The Judicial Paintbrush:

The Ongoing Evolution of Copyright Law and its Relationships with Creators, Corporations, and Artificial Intelligence

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Author Biography

Lauren Elscott is a fourth year legal studies major and electronic music minor at the University of California, Santa Cruz. Her interest in intellectual property law stems from her lifelong involvement in music and close collaborations with local musical artists. She is also involved in the UCSC arts program, working as a House Manager for theater and music events on campus. Whenever possible, Lauren attempts to incorporate her interest in music into her legal studies degree. After graduation, Lauren hopes to continue the combined pursuit of legal studies and art, either through law school or an alternative route.

Dedicated to my mom, whose diligence towards everything she does inspires me everyday, and to my dad, who still lets me use his recording equipment even though I broke his microphone.

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Preface

This project is the culmination of the work I've been doing during my undergraduate degree, and the topic lies at the intersection between my major in legal studies and minor in electronic music. My work in a creative field means I have seen firsthand and directly experienced the interactions between copyright and creativity. I've also been witness to an impending feeling of doom in creative fields following the increasing advancement of generative artificial intelligence. The knowledge that copyright has the potential to be reworked extensively because of AI has always been a point of interest for me, and this project was an opportunity to learn more about the topic, and about the artists who will be impacted. I began my research with a wide array of research questions having to do with the interactions of artists and copyright law: How has copyright shaped what elements of artistic work are deemed valuable? Additionally, how does copyright shape creativity? Has litigation played a role in shaping copyright? If so, who are the major players pursuing litigation? How does copyright law help/harm creators, and who are the winners and losers of copyright?

I set out hoping to find a black-and-white stance to the ongoing tension between innovation vs. preservation of original work, but I completed this paper holding even less of a clear position than I started out with. This debate is incredibly nuanced, and my paper is an attempt to understand and sympathize with both sides of creativity, while understanding and dissecting the forces that mold copyright law, and by extension, creative works. I engaged in a lot of self reflection over the course of this project. I realized how impacted my own creative process is by copyright law, without even realizing it, and how artistic material that is infringeable informs my own view of what is "valuable" in an artistic work. This project

challenged the notions I have held about what constitutes creativity, and what constitutes an artist.

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Introduction:

Refik Anadol's massive, generative AI art exhibits draw in large crowds. *Echoes of the Earth: Living Archive* uses his studio's Large Nature Model algorithm, trained on billions of images, to create sweeping, colorful installations, intended to inspire awareness about climate change (Brewer). Kelly Mckernan is a creator on the opposing side of the AI debate - upon discovering that their art had been used without permission or compensation to train AI image generators, Mckernan was among three artists who filed suit against an AI company (Noveck). The advent of Generative AI raises complex questions. Does safeguarding Mckernan's work curtail the creativity of artists like Anadol? Does Anadol's work even constitute creativity? If so, which work is more worthy of protection? This distinction hasn't been made yet, but it will be determined at the hands of the interpretation and use of copyright law. The creative process exists in a complex entanglement with copyright law in the United States. By marking creative boundaries, copyright exerts power over creators and their works, especially following the advent of a new technology. Providing adequate protection while avoiding stifling innovation is a delicate balancing act that deserves careful consideration of multiple sides, before new copyright norms solidify forever. If copyright history repeats itself, the interests of major corporations will exert the most control over copyright laws, undermining the interests of artists.

First, I will trace the development of copyright at the hands of corporate interests, with a specific focus on the musical copyright landscape. Then, I will examine how the boundaries of copyright can dictate creativity, to emphasize the impact that redrawing those lines may have on creators. Finally, I will relate these past disconnects to the very recent complications concerning AI and copyright law, and identify individuals and groups attempting to enact new copyright norms through litigation.

An Overview of Copyright and Artificial Intelligence

All copyright roads in the United States lead back to the Constitution, whose copyright clause aims to "promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventor the exclusive right to their respective writings and discoveries" (Article I, Sec. 8, Cl 8). A constitutional recognition of copyright enables Congress to pass laws that dictate its terms. In practice, copyright is constantly met with evolving external circumstances. Technological advances introduce new ways to infringe copyright. In response, copyright laws are altered through new laws or new judicial interpretations, though the 1976 Copyright Act remains copyright's modern basis. The most recent of these pivotal moments, and perhaps the most drastic ever, is the advent of artificial intelligence.

