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The Future of Art and Copyright in the World of AI

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The law moves and adapts to the necessities of its time. What happens if it ceases to outline the constructs of our society with sufficient precision?

The Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing, for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] The execution of this authority in the form of intellectual property law—copyrights and patents—has promoted American society as one that values entrepreneurship, creativity, and various forms of productive risk-taking.[2] As time has passed and new frontiers of technology emerge, this evolving framework of statutory and case law has served the country well in defining what creators' rights are and where they end.[3] Some, if not all, of the intellectual property rights taken for granted today were once up for debate.[4] For example, there was a time when it was a question whether the work of photographers deserved copyright protection.[5] Today, society knows that when Annie Leibovitz captures a frame, the rights to its reproduction and display belong to

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1 U.S. CONST. art. I, § 8, cl. 8.

2 Richard Epstein, *The Irrelevance of the First Amendment to the Modern Regulation of the Internet*, 23 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 100, 101 (2014) (arguing that property rights are entangled with and have helped shape First Amendment and Copyright law).

3 *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55–56 (1884).

4 *Id.* at 56.

5 *Id.*

her.[6] This understanding is because American courts made an interpretive choice to include photographs within the ambit of copyright law.[7]

This paper focuses on the interpretive framework embodied in copyright law and its application to art-producing technologies, how this framework has been applied to new technologies in the past, and the issues surrounding the adaption of these old frameworks to the modern concern of AI-created art. The paper also considers how the application of copyright law to modern AI issues reflects the law's capability, or inability, to evolve and address novel situations, specifically in relation to AI-based technology. Further, it examines what, if any, steps should be taken to promote courts maintaining a firm grip on copyright protections. The issues surrounding copyright law and AI-generated creations are progressing and will need updating as new concerns arise and litigation commences.[8]

Large language models ("LLMs") are very large and expensive AI systems that are trained on virtually all text that has ever been published online.[9] They are incredibly powerful and have been the starting point for almost all AI projects over the past several years.[10] This paper is concerned with a form of LLMs called Image Synthesis Models ("ISMs").[11] These function as follows:

> When you type in a prompt like, "a painting of a cat by Leonardo DaVinci," the ISM references what it knows about every word in that phrase, including images of cats and DaVinci's paintings, and how the pixels in those images are usually arranged in relationship to each

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6 Associated Press, *Annie Leibovitz Retains Copyright to Her Famous Photos*, FOX NEWS, https://www.foxnews.com/story/annie-leibovitz-retains-copyright-to-her-famous-photos (Jan. 14, 2015).

7 *Burrow-Giles Lithographic Co.*, 111 U.S. at 58–59.

8 *See, e.g.*, Benj Edwards, *Fearing Copyright Issues, Getty Images Bans AI-generated Artwork*, ARSTECHNICA (Sept. 21, 2022), https://arstechnica.com/information-technology/2022/09/fearing-copyright-issues-getty-images-bans-ai-generated-artwork/ (showing one of the largest stock image producers recently bringing light to the issue).

9 Sean Michael Kerner, *Large Language Models (LLMs)*, TECHTARGET, https://www.techtarget.com/whatis/definition/large-language-model-LLM (May 2024). Note, however, that while LLMs are expensive to create, there are free open-source LLMs available. *See, e.g.*, Esther Ajao, *AI Vendor Cerebras Releases 7 Open Source LLMs*, TECHTARGET (Mar. 28, 2023), https://www.techtarget.com/searchenterpriseai/news/365534140/AI-vendor-Cerebras-releases-seven-open-source-LLMs. Also, there are reports that reasonable training of an LLM can be accomplished for around $500,000. *See, e.g.*, Abhi Venigalla & Linden Li, *Mosaic LLMs: GPT-3 Quality for <$500K*, DATABRICKS (Sept. 29, 2022), https://www.mosaicml.com/blog/gpt-3-quality-for-500k.

10 Kerner, *supra* note 9.

11 *The Promise and Perils of Large Language Models*, TWO SIGMA VENTURES (Aug. 4, 2022), https://twosigmaventures.com/blog/article/the-promise-and-perils-of-large-language-models/.

