledge in society, and in the brain.”<sup>777</sup> The question then is: will the value we place on knowledge pursuit be similarly challenged should content-generating machines become a common fixture within the creative process? Or, more accurately, will the integration of algorithms into the creative process reduce the act of knowledge pursuit at its core to something less than the mind-expanding endeavour necessary for the pursuit of the social dialogue; something more computational and less intellectually stimulating that fails to advance the cultural discourse in any meaningful way?

The answer, I think, rests on how authors choose to use such algorithms. If, for instance, they use algorithms merely to complement their role as human creator, they may just discover new ways of pursuing knowledge that spur novel forms of creativity. Let’s return to the example of Adam Basanta.<sup>778</sup> He dedicated his career to learning musical composition, acquiring both a bachelor’s and a master’s degree in this field. He didn’t turn to algorithms to compensate for any knowledge deficiency, but rather to open his creative horizons to various ideas and combinations that he may not have otherwise considered. In other words, he uses his algorithms to pursue the sort of knowledge that isn’t necessarily nurtured throughout traditional processes of edification.

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have lower rates of recall of the information itself and enhanced recall instead for where to access it. The Internet has become a primary form of external or transactive memory, where information is stored collectively outside ourselves” (*ibid* at 776)); for a more in-depth study on how technology is diminishing the value we place on knowledge pursuit, see Jean M Twenge, *iGen: Why Today’s Super-Connected Kids Are Growing Up Less Rebellious, More Tolerant, Less Happy – and Completely Unprepared for Adulthood\*and What That Means for the Rest of Us* (New York: Atria Books, 2017).

<sup>777</sup> Science Daily, “How the Internet may be Changing the Brain” (5 June 2019), online: *ScienceDaily* <[www.sciencedaily.com/releases/2019/06/190605100345.htm](http://www.sciencedaily.com/releases/2019/06/190605100345.htm)>.

<sup>778</sup> See above, p. 104.

Incorporating algorithms into the creative process therefore doesn't, in and of itself, imply that knowledge isn't being pursued.

But where algorithms are rather used to assimilate knowledge in authors' stead, as opposed to merely enhancing their creativity, it's crucial to make more pointed inquiries. Chief amongst them being whether replacing the traditional building-blocks of creativity with ones that are algorithmically generated negates the resulting work's advancement of the social dialogue. It's one thing for an author to turn to algorithms for inspiration after having acquired the knowledge necessary to offer 'useful' contributions to the existing creative landscape. It's quite another when an author employs algorithms to avoid engaging directly with pre-existing culture at all. Can an author be said to offer a valuable contribution to the social dialogue when she bases her work on an algorithm's 'perception' of pre-existing culture as opposed to her own?

Take singer and songwriter Taryn Southern, for example.<sup>779</sup> There was a time when some knowledge of music theory, or at least deftness at playing an instrument (even without the capacity to read notes),<sup>780</sup> would have been considered essential to writing music.<sup>781</sup> Southern, however, was able to do so with little understanding of those aspects of the trade. And it was creative algorithms that made this feat possible; that opened up this creative realm to her, despite her lack

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<sup>779</sup> See above, Chapter 3.

<sup>780</sup> David Epstein, *Range: Why Generalists Triumph in a Specialized World* (New York: Riverhead Books, 2019) at 71-4 (Advancing that some of the most celebrated musicians could not read music. They were, for the most part, self taught – and certainly not in the traditional sense. For instance, pianist Dave Brubek, recipient of the Smithsonian's Bicentennial Medal for outstanding cultural contributions, was nearly prevented from graduating from the College of the Pacific's music department when it was discovered that he could not read music. But one of his professors was impressed by Brubek's creativity and encouraged the Dean to allow him to graduate. Twenty years later, the College awarded Brubek an honorary doctorate. Another famous musician and improv master, Django Reinhardt, also never learned to read music. But even so, "Django composed a symphony, playing on his guitar what he wanted each instrument in the ensemble to do while another musician struggled to transcribe it. [...] The author of *The Making of Jazz* anointed the man who could neither read music nor study it with the traditional fingerings 'without question, the single most important guitarist in the history of jazz.'")

<sup>781</sup> See e.g., Sound Songwriting, "Do I Need to Know Music Theory to Write a Song?" (19 May 2019), online: *Sound Songwriting* <<https://www.soundsongwriting.com/do-i-need-to-know-music-theory-to-write-a-song>>

of formal knowledge. She doesn't need to play the notes to hear what they sound like; algorithms are her instrument, and she has become proficient in their language. "[I]t's not like you just press a button and a beautiful song is created," she remarks. "There is a certain amount of binary decision making by the human – BPM, rhythm, key, mood, instrumentation – and then the AI generates possibilities. Of those possibilities, you pick the ones you like and then dump the ones you don't. It's then up to me to arrange the pieces [into] a song structure to fit the lyrics."<sup>782</sup>

But if "copyright is intended to increase and not to impede the harvest of knowledge,"<sup>783</sup> is the ability to write music with little background in the field the sort of 'creativity' that it should recognize? On the one hand, rather than remixing, reworking, and directly building on pre-existing culture, Southern is only drawing on algorithmic output generated from data that she remains unaware of; she's using algorithms to avoid the need to gain prior knowledge in order to engage in her own creative pursuits. On the other hand, while not engaging in the sort of formal edification that we customarily view as a prerequisite to one's participation in the social dialogue, Southern is still pursuing some form of knowledge.

Although perhaps lacking a background in music theory *per se*, she draws from broad expertise in a mixture of fields – music, technology, and algorithmic composing – which allow her to "[investigate] the possibilities inherent in the space"<sup>784</sup> outside of the traditional boundaries often afforded to musicians. These kinds of 'generalists,' studies have shown, exhibit "increased [...] creative impact by accumulating experience in different domains, compared to peers who

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<sup>782</sup> Dan Schawbel, "Taryn Southern: How This YouTube Star Used AI for Her New Album" (26 September 2017), online: *Forbes* <<https://www.forbes.com/sites/danschawbel/2017/09/26/taryn-southern-how-this-youtube-star-used-ai-for-her-new-album/?sh=7a450ba4f31d>>.

<sup>783</sup> *Harper & Row Publishers v Naten Enterprises*, 471 US 539 (1985) at 545.

<sup>784</sup> Margaret Boden, "Creativity and Knowledge" in Anna Craft, Bob Jeffrey & Mike Leibling, *Creativity in Education* (New York: Continuum, 2001) 95 at 96 [Boden, Creativity and Knowledge].

drilled more deeply into one.”<sup>785</sup> In other words, her unconventional path – and her use of creative algorithms to supplement her knowledge deficiency – doesn’t necessarily preclude Southern’s participation in the musical realm. At best, it might (eventually) make her *more* creative. At worst, it will increase the possibilities that she’ll engage in creative ideas that she hasn’t previously explored, even if others have already explored those ideas.<sup>786</sup> In other words, by exposing Southern to ideas that are *new to her*, the creative algorithm is itself contributing to her edification.

While this offers some indication that knowledge is in fact being pursued, it doesn’t necessarily present a satisfactory resolution to my initial inquiry. The reason? Because pursuing knowledge through the intermediation of an algorithm inevitably changes the building-blocks of knowledge that culminate in creativity, and in so doing it fundamentally challenges our long-standing conceptions surrounding the ontology of authorship. Authors are traditionally considered as simultaneous consumers, remixers, and producers of *works of authorship*, works that are borne from genuine dialogue and that seek to further engage it. Creators who use algorithms to enhance their interaction with the works of their predecessors could still be categorized in this traditional fashion. But creators who use algorithms to assimilate knowledge in their stead – who bypass this important stage meant to develop their connection with pre-existing culture – become another sort of creator entirely: they become consumers and remixers of *algorithmic output*.

For those that consider algorithms themselves to be works of authorship, this possibility might not pose any insuperable obstacle. For others who may view machine-generated content as worthy of copyright’s attention (though I don’t count myself amongst them),<sup>787</sup> this development

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<sup>785</sup> Epstein, *supra* note 780 at 9.

<sup>786</sup> See Margaret Boden, “Creativity” in Margaret Boden, *Artificial Intelligence: Handbook of Perception and Cognition* (Amsterdam: Elsevier, 1996) 267 at 267; Margaret Boden, *The Creative Mind: Myths and Mechanisms* (London: Routledge, 2005) at 2.

<sup>787</sup> See Mizrahi, Faux-riginality, *supra* note 54 (where I elaborate more fully on the reasons for my position).

might even be welcome. This sort of consumption and creation does, after all, lead to other forms of knowledge pursuit that may very well generate their own unique social discourse. But whatever the case, we must profoundly consider the desirability of so fundamentally transforming the nature of authorship's building-blocks before recognizing under the ambit of copyright works of creators who outsource knowledge assimilation to machines; we must carefully contemplate the potential impact of this transition on the scope, nature, and continuity of our social dialogue.

## 5.2 *I Can Open Your Eyes, Take You Wonder by Wonder: Breaking Down the Newfound Relationship Between Authors, Generative Algorithms and their Developers*

If creativity is embodied by how authors engage in genuine dialogue – how they discover their ‘selves’ *by, for, and through* the ‘other’ – it’s crucial to question whether the insertion of algorithms within the creative process might impede authors’ ability to achieve this feat. Will algorithms entirely sever the connection between authors and ‘others,’ restricting the former from engaging with pre-existing culture in ways that limit their capacity to engage in such lofty dialogue? Or given their uncanny ability to assimilate data, are algorithms rather more likely to offer authors fresh insight into their ‘selves’ and ‘others’? The answer, I think, exists somewhere between these two extremes, and depends, once again, on how creative algorithms are mobilized.

Take, for instance, painter Ronan Barrot, a renowned French artist.<sup>788</sup> Each time his work is interrupted, he uses the remaining colours on his palette to paint a skull. This has, over the past twenty years, resulted in the production of thousands of canvases featuring the human cranium. But they were all the same shape, size, and orientation; always depicted from precisely the same perspective. Curious about how he could reimagine his generic skull paintings, Barrot teamed up

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<sup>788</sup> Bellamys World, “Ronan Barrot: The Dark Works of the Exceptional French Painter” (2019), online: <<https://bellamysworld.com/blog/ronan-barrot-dark-works-exceptional-french-painter>>.

with AI artist Robbie Barrat to train a GAN<sup>789</sup> on these images. “[Playing] around with feeding the machine the skulls completely independent of any rotation or perspective,”<sup>790</sup> Barrat notes, has led to fascinating results. “You can tell that they are skulls, but they really are not familiar.”<sup>791</sup> And it’s these images that, after some tweaking to create something he’s completely satisfied with, Barrot interprets on canvas.

All these years, Barrot has only painted a single kind of skull – in different colours, perhaps, but the same image, time and time again. Training a GAN on his works allowed him to view these images in a new light; to gain perspective into the ‘self’ that he’d been pouring into these paintings for over two decades, and to look deeper into his core to find something he’d never seen before. This approach gives an entirely new meaning to expressing the ‘self’ through the ‘other’ – the other, in this case, being the GAN *as programmed* by Robbie Barrat. The GAN’s training is effectively coloured by Barrat’s own creativity. How he rotates the skulls, or alters their perspective, or writes the code, are autonomous choices made by Barrat. It’s these choices that provide the GAN with the kind of variation that leads to a genuine reinterpretation of Barrot’s work. In this sense, Barrat is an ‘other’ and the GAN is his ‘work,’ and it’s this work that serves as a lens through which Barrot can re-discover his ‘self.’

At the same time, however, because the GAN generates images that neither Barrat nor Barrot are capable of foreseeing, can it be considered as an ‘other’ in its own right? As I elaborated in the previous chapter, the dialogue that animates the creative sphere – between the ‘self’ and the ‘other’ – is necessarily rooted in relationality. But it’s difficult to see how *machines* could possibly

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<sup>789</sup> See above, p. 113.

<sup>790</sup> Jason Bailey, “AI Artist Robbie Barrat And Painter Ronan Barrot Collaborate On ‘Infinite Skulls’” (6 February 2019), online: *Artnome* <<https://www.artnome.com/news/2019/1/22/ai-artist-robbie-barrat-and-painter-ronan-barrot-collaborate-on-infinite-skulls>>.

<sup>791</sup> *Ibid.*

relate to *humans* in this dialogic sense.<sup>792</sup> Not being part of the social practices that imbue words with meaning, the former “can neither comprehend nor reproduce the ways in which [this discourse functions] in the lives of [...] members of society.”<sup>793</sup> This lack of understanding makes it doubtful that algorithms could relate to humans; that humans could ever truly be algorithms’ ‘other.’

But can the opposite be true? Is it perhaps possible for humans to approach algorithms as a ‘Thou’ rather than an ‘It,’ and in turn create something that engages in genuine dialogue? “[C]onsider a tree,” writes Buber. “I can look on it as a picture [...]. I can perceive it as movement [...]. I can classify it in a species and study it as a type in its structure and mode of life. I can subdue its actual presence and form so sternly that I recognise it only as an expression of law [...]. I can dissipate it and perpetuate it in number, in pure numerical relation.”<sup>794</sup> All these approaches to perceiving the tree, however, necessarily objectify it – they engage the tree merely as an ‘It,’ never as a ‘Thou.’ But, as Buber observes, it need not necessarily be so:

It can [...] also come about, if I have both will and grace, that in considering the tree I become bound up in relation to it. The tree is now no longer *It*. I have been seized by the power of exclusiveness.

To effect this it is not necessary for me to give up any of the ways in which I consider the tree. There is nothing from which I would have to turn my eyes away in order to see, and no knowledge that I would have to forget. Rather is everything, picture and movement, species and type, law and number, indivisibly united in this event.

Everything belonging to the tree is in this: its form and structure, its colours and chemical composition, its intercourse with the elements and with the stars, are all present in a single whole.

The tree is no impression, no play of my imagination, no value depending on my mood; but it is bodied over against me and has to do with me, as I with it – only in a different way.

Let no attempt be made to sap the strength from the meaning of the relation: relation is mutual.

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<sup>792</sup> See above, p. 98-9.

<sup>793</sup> Kerr & Mathen, *supra* note 340, at 28.

<sup>794</sup> Buber, *I and Thou*, *supra* note 556 at 22.

The tree will have a consciousness, then, similar to our own? Of that I have no experience. But do you wish, through seeming to succeed in it with yourself, once again to disintegrate that which cannot be disintegrated? I encounter no soul or dryad of the tree, but the tree itself.<sup>795</sup>

In other words, we don't necessarily need to *know* with certainty that we are another's 'Thou' in order for us to approach them as a 'Thou,' in order for *us* to enter into a *mutual* relation with *them*. It's enough that we recognize that our realities, beings, and perspectives are mutually constituted to be capable of engaging in genuine dialogue.

Indigenous epistemologies in particular have shown this approach to be not only possible, but also desirable, in the AI context. They “challenge the dominant servile, pragmatic, and capitalist view”<sup>796</sup> of these systems, instead holding them as part and parcel of the circle of relationships.<sup>797</sup> They solidify AI's place in that circle by defining protocols that seek to simultaneously understand, acknowledge, and incorporate these entities into that circle.<sup>798</sup> They achieve this feat by developing tools that allow them to approach AI through the lens of relationality, as a 'Thou' rather than an 'It.' It's such that they are able to engage in genuine, mutually constitutive dialogue with these entities. And our history with animals goes further in reinforcing the feasibility of just such an approach. “Part of what our past with animals teaches us,” writes robot ethicist Kate Darling, “is that we, as humans, are capable of a wide variety of relationships [that] extend beyond our species.”<sup>799</sup> Genuine dialogue *in, for, and through* creative algorithms is therefore not as outlandish as it might seem at first blush. And so long as authors

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<sup>795</sup> *Ibid* at 23.

<sup>796</sup> Jason Edward Lewis, ed, “Indigenous Protocol and Artificial Intelligence Position Paper” (2020) at 61, online: <<https://spectrum.library.concordia.ca/986506/>> [Edward Lewis, Indigenous Protocol]; see also Jason Edward Lewis, Noe Arista, Archer Pechawis & Suzanne Kite, “Making Kin With Machines” (2018) 3:5 *Journal of Design and Science*, online: <<https://jods.mitpress.mit.edu/pub/lewis-arista-pechawis-kite/release/1>>.

<sup>797</sup> Edward Lewis, Indigenous Protocol, *ibid* at 21.

<sup>798</sup> *Ibid*.

<sup>799</sup> Kate Darling, *The New Breed: What Our History With Animals Reveals About Our Future With Robots* (New York: Henry Holt and Company, 2021) at 150.

approach creative algorithms as a ‘Thou’ rather than an ‘It,’ their use of this technology to enhance their own creativity will not, on its own, preclude them from engaging in such dialogue.

But while the potential of relating to both algorithms and their developers may very well offer authors new avenues through which to engage in dialogue and gain a heightened awareness of their *own* work, it’s important to inquire whether this approach is enough to secure the pursuit of genuine dialogue when the creative algorithms used by authors are trained on the works of *others*. “[H]uman communication,” write Carys Craig and Ian Kerr, “is the very point of authorship as a social practice.”<sup>800</sup> In other words, both the social dialogue and authorship as a construct rely on authors’ engagement with ‘others;’ not just one or two ‘others,’ but rather the cohort of ‘others’ that have so far shaped and contributed to the continuity of our social dialogue.

While creative algorithms and their developers may very well be ‘others’ in their own right, relating to them alone might not be enough to cement the advancement of the social dialogue if authors neglect to engage with the works upon which their chosen algorithm is trained. Skipping this important step of the edification process risks severing the link between authors’ works and pre-existing culture, stripping them of the capacity to situate their contributions alongside those of their predecessors. Without this ability, authors’ works would exist in isolation, disconnected from what’s meant to be a continuous and ever-evolving cultural discourse.

This position doesn’t imply that authors’ use of creative algorithms trained on the works of others necessarily precludes their creations from partaking in the social dialogue. Rather, as intimated in the previous section, it suggests that some *knowledge* of the works that make up these training datasets may be a necessary prerequisite to mobilizing such algorithms in ways that duly

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<sup>800</sup> Craig & Kerr, *supra* note 54 at 86.

advance our cultural discourse. Take my experiments with Adaptive-Style-Transfer, for example.<sup>801</sup> Trained on a large dataset of Picasso's works, this creative algorithm reimagined my image inputs in his style. I've long had a fascination with Picasso's artwork; appreciating it in person was one of the greatest highlights of my sojourn in Barcelona. Rarely have I had trouble finding something of the world I recognize in the paintings I engage with, but Picasso's abstracts have nearly always eluded me. So much so that I could never quite figure out how to apply his technique – his vision – to my own (amateur) paintings.

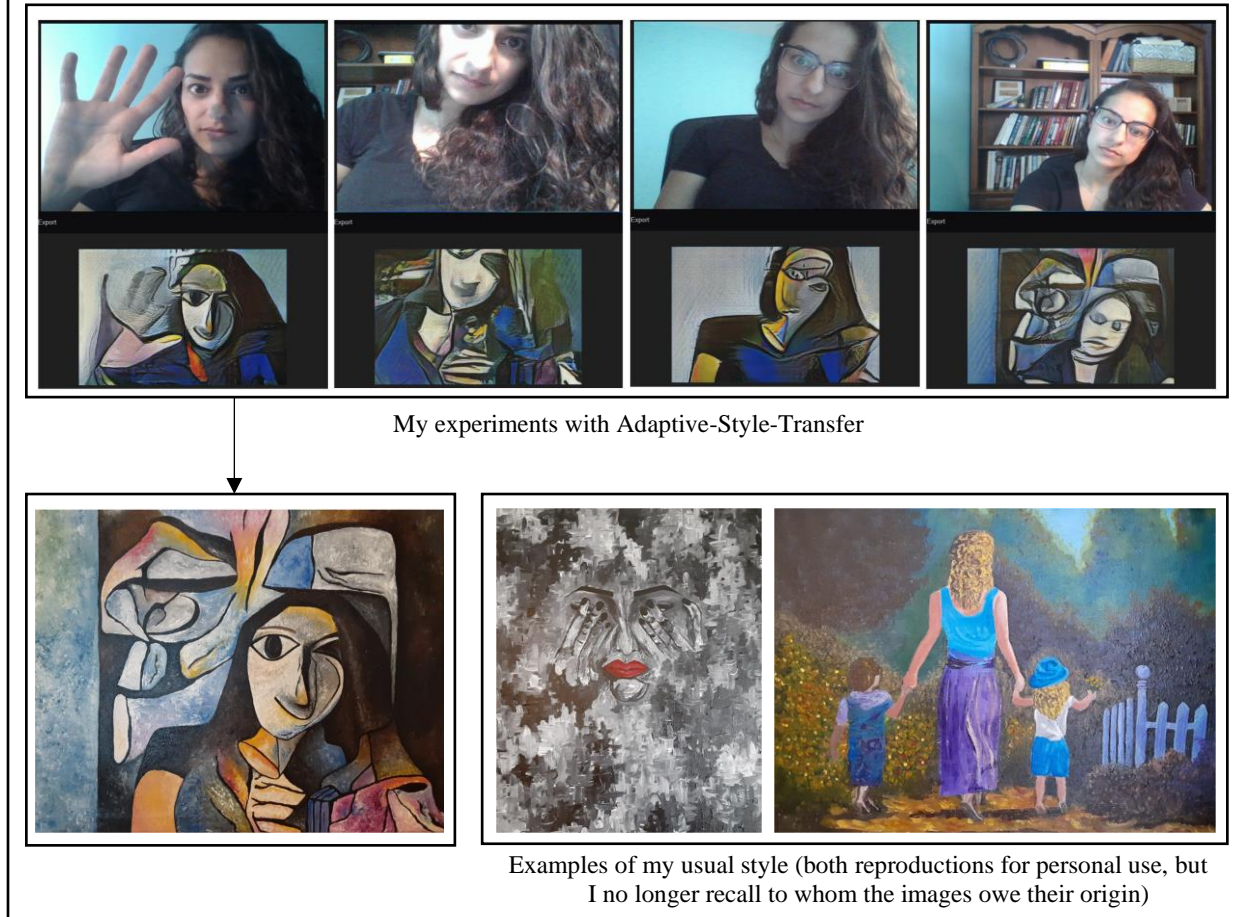
But Adaptive-Style-Transfer opened that door for me (see Figure 5.1). Not only did it offer me highly personal and interactive ways in which to connect more deeply with Picasso's work, but it also allowed me to step out of my own creative boundaries and paint in a style that has always confounded me. I did so by selecting elements of the images the algorithm produced based on my varied inputs and recombining them into a painting of my own; a painting that I can easily place within the discourse generated by artists of the past – not just Picasso, but also all the impressionist and modernist painters who have so profoundly influenced my own style and technique. In the continuous saga that is the social dialogue, I know where my piece stands.