Generative models of artificial intelligence refer to networks that are trained on preexisting information, such as images, and produce their own output based on these inputs (Gillotte 2660). Generative AI has the potential to completely upturn intellectual property law because it threatens to redefine the bottom line of copyright: creativity. Suddenly, it is unclear what constitutes an artistic piece. It's unclear who, or *what* constitutes an artistic creator. The future of copyright law is subject to a tug-of-war from several competing interests, and lawsuits are already attempting to shape it in their favor.

The Development of Musical Copyright Law

The topic of generative AI copyright exists in a broader ecosystem of copyright development, corporate interests, and emerging technologies. In this section, I will contextualize AI's position in this ecosystem by providing an overview of the development of copyright law in the United States, with a focus on its tendency to bend towards corporate interests. Analyzing the progression of copyright laws in the music industry is suitable to represent this entanglement

because it includes fast-moving technological advancements and major growth in corporate interest, particularly following the introduction of recording technology at the turn of the 20th century. I will use this historical context to demonstrate how and why big corporations exert influence over copyright, as well as examining how litigation has been used as a tool to uphold their interests.

From their constitutional origins, copyright laws in the United States were relatively lax. Early copyright offered protection for only twenty eight years, and copyright terms remained "significantly shorter than those of other nations until 1976" (Cummings 662). Copyright law in the United States prioritized ideas of free competition, commercial incentive, and public access (Cummings 662). Musical copyright was established under these values in 1831 with the implementation of legal protection for sheet music. By the turn of the century, the commercialization of the phonograph, which permitted sound recordings, warranted a legal response. This is an ongoing theme in copyright law - new technologies create incentive for new approaches in copyright. Indeed, in addition to other reforms, the landmark 1909 Copyright Act guaranteed composers the right to control the first recorded mechanical reproduction of their work; other reproductions were permitted but required a flat rate fee to the composer (or to whoever owned the compositional rights). However, the recording itself could not receive copyright protection (Cummings 664).

As the music industry expanded throughout the 20th century, the law embarked on a gradual shift towards strengthening protections for existing musical recordings, mirroring an expanding commercial incentive to protect musical works from piracy. These shifts eventually consolidated into major legal changes in the 1970s. In 1971, copyright expanded to encompass musical recordings (Cummings 659), followed by the Copyright Act of 1976. Both were major

victories for the recording industry. Copyright was being rewritten as a “safeguard for capital investment and an impetus to economic growth rather than a limited incentive for artistic creation" (Cummings 661). Whether these changes were ultimately to the benefit or detriment of the small artist is complicated. However, it is clear that the artist’s interests were not the main consideration behind shifting musical copyright norms.

Indeed, musical copyright expansion took place at the hands of corporate interests. In analyzing key developmental moments, it is obvious that the “Goliaths" of the music industry were the major players promoting the shift that resulted in the changes in the 70’s, and still continue to exert control. Scholars have identified at least three areas that corporate capital has exerted control over intellectual property laws, which were “extending the term of copyright, narrowing the arena for fair use, and creating brand-new intellectual property rights" (Garofalo 348). In the case of musical copyright, the threat of piracy is a main motivator for corporations to pursue a tightening of copyright, and their shield against piracy is lawsuits.

Litigation has historically been used by major players in the music industry to shape copyright norms in their favor. At the heels of new technologies that ease access to music are lawsuits from big corporations who feel threatened. Following the introduction of the Rio, one of the first consumer MP3 players, the Recording Industry Association of America (RIAA) immediately filed suit against the manufacturer (Garofalo 350). Shortly after its release, the early streaming platform Napster was torn apart from lawsuits brought by major record labels who were threatened by the prospect of losing CD sales (Ku 287-292). In doing so, these companies weren’t just protecting their immediate interests; their utilization of the law played a role in shifting the general norms of copyright protection. Albiston and Leachmen emphasize indirect effects of the law that span beyond its initial direct effects, specifically when considering social

change (Albiston & Leachman 543). Litigation doesn't always just lead to one direct outcome; its indirect effects can be widely encompassing, and companies with resources and legal power like the RIAA are able to use litigation to mold long-term outcomes in their favor.