> other. Then it composes a result that combines that knowledge into a new image. [Most models] will never return an exact copy of an image used to train it, but some images might be similar in style or composition to the source material.[12]

You can also think of the model as a translator, except instead of translating from one language to another, it translates from verbal language to images.[13] In practice, there are many ways to encode and decode the semantic content of text and image data, but contemporary models follow this general approach for millions and billions of images and captions.[14] Recently released projects, such as Imagen and Dall E2, show the power of the models while also showing cause for concern.[15] These enterprises use images "scraped" from the internet to produce new images from the descriptions that users input.[16] Essentially, these models take pictures off the internet and use them to train themselves to create new images.[17]

This technology raises a multitude of issues.[18] This comment focuses specifically on the legal issues in the art world arising from the use of potentially copyright-protected images to train the models. More broadly, there are questions surrounding the proper use of, and extent to which, LLM technology should be allowed to advance.[19] For example, LLM technology raises issues of privacy—including whether the models can be properly trained on personal and private data, whether they will be able to differentiate private information from public data, and whether the models spread misinformation (current language-based LLMs simply generate sentences and paragraphs but lack the capacity to fully understand what they produce, and thus, determine whether what they

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12 Benj Edwards, *Have AI Image Generators Assimilated Your Art? New Tool Lets You Check*, ARS TECHNICA (Sept. 15, 2022), https://arstechnica.com/information-technology/2022/09/have-ai-image-generators-assimilated-your-art-new-tool-lets-you-check/; *see also* Sarah Ligon, *AI Can Create Art, but Can It Own Copyright in It, or Infringe?*, LEXISNEXIS (Mar. 1, 2019), https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/ai-can-create-art-but-can-it-own-copyright-in-it-or-infringe (providing a more technical and legally related explanation).

13 *The Promise and Perils of Large Language Models*, *supra* note 11.

14 *Id.*

15 Joe Fedewa, *How to Create Synthetic AI Art With Midjourney*, HOW-TO GEEK, https://www.howtogeek.com/823337/how-to-create-synthetic-ai-art-with-midjourney/ (July 4, 2023).

16 *What Is Web Scraping? How to Legally Extract Web Content*, KINSTA https://kinsta.com/knowledgebase/what-is-web-scraping/ (Sept. 18, 2023).

17 *Id.*

18 James Vincent, *The Scary Truth About AI Copyright Is Nobody Knows What Will Happen Next*, THE VERGE (Nov. 15, 2022), https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data.

19 *See, e.g.*, Kamya Pandey, *AI in the Porn Industry: Exploring the Benefits, Risks and Ethical Concerns*, JUMPSTART (Mar. 31, 2023), https://www.jumpstartmag.com/ai-in-the-porn-industry-exploring-the-benefits-risks-and-ethical-concerns/.

produce is true).[20] This paper will focus on how the world of AI computing will become the new platform for legal issues arising in the art world and how the law must evolve to continue to protect artistic innovation while not stifling technological innovation.[21]

American common law is based on centuries of courts searching for remedies to resolve issues of natural persons experiencing what were often physical harms.[22] Today, we still live in the physical world, but we also inhabit a virtual, immaterial space much larger than the law has been built to accommodate. Now that nearly every creative work has some sort of online presence, what legal rules do—or should—apply to using information (usually copyright-protected information) for these models, and what rules do—or should—apply to the release and usage of these models? Is information on the internet common property of the population that virtually inhabits and enriches it, or is it property of the major companies that produce the technology that make it possible? What does the law have to say about it? Is the law even equipped to answer these questions? *Should* it even be a priority for policymakers to get ahead of these issues?[23]

I. BACKGROUND OF THE TECHNOLOGY AND KEY ISSUES

There are a variety of text-to-image LLM's currently available for public use, as well as more exclusive models available only by paying a license fee.[24] One of the most popular models is Google's Imagen.[25] Imagen allows users to input a simple phrase and obtain a highly realistic image output.[26] The tool was built from a dataset of millions of images that were on the internet.[27] Google has not provided a clear indication of the copyright or licensing status of the images used

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20 *The Promise and Perils of Large Language Models*, *supra* note 11; Karen Hao, *AI Still Doesn't Have the Common Sense to Understand Human Language*, MIT TECH. REV. (Jan. 31, 2020), https://www.technologyreview.com/2020/01/31/304844/ai-common-sense-reads-human-language-ai2/.

21 Vincent, *supra* note 18.

22 *British History, 2: The Origins of Common Law*, UNIV. OF WIS.-MADISON CTR. FOR L., SOC'Y, & JUST., https://www.ssc.wisc.edu/~rkeyser/?page_id=625 (last visited Mar. 5, 2024).

23 *See About Spawning*, SPAWNING AI, https://spawning.ai/About (last visited Apr. 21, 2024) (suggesting members of the art community do not want to promote the expansion of copyright to apply to AI-generated art as the legal framework is outdated and inapplicable).

24 Fedewa, *supra* note 15.

25 *Imagen*, GOOGLE RESEARCH, https://imagen.research.google (last visited Apr. 21, 2024).