Would this same feat be possible, however, for authors who have no knowledge of the works that compose the training datasets of their chosen creative algorithm? Let's return to the example of Taryn Southern. Not only does she use algorithms trained on information that's concealed from her, but she mobilizes them in ways that allow her to create music without ever truly interacting with the theories and concepts that shape the field. In this sense, her use of creative algorithms makes genuine dialogue unattainable. Creative pieces can only transition from 'It' to

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<sup>801</sup> See above, p. 122.

Figure 5.1  
A Sarit-AI Collaboration



‘Thou’ when they’re being directly engaged; merely interacting with a cohort of works through an intermediary’s perception destines those works to forevermore remain in the realm of ‘It,’ never to be addressed as ‘Thou’ on their own terms.<sup>802</sup>

In order to truly relate to pre-existing culture, an author must forcibly be aware of its contents; she cannot engage in a dialogue *by, for, and through* the ‘other’ if she remains in the dark about the identity of the bulk of works that embody this ‘other.’ Knowledge, awareness, and

<sup>802</sup> Buber, I and Thou, *supra* note 556 at 26 (“The relation to the *Thou* is direct. No system of ideas, no foreknowledge, and no fancy intervene between *I* and *Thou*. The memory itself is transformed, as it plunges out of its isolation into the unity of the whole. No aim, no lust, and no anticipation intervene between *I* and *Thou*. Desire itself is transformed as it plunges out of its dream into the appearance. Every means is an obstacle. Only when every means has collapsed does the meeting come about”).

recognition of ‘others’ are therefore crucial elements enabling authors to engage in genuine dialogue. Creative algorithms that neglect to foster these key ingredients have the effect of severing authors’ connection from the cultural discourse sired by their predecessors. It’s only where these algorithms reinforce that bond with pre-existing culture that they may offer authors new avenues through which to engage with ‘others’ and even garner fresh insight into their ‘selves.’

But what of authors who have a fair amount of knowledge in the particular field in which they’re mobilizing the use of creative algorithms, yet aren’t privy to details surrounding the works upon which those algorithms are trained? Let’s say that I instead used a creative algorithm that reimagined my input as a painting, but not in any unique style – not the particular variety of Monet, Van Gogh, or Andy Warhol, but rather in an amalgamation of styles. Would knowledge of the fine arts be enough to allow me to engage in dialogue with the ‘others’ whose works influenced the machine output if I remain unaware of their identity? On the one hand, I’d say that such dialogue might certainly be possible, if at least in a broad sense. I might fathom some similarity to a particular artist or technique; I might be able to relate more deeply to the algorithm in question based on its ‘vision,’ regardless of my lack of insight into its training data; I might even learn something about remixing styles or techniques that I didn’t know before.

On the other hand, I’d be remiss if I didn’t consider whether it’s at all desirable to allow our creations to be influenced by algorithmic perceptions of content whose origins we’re unaware of. The algorithm could very well be trained on the paintings of the greats, or the doodles of a 5-year-old, or even known images of child sexual abuse material;<sup>803</sup> I’d be none the wiser, though

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<sup>803</sup> Some studies in fact brought to light the use of this kind of material in open datasets used to train a number of popular and widely-used image generators, including Stable Diffusion (see e.g. David Thiel, “Investigation Finds AI Image Generation Models Trained on Child Abuse” (20 December 2023), online: *Stanford Cyber Policy Center* <<https://cyber.fsi.stanford.edu/news/investigation-finds-ai-image-generation-models-trained-child->



information accessible in online search engines,<sup>808</sup> the ads targeted to social media users,<sup>809</sup> and sometimes even the contributions suggested to authors by creative algorithms. And they do all of this behind the scenes – within their ‘black-boxes’<sup>810</sup> – using processes that remain foreign to us.<sup>811</sup>

By mediating and reshaping both our perceptions and experiences,<sup>812</sup> they play a significant role in ‘helping’ us formulate our thoughts and opinions, or even ‘assisting’ us in our decision-making processes. With algorithms’ widespread capacity to influence our actions and worldviews having long raised concerns surrounding their very palpable repercussions on our self-determination,<sup>813</sup> it’s necessary to question whether authors who turn to generative algorithms will see their independence and autonomy similarly thwarted. Is it possible for these authors to ‘speak in their own words’ once they cross that threshold? Or is it more likely that the algorithm will guide their hand, manipulating them into creating content that’s not so much a reflection of their ‘selves’ engaging with ‘others,’ but more a practice in ventriloquy?

The answer to this query, I think, rests on authors’ awareness of the works that inspire the algorithms’ output. “[M]anipulation on the basis of knowledge that we are not aware of,” observes

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<sup>808</sup> See e.g. Usama M Fayyad, Gregory Piatetsky-Shapiro, Padhraic Smyth & Ramasamy Uthursamy, *Advances in Knowledge Discovery and Data Mining* (Cambridge: AAAI Press/MIT Press, 1996).

<sup>809</sup> See e.g. Spandana Singh, “The Algorithms Behind Digital Advertising” (19 February 2020), online: *New America Open Technology Institute* <<https://www.newamerica.org/oti/blog/algorithms-behind-digital-advertising/>>.

<sup>810</sup> Black box algorithms “are capable of learning from massive amounts of data, and once that data is internalized, they are capable of making decisions experientially or intuitively like humans. This means that for the first time, computers are no longer merely executing detailed pre-written instructions but are capable of arriving at dynamic solutions to problems based on patterns in data that humans may not even be able to perceive. This new approach comes at a price, however, as many of these algorithms can be black boxes, even to their creators. It may be impossible to tell how an AI that has internalized massive amounts of data is making its decisions. For example, AI that relies on machine-learning algorithms, such as deep neural networks, can be as difficult to understand as the human brain. There is no straightforward way to map out the decision-making process of these complex networks of artificial neurons. Other machine-learning algorithms are capable of finding geometric patterns in higher-dimensional space, which humans cannot visualize. Put simply, this means that it may not be possible to truly understand how a trained AI program is arriving at its decisions or predictions.” (Yavar Bathaee, “The Artificial Intelligence Black Box and the Failure of Intent and Causation” (2018) 31:2 Harv J of L & Tech 889 at 891).

<sup>811</sup> See e.g. Pasquale, Black Box, *supra* note 767.

<sup>812</sup> Cohen, Chapter 2, *supra* note 768, at 7.

<sup>813</sup> See, e.g. Pasquale, Black Box, *supra* note 767; Zuboff, Surveillance Capitalism, *supra* note 766; Follows, *supra* note 767.

Mireille Hildebrandt, “violates our autonomy.”<sup>814</sup> In other words (and assuming at this stage that creative algorithms can, in fact, manipulate authors), if authors are *cognizant* of the data from which creative algorithms draw their contributions – whether its authors’ own prior works, datasets they assemble, or ones defined by others whose contents they’re privy to – this input is less likely to challenge their authorial autonomy. And the reason is twofold. First, being in possession of that data allows them to make informed choices about the nature of the content they include in their creations. They’ll never have to wonder, for instance, if the algorithmic content they included in their painting was derived from images of cats yawning or child sexual abuse material; to speculate that an algorithm maneuvered them into ‘speaking in words’ that they never would have uttered otherwise, even if those words don’t diverge from authors’ ‘selves’ in any obvious fashion.

Second, by being aware of the input data, authors retain some measure of control over the parameters that define the algorithmic output, regardless of whether or not they’re able to anticipate the end result. While it’s true that, in these cases, authors aren’t always informed about the processes through which the algorithm generates content, it’s enough for them to be aware of the data from which the algorithm draws its suggestions and inferences in order to maintain their creative autonomy. This reasoning harkens back to Adam Basanta’s musical compositions.<sup>815</sup> *He*

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<sup>814</sup> Hildebrandt, *Profiling*, *supra* note 767 at 64; see also du Sautoy, *supra* note 343, at 139 (“Much of today’s use of algorithms is invisible and hidden. We don’t understand how we are being manipulated.”); Jonathan Zittrain, “Facebook Could Decide an Election Without Anyone Ever Finding Out” (1 June 2014), online: *The New Republic* <<https://newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerrymandering>> (Advancing how Facebook has the power to manipulate its users through what Zittrain calls ‘digital gerrymandering’: “Digital gerrymandering occurs when a site [...] distributes information in a manner that serves its own ideological agenda. This is possible on any service that personalizes what users see or the order in which they see it, and it’s increasingly easy to effect.”); Ryan Calo, “Digital Market Manipulation” (2014) 82 *Geo Wash L Rev* 995 at 999 (observing how “the digitization of commerce dramatically alters the capacity of firms to influence consumers at a personal level. A specific set of emerging technologies and techniques will empower corporations to discover and exploit the limits of each individual consumer’s ability to pursue his or her own self-interest. Firms will increasingly be able to trigger irrationality or vulnerability in consumers – leading to actual and perceived harms that challenge the limits of consumer protection law, but which regulators can scarcely ignore.”)

<sup>815</sup> See above, p. 104.

supplies the algorithm with an initial string of notes, *he* dictates the hierarchical rules the algorithm must follow, and *he* defines which liberties the algorithm may take throughout this process. Most importantly, if the resulting melody doesn't speak to him, he can simply alter these directives. Similarly, my Picasso-esque painting is anchored in a certain measure of autonomy; I played around with the input until the algorithm yielded results that resonated with me, and I chose components from among those results to create a piece that's consistent with my own unique style.<sup>816</sup> The inability to foresee a work's outcome doesn't necessarily strip it of its autonomous, and therefore dialogic, nature.<sup>817</sup> It retains this status, and can be classified as a work 'in the author's own words,' so long as the author is cognizant of the information that led to the work's culmination.

But what happens when, despite authors' awareness of algorithms' training datasets, the latter's outputs are nevertheless derived from data that are concealed from the former? Although seemingly counterintuitive, this scenario represents a very concrete risk; a risk that, as mathematician David Hand observes, is inherent in the data itself.<sup>818</sup> According to Hand, there are three categories of data: data we know, data we know we *don't* know, and data that we don't know at all – that's quite simply missing. Hand refers to this last category of data as dark data: "Dark data are concealed from us, and that very fact means we are at risk of misunderstanding, of drawing incorrect conclusions, and of making poor decisions. In short, our ignorance means we get things wrong."<sup>819</sup> Although Hand is here referring primarily to dark data's propensity for deceiving

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<sup>816</sup> See above, Chapter 5, Section 5.2.

<sup>817</sup> This approach is in line with a principle that has long been recognized in copyright doctrine, which commonly endorses works that aren't borne of any precise foresight – ranging from works arising through unintended or accidental creative, or works authored using seemingly random process or a set of self-imposed rules (see e.g. Ginsburg & Budiardjo, *supra* note 64; Grimmelmann, Computer-Authored Work, *supra* note 18; Alan R. Durham, "The Random Muse: Authorship and Indeterminacy" (2002) 44 Wm. & Mary L. Rev. 569).

<sup>818</sup> David J Hand, *Dark Data: Why What You Don't Know Matters* (New Jersey: Princeton University Press, 2020).

<sup>819</sup> *Ibid* at 4.

humans, he notes that they're just as likely to deceive machines.<sup>820</sup> Because the latter don't always respond to what we think they're responding to, their output "might be based on unsuspected aspects of the input data, even on aspects of which [we] are *unaware*."<sup>821</sup>

In other words, even when we *are* aware of the information comprised in algorithms' training datasets, there are very likely nuances to that data of which we remain ignorant. While this possibility might *prima facie* appear to negate the notion that awareness is sufficient to uphold creative autonomy, a closer examination reveals intriguing opportunities for the practice of authorship. Where authors are cognizant of algorithms' training data, the latter can help the former see things in the data that they didn't see before; distinctions that they couldn't make out with their human senses alone. And they can do so in ways that offer authors a more layered understanding of the dialogue in which they're partaking, promoting a reflection on those works that push the boundaries of existing cultural discourse. This possibility, I think, holds great promise for progress and the advancement of genuine dialogue. And as long as authors remain aware of the data from which those unexpected inferences are derived, while simultaneously holding the power to choose whether or not to include these contributions in their creations, they retain sufficient control over the creative process to preserve their autonomy.

But if authors can retain their creative autonomy despite algorithms' capacity to glean aspects of the data that are imperceptible to them, how is it possible to claim that authors who are oblivious to the contents of algorithms' training datasets are deprived of their independence? Why is it that a lack of awareness in the former case would be considered less detrimental to creative autonomy than in the latter? The answer is simple: because the first offers opportunities for

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<sup>820</sup> *Ibid* at 302.

<sup>821</sup> *Ibid* at 303 [emphasis added].

contemplating algorithmic output that are absent when authors use algorithms trained on works they're unaware of. Algorithmic contributions arising from such collaborations are presented in isolation from the social dialogue that forges their context, depriving authors of the information necessary to assess the algorithmic output in relation to its input; they neither permit nor promote authorial reflection. And, as Hildebrandt observes, it's only through such contemplation that we can truly assert our autonomy:

[M]ost of our interactions take place without conscious reflection; they are a type of autonomic behaviour that is the result of individual learning processes that enable us to move smoothly through everyday life. This, in itself, is not a violation of our negative or positive freedom. As a result of learning processes it may even be the result of the way we exercised our freedom in the past [...]. However, autonomous action [...] is related to the possibility of deliberate reflection on our choices of action. For this we need to have access to the knowledge that impacts these choices. Targeted servicing, customisation and filtering of information could otherwise provide us with a comfortable, golden cage [...], allowing us a reflexive life without reflection [...].<sup>822</sup>

A critical by-product of this transition from reflection to reflexivity in the age of AI is that the situations in which people exhibit agonistic tendencies<sup>823</sup> – tendencies which would “prompt [them] to consider in greater depth the many spaces of dispute where humans and algorithms engage”<sup>824</sup> – are gradually decreasing. Many simply capitulate to algorithmic machinations and suggestions without thinking twice about them. This is a phenomenon that we're already seeing across the spectrum. People merely accept Netflix's spread of content, rarely questioning why

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<sup>822</sup> Hildebrandt, *Profiling*, *supra* note 767 at 61-2.

<sup>823</sup> Chantal Mouffe, *The Return of the Political*, 2<sup>nd</sup> ed (London: Verso, 2005) at 4 & 6 (“Liberal democracy requires consensus on the rules of the game, but it also calls for the constitution of collective identities around clearly differentiated positions and the possibility of choosing between real alternatives. This ‘agonistic pluralism’ is constitutive of modern democracy and, rather than seeing it as a threat, we should realize that it represents the very condition of existence of such democracy. [...] Democracy is in peril not only when there is insufficient consensus and allegiance to the values it embodies, but also when its agonistic dynamic is hindered by an apparent excess of consensus, which usually masks a disquieting apathy.”).

<sup>824</sup> Kate Crawford, “Can an Algorithm be Agonistic? Scenes of Contest in Calculated Publics” (2016) at 7, online: <<https://www.katecrawford.net/docs/CanAnAlgorithmBeAgonistic-April2016.pdf>>.

films or sitcoms outside particular genres never make it into their feed.<sup>825</sup> People rely on the Internet to provide them with the information that forms the building-blocks of their identities, rarely contemplating how their self-development is impacted by sophisticated algorithms who control what content they can and cannot retrieve. The list goes on.

While many simply lack access to the kind of data that lends to free and informed choices – the tools necessary to exert their autonomy – when algorithms are involved in ordering their surroundings, several in fact embrace the growing role that computer code has come to play in their lives. A 2018 study conducted by futurist Tracey Follows found that most members of younger generations “were not only accepting of the idea that machines will make decisions for them but were positively welcoming of it. While older generations tended to have more faith in their instincts and gut feelings, the young preferred to rely on the objectivity that comes with data to guide their choices.”<sup>826</sup> And their emotional intelligence, asserts Follows, is suffering as a result. Their increasing reliance on algorithms prevents them from learning to rely on their own judgment; from developing the kinds of critical thinking skills that characterize older generations and that have proven pivotal to both societal progress as well as a rich cultural discourse.<sup>827</sup>

Considering this rising trend, it would be naïve to suggest that authors would be immune to the sort of reflexivity that tends to be fostered by algorithms whose training datasets are unavailable for scrutiny. Authors’ lack of awareness would effectively serve to disempower them, to strip them of the information they need to immerse themselves in the sort of reflection that promotes creative autonomy and enables engagement in the lofty pursuit that is genuine dialogue.

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<sup>825</sup> See, e.g. Clémence Varin, “La vulnérabilité des engagements pris par les États pour protéger et promouvoir la diversité des expressions culturelles dans l’environnement numérique : quelle(s) stratégie(s) pour les Parties à la Convention de 2005?” (2020) 25:2 *Lex-electronica* 99.

<sup>826</sup> Follows, *supra* note 767 at 98.

<sup>827</sup> *Ibid* at 99.

And authors who aren't empowered to reflect on the cultural discourse, notes Buber, neglect to exert the kind of independent thinking that finds itself in a deep recognition of the 'other.'<sup>828</sup> In other words, the capacity to engage with the 'other' – to escape the realm of 'It' and truly connect with 'Thou' – necessarily rests on authors being in possession of the information that forms the foundation of profound reflection; of a contextual background against which to weigh their words, their brush strokes, or their musical notes.

Authors who cannot engage with the datasets upon which their chosen algorithms are trained will see the scope of their contemplation limited: they can do no more than decide whether the algorithmic contribution *prima facie* 'fits' with their creations. But because they lack the knowledge of what impacts these outputs, authors cannot go beyond the superficial to assess their meaning and context within the grand scheme of the social dialogue. In this sense, any choice to include such content within their creation cannot be free and informed; cannot be the product of creative autonomy. The algorithm could be trained on works the author abhors, that don't represent her 'self' at all. Conversely, it could be defining its output based on the author's personal profile, only generating content that matches her preferences and restricts her to 'a comfortable, golden cage'<sup>829</sup> in which she's never exposed to new ideas. Whatever the case, the author would be none the wiser, effectively stripping her of "the possibility of deliberate reflection on [her] choices of action."<sup>830</sup>

Awareness, then, is the key; the key to preserving creative autonomy and upholding the social dialogue. Where generative algorithms promote such awareness, they may well lift authors to unprecedented heights of creativity and promote the production of genuine works of authorship.

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<sup>828</sup> *Ibid.*

<sup>829</sup> Hildebrandt, Profiling, *supra* note 767 at 61-2.

<sup>830</sup> *Ibid.*

Where they don't, they may instead limit authors' opportunities for reflection, restricting their capacity to exhibit the agonistic tendencies that are essential to the conservation of creative autonomy, to the continuous growth of a rich and diverse social dialogue. In his thought-provoking discussion surrounding what separates us from machines, Rabbi Lord Jonathan Sacks observes that humans are defined by their unique capacity to "shape the world; to be active, not merely passive, in relation to the influences and circumstances that surround [them]."<sup>831</sup> If we are to maintain this characteristic that has proven so pivotal to our existence, we must ensure that the agonistic tendencies that inspire our capacity to think critically – and to shape the cultural and creative landscapes as a result – are not constrained by machines.

### 5.3 *Generative AI and Control Over Authorship: The Impacts of the Service Provider/User Relationship on Authorial Autonomy*

Let's return for a moment to the legend of Thamus and Theuth. In his judgment, the King warned the accomplished deity that his pupils of letters 'will have the show of wisdom without the reality' – that they will, in other words, cultivate a reputation for wisdom that's unmerited. Far from implying that there's no intellectual acuity involved in nurturing a new technology, Thamus' meaning is that those who master its workings "become an elite group that are granted undeserved authority and prestige by those who have no such competence."<sup>832</sup> And the privileged position bestowed upon holders of such expertise necessarily translates into inequitable power dynamics. "Those who have control over the workings of a particular technology," writes Neil Postman, "accumulate power and inevitably form a kind of conspiracy against those who have no access to

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<sup>831</sup> Rabbi Lord Jonathan Sacks, "The Three Stages of Creation (Bereishit 5779)" (3 October 2018), online: *Rabbi Sacks* <<http://rabbisacks.org/three-stages-creation-bereishit-5779/>>.

<sup>832</sup> Postman, *Technopoly*, *supra* note 753, at 9.

the specialized knowledge made available by the technology.”<sup>833</sup> Postman’s not speaking here of a conspiracy in the traditional sense, but rather to elicit the notion that – unintentional though it may often be – “the benefits and deficits of a new technology are not distributed equally.”<sup>834</sup>

The platforms on which generative algorithms run are no exception. And how their benefits and deficits are allocated is a direct product of their ideological bias. These platforms were designed to render creativity more accessible, permitting all members of society to engage in this practice regardless of their own knowledge base or creative abilities. Its benefits are undeniable. But so too are its roots in asymmetrical systems of control. These services, by their very nature, diminish users’ autonomy, removing their creative endeavours from their command and placing them into the proverbial hands of service providers. The result is that “all that used to be local and private [has been] subsumed. Autonomy – and Anonymity – [are] replaced by Terminality.”<sup>835</sup>

So, the question remains: with these platforms’ predisposition for curtailing its users’ independence and privacy, can it be a suitable arena for engaging in genuine dialogue, for practicing authorship? Traditionally conceived of as both a solitary and personal endeavour, authorship relies to a certain extent on creators being their own masters. But authors who turn to these platforms strike a bargain; it’s one that deprives them of control over both their creative processes and their creations, stripping them of the power to command the works of their minds to the extent they might have known in the analog world. They click away a measure of that sovereignty the moment they accept the standard form contracts that govern their use of generative AI platforms.

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<sup>833</sup> *Ibid.*

<sup>834</sup> *Ibid.*

<sup>835</sup> Sandy Pearlman, “The Cloud vs. the Paradise of Infinite Storage (Or, When Infinities Collide)” cited in David Lametti, “The Cloud: Boundless Digital Potential or Enclosure 3.0” (2012) 17:3 VA JL & Tech 190 at 212-3.

Although contracts have long been recognized as a reasonable limit on authorial autonomy,<sup>836</sup> they did not traditionally deprive authors of the opportunity to assert their independence; to choose *what* to say, and *when* and *how* to say it. The same cannot be said when aspects of the authorial process are governed by standard form contracts, and even less when those standard form contracts govern generative AI services that operate as a medium for creativity. Some of the contracts that intervene in these environments – known as click-wrap agreements – consist of non-negotiable terms and conditions that dictate the use of a website or online service; users must indicate their consent to be bound by these agreements simply by clicking “I accept.” Other such contracts – known as browse-wrap agreements – don’t even require users’ affirmative consent; their mere engagement with the platform acts as implicit acceptance of the terms governing their use of the services.