As a legal principle, copyright is intended to protect and inspire the creator, but the uneven power balance of litigation can create skewed results in practice. This isn't a unique phenomenon; scholars have long grappled with the validity of litigation as a method for social change in the United States. Scholars with a pessimistic view on the court's capacity to produce social change critique the judicial system's tendency to embrace the status quo or bend towards the group with the most resources (Rosenberg 796). Copyright in the music industry exemplifies Rosenburg's stance; the law and courts can override artists' interests in favor of corporate status quo. This system has social repercussions: by shaping copyright norms, companies have a powerful role in influencing the scope of creativity available to artists in the United States. Identifying the skewed nature of copyright litigation in artistic fields is relevant to the current conversation surrounding generative AI. Groups who have the most resources to litigate, lobby, and command the law in their direction are capable of controlling the future of artistic protection. It's important to consider who these groups are, and whose interests they are aiming to protect.

Creativity's Entanglement with the Law: Innovation vs. Preserving Ownership

The point where copyright lines are drawn has impacts on creators. Copyright can enhance or stifle an individual's creativity; it can also favor a certain type of creativity over another. The control that bigger voices and corporate interests exert over copyright means that interests of smaller creators and their interests are often underrepresented or sidestepped. In this section, I will focus on the interactions between copyright law and the entity it was created to protect: creators, to demonstrate the influences that copyright can have on their creative works. I

will examine how copyright norms favoring Western musical styles developed and manage to persist, and how this concept impacts musicians and their creative processes. Additionally, I will describe how copyright fails to protect creators on the cusp of innovation, and relate these ideas to the onset of AI.

Although there are no official boundaries designating what constitutes a copyrightable musical work, a series of judicial decisions at the early stages of the modern music industry have successfully managed to shape what elements are able to receive protection. An emphasis on melody as the most copyrightable element has been consistently reinforced in court, to the point it's become a norm in the industry. In *White Smith Music Publishing Co. v. Apollo Co. (1908),* the supreme court pointed to the melody as the "real invention of the composer." A year later, in *Hein v. Harris,* Judge Hand employed a "comparative test," where copyright infringement was determined based on how closely two melodies aligned (Fishman 1879-1880). In comparison to melody, musical traditions that center other musical elements, like rhythm or improvisation, don't receive the same amount of copyright protection (Garofalo 323). Genres pioneered by black artists in particular are less susceptible to adequate protection; centering the melody as the most protectable element has "discounted and discriminated against wide swaths of [black] artists' creativity" (Fishman 1916). A western-music centered idea of protection is widely-recognized as flawed and outdated among scholars, yet its existence has been excused as being a predictable and straightforward way for artists to predict infringements. Essentially, this copyright norm is too deeply entrenched to take back.

Impacts of a Western-centered Copyright System

Creators that don't fit within a western-musical standard have historically suffered negative impacts. In addition to the bias of melody, there are multiple standards and norms in

copyright that have contributed to the exclusion of artists, particularly black artists. Prior to changes in 1976, copyrighted music was required to be in written form (Greene 380). As a result, improvisation, a technique that is tied to African oral traditions, was incredibly difficult to copyright. Greene highlights jazz music and african-american dancing, both built on improvisation and dominated by black artists, as two genres that suffered a lack of protection due to difficulty notating music (Greene 379). Another barrier preventing artists from receiving adequate protection is the law's bias to only extend protection against the copying of certain musical moments, rather than imitation of a vibe or genre as a whole. As a consequence, black artists, who have been historically and repeatedly imitated, typically can't claim infringement unless a direct musical element like melody is copied, even if a clear imitation of style occurred. Greene details how "many of the innovators of [blues, jazz, and rock] lived or died in relative obscurity and poverty, while the imitators, typically white and not nearly as creative or innovative musically, reaped a windfall" (Greene 383). The specific ways in which copyright lines are drawn can have significant consequences, especially when a creator's work is their livelihood.

While there have been some recent successful litigative attempts to counter these western-music centered norms, for the most part, musical copyright continues to extend its shield solely around its own status quo. *Williams v. Gaye* (2015) was an isolated successful counter to these traditional frameworks. The decision ruled that Robin Thicke's *Blurred Lines* infringed on Marvin Gaye's *What's Going On* based on the elements that weren't melody; instead, stylistic elements of *Blurred Lines* were found to be the site of infringement (Fishman 1864). However, despite explicitly counteracting the status-quo, instead of opening the *beyond melody* copyright flood gates, the cases that emerged as a result of *Williams v. Gaye* were a return to melody

norms. Ed Sheeran was sued unsuccessfully by the Townsend estate in 2023 under very similar circumstances. Like *Williams v. Gaye,* the Townsend estate claimed that Sheeran's *Thinking out Loud* infringed on non-melodic elements of Townsend's *Let's Get it On,* such as the song's chord progressions and rhythmic patterns. However, unlike *Williams v. Gaye,* the court leaned in favor of Sheeran, towards the traditional melody-centered status quo (Sisario). Instead of producing a transformative change as some would have hoped, the *Williams v. Gaye* case appears to be a one-time disruption of the copyright status quo. Once in place, the norms created by litigation are difficult to change.