26 CHITWAN SAHARIA ET AL., GOOGLE RESEARCH, PHOTOREALISTIC TEXT-TO-IMAGE DIFFUSION MODELS WITH DEEP LANGUAGE UNDERSTANDING 2 (2022).

27 *Imagen*, *supra* note 25.

to train Imagen.[28] This lack of clarity is common in almost all ISMs.[29]

To help understand the problem behind training on data scraped from the internet, consider the dataset that Imagen used to compare the performance of its program to others: Common Objects in Context ("COCO").[30] COCO is a benchmark dataset, meaning that some of the performance scores reported in Imagen's research paper were calculated based on this dataset.[31] COCO was used to benchmark Imagen and highlight its success.[32]

COCO is a consortium of images available to users under a Creative Commons Attribution license.[33] The rights granted by a Creative Commons license range from attribution rights (meaning users can copy, distribute, display, and perform copyrighted works if they give credit to the owner) to public domain dedication rights (meaning all rights to the images are waived by the copyright owners).[34] COCO users are clearly alerted to the fact that COCO and its users do not own the copyrights of the images and are thus subject to the limits of their use.[35] As a result, unless a model is being trained on a data set that exclusively includes public domain images, a dataset will contain images that whose owners assert some control over the permitted usage for each particular image. Each image will potentially vary as to what ownership right the individual owner retainsRecall that the number of images used in a given dataset ranges from millions to billions.[36] Keeping track of and respecting those ownership rights—to the extent that the creator of an LLM/ISM tries to do so—will be no easy task.

COCO is only one example of what the datasets that train LLMs look like. Imagen is also only one example of how these LLMs work. Notably, the creators of both COCO and Imagen have made a great deal of information available about how they were created and trained.[37] Not all creators of LLMs are so forthcoming.[38] For example, one model emerging in commercial popularity is Midjourney, but information about what datasets Midjourney used in its training

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28 *See* SAHARIA ET AL., *supra* note 26.

29 Matt Growcoot, *Artificial Intelligence Companies Aren't Very Transparent, Report Finds*, PETAPIXEL (Oct. 19, 2023, https://petapixel.com/2023/10/19/artificial-intelligence-companies-arent-very-transparent-report-finds/.

30 SAHARIA ET AL., *supra* note 26.

31 *Id.*

32 *Id.*

33 *Terms of Use*, COCO, https://cocodataset.org/#termsofuse (last visited Apr. 15, 2024).

34 *Creative Commons*, FLICKR, https://www.flickr.com/creativecommons/ (last visited Apr. 15, 2024).

35 *Terms of Use*, *supra* note 33.

36 *See, e.g.*, Growcoot, *supra* note 29; *see Creative Commons*, *supra* note 34.

37 SAHARIA ET AL., *supra* note 26; *Terms of Use*, *supra* note 33.

38 *See generally* Complaint, J. Doe v. Github, Inc., No. 4:22-cv-06823-JST (N.D. Cal. June 8, 2023).

has been less available than those seeking to find out would like.[39] This lack of transparency makes it difficult to assess whether or how the creators of Midjourney have addressed concerns regarding the intellectual property rights of the underlying images used to train the model.

This comment focuses on what remedies, if any, are available to artists claiming damage from the use of their work to train ISMs. Consider how easy it can be for a producer of these tools to cross the line from respecting copyright to infringing upon it: all it would take to raise concern is to train a model using a COCO dataset containing images with full attribution rights instead of a strictly public domain dataset.[40] Many modern-day working artists focus the creation and promotion of their art on internet platforms.[41] As ISMs enter the marketplace—offering a set of art-images to anyone with $5 and an idea to manifest—the role of the freelance artist who depends on commissions may simply disappear.[42]

Consider the case of Kris Kashtanova.[43] Kashtanova wrote a comic book, *Zarya of the Dawn*, and used Midjourney to generate the illustrations she wanted and then used for the comic.[44] In addressing whether the AI-generated images should have been granted copyright protection, the Copyright Office concluded that while Kashtanova held the copyright in the "selection, coordination, and arrangement of the Work's written and visual elements," she did not hold the copyright to the images, on the theory that a copyright requires a human author, and here, "it was Midjourney—not Kashtanova—that originated the 'traditional elements of authorship' in the images."[45] As recently as 2022, the art in *Zarya of the Dawn* would have been produced by an artist who would have been paid for their work. If that shift is not terrifying enough to the independent artist, these models are also being trained using *their* art.[46] This issue is at the heart of this comment.