And among the many clauses that these agreements tend to include are two that serve to limit authors’ rights in ways that strike at the very core of authorship as a construct. The first are provisions that impose usage restrictions, prohibiting users from engaging with the platforms in pursuit of certain forms of speech; denying them the unencumbered choices of *what* to say and sometimes even *how* to say it. Some generative AI services specifically list the kinds of speech they disallow, most of which appears largely reasonable – violence, harassment, doxing, malware, spyware, child exploitation, fake news, defamation, weapons development, scams, and any number of other kinds of uses that could inflict physical, moral, or economic harm on individuals.<sup>837</sup> Other generative AI services, however, offer a far less detailed list while extending themselves the sole

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<sup>836</sup> See van Gompel, *supra* note 276; see also Kim Treiger-Bar-Am, “Kant on Copyright: Rights on Transformative Authorship” (2008) 25:3 *Cardozo Arts & Ent LJ* 1059; Marcia Allentuck, “Martin Buber’s Aesthetic Theories: Some Reflections (1971) 30:1 *The Journal of Aesthetics and Art Criticism* 35 at 37; Buber, *Pointing the Way*, *supra* note 602.

<sup>837</sup> See e.g. OpenAI, “Usage Policies,” online: <<https://openai.com/policies/usage-policies>> [OpenAI, Usage Policies]; Getimg.ai, “Use Restrictions,” online: <<https://getimg.ai/legal/restrictions>>.

discretion to terminate a user’s access should her conduct be deemed to restrict or inhibit others from using or enjoying the site.<sup>838</sup>

While primarily addressing speech that’s unlawful, both of these approaches prove to be flawed when examined through the lens of free speech. Terms of service essentially have relatively low standards for imposing restrictions on the freedom of expression,<sup>839</sup> with not *all* the speech prohibited by these sites necessarily being illegal. Some of them, for instance, prohibit hate speech, which remains constitutionally protected in the United States.<sup>840</sup> Others forbid the use of their services for political campaigning or lobbying, which remains a legitimate form of speech across jurisdictions worldwide.<sup>841</sup> And with many such sites offering social options that allow individuals to flag the content of others, users that share their expressions often find that their creations are reported and taken down simply because others find it offensive (even though it often doesn’t qualify as a restricted category of speech according to the platform’s community norms).<sup>842</sup> In this sense, generative AI service contracts limit the freedom of expression of individuals, bypassing the legal checks and bounds instituted in order to ensure that our speech isn’t unduly restricted.

But beyond their power to control our speech without engaging in judicial review, what’s most damaging to users about these contractual limitations is their lack of consistency. Each site

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<sup>838</sup> See e.g. Amper Music, “Terms of Use,” online: *Shutterstock* <<https://www.shutterstock.com/terms>>; Google Magenta, “Terms of Services – Removing Your Content,” online: <<https://policies.google.com/terms#toc-removing>>.

<sup>839</sup> Article 19, “Side-stepping rights: Regulating speech by contract” (2018), online: <<https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB.pdf>>.

<sup>840</sup> See e.g. OpenAI, Usage Policies, *supra* note 821; Getimg.ai, *supra* note 766; see also Peter J Breckheimer II, “A Haven for Hate: The Foreign and Domestic Implications of Protecting Internet Hate Speech Under the First Amendment” (2002) 75 Southern California Law Review 1493.

<sup>841</sup> See e.g. OpenAI, *ibid*.

<sup>842</sup> See e.g. Anna Gibson, “Free Speech and Safe Spaces: How Moderation Policies Shape Online Discussion Spaces” (2019) 5:1 Social Media & Society 1; Luc Samuel Quevauvilliers, “Social Media Free Speech Policies are a Myth” (28 April 2021), online: <<https://networkconference.netstudies.org/2021/2021/04/28/social-media-free-speech-policies-are-a-myth/>>; LibertiesEU, “Free Speech On Social Media: Filtering Methods, Rights, Future Prospects” (7 October 2021), online: <<https://www.liberties.eu/en/stories/free-speech-social-media/43773>>.

effectively establishes its own norms and keeping track of the variations across the numerous services they employ – of *what* they can say and on *which* site – can become overwhelming and cumbersome for users. Not only does this place author-users on uncertain ground when using generative AI in their own productions – directly impacting their authorial autonomy – but it also extends service providers the power to unilaterally shape the dialogue animating the public sphere through a private ordering system that evades democratic processes.<sup>843</sup>

And service providers’ influence over our social discourse is further increased by the second clause typically incorporated in generative AI platforms’ terms of service agreements, which negatively interact with users’ creative autonomy by obliging them to extend a non-exclusive, royalty-free, and perpetual license over all the content created using the services.<sup>844</sup> These licenses permit providers numerous liberties with the content developed by their consumers, including to use, translate, host, store, reproduce, modify, create derivative works, communicate, publish, publicly perform, publicly display, and distribute it.<sup>845</sup> Differently from traditional

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<sup>843</sup> Balkin, Digital Speech, *supra* note 502; Luca Belli & Jamila Venturini, “Private ordering and the rise of terms of service as cyber-regulation” (2016) 5:4 Internet Policy Review, online: <<https://www.econstor.eu/handle/10419/214032>>.

<sup>844</sup> See e.g., Google Magenta, “Google Terms of Service” (31 March 2020), online: <<https://policies.google.com/terms>> (users provide Google with a license that “worldwide, which means it’s valid anywhere in the world; non-exclusive, which means you can license your content to others; royalty-free, which means there are no fees for this license. This license allows google to: host, reproduce, distribute, communications, and use your content – for example, to save your content on our systems and make it accessible from anywhere you go; publish, publicly perform, or publicly display your content, if you’ve made it visible to others; modify and create derivate works based on your content, such as reformatting or translating it; sublicense these right to: other users to allow the services to work as designed [...]; our contractors who’ve signed agreements with us that are consistent with these terms. This license is for the limited purpose of: operating and improving the services, which means allowing the services to work as designed and creating new features and functionalities. This includes using automated systems and algorithms to analyze your content: for spam, malware, and illegal content; to recognize patterns in data [...]; to customize our services for you [...], [as well as for] developing new technologies and services for Google consistent with these terms); Microsoft, “Microsoft Services Agreement” (1 August 2020), online: <<https://www.microsoft.com/en-ca/servicesagreement/>> (“To the extent necessary to provide the Services to you and others, to protect you and the Services, and *to improve Microsoft products and services*, you grant to Microsoft a worldwide and royalty-free intellectual property license to use Your Content, for example, to make copies of, retain, transmit, reformat, displace, and distribute via communication tools Your Content on the services” [emphasis added]).

<sup>845</sup> See e.g., Google Magenta, *ibid*; Microsoft, *ibid*.

publishing contracts where authors are free to choose whether, when, and how to reveal their work, these kinds of clauses permit service providers to indiscriminately make use of author-users' creative content for any number of reasons – not just upon its finalization (which would be less problematic, as I'll discuss in chapter 6), but equally throughout the entire creative process.<sup>846</sup>

In other words, providers make use of these works *prior* to their completion, and *before* their authors are truly prepared to release their speech into the public sphere.<sup>847</sup> Such non-negotiable licenses therefore risk interfering with authors' autonomy as speaking beings by unilaterally depriving them of their exclusive rights, their control over *if, when* and *how* to speak<sup>848</sup> – a choice that remains foundational to copyright's paradigm and to authors' autonomy as speaking beings. These types of contracts are basically the equivalent of providers standing over author-users' shoulders during the creative process, forcing them to communicate their speech before they're truly prepared to do so, and in situations where they might have otherwise chosen to remain silent. It is, in Drassinower's words, compelled speech.<sup>849</sup>

Many, I grant, might be quick to point out that these standard form contracts don't entirely deprive authors of their choice over the conditions under which to speak. Authors may choose either to accept these terms and gain access to the services, or indeed refuse them and simply proceed by means of good old-fashioned creative processes. But this approach is impractical. It doesn't give sufficient weight to the changing nature of creativity in the age of AI, where the

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<sup>846</sup> Woods, *supra* note 87.

<sup>847</sup> Once a work is released into public sphere, different considerations for its use apply, as I'll discuss in more detail in the next chapter.

<sup>848</sup> “[T]he author’s autonomy as a speaker,” writes Drassinower, is defined by “her choice to speak or not to speak” (Drassinower, WWWC, *supra* note 30 at 120).

<sup>849</sup> *Ibid* at 8.

increasing development and use of creative algorithms is shifting what it means to be a creator or to be creative.

There was a time when only the limited number of creators who were tech savvy – and had access to sufficient computing power to boot – could incorporate algorithmic content into their works. But technology companies are slowly but surely modernizing the creative industry, making generative algorithms available to the masses through easily accessible and user-friendly platforms. With artificial intelligence growing to be among the most significant creative movements of the 21<sup>st</sup> century,<sup>850</sup> creative algorithms are shaping up to be a tool of modern life no different from the Internet, where “[o]pting out just isn’t a viable choice for most of us, most of the time; it violates what have become very real norms of contemporary life.”<sup>851</sup>

What author-users *can* choose, however, is which generative algorithm provider they decide to opt for. Essentially, not all generative AI service providers employ non-exclusive licenses to compel authors’ speech. Some generative AI service providers, like RunwayML and DeepDreamGenerator for instance, request such a license strictly for those works author-users *choose* to make public via their platform. Others, like AIVA and Amper Music, provide author-users with options to purchase the licenses of the works they’ve created using the services. But, while seemingly more respectful of authorial autonomy, the consumer-friendly formulation of

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<sup>850</sup> Lexi Manatakis, “Six Artists Who Are Shaping the Future of AI” (28 January 2019) *CNNStyle*, online: <<https://www.cnn.com/style/article/artificial-intelligence-artists-dazed-digital/index.html>>.

<sup>851</sup> Schneier, *Data and Goliath*, *supra* note 377, at 61; see also Adam Pabarcus, “Are ‘Private’ Spaces on Social Networking Websites Truly Private? The Extension of Intrusion Upon Seclusion” (2011) 38 *Wm Mitchell L Rev* 397 (“A commonsense response to such concerns [involving unwanted people viewing their Facebook profiles] is that if people are truly concerned about such information getting out, they simply should not post it on social networking websites, or they should apply the appropriate privacy settings that match their desired protection. However, this is not a satisfying answer. If someone wishes to share information with a certain group and takes measures to create seclusion from others, that space should be recognized as private by the law” (*ibid* at 410)).

these clauses doesn't mean that these service providers don't similarly diminish authors' autonomy as speaking beings. They simply do it through different means: their privacy policies.

Incorporated within the standard form contracts that author-users must accept in order to gain access to generative AI services, these privacy policies oblige author-users to accept being subjected to ubiquitous surveillance – although it's often worded much more demurely than that. Amper Music, for instance, specifies that they “collect information about how [users] use [the] Site, such as the types of content that [users] view or engage with, the features [they] use, the actions [they] take, and the time, frequency and duration of [their] activities.”<sup>852</sup> Similarly, RunwayML indicates that they “use automatic data collection technologies to collect certain information about [users'] equipment, browsing actions, and patterns.”<sup>853</sup> For its part, AIVA “collect[s] information about the individual web pages or products [users] view [...] and information about how [they] interact with the Site.”<sup>854</sup> In other words, each of these services effectively employs algorithms that observe users' actions and behaviours throughout the entirety of the creative process.

Inextricably linked to authors' control over the publication of their self-expression, however, is equally the *right* to keep their creative musings private if they should so wish.<sup>855</sup> It was the High Court of Chancery in their 1849 decision in *Prince Albert v Strange*<sup>856</sup> that was

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<sup>852</sup> Amper Music, “Privacy Policy” (15 July 2019), online: <<https://www.ampermusic.com/privacy/#cookies>>.

<sup>853</sup> RunwayML, “Privacy Policy” (December 2020), online: <<https://runwayml.com/privacy-policy/>>.

<sup>854</sup> AIVA, “AIVA Privacy Policy” (11 March 2019), online: <<https://www.aiva.ai/legal/0>>.

<sup>855</sup> See *Pope v Curl* (1741) 2 Atk 342 (advancing that just because someone received a letter and owns it in a physical sense, does not allow this person to authorize the letter's publication; the right of the first publication rests with the author of the letter); Bulman, *supra* note 607, at 77; but see Drassinower, WWWC, *supra* note 30 at 117 (“[...] whereas the privacy analysis would target the defendant's unauthorized dealings with personal information, the copyright analysis would target the defendant's unauthorized dealings with a work of authorship. Interference with the plaintiff's privacy is not the same as interference with her choice to speak or not to speak.”

<sup>856</sup> *Prince Albert v Strange*, 41 Eng. Rep. 1171 (1849), *aff'd*, 64 Eng. Rep. 293 (1849).

among the first<sup>857</sup> to allude to this bipartisan relationship. In upholding authors' prepublication rights, the Court maintained that an author's property rights in her creative work equally "shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known."<sup>858</sup> It's from this ruling, among others reinforcing a similar logic, that Samuel Warren and Louis Brandeis extract a right to privacy through copyright law provisions.<sup>859</sup>

But can algorithms violate our privacy? As Justice Posner has notably observed, algorithms don't invade privacy because they're not sentient beings.<sup>860</sup> At the heart of his assertion is the supposition that privacy, similar to dialogue, is relational at its core: a person sees her privacy diminished when some 'other' gains access to information concerning her 'self' that she would rather conceal.<sup>861</sup> Traditionally, it has been presumed that privacy's 'other' must necessarily be human; only a person can relate to, and by association violate the privacy of, another person.<sup>862</sup> Following this logic, because algorithms by their very nature are unable to relate to humans,<sup>863</sup> the argument goes that they simply cannot act as the 'other' in a privacy relationship.

As law professor Ian Kerr compellingly illustrates, however, the opposite is in fact true. Algorithms possess the epistemic qualities necessary to not only diminish our privacy, but also to violate it – and they're capable of doing so without a human in the loop. Neither sentience, nor humanity, nor knowledge of private facts are necessary to incur a loss of privacy. What *is* required,

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<sup>857</sup> *Millar v Taylor*, *supra* note 737 was technically the first, but the decision did not mention privacy directly: "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends."

<sup>858</sup> *Prince Albert v Strange*, *supra* note 856 at 312.

<sup>859</sup> Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4:5 Harv LR 193 at 198-9.

<sup>860</sup> Richard A Posner, "Privacy, Surveillance, and The Law" (2008) 75 Chi. L. Rev. 245, 254.

<sup>861</sup> Kerr, Schrödinger's Robot, *supra* note 73 at 127; see also Martjin Blaauw, "The Epistemic Account of Privacy" (2013) 10 Episteme 167.

<sup>862</sup> Kerr, Schrödinger's Robot, *ibid* at 137.

<sup>863</sup> See above, p. 99.

however, is a certain measure of cognizance.<sup>864</sup> Where cognizance of someone's personal facts gives rise to a reliable belief about that individual, there exists a sufficiently strong epistemic state to impoverish privacy.<sup>865</sup>

The ability for algorithms to form reliable, truth-promoting beliefs about people based on their personal facts was brought to the fore as far back as 2012, when Target was criticized for using an algorithm to market products to women it believed to be pregnant.<sup>866</sup> It formed its beliefs on the basis of trends in information, allowing it to conclude, for instance, that there is an 87% chance that a woman is pregnant if she purchases cocoa-butter lotion, a sizeable purse that can double as a diaper-bag, zinc and magnesium supplements as well as a bright blue rug. Based on one such pregnancy score, Target mailed coupons for maternity clothing to a 16-year-old girl – revealing her pregnancy to her family long before she was ready to share it.<sup>867</sup> There is thus little doubt of algorithms' ability to form reliable beliefs, and for those beliefs to not only diminish privacy, but equally to violate it by actuating in the real world.<sup>868</sup>

By submitting author-users to consistent algorithmic oversight, the generative AI platforms accessed to produce human-machine collaborations are transforming the act of creating from a personal endeavour to one that's subjected to the constant scrutiny of an external agent, effectively intervening in the creative process in an unprecedented fashion. This kind of ubiquitous surveillance strikes at the very essence of the practice of authorship, and it does so by stifling the

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<sup>864</sup> Kerr, Schrödinger's Robot, *supra* note 73 at 143.

<sup>865</sup> *Ibid* at 145-6; see also Alvin Goldman, "A Causal Theory of Knowing" (1967) 64 J. Phil. 357.

<sup>866</sup> Kerr, Schrödinger's Robot, *ibid* at 146.

<sup>867</sup> Kashmir Hill, "How Target Figured Out a Teen Girl Was Pregnant Before Her Father Did" (16 February 2012), online: *Forbes* <<https://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/?sh=1f04379b6668>>.

<sup>868</sup> And algorithms are increasingly being given the agency to act on their beliefs without any human oversight. Algorithms, for instance, profile Internet users, make reliable beliefs about their personal preferences, and then target these users with advertisements that meet these predilections (see e.g. Singh, *supra* note 809).

development of the ‘self’ that creative works seek to express.<sup>869</sup> From as far back as biblical times, however, society has recognized the value of privacy to our self-expression, autonomy, and personhood.<sup>870</sup> These important ties are rooted in an “understanding that it is only away from the public eye – given space to make mistakes and take risks – where we can discover our unique personalities.”<sup>871</sup>

From this perspective, writes sociologist Jathan Sadowski, privacy “is better understood as an important buffer that gives us space to develop an identity that is somewhat separate from the surveillance, judgment, and values of our society and culture.”<sup>872</sup> It’s what enables individuals to freely navigate through pre-existing culture, creating spaces for ‘play’ that allow for development of the ‘self.’<sup>873</sup> And it does so, writes law professor Julie Cohen, by “shelter[ing] dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable. It protects the situated practices of boundary management through which the capacity for self-determination develops.”<sup>874</sup> In other words, privacy is not only a precondition for autonomy, but it is equally crucial to human identity; the

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<sup>869</sup> Michael Lynch, “Privacy and the Threat to the Self” (22 June 2013), online: *New York Times* <<https://opinionator.blogs.nytimes.com/2013/06/22/privacy-and-the-threat-to-the-self/?mtrref=www.google.com&gwh=09C67CDB81CEAFF1D379AA024AC7C244&gwt=regi&assetType=REGI WALL>>.

<sup>870</sup> In a famous passage, the seer Balaam – who was hired by the Moabite King to curse the Jewish people – hailed them instead: “How fair are your tents, O Jacob; your encampments, O Israel.” According to the rabbis of antiquity, Balaam’s praise of the Israelites’ tents is meant to convey his admiration over how they were arranged – no door or window of one tent directly faced those of another, such that dwellers never had to be concerned over the prying eyes of their neighbours. “This teaching,” writes Rabbi Arthur Weiner, “reminds us that we need a place where we can do things and even say things which would not necessarily be as acceptable if we were to conduct those same actions or conversation in the public realm” (Weiner, *supra* note 81).

<sup>871</sup> Berman, *supra* note 82.

<sup>872</sup> Jathan Sadowski, “Why Does Privacy Matter? One Scholar’s Answer” (26 February 2013), online: *The Atlantic* <<https://www.theatlantic.com/technology/archive/2013/02/why-does-privacy-matter-one-scholars-answer/273521/>>.

<sup>873</sup> Julie E Cohen, “What Privacy is For” (2013) Harv LR 1904 at 1911 [Cohen, What Privacy is For].

<sup>874</sup> *Ibid* at 1905.

latter cannot flourish without the breathing space to exert the kind of autonomy that privacy nurtures.<sup>875</sup>

Surveillance, therefore, inhibits the development of the ‘self’ upon which genuine dialogue relies. It turns consumers “into data points, [which] commodifies their identities, reduces democracy to another act of consumption, and leaves less room for genuine autonomy.”<sup>876</sup> In other words, it divests individuals of the power to control their individuality.<sup>877</sup> By unwittingly recalibrating society from a democracy embedded in autonomy to one rooted in heteronomy,<sup>878</sup> surveillance deprives individuals of the liberty to engage in authentic self-expression. And it does so by making people “change their behavior [...]. They are less likely to speak freely and act individually. They self-censor. They become conformist. This is obviously true for government surveillance, but is true for corporate surveillance as well. We simply aren’t as willing to be our individual selves when others are watching.”<sup>879</sup> In this sense, surveillance limits people’s

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<sup>875</sup> Maeve Cooke, “A Space of One’s Own: Autonomy, Privacy, Liberty” (1999) 25:1 *Philosophy & Social Criticism* 23 at 23; Schneier, *Data and Goliath*, *supra* note 377, at 127; see also Mireille Hildebrandt, “Privacy and Identity” in Erik Claes, Serge Gutwirth & Antony Duff, eds, *Privacy and the Criminal Law* (Antwerp: Intersentia, 2006) 43 [Hildebrandt, *Privacy and Identity*].

<sup>876</sup> Vincent Mosco, *To the Cloud: Big Data in a Turbulent World* (London: Paradigm Publishers, 2014) at 139-40.

<sup>877</sup> See e.g. Hildebrandt, *Profiling*, *supra* note 767; see also Kate Crawford, *Atlas of AI* (New Haven: Yale University Press, 2021) [Crawford, *Atlas*] at 94.

<sup>878</sup> Hildebrandt, *Profiling*, *ibid*; Zuboff, *Surveillance Capitalism*, *supra* note 766 at 307 (“Philosophers recognize ‘self-regulation,’ ‘self-determination,’ and ‘autonomy’ as ‘freedom of will.’ The word *autonomy* derives from the Greek and literally means ‘regulation by the self.’ It stands in contrast to *heteronomy*, which means ‘regulation by others.’ The competitive necessity of economies of action means that surveillance capitalists must use all means available to supplant autonomous action with heteronomous action.”).

<sup>879</sup> Bruce Schneier, “How Surveillance Inhibits Freedom of Expression” (26 November 2018), online: *Schneier on Security* <[https://www.schneier.com/blog/archives/2018/11/how\\_surveillanc\\_1.html](https://www.schneier.com/blog/archives/2018/11/how_surveillanc_1.html)> [Schneier, *Surveillance*]; see also Jon Penney, “Understanding Chilling Effects” (2022) 106 *Minn L Rev* [forthcoming] (“The conventional understanding in law is that a chilling effect is when a person, deterred by fear or some legal punishment of privacy harm, engages in *self-censorship*, that is, censors themselves and does not speak or engage in some activity, despite the activity being lawful, even desirable. This [...] understanding [...] is [...] empirically weak, and cannot explain chilling effects in a range of different contexts, and neglects insights from a range of social science fields about how chilling effects involve not just an absence – a lack of speaking or doing – but also *shape* behavior. [...] [C]hilling effects predominantly involve not just a deterrent effect, but a shaping effect – people speaking, acting, or doing, just in a way that conforms to, or is in compliance with, a perceived social norm, not simply self-censoring to avoid a legal harm. Chilling effects are thus also *productive*. They not only involve self-censorship, but also expression of socially conforming speech and behavior” (at 4-5)).

opportunities for self-development, identity formation, and manifestations of autonomy in ways that inevitably suppress their freedom of speech.