These cases exemplify two classic competing interests of copyright law: the innovator and the owner. It is easy to sympathize with the *Townsend* and *Gaye* estates' positions, especially while contextualizing them within a biased copyright system. However, too much copyright is stifling. The fear of a loss of innovation was a major concern of the Sheeran case. The potential to permanently gatekeep a widely used chord progression raised worries of "removing essential ingredients from every songwriter's toolkit" (Sisario). How many elements of a work can be protected before no new artistic work can be created at all? Where is the line between protection and innovation? This question takes center-stage in recent AI debates. Both positions need to be considered.

On Musical Sampling

In addition to leaving out creative elements that don't fit within its western music-centered bias, copyright law has a tendency to leave out creativity that is on the cusp of innovation. This is exemplified in copyright's failure to respond to the popularization of musical sampling. Sampling refers to cutting excerpts of pre-existing music into original work. Despite a massive surge in popularity of sampling in the late 20th century, copyright law failed to

accommodate these new creations; instead, the enforcement of copyright law and lawsuits from labels and artists prevented new artists from using samples (Sharma 9). Despite sampling originating in its economic advantages and ease-of-access, the viability of using samples is based on the creator's economic resources, either to clear permission to use samples or to face a lawsuit (Sharma 9). This disconnect between creator and copyright ties in with Rosenburg's critique of the court system as facilitating privileged interests (Rosenberg 796). Rather than promoting the progress of their art, copyright is a stifling force on the small artist who wants to use samples but can't afford to be sued. If the Gaye and Townsend estates' cases represent the interests of preserving the works of original creators, focusing on artists who use sampling as a means for creativity presents an opposing perspective. Both are under the control of copyright law.

The technique of musical sampling plays a unique role relative to artificial intelligence because the two concepts are inherently similar. Sampling is the "utilization of an original [music] work recreated artistically into something new" (Sharma 9). AI art functions in a similar way, just on a larger, less visible and non-human scale. When faced with a potential upturning of copyright law, sampling is a relevant consideration. If sampling, an all-human creative process, can't bypass legal restrictions, how can generative AI?

Interactions between AI and Copyright Law

In this section, I will examine the very recent controversies concerning AI's interactions with copyright law. I will give a brief overview of generative AI, machine learning, and artificial intelligence, then explain the potential ways generative AI fits, and doesn't fit, within existing copyright frameworks. Finally, I will discuss court cases from artists on opposing sides, each attempting to mold the future of copyright law in the favor of their interests and methods of creativity.

Artificial Intelligence, Machine Learning, and Generative AI in Artistic Fields

Generative AI is a type of artificial intelligence that uses a machine learning model. Artificial intelligence is a broad term that describes a field in computer science where machines perform tasks mimicking human intelligence (Gillotte 2660). Machine learning is one of several subfields of artificial intelligence. The "intelligence" aspect of artificial intelligence doesn't appear out of nowhere; it is derived from existing human creativity. In a machine learning system, rather than being explicitly programmed to complete specific tasks, computers learn from patterns in large data sets. The program can revise its algorithm based on the input from data sets and improve its performance over time (Gillotte 2660). Generative AI is distinct from other machine learning programs because it produces a unique output based on the datasets it receives.

A Generative Adversarial Network (GAN) exemplifies how generative AI can replicate human creativity through two networks. One network uses generative AI to produce a random output based on random data, and another uses a discriminative model to determine if this output is generated or real. The two networks compete with each other, improving the overall performance of the GAN and steering the output of the generative network closer and closer to one that mimics reality (Gillotte 2662). The GAN model is one among several recently emerging generative AI models capable of producing outputs that look incredibly similar to a direct product of human creativity. These outputs can take on several forms, including music, images, artwork, and videos. Generative AI is on a rapid upward trajectory and its capabilities will only continue to expand. The speed of generative models' development and the application of open source practices allowing widespread use has pushed AI art well past the existing reach of copyright. Generative AI creations are taking place in an uncharted copyright

frontier without laws that impose limits on them. With each step in AI advancement, the Copyright Act of 1976 becomes more and more outdated, and different interests are scrambling to stake claim on a new age of copyright law.

Interactions between AI and Existing Copyright Frameworks

Generative AI poses several complications towards existing frameworks in copyright and copyright infringement. There are two general areas of concern: if and how works generated by AI can be copyrighted, and if using copyrighted data used to train AI constitutes an infringement. If works created by generative AI programs can be copyrighted, and copyright continues to exclude non-humans, scholars cite four potential copyright holders: "(1) the computer programmer, (2) the computer user, (3) both the programmer and the user as joint authors, or (4) simply no one" (Gillotte 2667). Each of these outcomes would produce a significantly different result for AI creation because they incentivize different stages of the creation process. AI companies would benefit from a programmer copyright, and scholars place this potential within a "work for hire" model (Gilotte 2667), but it wouldn't directly incentivize new users to create, sidestepping the constitutional purpose of copyright as "promot[ing] the progress of Science and useful Arts" (Article I, Sec. 8, Cl 8). Distinguishing the user as a copyright holder would fit neatly within these constitutional parameters, but the average user doesn't have as many resources or stake in shaping copyright laws as an AI company. That being said, one of the biggest distinctions being made right now is whether AI generated works should be copyrightable at all. Designating a work as "copyrightable" is a valuable nomination in art. The naming of melody as the most copyrightable element of a work contributed to the ongoing idea of its supreme value in a musical work. This distinction may

set generative AI on a long-term path of being understood as real, valuable art. The lack of a copyright distinction may contribute to the opposite ideal.

In addition to outlining copyright parameters of new AI works, the other main area of contention in the AI copyright debate is determining where the boundary lines of copyright infringement should be drawn. Generative AI creates outcomes based on pools of pre-existing human work. What happens when this work is already copyrighted? Generative AI's clearest offense for infringement is its creation of a digital intermediate copy of the data it learns from (Zirpoli 3). Copying a copyrighted work seems like clear grounds for copyright infringement, but the fair use doctrine may be used as a tool to shield generative AI. The fair use doctrine grants work that would otherwise be considered infringing as non-infringing based on four holistically weighed factors: (1) the purpose and character of the new use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use on the potential market or the value of the protected work (*Limitations on Exclusive Rights: Fair Use* 1976).

At the heart of determining if generative AI constitutes fair use is determining whether its use is transformative. This is the claim employed by AI companies engaged in ongoing lawsuits. The New York Times is suing Microsoft and OpenAI for using New York Times articles as data for generative AI models. In a statement written to the filing office, OpenAI outlined their intention to use the fair use argument as a defense, stating "We believe that the training of AI models qualifies as a fair use, falling squarely in line with established precedents recognizing that the use of copyrighted materials by technology innovators in transformative ways is entirely consistent with copyright law…"(Lonham 2023). A decision for this case in either direction will be a substantial ruling for post-AI copyright law. AI companies would

significantly benefit from the distinction of data used for training generative AI as fair use. This outcome would be a novel step forward in favor of the "innovator."

If AI is deemed transformative, why weren't techniques like sampling, which employ a similar creative method, considered transformative use? Reworking a preexisting musical sample into a new, transformative role would seem to require more human creativity than prompting generative AI to produce an output; shouldn't the input more creativity have a higher value under copyright law? A key difference distinguishes these two scenarios: the interests of sampling were largely concentrated in the smaller artist, whereas the interest of generative AI as fair use is backed by several major AI companies. Gloppen analyzes the likelihood of initial legal mobilization through her legal opportunity structure, and acknowledges the existence of a threshold to enter the legal system. When approaching legal mobilization, "significant time and costs are involved, as well as complex rules and legal language requiring litigants to consult legal expertise, and long-winded appeals procedures to have the case heard in a higher court" (Gloppen 299). Although sampling is similar in structure to artificial intelligence, artists who would have benefited from a similar fair use approach to sampling would likely fall short due to the litigative red tape. Their prominence, resources, and power to litigate allows AI companies, as well as other litigation-capable corporations like the New York Times, to play a role in shaping the boundaries of copyright.