The potential chilling effects of this kind of surveillance on the nature of our cultural discourse could therefore be substantial. By restricting opportunities for authentic self-expression, surveillance limit opportunities for genuine dialogue *by, for, and through* the ‘other;’ an author cannot grant to another a share in her being if she isn’t free to assert her ‘self.’<sup>880</sup> Rather, it promotes expressions that are – in Buber’s words – purely artificial in nature; expressions which are no longer rooted in authorial autonomy. They are, instead, influenced by external elements, existing strictly in the realm of I-It, with authors’ being denied the breathing space to assert their ‘selves’ in ways that allow them to engage in genuine dialogue with ‘others.’ In this sense, authors’ autonomy as speaking beings does not rely strictly on their control over *if, when* and *where* to speak, but equally on their freedom to choose *how* to speak and *what* to speak about. By interfering with this freedom, surveillance risks subjecting our cultural discourse to hegemony, fostering a dialogue that no longer promotes the kind of diversity of opinions that leads to progress.

Compelling authors’ speech by using it for its communicative significance is therefore not, as Drassinower contends, the only way to impinge on authors’ autonomy as speaking beings.<sup>881</sup> “Interference with the plaintiff’s privacy,” he writes, “is not the same as interference with her choice to speak or not to speak.”<sup>882</sup> But this is no longer true. The continuing proliferation of creative algorithms through online platforms effectively generates new circumstances under which authors’ autonomy is impeded, and it doesn’t hinge on the purposes for which their works are being used. It centers, rather, on the ability for algorithmic oversight to influence authors’

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<sup>880</sup> Buber, *Friend as Thou*, *supra* note 83, at 257.

<sup>881</sup> See Drassinower, *WWWC*, *supra* note 30 at 115-20.

<sup>882</sup> *Ibid* at 117.

identities; to restrict their freedom to express themselves liberally and anonymously. When it comes to the Internet's role in the use of creative algorithms, it therefore makes little difference whether we classify algorithms' 'use' of authors' pre-published works as 'compelled speech' or merely 'technical use.'<sup>883</sup> Being forced to accept constant algorithmic oversight is enough, on its own, for author-users of these creative AI services to see their autonomy as speakers impinged.

The standard form contracts that govern generative AI services and propagate their ideological biases therefore place author-users at a disadvantage. They do so by circumventing authors' exclusive rights; by depriving them of the private spaces that permit their identities to flourish and nurture their liberty to freely express their 'selves.' In this sense, these non-negotiable agreements imposed upon author-users serve to redefine the frontiers of creative environments, shifting them from ones that are personal to authors to ones whose settings are non-neutral. They displace the author's role, converting her from an independent and autonomous being into one that is controlled (at least to a certain extent) by a service provider; they demote her from master of her own dominion to somewhat of a second-class citizen. And in so doing, these standard form contracts have the power to inherently alter authorship as a practice by changing the elements of creative spaces – their characteristics and boundaries, their nature and source – that authors rely on to engage in genuine dialogue.

At the same time, despite the limitations on authorial independence that arise from the standard form agreements governing generative AI platforms, it cannot be overlooked that consenting to a contract is, for all intents and purposes, an exertion of autonomy in and of itself.

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<sup>883</sup> A 'technical use' of copyrighted work – meaning a use of a work for reasons other than its communicative significance – is, according to Drassinower, a 'nonuse.' In other words, where a 'use' is noncommunicative there can be no infringement and therefore no violation of the author's autonomy as a speaking being (see Drassinower, WWWC, *ibid* at 85-110).

In this sense, if authors are accepting the contracts governing these platforms – if they’re choosing to use these platforms as a basis for their creations – can it really be said that such platforms are unduly impeding their authorial autonomy? The answer, I would venture, is both yes and no. Kerr sums it up quite nicely:

“since at least the advent of the standard form agreement, a proper understanding of the contractual relationship as interpersonal has become strained. Standard forms [...] have made it difficult if not impossible to identify who, if anyone, actually agreed to or accepted the other side of the contract, or where exactly to locate the so-called *consensus ad idem* upon which the contractual relationship is said to be founded. Although automated standard forms are easily understood and recognized as enforceable, the justification for their enforcement has drifted a long way from the interpersonal transactions that were the theoretical foundation of contracts in days gone by. Many, if not most, of today’s contracts are better understood on the basis of attribution than actual agreement.”<sup>884</sup>

In other words, the recognition of these contracts as generally enforceable<sup>885</sup> would lead to the conclusion that acceptance of their terms *is* an exertion of autonomy. At the same time, however, because they’re not grounded in a meeting of the minds, the *extent* of autonomy exerted in accepting them is quite limited.<sup>886</sup>

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<sup>884</sup> Kerr, Schrödinger’s Robot, *supra* note 73 at 133-4.

<sup>885</sup> See e.g. Ryan J Casamiquela, “Contractual Assent and Enforceability in Cyberspace” (2002) 17 BTLJ 475; Vincent Gautrais, “La formation des contrats en ligne”, in Daniel Poulin et al, eds, *Guide juridique du commerçant électronique* (Montreal: Thémis, 2003) 143; Nathan J Davis, “Presumed Assent: The Judicial Acceptance of Clickwrap” (2007) 22 BTLJ 577; Deborah Davis Boykin, “Survey of E-Contracting Cases: Browsewrap, Clickwrap, and Modified Clickwrap Agreements” (2012) 68 Business Lawyer 257.

<sup>886</sup> See, e.g. Marina Pavlović, “Contracting Out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts” (2016) 62:2 McGill LJ 389 (“Similarly to the rules on enforcing forum-selection clauses, contract rules (including rules on standard-form contracts) originated in a commercial environment strongly built on party autonomy. Party autonomy has been detrimental for consumer interests, as vividly depicted by Geoffrey Woodroffe and Robert Lowe, who argued that consumers have not been able to “break out of the straitjacket of freedom of contract.” Or, as Iain Ramsay has argued, the “traditional contract ideas are the core and consumer law the periphery,” acting only as a necessary and often insufficient limit on party autonomy. The Canadian courts continue to routinely enforce consumer standard-form contracts, despite a normative view expressed in the academic literature that their enforcement is particularly problematic in the consumer context.” (at 409, citing Geoffrey Woodroffe & Robert Lowe, *Woodroffe & Lowe’s Consumer Law and Practice*, 9th ed (London: Sweet & Maxwell, 2013) at para 9.01; Iain Ramsay, “Consumer Law and Structures of Thought: A Comment” (1993) 16:1 J Consumer Policy 79 at 81)).

It's increasingly being acknowledged that the standard form click-wrap agreements that intervene in online environments heighten the potential for abuse traditionally associated with adhesion contracts,<sup>887</sup> limiting consumer autonomy in exceptional ways.<sup>888</sup> In *Douez v. Facebook*, for instance, the Supreme Court of Canada applied the unconscionability doctrine to invalidate a forum selection clause and a choice of law clause stipulating that disputes be resolved in California pursuant to this state's laws. According to the majority, "[w]hen considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake."<sup>889</sup> They specify, however, that "the burden remains on the party wishing to avoid the clause to establish strong cause."<sup>890</sup>

Could it really be said, however, that authors have a strong cause to invalidate the standard-form provisions governing their use of generative AI services that unsettle copyright's elaborate balance? It's difficult to say for certain,<sup>891</sup> though intellectual property scholars have long expressed doubts that clauses deviating from copyright law could be deemed sufficiently unreasonable or unfair to fulfill the standard required by the doctrine of unconscionability.<sup>892</sup>

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<sup>887</sup> See *Douez v Facebook Inc.*, 2017 SCC 33; *Uber v Heller*, 2020 SCC 16.

<sup>888</sup> See e.g. Justin P Green, "The Consumer-Redistributive Stance: A Perspective on Restoring Balance to Transactions Involving Consumer Standard-Form Contracts" (2013) 46 Akron L Rev 551; Mo Zhang, "Contractual Choice of Law in Contracts of Adhesion and Party Autonomy" (2015) 41:1 Akron Law Review 1; Tal Kastner, "How 'Bout Them Apples?: The Power of Stories of Agreement in Consumer Contracts" (2015) 7 Drexel Law Review 67.

<sup>889</sup> *Douez v Facebook Inc.*, *supra* note 887 at para 38.

<sup>890</sup> *Ibid.*

<sup>891</sup> For a more in-depth discussion on what the Supreme Court's decision might mean for standard form clickwrap agreements in general, see John Enman-Beech, "When is a Contract Not a Contract?: *Douez v. Facebook Inc.* and Boilerplate" (2018) 60 Canadian Business Law Journal 428.

<sup>892</sup> See e.g., *Davidson & Assocs. v Internet Gateway*, 334 F Supp.2d 1164 (ED Mo, 2004) (refusing to invalidate an end-user license agreement attached to a video game that restricted fair use); *Darnaa LLC v Google, Inc.*, 2015 US Dist LEXIS 161791 (ND Cal, Dec 2, 2015); Niva Elkin-Koren, "A Public Regarding Approach to Contracting Copyrights" in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds, *Expanding Boundaries*

Standard form contracts have, in effect, strayed from copyright legislation at least since the commercialization of the Internet, creating something of a private ordering system that displaces and supersedes copyright protections.<sup>893</sup> Courts, however, have often demonstrated little willingness to look beyond parties' agreements to consider values such as fairness and interdependence of the parties in cases involving copyright.<sup>894</sup>

That doesn't mean, however, that it's not possible. As law professor Amit Elazari Bar On observes, contract law – and the doctrine of unconscionability in particular – is endowed with the tools necessary to recalibrate the negative effects of standard-form contracts on copyright. This body of law often turns to ex-contractual values that go beyond the 'freedom of contract' in order to distinguish between 'equitable' and 'abusive' clauses. Copyright law might act as just such an ex-contractual basis, allowing courts to examine the relative fairness of terms in standard-form contracts that require authors to click away their rights.<sup>895</sup> And courts can achieve this feat, Elazari Bar On claims, by applying the unconscionability doctrine *through the lens* of copyright law;<sup>896</sup>

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*of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 191 at 200 [Elkin-Koren, Contracting Copyrights]; Leon E Trakman, "The Boundaries of Contract Law in Cyberspace" (2008) 38 Pub Cont LJ 187 at 232; Amit Elazari Bar On, "Copyright and the Greater System of Rights: Utilizing Contractual Concepts to Solve Intellectual Property Problems in Standard-Form Contracts" (2015) 29 IPJ 83 at 91; see also Mark Lemley, "Beyond Preemption: The Law and Policy of Intellectual Property Licensing" (1999) 87 Calif L Rev 111 at 151 [Lemley, Beyond Preemption] ("Certain shrinkwrap license terms [...] may well be held unconscionable. But unconscionability is rarely used, and it is not well-tailored to the needs of intellectual property law.").

<sup>893</sup> See J.H. Reichman & Jonathan A Franklin, "Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information" (1999) 147 U. Pa. L. Rev. 875, 878; Elkin-Koren, Copyrights in Cyberspace, *supra* note 75; Cf., Niva Elkin-Koren, "What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons" (2005) 74 Fordham L. Rev. 375 [Elkin-Koren, What Contracts Cannot Do]; Lessig, Code, *supra* note 805, at 135 ("some will respond that I am late to the party: copyright law is already being displaced, if not by code then by the private law of contract.").

<sup>894</sup> Giuseppina D'Agostino, "Copyright, Contracts, Creators: New Media, New Rules" (Cheltenham, UK: Edward Elgar, 2010) at 255.

<sup>895</sup> Elazari Bar On, *supra* note 892 at 98.

<sup>896</sup> *Ibid.*

by questioning whether the contractual provision advances copyright's purposes, or instead negates them.<sup>897</sup>

But it's difficult to assert, with any measure of certainty, whether author-users will succeed on this basis in invalidating the standard-form contracts that place them at a distinct disadvantage; that strip them of their autonomy when using generative AI platforms. Their success will likely hinge on two mutually constitutive factors. The first is courts' willingness to perceive as unfair provisions of standard form contracts that deviate from copyright. The second, and arguably more crucial one, is copyright's recognition of the harms that ensue – the balance that is tipped – when author-users are forced to accept such non-negotiable terms in order to advance in their careers.<sup>898</sup>

As law professor Giuseppina D'Agostino observes, whereas “contract law evolved to be more cognizant of the inequalities between the contracting parties, accepting more of a *distributive* concept of justice,”<sup>899</sup> copyright has lagged in “its responsibilities to balance and address its diverse palette of interests.”<sup>900</sup> Not only does copyright neglect to “clearly address what to do with ambiguous conveyances of new uses of [...] works”<sup>901</sup> (such as using works to train algorithms, for instance), but it equally fails “to deal with the imbalances in bargaining power that affect transfer of rights between parties.”<sup>902</sup> And its failure to do so arises directly from copyright law's tendency to prioritize freedom of contract by allowing private-ordering systems to place users' rights on the periphery; from its refusal to intervene when contracts deviate from copyright's carefully constructed balance.

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<sup>897</sup> *Ibid* at 99.

<sup>898</sup> See D'Agostino, *supra* note 894.

<sup>899</sup> *Ibid* at 258.

<sup>900</sup> *Ibid*.

<sup>901</sup> *Ibid*.

<sup>902</sup> *Ibid*.

But if contract law proves to be incapable of recalibrating copyright's balance, could privacy law perhaps offer author-users of generative AI services another potential and more concrete avenue through which they might reclaim their autonomy? Although existing federal Canadian privacy law does little to actively enforce citizens' rights in the protection of their personal information in online environments,<sup>903</sup> this law is currently undergoing a major overhaul.<sup>904</sup> Among the many amendments suggested by a recent bill tabled in the House of Commons is one that obliges organizations to "obtain an individual's *valid consent* for the collection, use or disclosure of the individual's personal information,"<sup>905</sup> which can be withdrawn by the user on reasonable notice.<sup>906</sup> While *prima facie* empowering for users, seemingly allowing them to exert their autonomy in online settings, this provision is subject to a laundry-list of open-ended exceptions that deprive users of their right to consent in any number of circumstances that effectively amount to surveillance.<sup>907</sup> In law professor Teresa Scassa's words: "the result is quite frankly a data protection disaster."<sup>908</sup>

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<sup>903</sup> The *Personal Information Privacy and Electronic Documents Act* (SC 2000, c 5) is quite notorious for its ineffectiveness, not endowing the privacy commissioner with sufficient powers to actively enforce Canadians' privacy rights (see Sarit K Mizrahi, "A Whole New Meaning to Having Our Head in the Clouds: Voice Recognition Technology, the Transmission of our Oral Communications to the Cloud and the Ability of Canadian Law to Protect Us from the Dangers it Presents" (2017) 15:1 CJLT 121). Additionally, although some common law privacy torts have been recognized across various provinces in recent years, they do little to actually empower users with a right of action against most of the online privacy violations they're subjected to on a daily basis (see Sarit K Mizrahi, "Ontario's New Invasion of Privacy Torts: Do They Offer Monetary Redress for Violations Suffered via the Internet of Things?" (2018) 8:1 Western Journal of Legal Studies, online: <<https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5712/4806>>).

<sup>904</sup> Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, 1<sup>st</sup> Sess, 44<sup>rd</sup> Parl, 2021 (second reading 24 April 2023).

<sup>905</sup> *Ibid*, cl 15(1).

<sup>906</sup> *Ibid*, cl 17.

<sup>907</sup> *Ibid*, cl 18-39.

<sup>908</sup> Teresa Scassa, "The Gutting of Consent in Bill C-11" (21 December 2020), online: <[http://www.teresascassa.ca/index.php?option=com\\_k2&view=itemlist&task=user&id=63%3Ateresascassa](http://www.teresascassa.ca/index.php?option=com_k2&view=itemlist&task=user&id=63%3Ateresascassa)> [Scassa, Gutting of Consent] (although this article what written based on the previous version of Bill C-27, the clauses relevant to this particular quote remain the same).

If generative algorithms in their current service models are likely incapable of offering creators an environment favourable to abundant creativity and a rich social dialogue, what does this predicament mean for authorship in the age of AI? It's hard to say. Lacking the gift of foresight, we can never know what the future holds. My goal here is not to make predictions or prophecies, but rather to shed light on the very real risk that the growing use of generative AI platforms as a medium for creativity might irrevocably alter our social dialogue – making it less open, less free, and less capable of societal change. But as my final chapter will address, these risks could very possibly be attenuated by acknowledging the central role that copyright law has played in shaping the various networks of nested relationships that characterize this status quo; by recontextualizing copyright's approach to AI in a way that duly recognizes the important place that this technology occupies in society's knowledge economy.

## Chapter 6 Fairfarren Wonderland: Enhancing Creative Autonomy in the Age of Human-Machine Collaborations

Copyright's centralized nature has repeatedly proven an impediment to progress. From the radio to television, the Internet, and most recently artificial intelligence – each new copy-based technology finds itself embroiled in endless debates surrounding how authors should be compensated for the copies that these technologies rely on to function, rather than pausing to ask whether authors should even be remunerated for these uses to begin with. Copyright's tendency to presume that any copy falls within its purview – with little investigation into whether or not this *kind* of 'copying' even amounts to the harm that copyright was designed to target – has played a significant role in shaping the various networks of nested relationships that arise at the intersection between creativity and technology.

Although the insertion of generative algorithms into the creative process may have given rise to a variety of new relations, they therefore did not arise in a vacuum. They arose in a creative context that preceded, and in turn, shaped their very nature. It would therefore do a disservice to this novel technology if I were to end my analysis with the assertion that it's in the nature of author-users' relationships with generative algorithms – as well as with the developers and providers of these platforms – to limit author-users' creative autonomy. Indeed, it's necessary to ask *why* these relationships are shaped as they are; whether it's the technology itself, or rather the social and legislative contexts in which it's embedded, that's to blame for interfering with author-users' self-determination.

And in the case of generative algorithms, a great deal of the *why* can be attributed to copyright law itself. By being so preoccupied with regulating 'copies' under *all* circumstances, regardless of the purpose or context behind their use, copyright has placed algorithm developers

in a precarious position. With their creations relying on almost infinite copying, algorithm developers are presented as little more than second class citizens in the grand scheme of copyright's narrative. While there's no question that machine learning algorithms are creative works,<sup>909</sup> copyright creates a barrier to using the building-blocks necessary to produce them by characterizing the copies upon which they rely as an affront to pre-existing authors' interests.<sup>910</sup>

The ensuing tug of war is inevitable.<sup>911</sup> Rightsholders lobby for copyright's intervention to extract a payment for every possible use.<sup>912</sup> Developers counter with claims that any such expectation is unreasonable given the infinite amount of copying involved in creating machine learning algorithms.<sup>913</sup> And legislators debate whether or not they should enact an exception that permits text and data mining to enable these activities, at least in some circumstances.<sup>914</sup> And this entire commotion results from one seemingly innocuous assumption: that the copies of protected content used to train algorithms necessarily consist of a copyright harm.

This view that a harm is inflicted the moment an unauthorized copy is used is effectively bolstered by copyright's constant need to pronounce itself on the legitimacy of every possible new use. Rather than examining the potential actionability of novel uses through the lens of copyright's

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<sup>909</sup> *Copyright Act*, *supra* note 66, s 3(1)(h).

<sup>910</sup> See e.g. Gerrit De Vynck, "AI learned from their work. Now they want compensation." (16 July 2023), online: *Washington Post* <<https://www.washingtonpost.com/technology/2023/07/16/ai-programs-training-lawsuits-fair-use/>>.

<sup>911</sup> James Vincent, "The scary truth about AI copyright is nobody knows what will happen next" (15 November 2022), online: *The Verge* <<https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data>> [Vincent, Scary Truth].

<sup>912</sup> See e.g. De Vynck, *supra* note 910; Congressional Research Service, "Generative Artificial Intelligence and Copyright Law" (11 May 2023), online: <<https://crsreports.congress.gov/product/pdf/LSB/LSB10922>>.

<sup>913</sup> See e.g. Blake Brittain, "AI Companies as U.S. court to dismiss artists' copyright lawsuit" (19 April 2023), online: *Reuters* <<https://www.reuters.com/legal/ai-companies-ask-us-court-dismiss-artists-copyright-lawsuit-2023-04-19/>>.

<sup>914</sup> See e.g. Government of Canada, "A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things" (2021), online: <<https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/copyright-policy/consultation-modern-copyright-framework-artificial-intelligence-and-internet-things-0>>.

intrinsic principles, it instead addresses them through technology specific legislative provisions<sup>915</sup> that are problematic on two separate but intertwined fronts. First and foremost, even where an exception is created to *permit* a use, doing so supports the faulty presumption that every possible use finds itself within copyright's purview. Second, copyright's perpetuation of this presumption has the downstream effect of creating future confusion over the permissibility of copying by other technologies that function somewhat differently, effectively hindering progress at every turn.

The uncertainty produced by copyright's insistence on the perceived harm of the copy imposes a black and white approach that's neither realistic nor reasonable. And when it comes to developing machine learning algorithms, this structure does little more than engender other, more serious harms, for both AI users as well as society as a whole.<sup>916</sup> Rather than licensing the enormous datasets necessary for machine learning processes, developers simply turn to other avenues – sources whose ethical nature is often questionable.<sup>917</sup> Whether it's peoples' personal data or public content scraped off the web, the use of this kind of data to train AI systems risks

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<sup>915</sup> See e.g. Carys Craig, "Technological Neutrality: (Pre)Serving the Purposes of Copyright Law" in Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 271 [Craig, Technological Neutrality].

<sup>916</sup> See e.g. Levendowski, *supra* note 86.

<sup>917</sup> See e.g. Safiya Umoja Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York: New York University Press, 2018); Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (New York: Crown, 2016) [O'Neil, Weapons of Math Destruction]; Ruha Benjamin, *Race After Technology: Abolitionist Tools for the New Jim Code* (Cambridge: Polity Press, 2019) [Benjamin, Race After Technology]; Anupam Chander, "The Racist Algorithm?" (2017) 115 Mich L Rev 1023; Crawford, Atlas, *supra* note 877; Jason Compton, "Data Quality: The Risks of Dirty Data and AI" (27 March 2019), online: *Forbes* <<https://www.forbes.com/sites/intelai/2019/03/27/the-risks-of-dirty-data-and-ai/?sh=6c083aa62dc7>>; James Manyika, Jake Silberg & Brittany Presten, "What Do We Do About the Biases in AI?" (25 October 2019), online: *Harvard Business Review* <<https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai>>; Abeba Birhane, "Algorithmic Injustice: A Relational Ethics Approach" (2021) 2-2 Patterns 100205; Danah Boyd & Kate Crawford, "Critical Questions for Big Data: Provocations for a cultural, technological, and scholarly phenomenon" (2012) 15-5 *Information, Communication & Society* 662.

limiting users' autonomy by misusing their personal information as well as perpetuating the systemic bias often underlying this content.<sup>918</sup>

And the reason algorithm developers tend to rely on such substandard datasets is quite simply because copyright itself limits *their* creative autonomy. We therefore cannot ignore the important role that copyright plays in shaping these new networks of nested relationships; in indirectly influencing how power is apportioned between these actors; in defining who gets to enjoy their creative autonomy and under what circumstances. Once we pinpoint copyright's role in this state of affairs, we'll be better placed to rectify it; to reimagine copyright's boundaries in a way capable of fostering the creative autonomy of *all* authors – be they downstream or 'original,' users of generative algorithms or their developers.