A potential obstacle OpenAI may face while attempting to place generative AI under the fair use umbrella is the doctrine's fourth point: the level of disruption that the new work imposes on the market or value of the initial work. Scholars in favor of designating generative AI as fair use claim that generative AI work does not violate this fourth point because the markets for AI and traditional artwork don't overlap. One argument is that "...consumers of art

are likely to value owning an original work of art rather than a reprint or a computer-generated piece that resembles or recalls the original." (Gillotte 2688). This would be an ideal scenario for all parties if true. However, it is a glorified and inaccurate painting of reality that is only applicable to a small pool of bigger artists. The small artist whose name isn't the selling point of their work directly competes with the AI models that use their art as learning data. This unfair situation is the driving force for the artistic creators involved in an ongoing lawsuit against AI companies. A complaint in this case filed on behalf of several artists directly states that AI works are "damaging the market for Plaintiffs' artwork and labor, and the art market more broadly" (Saveri et al. 3). This directly contradicts the scholarly assumption that the two don't overlap. Generative AI has real impacts on artists, and without a copyright safeguard to prevent their work from being recycled by a force they can't control, their incentive to create may be stifled.

Litigative Attempts from Artists

Despite holding less stake in its development, small artists are on the receiving end of significant impacts from changes in copyright law. Copyright norms and law place boundaries on their creativity, impacting the parameters of their work. In addition to corporate lawsuits shaping early AI norms, litigation is the preferred route of copyright change for several artists on both sides of the generative AI debate. Examining opposing litigative attempts from artists to mold the future of copyright highlights the familiar tension between innovator and original artist that consistently reappears in copyright debates. Original artists are seeking to safeguard their work from the claws of AI; AI artists seek a rewriting of copyright that embraces artificial intelligence. I will examine two cases on either side of this debate to explore artists' interests in establishing lasting norms and shaping future outcomes of copyright law and creativity.

Kelly Mckernan is one of ten artist plaintiffs currently involved in a class action lawsuit against three AI companies: Midjourney Inc, Stability AI, and DeviantArt Inc. Each artist in this case alleges that their artistic works were used without their permission to generate AI outputs. The amended complaint on behalf of the artists presents hundreds of examples of their copyrighted works that were used to train generative AI programs (Saveri et al. 97-239). This is an example of a litigative pull from the "original artist" side. Existing copyright isn't a stifling force for these artists; it is an incentive and safeguard for their preferred method of creation. The more that copyright bends in favor of AI, the more their work gets drowned out. The complaint emphasizes these concerns, describing how "AI image products are primarily valued as copyright-laundering devices, promising customers the benefits of art without the costs of artists" (Saveri et al. 6).

Although smaller artists don't inherently have as much litigative power as the corporations involved in molding copyright law, they are supported by a hesitancy, at least within artistic spaces, to relinquish art to artificial intelligence. The aid of popular opinion adds strength to the artists' litigative pull. In an IFPI survey of 43,000 internet users, 76% of participants agreed that an artist's work should not be used for AI without permission. Additionally, 73% agreed that an AI system should clearly list any music that it has ingested or used for training (IFPI 11). Gloppen describes how litigant actors can have varying views of the opportunity structure for litigation depending on the resources at their disposal, which include "...their numerical strength, public support, and political connections" (Gloppen 301). Understanding that they have a reasonable amount of public support on their side may positively impact the artist plaintiffs' views of their own opportunity structures and chances of success in court.

There are also litigative attempts from AI artists to establish copyright protection that is pro-generative AI. After Matthew Allen's AI generated artwork won first place in the Colorado State Fair, his attempt at copyright was rejected multiple times by the US Copyright Office. Allen intends to bring his interests to federal court, and stresses his work's transformative nature, despite the court's dismissal of similar cases (Knibbs). These series of cases represent the "innovating artist" litigative pull. Allen believes the Court and US Copyright Offices' reluctance to provide protection to AI art is "the definition of stifling innovation and creativity, the very thing the copyright office claims to protect" (Knibbs). Regardless of which direction copyright law leans towards, it will be forced to favor one type of creativity over another. These decisions will force either "innovating artists" like Allen, or "original artists" like Mckernan, to alter their methods of creativity and work to fit with the winning copyright structure.

The Future of Creativity?