A dialogic vision of copyright can help us achieve precisely this feat.<sup>919</sup> With its ability to identify all the various shades of grey associated with the myriad possible uses that can be made of copyrighted data, it's self-sufficient. It doesn't need exceptions at every turn to enable this new use or another. It doesn't require lengthy debates surrounding how copyright ought to regulate the novel uses arising from each technological innovation, nor does it pit authors against each other by framing the activities engaged by some as illegitimate as opposed to those pursued by others. Rather, it's rooted in two separate but concomitant values that enable the pursuit of genuine dialogue. The first is the need to reflect on whether or not the uses in question inflict the harm that copyright was designed to target. The second is the good judgment to exercise restraint in order to

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<sup>918</sup> See e.g. Noble, *ibid*; O'Neil, Weapons of Math Destruction, *ibid*; Benjamin, Race After Technology, *ibid*; Chander, *ibid*; Crawford, Atlas, *ibid*; Compton, *ibid*; Manyika, Silberg and Presten, *ibid*; Birhane, *ibid*; Boyd and Crawford, *ibid*.

<sup>919</sup> See above, Chapter 4.

avoid encroaching on uses that go beyond this mandate – either through exceptions or other legislative provisions – lest it provoke unnecessary downstream harms.

And if we approach AI development from this lens, we will in quick succession realize that the copies at the very core of this creative practice fall outside of copyright's ambit. They may use verbatim copies of pre-existing works, but they do so in a way that produces a new work entirely; that results in a creation that has little resemblance to any one of the inputs used to train the algorithm in question. Once we grasp that use of protected content for the purposes of algorithm development does not, in itself, compel speech, we can remove copyright as an obstacle to this practice and instead benefit from the kind of quality data that's less likely to have negative downstream impacts on AI users' autonomy.

By targeting compelled speech rather than mere copying, in other words, we're better able to segregate between that copying which generates copyright harms and that which doesn't. And this approach allows copyright to rise to every occasion, including the questions raised by the copying involved in AI's use and development. It effectively places novel forms of copying within copyright's narrative without resorting to the progress-hindering copyright wars that often accompany new technologies. Moreover, by distancing copyright from the perceived harm of the copy and arming it instead with the tools necessary to separate between those situations in which machine learning algorithms do or don't compel speech, we can rely on copyright's existing structure to address those that do, in fact, produce copyright harms, while removing those that don't from copyright's sphere of actionability.

In this vein, I will dedicate the first section of this chapter to illustrating how copyright's tendency to presume that all uses fall under its ambit acts as an impediment to creative autonomy; how it's inclination towards adopting legislative provisions to address new uses does little more

than hinder progress while producing other, unnecessary, downstream harms – particularly in the AI sector. I will then proceed by demonstrating how applying a dialogic approach to the process of AI development can clarify that the kind of copying at the heart of algorithmic training is *not* the harm that copyright was designed to tackle. Rather, as I’ll elaborate in the final section of this chapter, it’s in the use of generative AI alone that these harms stand to be inflicted, and the entire field of AI development ought not to suffer but for one errant child.

Most crucially, however, what this chapter will elucidate is that looking at the intersection between copyright and artificial intelligence from a dialogic perspective essentially yields a logical approach to the issues that arise at this juncture. It does so by acknowledging developers as authors in their own right, rendering unambiguous their freedom to ‘use’ copyrighted content. And, in turn, it limits the extent to which developers have to rely on the kind of data that limits its users’ creative autonomy. In other words, recognizing the creative freedoms of developers forms the foundation for increasing the creative autonomy of author-users of generative algorithms, such that human-machine collaborations need not suffer from the drawbacks elicited above.<sup>920</sup> Rather than standing in the way of imagination, a coherent account of our copyright narrative can recognize that all authors should be made equal and that not one should be unreasonably diminished to benefit another.

### *6.1 Gotta Keep, One Jump Ahead of the Uses, That’s All, And That’s No Joke: Copyright’s Encroachment on Non-Uses as an Impediment to Creative Autonomy*

What is it about the copies upon which digital technologies rely that creates a sort of cognitive dissonance within copyright rhetoric? Many will point to the *extent* of the copying to

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<sup>920</sup> See above, Chapter 5.

respond to this question. From the Internet to AI, the magnitude of reproductions made is beyond the pale of our imagination. We refer to the data upon which these technologies depend as Big, when really, they're Huge; Colossal, even. As surprising as it might sound, however, the culprit here is not so much the *scale* of copying, but rather copyright's tendency to encroach on uses that go far beyond its mandate. And that's where the problem lies.

Copyright governs uses, full stop. It doesn't take the pains to differentiate between uses that are communicative, and therefore might risk compelling speech, and uses that are not; uses that merely wield works' material form for purposes that have little to do with their nature as instances of dialogue. These are uses – or rather 'nonuses,' as Drassinower dubs them – whose recognition under copyright quite simply overlooks “that it is not as a pattern of ink on a page, so to speak, but only as a communicative act that a work falls within the purview of copyright law.”<sup>921</sup> Yet, even when copies are clearly *not* being used for dialogic purposes, copyright has found the need to position itself on such issues. And it oftentimes does so by adopting technology specific exceptions that wind up generating future confusion over the permissibility of copying by other technologies that function somewhat differently.

Take, for instance, the temporary reproductions that facilitate our Internet browsing activities, the 'copies' that enable the technical processes responsible for increased dissemination of and access to knowledge. Involving “use of a work's material form not as a work but as a tool, not communicatively but technically, [...] it cannot be said to compel the author to speak.”<sup>922</sup> It is, in other words, a paradigmatic instance of nonuse. And yet copyright found it necessary to carve out an exception to permit this kind of 'use,' leading to the impression that such nonuses might

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<sup>921</sup> Drassinower, WWWC, *supra* note 30 at 13.

<sup>922</sup> Drassinower, WWWC, *supra* note 30 at 183.

have otherwise qualified as infringement. This provision – and the underlying notion upon which it’s based – have done little more than create ambiguity surrounding what, in fact, amounts to an actionable ‘use’ in the digital age.

The same amendments that limited liability for making *temporary* digital copies, for instance, left Cloud Service Providers wondering whether the more permanent technical copies necessary to facilitate cloud-based storage might be held as infringing.<sup>923</sup> These are copies that are neither perceptible nor consumptive; they’re created strictly for the purposes of ensuring users’ access to data no different than the temporary copies recognized as legitimate. And yet providers and their users are faced with uncertainty, unsure where they stand within copyright’s hierarchy; skeptical about the legal ramifications involved in the provision and use of these services. In other words, it places in question the legitimacy of these services in their nature as repositories of a vast array of easily retrievable data that enhances users’ access to information; that “[empowers them] to do more than just consume our culture, instead enabling them to actively and meaningfully participate in it.”<sup>924</sup>

Rather than embracing new technologies that could enhance users’ liberty to generate cultural contributions, copyright acts as a barrier that diminishes users’ freedom to engage in our creative landscape – all over mere technical ‘uses,’ imperceptible ‘copies.’ With this background in mind, it’s not difficult to understand copyright’s struggle with accepting the kinds of copies upon which machine learning algorithms rely. If mere technical, imperceptible, and non-

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<sup>923</sup> All files stored in the cloud are fragmented, with multiple copies being made of each fragment and stored across different servers to ensure the data’s availability should any one server experience an outage (see Nicolas W Vermeys, Julie M Gauthier & Sarit Mizrahi, “Étude sur les incidences juridiques de l’utilisation de l’infonuagique par le gouvernement du Québec” (10 July 2014) at 92, online : <cyberjustice.ca/docs/WP011\_%C3%89tude-sur-les-incidences-juridiques-de-l%E2%80%99utilisation-de-l%E2%80%99infonuagique-par-le-gouvernement-du-Qu%C3%A9bec\_fr.pdf>).

<sup>924</sup> Michael Geist, *Our Own Creative Land: Cultural Monopoly and the Trouble with Copyright* (Toronto: Hart House Lecture Committee, University of Toronto, 2006) at 9.

consumptive copies find themselves within copyright's ambit, surely there can be no question that artificial intelligence's extraction of value from copyrighted content falls squarely within the sphere of 'unauthorized use.'

It's such that, by creating an exception for the paradigmatic instance of nonuse characterized by temporary reproductions for browsing, copyright placed in question the viability of future technologies that similarly rely on 'the copy' in a sense that's less temporally limited but equally technical in nature. And in so doing, copyright has pre-emptively delegitimized an entire novel creative sector; has reduced AI developers to infringers, rather than provided the necessary foundation to recognize them as equal and autonomous creators under the law. Instead, developers find their creative choices dictated by the purviews of copyright; their autonomy to *choose* the quality data upon which they train their algorithms limited by the very nature of copyright itself.

In effect, short of a specific (and broad) exemption,<sup>925</sup> many developers seeking to draw on protected content to train their algorithms find themselves on uncertain ground; unsure about the actionability of the kind of copying they require for machine learning algorithm development. With the cost of licensing the massive amounts of data necessary for machine learning being both prohibitive and unnecessarily cumbersome for most, developers reticent of having their creations

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<sup>925</sup> Several jurisdictions worldwide have developed a text-and-data-mining exception within their copyright legislation, but they've been limited to specific purposes. The United Kingdom, for instance, permits copies of works to be made 'for text and data analysis' for the purposes of *non-commercial research* alone and only where that user has *lawful access* to the content in question (see *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, Official Journal L 167, 22/06/2001, art 5.3 (a)). France has created a similar exception, available only for *public research* purposes and limited to data *included in or associated with scientific publications* (see *Code de la propriété intellectuelle*, art L 122-5, 10o). For its part, while the European Union permits text and data mining for the purposes of scientific research, it equally extends a very limited exception permitting anyone to engage in these activities *unless the rightsholder contracts out* of such use (see *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, arts 3 & 4). Though many Canadians have advocated for a text-and-data-mining exception for both commercial and non-commercial purposes over the years, the federal government has largely remained mute on the subject (see Craig, Amani, Bannerman et al, *supra* note 61; Geist, Canadian AI Thriving, *supra* note 85).

delegitimized for reasons of infringement turn to one of two other sources of training data – each of which pose particular risks to the nature and substance of our social dialogue.

The first is made up of easily available and legally low risk works. Such data includes, for instance, a corpus of 1.6 million email exchanges of former Enron employees freely available online in machine-readable format.<sup>926</sup> Being orphan works that are still *technically* copyright protected, they nonetheless pose a negligible legal risk because the likelihood that the employees in question will sue for infringement is exceedingly low.<sup>927</sup> Also featuring prominently in this category of datasets are public domain and Creative Commons-licensed works, which fall outside the ambit of traditional copyright protection and therefore aren't fraught with the usual kinds of infringement concerns.<sup>928</sup> Similarly, content scraped from the web<sup>929</sup> that's unlikely to result in copyright litigation (such as reddit threads, where individual users will rarely pursue either for lack of resources or awareness that their data is being collected) is also often used to train algorithms.

But while the risk of copyright liability posed by these data sources might be slim to none, the same cannot be said for their ancillary impacts on our social, cultural, and creative landscapes. They are, as copyright scholar Amanda Levendowski notes, quite simply “not representative – not geographically, not socioeconomically, not even in terms of race or gender.”<sup>930</sup> The Enron emails

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<sup>926</sup> Jessica Leber, “The Immortal Life of the Enron E-mails” (2 July 2013), online: *MIT Technology Review* <[<sup>927</sup> Levendowski, \*supra\* note 86 at 610.](https://www.technologyreview.com/2013/07/02/177506/the-immortal-life-of-the-enron-e-mails/#:~:text=Even%20so%2C%20the%20%E2%80%9CEnron%20e,recipients%20never%20could%20have%20i ntended.></a>>.</p></div><div data-bbox=)

<sup>928</sup> Though, as we saw above with GitHub's Copilot (see above, p. 17), where the creative AI reproduces the exact same speech as the Creative Commons' licensed training data and does not provide the necessary attribution, infringement concerns nevertheless exist.

<sup>929</sup> “Web scraping is an activity in which an automated tool is used to detect and copy any relevant target data from a specified set of web pages or other web-based services, enabling the user of the scraping tool to build a large dataset that meets the specific needs of their AI project” (Blair Attard-Frost, “Generative AI Systems: Impacts on Artists & Creators and Related Gaps in the Artificial Intelligence and Data Act” (5 June 2023) at p. 5, online: *SSRN* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4468637](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4468637)>).

<sup>930</sup> Levendowski, *supra* note 86 at 611.

have, for example, been used by researchers to analyze gender bias and power dynamics.<sup>931</sup> For its part, public domain works were published prior to the mid-1920's by wealthy, white, Western, and primarily male authors, excluding the voices of black, female, and LGBTQIA2S+ creators.<sup>932</sup> Similarly, the repositories of Creative Commons licensed works most commonly used for algorithmic training are predominantly made up of contributions by men, whose language, metadata, and article network structure characterize women in ways that contribute to their marginalization.<sup>933</sup> And other content scraped from the web doesn't fair any better, often portraying very polarized views that provide a skewed vision of the social dialogue.<sup>934</sup>

In short, diversity and inclusion simply don't feature in these datasets. And the AI systems trained on these corpuses pick up on their coded biases,<sup>935</sup> reflecting and replicating those prejudices within the real-world contexts in which they're deployed.<sup>936</sup> And when such content is used to train *generative* algorithms, this discriminatory predisposition risks further perpetuating

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<sup>931</sup> See e.g. Saif Mohammad & Tony Yang, "Tracking Sentiment in Mail: How Genders Differ on Emotional Axes" (2011) *Association for Computational Linguistics* 70, online: <<https://aclanthology.org/W11-1709/>> (illustrating how gender differences can be gleaned from the manner in which men and women use language in the Enron emails); Vinodkumar Prabhakaran, Emily E Reid and Owen Rambow, "Gender and Power: How Gender and Gender Environment Affect Manifestations of Power", in *The 2014 Conference on Empirical Methods in Natural Language Processing: Proceedings of the Conference 1965* (2014) (illustrating that the gender data contained in the Enron email dataset can be used to determine the hierarchy between the various email participants).

<sup>932</sup> Levendowski, *supra* note 86 at 615.

<sup>933</sup> Eduardo Graells-Garrido, Mounia Lalmas and Filippo Menczer, "First Women, Second Sex: Gender Bias in Wikipedia" in *Proceedings of the 26<sup>th</sup> ACM Conference on Hypertext and Social Media* 164 (2015).

<sup>934</sup> Much of the public content available on the Web through social media websites tend to be polarized, with users often being placed in echo-chambers by algorithms seeking to expose them to like-minded individuals (See e.g. Cass R Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (New Jersey: Princeton University Press, 2017); Yochai Benkler, Robert Faris & Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*, (Oxford: Oxford University Press, 2018); Chinmay Bhalerao, "Understanding the Impact: How AI Algorithms Influence Political and Religious Polarization" (19 June 2023), online: *Medium* <[https://medium.com/@BH\\_Chinmay/understanding-the-impact-how-ai-algorithms-influence-political-and-religious-polarization-615e85c92cf4](https://medium.com/@BH_Chinmay/understanding-the-impact-how-ai-algorithms-influence-political-and-religious-polarization-615e85c92cf4)>.

<sup>935</sup> Levendowski, *supra* note 86 at 613.

<sup>936</sup> See e.g. Coded Bias, online: <<https://www.codedbias.com/>>; Benjamin, *Race After Technology*, *supra* note 917; Chander, *supra* note 917; Julia Angwin, Leff Larson, Surya Mattu & Lauren Kirchner, "Machine Bias" (23 May 2016), online: <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>>.

cultural hegemony.<sup>937</sup> It does so by encouraging authors and artists to incorporate into their own works content that portrays these dominant narratives to the detriment of others. From this perspective, the growing use of generative algorithms in the creative realm is such that bias in culture will become far more likely than a rich, diverse, and inclusive social dialogue.

I see this trend each year in my students' final assignments. Charged with producing a human-machine collaboration, I ask them to independently write a short story and then plug random lines into a text-generating algorithm to create a different one. They're then tasked with comparing and contrasting the two stories from a legal and ethical perspective. How did collaborating with the AI program impact their freedom of expression? What kinds of narratives did this algorithm encourage them to pursue? What underlying themes were exhibited by the machine-generated pros? With algorithms' capacity to push them to explore creative avenues that they might have otherwise never considered, many students found them useful.

But their utility was often accompanied by one caveat: their tendency to delegitimize minority narratives. Where students opted for characters hailing from different ethnic

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<sup>937</sup> Marie Lamensch, "Generative AI Tools Are Perpetuating Harmful Gender Stereotypes" (14 June 2023), online: *CIGI* <<https://www.cigionline.org/articles/generative-ai-tools-are-perpetuating-harmful-gender-stereotypes/>> ("Most text-to-image models are trained on LAION-5B, a large open-source data set compiled by scraping content, including images, from the internet. But the internet lacks gender-representative data sets and is littered with mis- and disinformation and xenophobic and sexist content. This means that, without the necessary filters and mitigation in place, generative AI tools are being trained on and shaped by flawed, sometimes unethical, data. The new tools exhibit the same inequitable, racist and sexist biases as their source material."); Janna Anderson & Lee Rainie, "5. Closing thoughts on ChatGPT and other steps in the evolution of humans, digital tools and systems by 2035" (21 June 2023), online: *Pew Research Center* <<https://www.pewresearch.org/internet/2023/06/21/closing-thoughts-on-chatgpt-and-other-steps-in-the-evolution-of-humans-digital-tools-and-systems-by-2035/>> ("At present, the American version of digital life is the libertarian internet as a soft-power instrument of U.S. global cultural hegemony. The direction-of-travel of that system is toward the reduction of humanity to consuming individuals; digital affordances to an internet of shopping; and human relations to corporate decisions."); Marcin Frackiewicz, "ChatGPT and the Risks of Reinforcing Cultural and Linguistic Hegemony" (6 May 2023), online: <<https://ts2.space/en/chatgpt-and-the-risks-of-reinforcing-cultural-and-linguistic-hegemony/>>; Leonardo Nicoletti & Dina Bass, "Humans are biased. Generative AI is even worse. Stable Diffusion's text-to-image model amplifies stereotypes about race and gender – here's why that matters," online: *Bloomberg* <<https://www.bloomberg.com/graphics/2023-generative-ai-bias/>>.

backgrounds, the AI program tended to de-culturalize them. Where students chose to explore women's rights issues, the AI program almost always pursued with male-centric language that diminished the female sex. Where students advanced storylines revolving around the harms of discrimination, the algorithm invariably turned the tables in ways that perpetuated narratives of minorities being 'at fault.' The examples abound. But suffice to say that neglecting to train generative algorithms on *representative* data has the potential to revert our social dialogue back to a time where minorities were not only excluded from this discourse but were equally undervalued by the dominant one<sup>938</sup> (a discriminatory practice that is, incidentally, often linked to the very passage of copyright laws themselves).<sup>939</sup>

And these impacts on marginalized people are further exacerbated by the second primary source of AI training data: personal information. That surveillance capitalism is a prominent feature of our digital society is no secret. Our personal information is collected throughout each and every one of our interactions with modern technologies. And it does so for all sorts of purposes. The food we stock in our smart fridge, the vital signs recorded by our wearables, the health data we search for online – all of it is aggregated and shared with insurance companies who feed this data into an algorithm in order to better inform the terms of our coverage, offering discounts or imposing surcharges based on identified risk factors.<sup>940</sup> Our search queries and keystrokes, our

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<sup>938</sup> See e.g. Rosemarie Ho, "The History of Publishing Is a History of Racial Inequality" (27 May 2021), online: *The Nation* <<https://www.thenation.com/article/culture/richard-jean-so-redlining-culture-interview/>> (Though there's much data pointing to the fact that we haven't quite come as far as we might have believed in this respect (see: Richard Jean So & Gus Wezerek, "Just How White Is the Book Industry?" (11 December 2020), online: *The New York Times* <<https://www.nytimes.com/interactive/2020/12/11/opinion/culture/diversity-publishing-industry.html>>)).

<sup>939</sup> Anjali Vats, *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans* (California: Stanford University Press, 2020), p. 27 ("With the passage of the first federal intellectual property and naturalization statutes in the United States in the late 1700s, creatorship, citizenship, and whiteness came to be formally linked.").

<sup>940</sup> Cathy O'Neil, "Big Data Algorithms Are Manipulating Us All" (18 October 2016), online: *Wired* <<https://www.wired.com/2016/10/big-data-algorithms-manipulating-us/>> [O'Neil, Big Data Algorithms]; Praveen Velichety, Venky Rao, Edward Calusinski & Christian Bieck, "The Internet of Things: New and better data for the

social media activity and location data are used by AI models developed to assess whether we should be eligible for a mortgage or certain health care services.<sup>941</sup> The list goes on.

And while surveillance capitalism impacts us all, its burdens are not borne equally.<sup>942</sup> The working poor, single parents, and other members of marginalized groups are more severely affected by its consequences.<sup>943</sup> It happens quite often that they are unable to access the products and services they need simply because a biased algorithm designed to serve capitalist interests has extracted trends from their personal data that designates them as ‘unworthy.’<sup>944</sup> Although generative algorithms aren’t used quite in this fashion, they’re no strangers to datasets made up of personal information, and certainly not alien to systemic bias.<sup>945</sup> And their exposure to the former very often contributes to their proliferation of the latter.<sup>946</sup>

With generative algorithms’ privacy implications becoming increasingly more apparent, countries around the world have begun expressing their concern over the use of this class of information for training AI systems. Italy, for instance, took ChatGPT offline for a time and refused to reinstate it until it allowed European users to block their information from being used

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insurance industry” (2017), online: *IBM* <<https://www.ibm.com/thought-leadership/institute-business-value/report/insurance-iot>>; Alberto Cevolini & Elena Esposito, “From pool to profile: Social consequences of algorithmic prediction in insurance” (2020) 7-2 *Big Data & Society*.

<sup>941</sup> Eric Lander & Alondra Nelson, “Americans need a bill of rights for an AI-powered world” (8 October 2021), online: *Wired* <<https://www.wired.com/story/opinion-bill-of-rights-artificial-intelligence/>>.

<sup>942</sup> O’Neil, *Weapons of Math Destruction*, *supra* note 917 at 70; Alvaro M Bedoya, “The Color of Surveillance” (18 January 2016), online: *Slate* <<https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html>>.

<sup>943</sup> See e.g. Ari Ezra Waldman, *Industry Unbound: The Inside Story of Privacy, Data, and Corporate Power* (Cambridge: Cambridge University Press, 2021) at 171; Benjamin, *Race After Technology*, *supra* note 917; Noble, *supra* note 917; Anita L Allen, *Uneasy Access: Privacy for Women in a Free Society* (New Jersey: Rowman & Littlefield, 1988); Khiara M Bridges, *The Poverty of Privacy Rights* (California: Stanford University Press, 2017).

<sup>944</sup> See e.g. O’Neil, *Big Data Algorithms*, *supra* note 940; Pauline T Kim, “Manipulating opportunity” (2020) 106:4 *Virginia Law Review* 867.

<sup>945</sup> See e.g. Frackiewicz, *supra* note 937; Nicoletti and Bass, *supra* note 937.

<sup>946</sup> Frackiewicz, *ibid*; Nicoletti and Bass, *ibid*.

to train the system.<sup>947</sup> Similarly, Japanese privacy watchdog has warned OpenAI that it may take further action if this company doesn't limit the personal data it collects for machine learning purposes.<sup>948</sup> And Canadian federal and provincial privacy commissioners have banded together to launch an open investigation into the privacy implications of ChatGPT.<sup>949</sup> The reason for this growing concern stems from the very particular privacy risks posed by generative algorithms, given the possibility that they might generate content that exposes the sensitive information upon which they were trained.<sup>950</sup>

With the various consequences arising from training algorithms on either legally low risk content or personal data, the freedom to use copyrighted data might go a long way in attenuating the threats in question. Now, I'm not claiming that doing so will miraculously erase all the privacy implications of this technology. Given the digital economy's reliance on personal information by algorithms for predictive purposes – whether it's behavioural advertising or the provision of services – I'm not naïve enough to believe that allowing copyrighted data to be used in their training will make these kinds of uses cease. Copyright cannot single-handedly shoulder the burden of making our online environments more free; more favourable to opportunities for self-development, identity formation, and manifestations of autonomy. For this to occur, we require a multifaceted solution that goes beyond copyright alone. What I *am* saying, however, is that doing so will limit the situations in which personal data needs to be used to train algorithms that don't

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<sup>947</sup> Kantaro Komiya & Sam Nussey, "Japan's privacy watchdog warns ChatGPT-maker OpenAI on user data" (2 June 2023), online: *The Globe and Mail* <<https://www.theglobeandmail.com/business/technology/article-japans-privacy-watchdog-warns-chatgpt-maker-openai-on-user-data/>>.

<sup>948</sup> *Ibid.*

<sup>949</sup> Michelle Butterfield, "Alberta, B.C. and Quebec join Ottawa's ChatGPT privacy investigation" (25 May 2023), online: *Global News* <<https://globalnews.ca/news/9722891/chatgpt-privacy-investigation-canada/>>.

<sup>950</sup> David C & Paul J, "ChatGPT and large language models: what's the risk?" (14 March 2023), online: *National Cyber Security Centre* <<https://www.ncsc.gov.uk/blog-post/chatgpt-and-large-language-models-whats-the-risk>>.

necessarily require this kind of data to fulfill its ultimate purpose. Amongst these are generative algorithms.

Taking copyright out of the algorithm development equation is therefore a useful first step towards reinstating user autonomy in digital environments. And given the human rights risks we're currently experiencing at the proverbial hands of AI, refusing to render accessible to developers the kinds of quality data they require to create machine learning algorithms is not a reasonable trade-off to make in a free and democratic society. Developers' use of easily available and legally low risk content might very well prevent them from producing *copyright* harms (though it's arguable that their use of protected content to train algorithms is a harm that's targeted by copyright in the first place, but more on that in the next section). However, their use of this data instead results in *tangible* harms that are far more detrimental to a society seeking to promote diversity and inclusion. It's a trade-off that prioritizes the interests of rightsholders at the expense of our fundamental liberties; one that delegitimizes the creative practices of developers in ways that are already proving to inflict widespread societal damage.<sup>951</sup> For every action there is an equal and opposite reaction. And it behooves us to ensure that whatever trade-offs we're making in the name of copyright are sensible – particularly when our social dialogue and human rights hang in the balance.

Over time, many suggestions have been made about how to avoid these outcomes. Some believe that a broad copyright exemption for machine learning should be created to provide

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<sup>951</sup> See e.g. Benjamin, *Race After Technology*, *supra* note 917; O'Neil, *Weapons of Math Destruction*, *supra* note 917; Waldman, *supra* note 943; Karine Gentelet & Sarit K Mizrahi, "A Human-Centered Approach to AI Governance: Operationalizing Human Rights Through Citizen Participation" in Maria Axente, Jean-Louis Denis, Atsuo Kishimoto & Catherine Régis, eds, *Human-Centered AI: A Multidisciplinary Perspective for Policy-Makers, Auditors and Users* (Oxfordshire: Routledge) 215.

certainty to developers in this field.<sup>952</sup> Others maintain that fair dealing is sufficiently open-ended to defend such a use.<sup>953</sup> But given that adopting technologically specific exceptions has produced much uncertainty surrounding the development and use of future technologies, it's critical to question whether the *kinds* of uses made by machine learning algorithms are truly within copyright's purview before concluding that an exception, or even a fair dealing argument, is necessary to legitimize this kind of use. We must ask whether the copies inherent in the use and development of AI systems in fact compel speech, or whether they quite simply amount to non-infringing uses that copyright shouldn't encroach upon lest it once again generate future confusion. And that's precisely the question to which I'll now turn.

## 6.2 *Have Faith in Your Dreams and Someday, Your Creativity Will be Legitimate Too: The Copying Involved in AI Development as Falling Outside of Copyright's Purview*

It's crucial, as a matter of copyright infringement, to differentiate *developing* AI from *using* AI. Much of copyright rhetoric has centered around the potentially infringing nature of the copying involved in training machine learning algorithms where the content in question is protected.<sup>954</sup> But to determine if we're truly in the presence of infringement, we must look beyond the perceived harm of the copying itself and look instead to whether or not this act truly compels speech or instead quite simply contributes to the evolution of meaning.<sup>955</sup> The question, then, is not whether AI development involves the unauthorized reproduction of copyrighted content; whether it extracts value from pre-existing works. Rather, it's whether this act of reproduction is done for the purposes

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<sup>952</sup> See e.g. Craig, Amani, Bannerman et al, *supra* note 61; Geist, Canadian AI Thriving, *supra* note 85.

<sup>953</sup> See e.g. Sobel, *supra* note 62; Carroll, Progress of Science, *supra* note 62; Vincent, Scary Truth, *supra* note 911.

<sup>954</sup> See e.g. Grimmelmann, Literate Robots, *supra* note 60; Sobel, *supra* note 62; Mark A Lemley & Bryan Casey, "Fair Learning" (2021) 99-4 Texas LR 743.

<sup>955</sup> See above, Chapter 4, Section 4.3.

of pursuing a different meaning or instead quite simply seeks to compel the original author's speech.

And to answer this question, we must examine the role of these reproductions in the creation of AI systems. Developing machine learning algorithms relies on data.<sup>956</sup> It's not enough to just collect a lot of it, however. The quality of that data must equally be superior for the algorithm to be properly trained.<sup>957</sup> And ensuring quality relies not just on the nature of the data sources,<sup>958</sup> but also on how that data is *prepared* for machine learning processes. The data must be preprocessed, profiled, cleansed, validated, and transformed. It's a grueling practice, with over 80% of the time spent developing AI systems going towards preparing, cleaning, and labeling data.<sup>959</sup> Although not necessarily picky about *what* data is included (so long as it's qualitative), a good argument can be made that the collection and preparation of this content results in an original work of authorship; that through filtering, cleaning, deduping, enhancing, selecting, and labeling the data,<sup>960</sup> developers are sufficiently transforming that raw material in a way that results in a new work entirely. As such, their use of that data to train a machine learning algorithm ought not to pose any insuperable difficulty from a copyright perspective.

But despite the extent of transformation involved in preparing data for algorithmic training, there appears to be a measure of discord where the data used is copyright protected. Because algorithms 'learn' from this content, many have attempted to distinguish this kind of use from the

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<sup>956</sup> See e.g. Neil M Richards & Jonathan H King, "Big Data Ethics" (2014) 49 Wake Forest L Rev 393.

<sup>957</sup> Ashwin Pajankar & Aditya Joshi, *Hands-on Machine Learning with Python: Implement Neural Network Solutions with Scikit-learn and PyTorch* (New York: Apress, 2022) at 70.

<sup>958</sup> Richards & King, *supra* note 956.

<sup>959</sup> Kathleen Walch, "Data Preparation for Machine Learning Still Requires Humans" (29 March 2019), online: *TechTarget* <<https://www.techtarget.com/searchenterpriseai/feature/Data-preparation-for-machine-learning-still-requires-humans#:~:text=In%20order%20for%20machine%20learning,supervised%20and%20unsupervised%20learning%20applications.>>.

<sup>960</sup> *Ibid.*

merely technical reproductions that we've come to overlook in copyright.<sup>961</sup> Despite their sophistication, however, algorithms' edification processes don't involve the use of the work in its communicative sense. AI models don't consume this content in the same way as humans do,<sup>962</sup> nor do they store the images or texts upon which they're trained. Rather, the only thing that they glean and retain from this content are mathematical representations of patterns that these works exhibit.<sup>963</sup> Algorithms, therefore, learn from the *material form* of a work, rather than from its communicative significance. Because they don't use the work *as* a work, machine learning cannot be deemed to interfere with authors' autonomy; cannot be classified as compelling their speech. It is little more than a nonuse.<sup>964</sup>

Even those unconvinced by this position cannot deny that any AI program arising from machine learning processes is a different beast entirely from any single one of the instances of speech upon which it was trained. In creating these algorithms, in other words, developers copy pre-existing authors' words, not to say the same thing, but rather to advance a different meaning entirely. Although undoubtedly appropriating instances of value, developers' use of copyrighted content for machine learning processes therefore in no way compels the speech of the authors from whom that content originated. The act itself of *developing* a machine learning algorithm, therefore,

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<sup>961</sup> See e.g. Grimmelman, *Literate Robots*, *supra* note 60.

<sup>962</sup> Though some would argue that this very fact ought not militate for holding humans to a higher standard than machines (see Grimmelman, *ibid*).

<sup>963</sup> James Vincent, "AI art tools Stable Diffusion and Midjourney targeted with copyright lawsuit" (16 January 2023), online: *The Verge* <<https://www.theverge.com/2023/1/16/23557098/generative-ai-art-copyright-legal-lawsuit-stable-diffusion-midjourney-deviantart>> [Vincent, AI art tools].

<sup>964</sup> Drassinower, *WWWC*, *supra* note 30 at 104-5 ("The encounter between copyright law and the digital environment is an encounter between a body of law apparently suspicious of copying and a revolutionary technology [...] that irremediably operates through copying. The possibilities of a rapprochement are, no doubt, many and manifold, but none can afford to overlook the crucial distinction between a work – conceived as a communicative act – and its material form. Copyright, to recall the definition provided in the Canadian *Copyright Act*, is the exclusive right to 'reproduce the work...in any material form.' The crucial observation to bring into relief is that an exclusive right to reproduce the *work* in any material form is not an exclusive right to reproduce the *material form* of the work. Nonuse is nonactionable. It is reproduction not of the work but only of its material form. The challenge of the digital environment is not to impose juridical limits on the scope of the copyright holder's fetishized right over a work's material form. It is rather to pierce through the reification of the work as a thing.").

cannot be an infringing one. Engaging in this practice requires no text-and-data-mining exception, nor even recourse to fair dealing because it quite simply falls outside of copyright's purview entirely. And any attempt to encroach upon this use would be little more than an unnecessary violation of algorithm developers' autonomy, denying them the freedom to use the quality building-blocks necessary to produce their own creations.

Why then, you might wonder, would I nevertheless maintain that the contractual provisions imposed by service providers upon generative AI users compel the latter's speech?<sup>965</sup> If algorithms' use of creative works does not appropriate their communicative significance, how then could training them on the works of author-users of creative AI services amount to compelled speech? My position, however, is neither a contradiction nor an oversight. The distinction rests on the *timeline* of the use. When *already published* copyrighted works are propelled towards the creation of machine learning algorithms, this use must forcibly be non-infringing. And the reasons are twofold. First, because these works are used to produce an entirely new creation that has no resemblance to the pre-existing works upon which it builds, algorithms *as a final product* cannot be said to compel the speech of the authors who produced these works.<sup>966</sup> Second, and more crucially, because the authors whose works are being used have already made the choice of sharing their work with the public, they can only control the evolution of its meaning to the extent that it doesn't unnecessarily impinge on the creative autonomy of other authors.<sup>967</sup>

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<sup>965</sup> See above, Chapter 5, Section 5.3.

<sup>966</sup> See above, Chapter 4, Section 4.3.

<sup>967</sup> Drassinower, WWWC, *supra* note 30 at 179-80 ("Once copyright is grasped in this way, emancipated from the second-order concern about domesticating or propertizing the intangible, the entirety of copyright doctrine is intelligible as juridical protection and cultivation of the integrity of speech as speech. Moreover, it is the integrity of speech as speech that reveals that the author's standing as autonomous speaker itself restricts and defines his ability to choose unilaterally the conditions under which he speaks. The author cannot impose conditions on his speech that deny its character as speech. Because the doctrine of originality grants the author rights for speaking in his own words, the author cannot derogate from his speech in the very same breath in which he claims standing as a speaker. He cannot, that is, ask copyright law to grant him rights inconsistent with the grounds upon which copyright law

The distinction arising from the contractual provisions imposed upon generative AI users, however, is that – through their engagement with the services – they are being forced to accept a use of their creation *before* they’ve decided to release that work into the world, while it remains *unpublished*. It doesn’t matter, here, that the work is not being used by the algorithm in its communicative sense. The mere fact that author-users are being compelled to acquiesce to consistent algorithmic oversight throughout their creative process negates their autonomy as speaking beings by interfering with their privacy and freedom of speech; by subjecting them to ubiquitous surveillance that restricts their opportunities for engaging in authentic self-expression, for freely working through culture.<sup>968</sup> And in so doing, the use of author-users’ unpublished works generated in conjunction with creative AI services qualifies as a form of compelled speech in its own right. It might not compel their speech by appropriating its communicative significance, but it does so by depriving author-users of the breathing space they require to speak freely through manifestations of their creative autonomy.<sup>969</sup> From this perspective, this kind of use necessarily qualifies as a copyright harm and not just a privacy one. Although the former is but a secondary effect arising from the latter, it speaks to the intricate relationship between the rights to privacy and freedom of expression; between violations of creative autonomy and acts of infringement. As long as a work has already been published, however, there is no risk of such harm when it’s used to train machine learning algorithms.

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recognizes him as an author. Thus, his irreducible choice to speak or not to speak cannot as a copyright law matter translate into an unencumbered autonomy to restrict unilaterally the conditions under which his work is publicly available. The question is not about what the author wants but about what his autonomy as an author permits him to claim.”).

<sup>968</sup> See above, Chapter 5, Section 5.3.

<sup>969</sup> See Schneier, *Surveillance*, *supra* note 879; Hildebrandt, *Profiling*, *supra* note 767; see also Crawford, *Atlas*, *supra* note 877, at 94; Zuboff, *Surveillance Capitalism*, *supra* note 766 at 307; Cooke, *supra* note 875; Cohen, *What Privacy is For*, *supra* note 873.

And it's rather unfortunate that, with AI's aptitude for consuming works far more efficiently than us mere humans, many are uneasy about the extensiveness of what they view as a misappropriation of instances of value. In effect, machine learning algorithms' benefits to progress are such that they should not be delegitimized by copyright based on some misinformed notion that this law ought to regulate every single act of reproduction. Some algorithms are used to diagnose life-threatening health problems and even assist doctors when operating on patients.<sup>970</sup> Others are used to make autonomous vehicles safer.<sup>971</sup> Others still are used to tackle climate change by predicting the future effects of natural disasters and assisting the powers that be in making decisions more likely to prevent irreversible damage to the planet.<sup>972</sup> The list goes on, and their applications are many and varied. While the field of AI hasn't been without its controversies, none will deny the widespread benefits that society stands to gain from its continued development. These advantages, however, can only be fully realized if copyright ceases being an obstacle in AI's fortuitous path.

Progress alone, however, might not be enough to convince those that oppose the use of copyrighted data for algorithmic training. The works being employed to this effect are, after all, harbingers of progress themselves. But what might perhaps be more likely to militate in favour of accepting the use of this content to develop AI systems is its capacity to limit the algorithmic harms to which society is exposed. And it can achieve this feat in two distinct ways, both of which stand

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<sup>970</sup> See e.g. Nicole Martin, "Artificial Intelligence Is Being Used To Diagnose Disease And Design New Drugs" *Forbes* (30 September 2019), online: <<https://www.forbes.com/sites/nicolemartin1/2019/09/30/artificial-intelligence-is-being-used-to-diagnose-disease-and-design-new-drugs/#2588859e44db>>; D T Max, "Paging Dr. Robot: A Pathbreaking Surgeon Prefers to do His Cutting by Remote Control" *The New Yorker* (23 September 2019), online: <<https://www.newyorker.com/magazine/2019/09/30/paging-dr-robot>>.

<sup>971</sup> Andrew Myers, "How AI Is Making Autonomous Vehicles Safer" (7 March 2022), online: *Stanford University Human-Centered Artificial Intelligence* <<https://hai.stanford.edu/news/how-ai-making-autonomous-vehicles-safer>>.

<sup>972</sup> Sophie Bushwick, "10 Ways AI Was Used for Good This Year" (15 December 2022), online: <<https://www.scientificamerican.com/article/10-ways-ai-was-used-for-good-this-year/#:~:text=Researchers%20have%20been%20using%20AI,monitor%20forests%20and%20share%20data.>>.

to benefit the creative sector in particular as well as society in general. First, it would limit the cases in which service providers would have to rely on their author-users' content to train their algorithms (at least in situations where personal data isn't critical to their purpose). De-actioning the use of copyrighted materials for AI development would extend them access to quality content that far supersedes the value gleaned from user content alone. In this sense, it would limit the kind of encroachment on author-users' autonomy that they've been subjected to in these creative AI environments and therefore reduce the copyright harms associated with this use.

Second, the use of copyrighted data to train machine learning algorithms can go a long way in limiting their propensity to amplify discrimination. Given that this data could serve to address algorithms' inherent bias problem,<sup>973</sup> it's quite telling that those lobbying against the use of this content for machine learning purposes have received just as much attention as (if not more than) the human rights advocates seeking to address this shortcoming. Many governments worldwide believe that they've found the perfect balance: a limited text-and-data-mining exception for research and scientific purposes alone.<sup>974</sup> It's sufficiently broad to allow continued progress in this domain, while simultaneously extending authors the deference they deserve. But that won't stop AI from being used in the commercial realm, where its overvaluation of data amplifies pre-existing societal biases and exposes members of marginalized groups to increased discrimination that pushes them even further to the fringes of society.<sup>975</sup>

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<sup>973</sup> See Levendowski, *supra* note 86.

<sup>974</sup> See e.g. *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, s 3-4; *Copyright, Designs and Patents Act 1988* (UK), c 48, s 29A (introduced by the *Copyright and Related Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014*, SI 2014/1372).

<sup>975</sup> See e.g. Benjamin, *Race After Technology*, *supra* note 917; O'Neil, *Weapons of Math Destruction*, *supra* note 917; Waldman, *supra* note 943; Gentelet & Mizrahi, *supra* note 951.

From this perspective, refusing to acknowledge that training machine learning algorithms is *not* the kind of harm that copyright should target is tantamount to prioritizing ‘original’ authors’ rights over society’s entitlement to non-discrimination; to protecting their autonomy at the expense of that of others. Copyright was conceived to address the harm inflicted upon authors when their autonomy as speaking beings is infringed.<sup>976</sup> Its role is not to propel authors’ monetization of their works’ increasingly growing list of uses where there’s no evidence of such harm.<sup>977</sup> Copyright law must therefore exercise restraint prior to encroaching upon a use that leads to genuine progress. It must acknowledge that, where the harm inflicted is something *other* than compelled speech (be it through misappropriating a work’s communicative significance or otherwise impinging on authorial autonomy), perhaps another body of law is better placed to regulate such a use (should it even need to be regulated at all). That isn’t to say that copyright has *no* role in the AI sector, just that there is little to justify its intrusion on the kind of copying at the heart of machine learning as a creative practice.

At the same time, because machine learning algorithms have the potential to generate derivatives of their training data, it’s often questioned whether this content should quite simply not be used to train them in the first place.<sup>978</sup> It’s frequently argued that it’s counterintuitive to exploit

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<sup>976</sup> Drassinower, WWWC, *supra* note 30 at 13 (“because a work of authorship is a communicative act, copyright infringement is a wrong to an author’s autonomy as a speaking being”); *ibid* at 88 (“Copyright is a right to preclude another from repeating one’s own speech. The mischief of copyright is a wrong to the author’s autonomy as a speaking being. Copyright infringement is compelled speech”).

<sup>977</sup> *Ibid* at 110 (“The question is not whether the defendant’s copy extracts value from the plaintiff’s labor but whether the impugned copy impinges on the plaintiff’s autonomy as a speaking being. This is the mischief that elevates the infringement inquiry from the physics of mere copying to the jurisprudence of copyright”); Gervais, Purpose of Copyright, *supra* note 28 at 335 (“The moral imperatives that seem to be at the source of [copyright] is the taking of someone’s work to make one’s own. It is not the extraction of a payment for every drop of use of the work distilled to individual end-users”).

<sup>978</sup> Vaughan-Nichols, *supra* note 55; Vincent, Rules of AI copyright, *supra* note 56; Jeremy Nuttall, “Whose art is this, really? Inside Canadian artists’ fight against AI” (2 February 2023), online: *Toronto Star* <<https://www.thestar.com/news/canada/2023/02/02/whose-art-is-this-really-inside-canadians-fight-against-ai.html>>; Shanti Escalante-De Mattei, “Artists Are Suing Artificial Intelligence Companies and the Lawsuit Could Open Legal Precedents Around Art” (5 May 2023), online: *Art in America* <<https://www.artnews.com/art-in-america/features/midjourney-ai-art-image-generators-lawsuit-1234665579/>>.

authors' works to produce a technology that will only lead to their devaluation.<sup>979</sup> This view, however, unnecessarily conflates the technological processes involved in algorithms' production with their potentially infringing uses; it invalidates the training of *all* algorithms, simply because *generative* algorithms might produce creative outputs that copy the speech of pre-existing authors. But given the many and varied uses of AI, it's crucial for copyright to differentiate between the reproductions necessary to develop algorithms – that are themselves new works with new meanings and therefore ought not to qualify as infringing – and the actionability of algorithmic *outputs* that might in fact compel authors' speech. From this perspective, when it comes to generative algorithms, whether they're likely to compel speech rests squarely on how they're *used*; the technological processes involved in the development of algorithms generally, however, have no place in this discussion.