Reactions to AI art involve strong contrasts. Some perceive it as the antithesis to creativity - it endangers the interests of authentic human artists, like Kelly Mckernan, whose work and livelihood depend on the implementation of copyright protection. Others see it as an open door and an opportunity to expand the creative process - strict copyright laws in response to AI would result in stifling the innovation of AI creators like Refik Anadol, similarly to laws placing restrictions on sampling. However, a common consensus between these two camps consistently breaks through the noise: AI art is inevitable. Additionally, no matter which side copyright settles with, certain creators will end up reaping more benefits than others. The future copyright in a post-generative AI world is still undetermined; we are witnessing the critical initial stages of decision making. The new copyright laws and norms that result (or don't result)

from the ongoing cases and discourses happening right now have the potential to produce real social impacts in regards to art. The groups that play the biggest hand in enacting early litigation will likely create new, long-lasting norms that redefine the state of copyright, and as a result, the state of art, forever. The stakes of these changes should not be underestimated.

References:

Albiston, Catherine R., and Gwendolyn M. Leachman. 2015. "Law as an Instrument of Social Change." International Encyclopedia of the Social & Behavioral Sciences, pp. 542–49.

Brewer, Jenny. "Refik Anadol Hopes to Demystify AI and Look beyond the 'Shiny Pixels' of Generative Art." *It's Nice That*, 21 Feb. 2024, www.itsnicethat.com/features/refik-anadol-echoes-of-the-earth-living-archive-ai-art-spotlight-210224.

Cummings, Alex S. "From Monopoly to Intellectual Property: Music Piracy and the Remaking of American Copyright, 1909-1971." *The Journal of American History* 97, no. 3 (2010): 659–81. http://www.jstor.org/stable/40959938.

Fishman, Joseph P. "MUSIC AS A MATTER OF LAW." Harvard Law Review 131, no. 7 (2018): 1861–1923. http://www.jstor.org/stable/44865916.

Garofalo, R. (1999). From Music Publishing to MP3: Music and Industry in the Twentieth Century. *American Music*, *17*(3), 318. https://doi.org/10.2307/3052666

Gillotte, Jessica, "Copyright Infringement in AI-Generated Artworks," UC Davis Law Review 53, no. 5 (June 2020): 2655-2692

Greene, K J. 1998. “Copyright, Culture & (And) Black Music: A Legacy of Unequal Protection.” *Hastings Communications and Entertainment Law Journal* 21 (2): 339.

Gloppen, Siri. “Studying Courts in Context.” *Closing the Rights Gap*, March 27, 2015, 291–318. https://doi.org/10.1525/california/9780520283091.003.0014.

“IFPI’S ENGAGING WITH MUSIC 2023: Artificial Intelligence Enters the Stage,” 2023.

Knibbs, Kate. 2023. “Why This Award-Winning Piece of AI Art Can’t Be Copyrighted.” Wired. September 6, 2023. https://www.wired.com/story/ai-art-copyright-matthew-allen/.

Ku, R. S. R. (2001). The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.266964

Limitations on Exclusive Rights: Fair Use. 1976. Vol. 17 U.S. Code § 107.

Lonham, Fred von. 2023. “Re: Notice of Inquiry and Request for Comment [Docket No. 2023-06],” October 30, 2023.

Noveck, Jocelyn, and Matt O’Brien. “Visual Artists Fight Back against AI Companies for Repurposing Their Work.” KQED, August 31, 2023. https://www.kqed.org/arts/13934119/artists-ai-lawsuit-artificial-intelligence-stable-diffusion-deviantart.

Rosenberg, Gerald (2005). “Courting Disaster: Looking for Change in All the Wrong Places”. *Chicago Unbound*. University of Chicago Law School.

Saveri, Joseph, Cadio Zirpoli, Christopher K.L. Young, Elissa A. Buchanan, and Travis Manfredi. 2024. Andersen v. Stability AI Ltd.

Sharma, Nitasha. “Down By Law: Responses and Effects of Sampling Restrictions on Rap.” *Political and Legal Anthropology Review* 22, no. 1 (1999): 1–13. http://www.jstor.org/stable/24510842.

Sisario, Ben. “Ed Sheeran Won His Copyright Trial. Here’s What to Know.” *The New York Times*, The New York Times, 24 Apr. 2023, www.nytimes.com/article/ed-sheeran-marvin-gaye-copyright-trial.html#:~:text=In%20a%20closely%20watched%20music,had%20created%20his%20song%20independently.

U.S. Constitution, art. 1, sec. 8, cl. 3.

Williams v. Gaye, No. 15-56880 (9th Cir. 2018)

Zirpoli, Christopher . 2023. “Generative Artificial Intelligence and Copyright Law.” *Congressional Research Service*, September.