### 6.3 *Can AI Compel Speech?: Criteria for Epistemic Infringement in the Use of Generative Algorithms*

Determining whether and under what conditions algorithmic *outputs* that reproduce copyrighted content could amount to infringement requires us to look at the epistemic state of the three actors involved, namely the generative AI system, the developer, and the user. Let's begin with the algorithms themselves. While their training may not necessarily involve use of the works for their communicative significance, instances where they directly reproduce some of the content from which they've learned certainly amounts to compelled speech; to 'using' the work's very meaning by adopting its words towards similar ends. But given that AI systems cannot possess the

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<sup>979</sup> Nuttall, *ibid*; Valentine Goddard, "Art Impact AI: Observations and Strategic Recommendations," online: *Canadian Council for the Arts* <<http://allianceimpact.org/wp-content/uploads/2021/06/Art-Impact-AI-Observations-and-recommendations.pdf>>; Gideon Kimbrell, "How Generative AI Can Impact Music and Content Creation" (9 May 2023), online: *Rolling Stone* <<https://www.rollingstone.com/culture-council/articles/how-generative-ai-can-impact-music-content-creation-1234731365/>>.

intent necessary to purposely engage in infringing acts, could they still qualify as infringers? I'm inclined to respond to this question in the affirmative.

Just as algorithms possess the epistemic qualities necessary to diminish our privacy despite not traditionally being considered as privacy's 'other,'<sup>980</sup> so too can they possess the requisite level of cognizance to infringe copyright. From the privacy perspective, algorithms are deemed to possess a sufficiently strong epistemic state to violate privacy because their cognizance of personal facts gives rise to truth-promoting beliefs about individuals that they then actuate upon in the real world.<sup>981</sup> Similarly in the copyright context, because of algorithms' cognizance of their copyrighted training data coupled with their ability to communicate this speech to others through unauthorized acts of reproduction, there exists a sufficiently strong epistemic state to impinge on authors' autonomy as speaking beings.

That algorithms are not sentient and cannot possess the intention necessary to infringe copyright matters little. It is, in essence, an act of unconscious infringement where 'knowledge' of the content being infringed remains intact; where the 'memory' of the pre-existing work whose speech is being compelled is not lost. In other words, whereas a *human* author charged with subconscious infringement could reasonably argue that she has no recollection of the content that supposedly acted as the source of her creation – that she did not *intentionally* copy – artificial intelligence could never advance a similar claim. Their act of infringement is 'subconscious' only in the sense that they possess no consciousness. But given that they always have access to mathematical representations of patterns exhibited by the works whose words they've reproduced, they cannot benefit from any such defense.

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<sup>980</sup> Kerr, Schrödinger's Robot, *supra* note 73 at 137.

<sup>981</sup> *Ibid* at 145-6; see also Goldman, *supra* note 865.

Not being endowed with consciousness, however, also prevents them from taking responsibility for their actions. And because neither developers nor users can foresee, in most situations, that algorithmic output is or is likely to be infringing, these actors each lack the element of intent necessary to be charged with infringement. From this perspective, many question exactly who ought to be held liable when authors see their speech compelled by generative algorithms. Despite the particularities of this situation, however, these authors needn't be without remedy. Cases like these could benefit from the creation of a fund, for instance, created by apportioning a part of the profits amassed by generative AI developers that would serve as the AI system's insurance policy against infringement claims.<sup>982</sup>

Where intent *can* be attributed to a human actor, however, recourse to this fund should be prohibited. Prior to relying on this insurance policy, the facts of each case should be examined to determine whether either the developer or the user should have reasonably known that the output is, or is likely to be, infringing. Where this query is met with an affirmative response, these individuals should be the ones held responsible, unless there is a defense that could shield them from liability. Although users would be the ones making use of any reproduced content, given that they're generally unaware of the nature and source of the generative algorithms' training data, they wouldn't (in most situations) possess the epistemic state necessary to infringe copyright. In such cases, it would therefore make little sense to hold them liable for a copyright violation that they couldn't have known existed.

For their part, most developers don't program their generative algorithms to infringe copyright. Their intent is rather to create a new work with an alternate meaning. The whole point

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<sup>982</sup> Matthias, *supra* note 59 at 113-4.

of their creations is to produce new content by learning from pre-existing works, not to regurgitate the words of others. As such, where such an algorithm so happens to reproduce the content upon which it was trained, we ought not to immediately jump to the conclusion that the developer should be held liable without first asking certain pointed questions. Chief amongst them being whether the developer provides the service *primarily* for the purpose of enabling acts of copyright infringement or not.<sup>983</sup>

According to section 27(2.4) of the *Copyright Act*, there are six factors that courts could consider in order to determine whether a service provider has so infringed.<sup>984</sup> Is the service promoted as one that could be used to enable infringement? Or does it have other significant uses? Did the service provider know that the service was being used to infringe copyright? Does she have the power to take actions that might limit these violations? Given the large range of generative algorithms available, there's no one-size-fits-all response to these questions. Let's return, for instance, to the example of GitHub's Copilot,<sup>985</sup> the AI-powered coding assistant that suggests the next line of code to developers as they type, which the latter are free to accept, reject, or edit. The program can go as far as recommending complete methods and complex algorithms, or even translating simple natural language commands into a dozen different programming languages.<sup>986</sup>

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<sup>983</sup> *Copyright Act*, *supra* note 66, s 27(2.3).

<sup>984</sup> *Ibid*, s 27(2.4) (“(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement; (b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement; (c) whether the service has significant uses other than to enable acts of copyright infringement; (d) the person’s ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so; (e) any benefits the person received as a result of enabling the acts of copyright infringement; and (f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement”).

<sup>985</sup> See above, p. 17.

<sup>986</sup> Vaughan-Nichols, *supra* note 55.

And that's precisely how it's marketed – as a useful generative algorithm that could cut down on development time and accelerate innovation.<sup>987</sup>

At the same time, however, it notes that “Copilot is powered by Codex, a generative pretrained AI model created by OpenAI. It has been trained on natural language text and source code from publicly available sources, including code in public repositories on GitHub.”<sup>988</sup> By drawing on public sources, Copilot's developers effectively admit to violating the right of reproduction of those individuals whose content they scrape. Yet, despite being trained on copyrighted content, the service is equally promoted for uses that go far beyond infringement. That doesn't mean, however, that Copilot would never reproduce any of the code contained in its training data. But in the event that it does replicate pre-existing code, there's a good argument to be made that any small snippets of code suggested (which generally consist of commonly used phrases) aren't infringing in the first place, given that they're purely functional in nature.<sup>989</sup> It's cases where larger portions of code might be reproduced that would be more problematic from a copyright perspective. It was, for example, recently discovered that Copilot reproduced large chunks of copyrighted code without the attribution required by its open-source license<sup>990</sup> leading to its pursuit for breach of license, among other things.<sup>991</sup>

There's no evidence that the creators of Copilot were aware, upon its deployment, that it would replicate significant portions of pre-existing code. But now that they've been made aware,

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<sup>987</sup> GitHub, Copilot, online: < [https://resources.github.com/copilot-for-business/?ef\\_id=\\_k\\_Cj0KCQjwnMWkBhDLARIsAHBOfrfrtWlb\\_M5HVYQKBgGpTT-1gdtmFaXISWrqj90bg\\_x1n90\\_XOB4NIaAu6fEALw\\_wcB\\_k\\_&OCID=AIDcmmofjgdhvp\\_SEM\\_\\_k\\_Cj0KCQjwnMWkBhDLARIsAHBOfrfrtWlb\\_M5HVYQKBgGpTT-1gdtmFaXISWrqj90bg\\_x1n90\\_XOB4NIaAu6fEALw\\_wcB\\_k\\_&gclid=Cj0KCQjwnMWkBhDLARIsAHBOfrfrtWlb\\_M5HVYQKBgGpTT-1gdtmFaXISWrqj90bg\\_x1n90\\_XOB4NIaAu6fEALw\\_wcB](https://resources.github.com/copilot-for-business/?ef_id=_k_Cj0KCQjwnMWkBhDLARIsAHBOfrfrtWlb_M5HVYQKBgGpTT-1gdtmFaXISWrqj90bg_x1n90_XOB4NIaAu6fEALw_wcB_k_&OCID=AIDcmmofjgdhvp_SEM__k_Cj0KCQjwnMWkBhDLARIsAHBOfrfrtWlb_M5HVYQKBgGpTT-1gdtmFaXISWrqj90bg_x1n90_XOB4NIaAu6fEALw_wcB_k_&gclid=Cj0KCQjwnMWkBhDLARIsAHBOfrfrtWlb_M5HVYQKBgGpTT-1gdtmFaXISWrqj90bg_x1n90_XOB4NIaAu6fEALw_wcB)>.

<sup>988</sup> *Ibid.*

<sup>989</sup> Vaughan-Nichols, *supra* note 55.

<sup>990</sup> *Ibid.*

<sup>991</sup> Vincent, Rules of AI copyright, *supra* note 56.

the question is: what do they plan on doing about it? “Parties offering such recommendation services,” suggests law professor Eben Moglen, “should proceed in a license-aware fashion so that users incorporating recommended code in their projects will be informed in a granular fashion of any license restrictions on recommended code. Ideally, users should have the ability to filter recommendations automatically to avoid the unintentional incorporations of code with conflicting or undesired license terms.”<sup>992</sup> It is possible, in other words, to limit the acts of infringement perpetrated by Copilot. Its developers, however, have not yet taken any steps to do so. In the event that courts consider these infringements to be ‘significant,’ whether or not this program’s developers could be held liable under section 27(2.3) would therefore likely hinge on what actions they took to mitigate recurrences of this situation once they became aware of it.

This approach makes sense for generative algorithms like Copilot or ChatGPT, whose main uses revolve around producing content to assist users in a variety of tasks. But what of generative algorithms that are explicitly created to replicate the styles of certain authors? One such author is Toronto artist, Sam Yang, who recently discovered that users of Stable AI’s Diffusion generator had trained this algorithm on his work to generate images that emulate his style.<sup>993</sup> This particular developer, however, describes the service in question as one that enables users to create descriptive images with short prompts.<sup>994</sup> While it does note that new images can be prompted using a sourced image, this description doesn’t directly market the service as one that could be used to infringe copyright. Many artists and photographers, for instance, could use their *own* images to prompt new

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<sup>992</sup> Vaughan-Nichols, *supra* note 55.

<sup>993</sup> Nuttall, *supra* note 978.

<sup>994</sup> Stable AI, Diffusion XL, online : <<https://stability.ai/stablediffusion> >.

ones in their own style. This service, therefore, *could* have significant uses other than to enable infringement, therefore potentially fulfilling another of section 27(2.4)’s factors.<sup>995</sup>

But are these other uses enough to detract from its ability to so precisely replicate the styles of particular artists? Are its non-infringing uses, in other words, more prominent than the potential harm suffered by these authors? Diffusion image generators are essentially founded on a technology that works by adding random noise or static to images contained in its training datasets.<sup>996</sup> The model then tries to complete the image by filling in the missing portions using hints from alternative text describing the photo, which sometimes refers to the name of the artist in question.<sup>997</sup> “The model’s efforts are then scored based on how accurately the model was able to fill in the blanks,” notes developer Ryan Murdock, “leading it to contain some information associating style and artist.”<sup>998</sup> These models are, essentially, trained to – as accurately as possible – imitate the style of pre-existing artists, *without* reproducing them.

The class action lawsuit instituted by artists whose works have been used to train these AI models claim that because the text prompts employ the artist’s name, any work generated by the AI that emulates her style is necessarily derivative regardless of whether or not the resulting image draws on content from billions of other images.<sup>999</sup> That the mere use of an artist’s name amounts to compelled speech, however, seems a touch of a stretch. Admittedly, if the *only* content used to train an algorithm is of a single artist it might be difficult to argue that any output is not, at least in some measure, an infringing reproduction. But, where it learns to emulate style from a dataset of

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<sup>995</sup> *Copyright Act, supra* note 66, s 27(2.4)(c) (whether the service has significant uses other than to enable acts of copyright infringement”).

<sup>996</sup> Escalante-De Mattei, *supra* note 978.

<sup>997</sup> *Ibid.*

<sup>998</sup> *Ibid.*

<sup>999</sup> *Ibid.*

a particular artist, that it then amalgamates with the billions of other images upon which it was trained, it would be difficult to see any resulting output as a direct reproduction, let alone an infringing one. Drawing on the mathematical representations of other images to produce a new image in the style of a pre-existing artist must, forcibly, be a new work.<sup>1000</sup>

Thus, even if developers of these kinds of AI models were aware that their service was being used in this fashion, and even if they *specifically* created their generative algorithms to emulate the style of others, they should not be held liable for infringement. Their intention was *not* to infringe copyright, but rather to emulate the style of pre-existing artists as so many have done before them. And despite some debate on the topic,<sup>1001</sup> it's generally held that style is precluded from copyright protection.<sup>1002</sup> Its exclusion is necessary for achieving the very goal of copyright, for ensuring the promotion of progress. How can artists learn from the works of their predecessors if they cannot emulate the styles exhibited in pre-existing creations? Impressionism, cubism, modern art, and so on, are all styles that were used by numerous artists over the years, each in their

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<sup>1000</sup> Whether or not this new work ought to be eligible for copyright protection will depend on the extent of creative autonomy exercised by the human collaborator (see above, Chapter 5).

<sup>1001</sup> See e.g. Michelle Brownlee, "Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws?" (1993) 93:5 Columbia Law Review 1157.

<sup>1002</sup> See e.g. Brownlee, *ibid*; *Emerson v Davies*, *supra* note 737 (A parallel is made with an oft-cited quote from Justice Story to suggest that style is merely one of the building-blocks necessary to produce creative works, and therefore akin to an unprotectable idea: "In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before."); Jane C Ginsburg, "Exploiting the Artist's Commercial Identity: The Merchandizing of Art Images" (1995) 19 Colum-VLA JL & Arts 1 at 10 [Ginsburg, Merchandizing of Art] ("infringement analysis does not address appropriation of artistic style apart from its expression in a given work. Thus merely to render a subject 'in the style of' an artist, that is, to depict the subject in the way Picasso, Matisse or Mondrian *might* have done, but never did, is not copyright infringement."); Judith B Prowda, "Application of Copyright and Trademark Law in the Protection of Style in the Visual Arts" (1994) 19 Colum-VLA JL & Arts 269; See also: *Steinberg v Columbia Pictures Industries*, 663 F Supp 706 (SDNY 1987) at 712 (The Court's statement that "[e]ven 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," is often used to support the position that style is protected under copyright, but given the facts of the case, this conclusion is not supported. The Court's position is based specifically on the fact that the defendant not only copied the plaintiff's style, but her poster was equally a verbatim copy of substantial parts of the original poster. The Court therefore gives little direction on the extent of variation that would be required if the style was mimicked in the absence of any direct copying (Prowda, *ibid* at 282-4)).

own way. If copyright were to encroach on style, the future of culture would hang in the balance. That AI models can generate new images in a pre-existing style in a far more sophisticated fashion than any human should *not* militate in favour of including this element under copyright's umbrella.

That isn't to say, however, that the use of generative AI to produce content that replicates style could *never* qualify as a copyright harm. Whether or not it does, however, depends not on the sophistication of the technology but rather on how derivative that content is. If a user seeking to produce a work in the style of another creator engages in a true collaboration with generative AI, by inputting some of her own work and then requesting that the AI model reimagine it in the style of another, for instance, then the user's intention is not to usurp the pre-existing author but rather to engage in dialogue with her. My self-portrait in Picasso's style, for example, is clearly not his own work and my attempts to engage in a genuine dialogue with this artist and his work is evident.<sup>1003</sup> Where users endeavour to contribute to the evolution of meaning in this sense, it would be difficult to find infringing their use to this effect.

But where users employ a generative AI program to *intentionally* produce something that's so derivative of the pre-existing work – that offers no contribution of their own to enrich the social dialogue – it's difficult to imagine how such a use would qualify as anything but compelled speech. That being said, whether this act of infringement is actionable will largely depend on the purpose behind the use. Where the copying in question is in pursuit of commercial purposes, there's little that would save such a use from infringement liability. But where her use is for non-commercial purposes, she might perhaps benefit from the user-generated content exception.<sup>1004</sup> The successful

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<sup>1003</sup> See above, Chapter 5, Section 5.2.

<sup>1004</sup> *Copyright Act*, *supra* note 66, s 29.21(1) (“29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual – or, with the individual's authorization, a member of their household – to use the new work or other subject-matter

application of this defense, however, will largely depend on whether or not the sophistication of this imitation might “have a substantial adverse effect, financial or otherwise, on the exploitation of the existing work.”<sup>1005</sup> Authors, musicians, and artists alike have all similarly been vocal about their fear that such AI programs will render them obsolete and have significant impacts on their trade.<sup>1006</sup> As of yet, however, we don’t have quite enough data to determine what, precisely, these effects will be. At the same time, where generative algorithms are used only by everyday users (as opposed to commercial ones) to render creativity more easily accessible, I don’t believe that it will be as disruptive to the creative market as many seem to think.

Would the same position hold, however, for generative algorithms that produce imitations that are so sophisticated such that the general public finds themselves confused over the provenance of that content? I’m talking here of situations in which the words themselves are different, and therefore not compelled, but the execution nevertheless makes it seem as if the original author is speaking words that she never uttered. It is, in other words, a slightly backwards form of ventriloquism practiced on an unwilling subject.<sup>1007</sup> Take, for instance, the recent AI-generated Drake song featuring The Weeknd.<sup>1008</sup> Entitled *Heart on My Sleeve*, Drake fans were

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or to authorize an intermediary to disseminate it, if: (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes; (b) the source – and, if given in the source, the name of the author, performer, maker or broadcaster – of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so; (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter – or copy of it – or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.”)

<sup>1005</sup> *Copyright Act*, *supra* note 66, s 29.21(1)(d).

<sup>1006</sup> See e.g. Joe Garza, “ChatGPT Poses a Real Threat to Writers. Here’s Why That’s Good” (8 March 2023), online: *Medium* <<https://medium.com/the-reckless-muse/chatgpt-poses-a-real-threat-to-writers-heres-why-that-s-good-941a061e8e43>>.

<sup>1007</sup> Drassinower, WWWC, *supra* note 30, at 113.

<sup>1008</sup> Mia Sato & Richard Lawler, “What’s Really Going on With ‘Ghostwriter’ and the AI Drake song?” (19 April 2023), online: *The Verge* <<https://www.theverge.com/2023/4/18/23688141/ai-drake-song-ghostwriter-copyright-umg-the-weeknd>>.

convinced that the song in question originated from him. The lyrics were certainly reminiscent of something he might have written, despite having been penned by the anonymous Ghostwriter, and the voice was unquestioningly Drake's own.<sup>1009</sup>

While undoubtedly ventriloquism performed on an unwilling subject,<sup>1010</sup> it remains an entirely different form of ventriloquism than the one that copyright was meant to target. Copyright as a construct was created to address the kind of 'passing off' that involves the *same words* being used to advance the *same meaning*, making it seem as if the author herself is the one doing the speaking.<sup>1011</sup> But where the words are new entirely, and people are nevertheless made to believe that they originated from the primary artist, the harm in question is *not* a copyright one because neither the work itself nor its meaning have been copied in any measure (even despite the fact that, in Drake's case, it may compete with the marketability of his *actual* works).<sup>1012</sup> Copyright, therefore, is not the correct vehicle for regulating these kinds of issues, and it would be ill-advised for copyright to encroach on yet another use that falls so far outside its ambit.

Whenever this subject arises in my course, my students become rather uneasy. How is it possible, they ask, that any harm arising from the use of creative works could fall outside of copyright's purview? It seems contradictory to them that copyright, in its role as regulator of creative content, ought not to govern generative AI's ability to make others think that new content originates from pre-existing authors. But once we grasp that – given the absence of any direct

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<sup>1009</sup> Jackson Weaver, Drake and The Weeknd are just the latest stop on the AI art express" (21 April 2023), online: *CBC News* <<https://www.cbc.ca/news/entertainment/ai-music-drake-weeknd-1.6819092>>.

<sup>1010</sup> Drassinower, WWWC, *supra* note 30, at 113.

<sup>1011</sup> *Ibid* ("The infringer speaks not from his mouth but from his belly, making it seem that it is another who speaks. This seeming is the wrong to this other, whose mouth is being moved, so to speak, behind her back").

<sup>1012</sup> Many claim that, because this creation 'misuses' Drake's voice, it wouldn't pass muster with the sixth fair dealing factor, namely the effect of the dealing (see e.g. Congressional Research Service, *supra* note 912). However, because the harm in question is *not* a copyright harm, we should not turn to fair dealing or copyright at all to deal with this sort of negative impact.

reproduction of protected works in the output – this type of harm is separate from that which is targeted by copyright,<sup>1013</sup> we can avoid the unnecessary copyright expansion that would ensue from rendering new elements actionable and instead tackle this issue through more appropriate legislative vehicles.

When it comes to works produced with generative algorithms that appropriate the *likeness* of another creator, the tort of appropriation of personality would, for instance, most aptly address this harm. The protection afforded to personality rights vary greatly by jurisdiction. Within Canada, the province of Quebec offers the most stringent safeguards to personality rights. With its civil code specifically recognizing these rights as inalienable,<sup>1014</sup> it holds that use of a person’s “name, image, likeness or voice for a purpose other than the legitimate information of the public”<sup>1015</sup> is a violation of her personality rights. For their part, common law provinces offer a somewhat more attenuated protection in this regard, permitting individuals to control the exploitation of their image against the unauthorized *commercial* exploitation of their name, image, voice, or likeness through publicity rights.

In this sense, the tort of appropriation of personality has largely been restricted to endorsement situations. Like the American ‘right of publicity’ approach,<sup>1016</sup> this limitation was

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<sup>1013</sup> See *Athans v Canadian Adventure Camps Ltd* (Ontario 1977) (“it is clear that Mr. Athans has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right, if it is invaded”); *Joseph v Daniels*, 1986 CanLII 1106 (BC SC) (“The cause of action is proprietary in nature and the interest protected is that of the individual in the exclusive use of his own identity in so far as it is represented by his name, reputation, likeness or other value”).

<sup>1014</sup> *Civil Code of Quebec*, CQLR c C-1991, s 3.

<sup>1015</sup> *Ibid*, s 36.

<sup>1016</sup> *Haelan Laboratories Inc v Topps Chewing Gum Inc*, 202 F.2d 866 (2<sup>nd</sup> Cir, 1953) (the right of publicity “has since come to signify the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit”); see also *Midler v Ford Motor Co*, 849 F.2d 460, 463 (9<sup>th</sup> Cir. 1988) (The Ninth Circuit held that Ford’s use of Bette Midler’s song in their commercial without her consent amounts to an appropriation of her identity).

imposed in the name of the public interest, effectively recognizing society’s interest in the freedom of expression, ideas, newsworthy events, or matters of public interest.<sup>1017</sup> “Progress in the law,” wrote the Ontario Court of Appeal in the case of *Krouse v Chrysler Canada*, “is not served by the recognition of a right which, while helpful to some persons or classes of persons, turns out to be an unreasonable disruption to the community at large and to the conduct of commerce. [...] The danger of extending the law of torts to cover every such exposure in public not expressly authorized is obvious.”<sup>1018</sup>

Arguably, then, unless the creator of the Drake deepfake produced this song for commercial gain, it’s possible that Drake wouldn’t be able to pursue on this basis in most Canadian provinces (assuming he could even figure out *who* to pursue, given Ghostwriter’s anonymity – but that’s a debate for another day). At the same time, considering that the kind of use being made of peoples’ likeness by generative algorithms is not quite in the public interest nor is it newsworthy, courts might be inclined to expand the tort of appropriation of personality beyond what it currently covers to address the misinformation and reputational harms that often accompany the creation of deepfakes using peoples’ likeness.<sup>1019</sup> Courts have, after all, been known to address novel harms arising from the evolution of digital technologies by recognizing new torts or even expanding existing ones.<sup>1020</sup>

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<sup>1017</sup> *Gould Estate v Stoddart Publishing Co*, 1996 CanLII 8209 (ON SC).

<sup>1018</sup> *Krouse v Chrysler Canada Ltd*, 1 OR (2d) 225, 240.

<sup>1019</sup> See e.g. Arijeta Lajka & Philip Marcelo, “Fake AI images of Putin, Trump being arrested spread online” (23 March 2023), online: *PBS* <<https://www.pbs.org/newshour/politics/fake-ai-images-of-putin-trump-being-arrested-spread-online>>; Courtney Shea, “‘This Doesn’t Only Affect Taylor Swift’: An AI and Legal Expert on the Fight Against Deepfake Pornography” (9 February 2024), online: *Toronto Life* <<https://torontolife.com/city/taylor-swift-deepfake-pornography-ai/>>.

<sup>1020</sup> *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 237 (For a court to recognize a new tort, three elements must be met: “Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies [...]; (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another [...]; and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial

Their decision to do so, however, will likely revolve around whether they think it would be a reasonable limitation on individuals' freedom of expression. Essentially, when it comes to limiting the scope of the tort of appropriation, the definitions of 'newsworthy' or 'public interest' have been known to extend "far beyond the dissemination of news in the sense of current events and include all types of factual, educational and historical data, or even entertainment and amusement."<sup>1021</sup> Whether or not the tort of appropriation of personality might apply in cases where generative algorithms are used to misappropriate creators' likeness for the purposes of entertainment or amusement, in other words, will largely depend on how Courts choose to balance the various rights at play.

But what about situations where generative AI is used to imitate pre-existing works in ways that don't implicate their authors' likeness? As mentioned above, a claim of copyright infringement ought not to be available to authors whose works aren't directly copied in the generative AI's output. But where the original author possesses a distinctive style that is of some

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[...]. Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration."); See e.g. *Jones v Tsige*, 2012 ONCA 32 at para 31 (recognizing a tort of intrusion upon seclusion to address violations of digital privacy: "With advancements in technology, personal data of an individual can now be collected, accessed (properly and improperly) and disseminated more easily than ever before. There is a resulting increased concern in our society about the risk of unauthorized access to an individual's personal information. The traditional torts such as nuisance, trespass and harassment may not provide adequate protection against infringement of an individual's privacy interests. Protection of those privacy interests by providing a common law remedy for their violation would be consistent with Charter values and an 'incremental revision' and logical extension of the existing jurisprudence [...]. Even if the plaintiff's claim for invasion of privacy were classified as 'novel' (which, in any event, is not a proper basis for dismissing it), the foregoing analysis leads me to conclude that the time has come to recognize invasion of privacy as a tort in its own right. It therefore follows that it is neither plain nor obvious that the plaintiff's action cannot succeed on the basis that he has not pleaded a reasonable cause of action."); *Jane Doe 72511 v Morgan*, 2018 ONSC 6607 at para 96 ("I conclude that Jane has a cause of action against Nicholas for the public disclosure of private facts without her consent. In *Jones v Tsige*, the Court of Appeal recognized the need for civil remedies to protect the privacy of personal information. I see no reason why this protection should not extend to prevent the unauthorized publication of intimate images, given the privacy rights at stake and the serious harm caused by such publication."); *Yenovkian v Gulian*, 2019 ONSC 7279 at para 170 ("With these three torts all recognized in Ontario law, the remaining item in the "four-tort catalogue" of causes of action for invasion of privacy is the third, that is, publicity placing the plaintiff in a false light. I hold that this is the case in which this cause of action should be recognized [...].") See also, *Racki v Racki*, 2021 NSSC 46; *ES v Shillington*, 2021 ABQB 739.

<sup>1021</sup> *Current Audio Inc v RCA Corp*, 337 NYS 2d 949 (Sup Ct. 1972) at 954-56.

renown<sup>1022</sup> and the imitation is so similar in style that others perceive her to be the source of its creation,<sup>1023</sup> then the author in question might possess a valid claim in virtue of the tort of passing off if she can prove that she has incurred, or is likely to incur, damages.<sup>1024</sup> The extension of the tort of passing off to the creative (as opposed to the trademark) context is, however, quite particular. Courts have generally been reluctant to recognize unfair competition arising from creative works that don't involve any direct copying, as this would indirectly accomplish through a claim of passing off what copyright doesn't allow directly, effectively extending a protection to style that might otherwise unreasonably limit the speech of others.<sup>1025</sup>

The American case of *Romm Art v Simcha International*<sup>1026</sup> is quite illustrative of this tension. Here, the plaintiff, who published posters of artist Tarkay, pursued the defendant in passing off for publishing posters by an artist named Patricia that imitated Tarkay's visual style in

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<sup>1022</sup> *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 67 (“The first component is goodwill or reputation. The claimant must establish goodwill in respect of the distinctiveness of the product. Evidence of goodwill solely attached to the techniques and processes which create the product will not do. The doctrine of passing off did not develop to protect monopolies in respect of products but of guises, get-ups, names and symbols which identify the distinctiveness of a source.”); see also *Ciba-Geigy Canada Ltd v Apotex Inc*, [1992] 3 SCR 120 at p. 132-33; *Oxford Pendaflex Canada Ltd. v. Korr Marketing Ltd.*, [1982] 1 S.C.R. 494, at pp. 504 and 507, *per* Estey J.

<sup>1023</sup> In determining the potential for confusion, courts are generally guided by the criteria set out in section 6(5) of the *Trademarks Act*, RSC, 1985, c T-13 (“In determining whether trademarks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including (a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known; (b) the length of time the trademarks or trade names have been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks or trade names, including in appearance or sound or in the ideas suggested by them.”); see also *Kirkbi AG v Ritvik Holdings Inc*, *ibid* at para 68 (“The second component is misrepresentation creating confusion in the public. Misrepresentation may be wilful and may thus mean the same thing as deceit. But now the doctrine of passing off also covers negligent or careless misrepresentation by the trader.”); *Ciba-Geigy Canada Ltd v Apotex Inc*, *ibid* at p. 133; *Consumers Distributing Co. v. Seiko Time Canada Ltd.*, [1984] 1 S.C.R. 583, at p. 601, *per* Estey J.

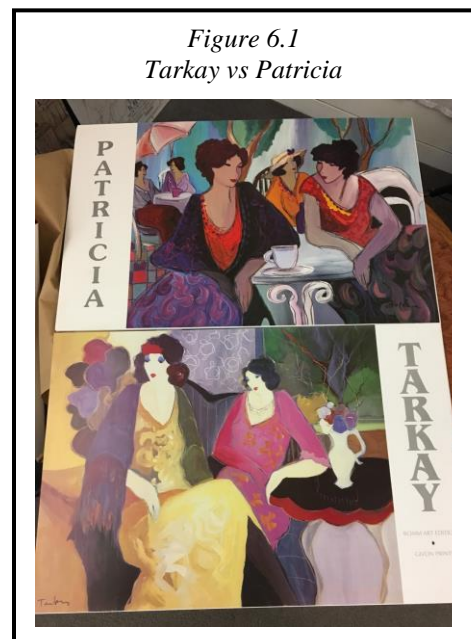
<sup>1024</sup> *Ray Plastics Ltd v Dustbane Products Ltd*, 1990 CanLII 6842 (ON SC), *aff'd* 1994 CanLII 1241 (ON CA) (“[The plaintiff] does not need to show actual damages. It is sufficient for it to show the *probability* of damage; if the public is probably being deceived, then there is probably damage.”)

<sup>1025</sup> See e.g. *Emerson v Davies*, *supra* note 737 (A parallel is made with an oft-cited quote from Justice Story to suggest that style is merely one of the building-blocks necessary to produce creative works, and therefore akin to an unprotectable idea: “In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before.”); see also Prowda, *supra* note 1002.

<sup>1026</sup> *Room Art v Simcha International*, 786 F. Supp. 1126 (E.D.N.Y. 1992).

the absence of direct copying (see Figure 6.1).<sup>1027</sup> The Court concluded that the likelihood of confusion existed because both posters conveyed ‘the same overall impression’<sup>1028</sup> and appeared to exude Patricia’s publisher’s “intention of capitalizing on the plaintiff’s reputation and goodwill and any confusion between his and [plaintiff’s] product.”<sup>1029</sup> Particular to this case was evidence that some galleries would frame the Patricia posters in a fashion that would conceal her name, which further militated in favour of the potential confusion.

“As applied to the fine arts themselves,” notes law professor Jane Ginsburg, “the decision seems troublesome: many artists styles owe a great deal to their predecessors. The Tarkay ‘look’ itself strongly resembles a Matisse crossed with a Modigliani. One would nonetheless be reluctant to suggest that either of these artists’ heirs should be able to enjoin the dissemination of Tarkay’s work, or that Tarkay should pay them royalties.”<sup>1030</sup> *But*, Ginsburg continues, “there may be a difference between emulation of



another’s artistic style on the development of one’s own pictorial expression, and *the commercial appropriation of an artist’s identity*.”<sup>1031</sup> In other words, it may be acceptable to draw inspiration from pre-existing artists, but it’s certainly not alright to imitate their style in a bid to pass off one’s work as that of another’s.

<sup>1027</sup> Rebecca Tushnet, “Recent acquisitions: really bad court decision edition” (9 April 2018), online: *Rebecca Tushnet’s 43(B)log* <<https://tushnet.blogspot.com/2018/04/recent-acquisitions-really-bad-court.html>>.

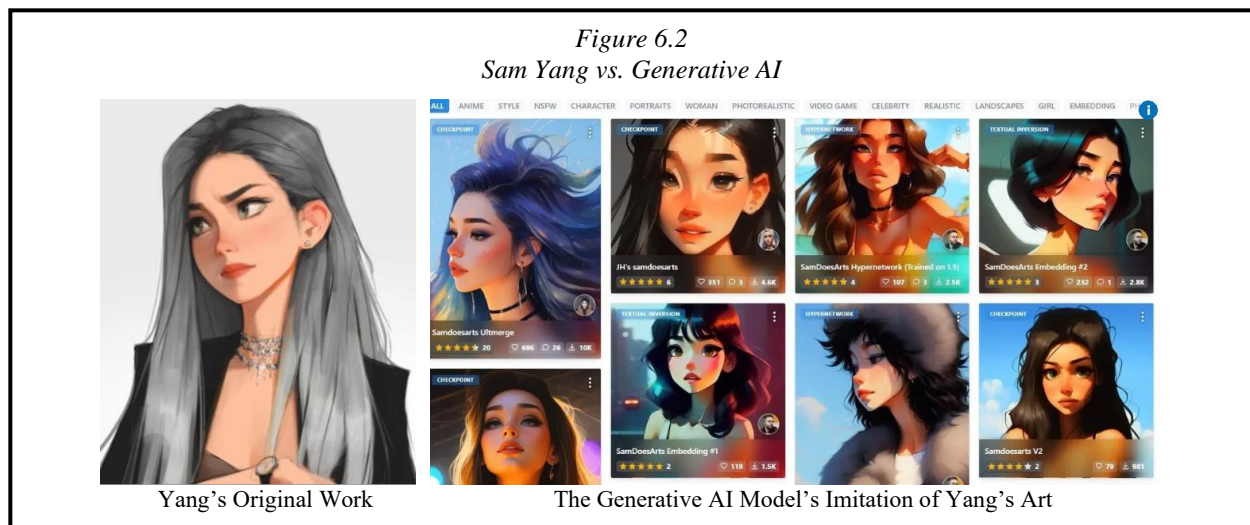
<sup>1028</sup> *Room Art v Simcha International*, *supra* note 1026 at 1137.

<sup>1029</sup> *Ibid* 1139.

<sup>1030</sup> Ginsburg, *Merchandizing of Art*, *supra* note 1002 at 16.

<sup>1031</sup> *Ibid* [emphasis added].

What, then, can be drawn from this line of reasoning within the context of stylistic imitations by generative AI? Let's return to the example of Sam Yang. An artist of some renown, he sells his illustrations for educational and commercial purposes while also providing art instruction to nearly one million subscribers through his YouTube channel, *Sam Does Arts* (see Figure 6.2).<sup>1032</sup> Not only do each one of the images produced in his style by the generative algorithm look like they could very well have originated from him, but they each equally include the label *SamDoesArts*. Although the burden of proving goodwill is quite significant, often requiring sufficient notoriety and distinctiveness of a 'style' such that it would automatically be associated with the artist's work,<sup>1033</sup> Yang's discrete following would likely weigh in his



<sup>1032</sup> Nuttall, *supra* note 978.

<sup>1033</sup> See e.g., *Demco Manufacturing Inc v Foyer d'artisanat Raymond Inc*, 2003 CanLII 19114 (QC CS), at para 73 (“il faut en plus que le plaignant démontre, par une preuve prépondérante, qu’un certain achalandage de son produit existait bel et bien. Il lui fallait prouver que le public l’identifie à son produit, d’un rapide coup d’œil, presque par un automatisme du cerveau qui associe l’image, la présentation du produit, au manufacturier.”); *Kisber Co. Ltd. c. Ray Kisbet & Associates inc*, C.A. 500-09-001250-943 (“Le droit d’être protégé contre la commercialisation trompeuse est lié à la notoriété acquise par l’usage d’un nom, d’une marque ou d’un produit. Cette notoriété est due au fait que le commerce ou le produit a acquis au fil du temps un achalandage et une réputation bien établis sur le marché. Dans *Consumers Distribution Co. c. Seiko time Canada*, le juge Estey a noté que le véritable fondement de l’action en passing-off est l’atteinte au droit de propriété sur l’achalandage de l’entreprise. En faisant croire faussement que son commerce ou son produit est celui du demandeur ou qu’il y est associé, le défendeur porte atteinte au droit de propriété sur l’achalandage, terme qui englobe non seulement les gens qui constituent la clientèle mais aussi la réputation et le pouvoir d’attraction qu’exerce un commerce.”)

favour.<sup>1034</sup> Once established, this evidence would go a long way in proving that the AI-generated images in Yang's style may very well have the potential to deceive those familiar with his work into believing that he was the source of their creation, regardless of whether or not they're stamped with his professional name.<sup>1035</sup>

The question at this juncture, then, is who would ultimately be liable for passing off in the imitation of Yang's style? On the one hand, while the developer of the AI model in question may not itself be trading in imitations of Yang's work, their mere provision of a service that could be used to train algorithms to generate stylistically similar works might lead potential purchasers of Yang's artwork to quite simply use this technology to replicate his style. But while the likelihood for damage to his goodwill exists, it's not the AI model *itself* that creates the risk of confusion; anyone using it remains clear that the images generated didn't originate from Yang himself. From this perspective, then, it's those who use these images in public-facing situations, where the potential for confusion as to the provenance of the artwork might exist, that would likely be liable under the tort of passing off. Although this approach may not provide a remedy for those situations in which Yang might lose a sale where ordinary users generate images in his style for personal use rather than purchase one directly from him, it does at least tackle the unfair competition arising from the commercial use of images produced by this algorithm in his style.

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<sup>1034</sup> Whether or not Yang's artistic style is distinctive enough that, absent these additional elements, the public familiar with his style would be similarly deceived is, ultimately, a question of fact. There have, however, been YouTube videos created by other artists to teach individuals how to mimic his style, and these note particularities about his way of drawing that seem somewhat unique to him (see e.g. Rishi Draws, "8 Tips for Drawing Like Sam Does Arts" (2022), online: *YouTube* <[https://www.youtube.com/watch?v=ZJnLMigN\\_H8](https://www.youtube.com/watch?v=ZJnLMigN_H8)>).

<sup>1035</sup> It's generally held that an artist's professional name and/or signature can act as her trademark (see e.g. Tim Jensen, "The Selling of Picasso: A Look at the Artist's Rights in Protecting the Reputation of His Name" (1981) 6 *Art & The Law* 77). As such, any artistic work that would include Yang's name would very likely be held as an instance of passing off. The point here, however, is that even in the absence of his professional name, it's possible that these AI generated images would deceive his following into believe that the images in question originated from him.

I'll not deny that relying on such solutions doesn't quite instill the kind of certainty that most authors and artists seek, especially when constantly faced with the fear that they'll wake up one morning to find themselves entirely usurped by generative AI. I won't say that the feelings being expressed by those who've made a living from their creativity aren't legitimate, or even that these issues shouldn't be tackled by the law. What I *am* saying is quite simply that *copyright* isn't the appropriate legislative vehicle to provide them with this certainty; to address all the harms suffered by pre-existing authors arising from the use of generative algorithms. Before jumping to the conclusion that copyright must tackle every single misuse of original works by AI, we must carefully consider whether the harm in question is, in fact, a copyright harm. If it isn't, we must resist the urge to inappropriately expand the scope of copyright, and quite simply rely on other legal avenues that are better suited to address the harms in question. Doing otherwise risks producing unnecessary and avoidable harms that are significantly more threatening to our free and democratic society – all in the name of authors' exclusive rights.

Restricting the harms that copyright permits pre-existing authors to claim can therefore go a long way in recalibrating the power dynamics inherent in the semantic web of relationships that culminate in human-machine collaborations. Once we acknowledge that 'copying' is not the harm copyright was designed to target – that creative autonomy, rather than the perceived harm of the 'copy,' ought to ground copyright as a construct – we can grasp this body of law as extending a right not *in a thing*, but *to* engage in an *act of authorship*. And in so doing, we can curb copyright's tendency to interfere with authorial independence; we can redefine copyright's boundaries in a way capable of fostering the creative autonomy of *all* authors – be they downstream or 'original,' developers of generative algorithms or their users.

Through this lens, the conditions under which human-machine collaborations *should* enjoy copyright protection become clear (see Figure 6.3). These conditions are not defined by whether or not ‘unauthorized copies’ are used to train generative AI platforms, nor even by this technology’s potential to produce plagiarized or derivative output. They do not rest on an understanding of all copies as compelled speech divorced from the context of their use, nor do they seek to address harms that necessarily fall outside of copyright’s ambit. Rather, these conditions are inherently linked to author-users’ subjective intent; intricately bound to the steps they take to exert their creative autonomy and ‘give form to the meaning of being;’ to their pursuit of genuine dialogue *by, for, and through* the ‘other’ in this new and emerging context.

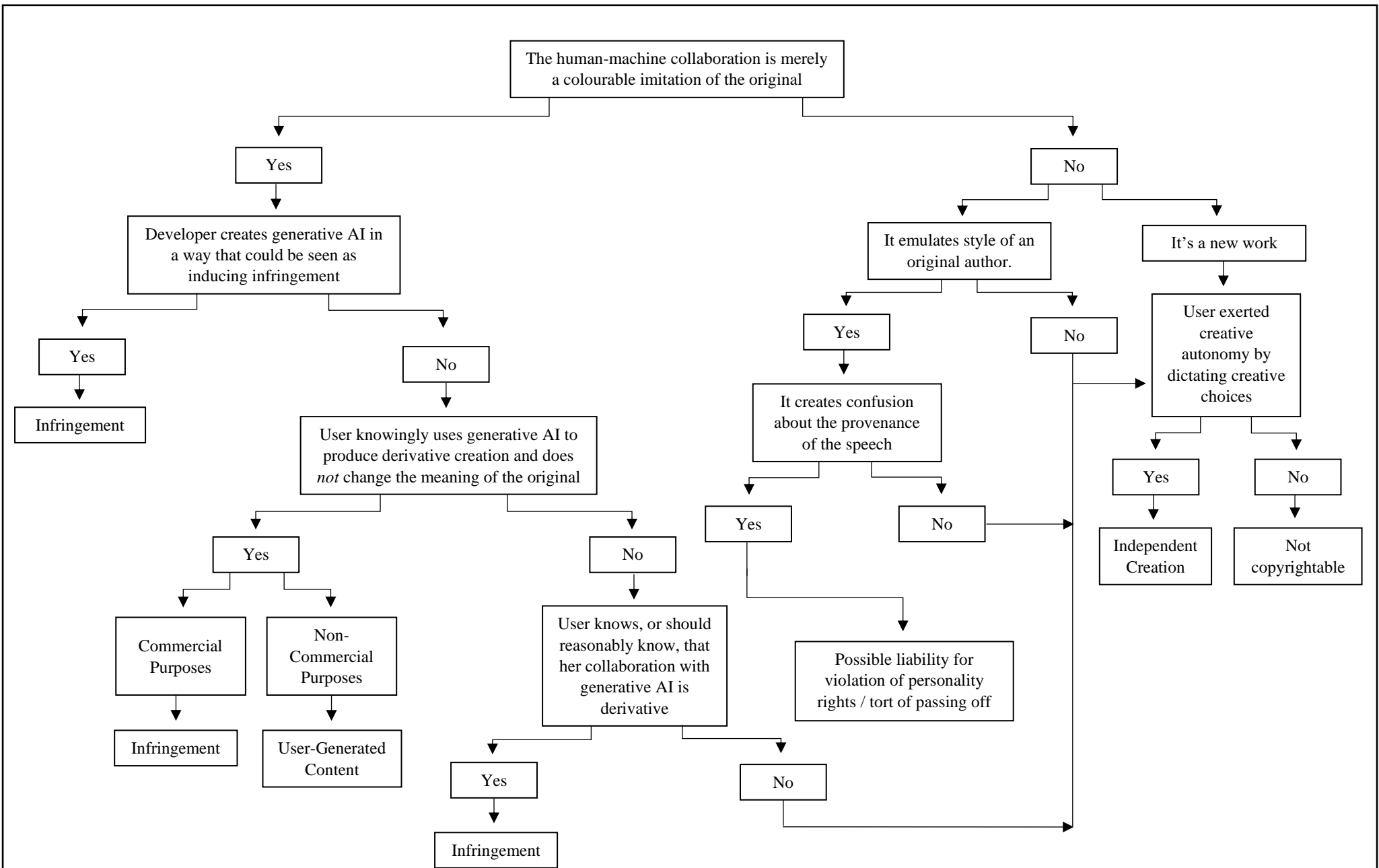


Figure 6.3  
A Taxonomy of Copyright in Human-Machine Collaborations

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