With seemingly unlimited financial resources, presumably some of the best

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39 *Id.*

40 Gopi Krishnan Rajbahadur et al., *Can I Use This Publicly Available Dataset to Build Commercial AI Software?–A Case Study on Publicly Available Image Datasets*, ACM TRANSACTIONS SOFTWARE ENG'G AND METHODOLOGY 13–14 (2022).

41 Complaint at 1, 9, Andersen v. Stability AI Ltd., 2023 U.S. Dist. LEXIS 194324 (N.D. Cal. Nov. 29, 2023) (No. 3:23-cv-00201-WHO).

42 RJ Palmer (@arvalis), TWITTER (Aug. 13, 2022, 9:53 PM), https://twitter.com/arvalis/status/1558632898336501761.

43 *See* Benj Edwards, *AI-Generated Comic Artwork Loses US Copyright Protection*, ARS TECHNICA (Feb. 23, 2023), https://arstechnica.com/information-technology/2023/02/us-copyright-office-withdraws-copyright-for-ai-generated-comic-artwork/.

44 For a description of this case, see Edwards, *supra* note 43.

45 *See* Edwards, *supra* note 43.

46 Complaint at 1, *Andersen*, 2023 U.S. Dist. LEXIS 194324 (N.D. Cal. Nov. 29, 2023) (No. 3:23-cv-00201-WHO).

engineers in the world, and likely constant access to legal advice, one may reasonably assume that Google will produce an ISM that is more legally clear regarding the rights held by the creators of the images in datasets used to train the ISM. Yet, the expectation that Google and other large entities that create ISMs will have a thoroughly researched position regarding the rights of the creators of training images is not necessarily accurate.[47] Even if Google and other large, responsible entities do use sophisticated tools to respect the rights of the creators of training images, there will be less sophisticated tools created by less scrupulous entities with less transparent training models.[48] This side of the issue is already being addressed, with some remedial measures arising for use by the art community.[49] For example, tools like Spawning AI and HaveIBeenTrained allow an artist to run a check on their art to find out if it has been scraped and used in an LLM-training dataset.[50] These tools are clearly useful for artists, but even if they could identify every instance of an image being scooped up in a data-scrape, it would be neither efficient nor fair to require each artist that has ever posted his or her work on the internet to run a check on every piece of work in order to find out if his or her rights have been infringed.

There are also tools for artists to identify themselves as opting in or out of data-set scrapes.[51] Again, these measures are preliminary at best, as there is currently no technical means to require tools of this breed to *only* scrape the parts of the internet that have authorized use of images for ISM training.[52] For these reasons, it is important to know exactly what datasets are being used, how they were assembled (was it an internet scrape?), and how to promote the use of data sets made up exclusively of images that authorize their use.[53] These measures only serve to help an artist find out if their art is being used—whether or not the use is an infringement on their copyright is still at issue.[54]

The Copyright Act grants specific exclusive rights to creators, which at a high level include the dissemination of, profit from, and control of their work.[55] This grant includes the exclusive right to prepare derivative works based on the

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47 *Id.*

48 *See, e.g.*, Matt Growcoot, *Midjourney Founder Admits to Using a 'Hundred Million' Images Without Consent*, PETAPIXEL (Dec. 21, 2022), https://petapixel.com/2022/12/21/midjourny-founder-admits-to-using-a-hundred-million-images-without-consent/.

49 *About Spawning*, *supra* note 23 (demonstrating a tool that assists in searching the text-to-image models' datasets to determine if your art is in it).

50 *Id.*; *Have I Been Trained?*, HAVEIBEENTRAINED, https://haveibeentrained.com (last visited Apr. 18, 2024).

51 Jay Springett, *Permissive IPs*, THEJAYMO (Nov. 19, 2020), https://www.thejaymo.net/2020/11/19/permissive-ips/ (outlining permissive IP protocols).

52 *About Spawning*, *supra* note 49; *see also Have I Been Trained?*, *supra* note 50.

53 *See generally The Promise and Perils of Large Language Models*, *supra* note 11.

54 Vincent, *supra* note 18.

55 *See* 17 U.S.C. § 106.

original.[56] If an artist has ownership control over derivative versions of their work, it would be an infringement on their Copyright protection for their work to be used to create a derivative work without them receiving any notice, royalties, or even acknowledgement.[57] This protection, however, is subject to the Fair Use exception outlined in 17 U.S.C. § 107.[58]

Section 107 states that the rights granted by copyright do not extend to "Fair Use" of the copyrighted work and identifies four factors relevant to determining whether the use is "fair" and thus a non-infringement.[59] Fair Use allows secondary works to be created using the copyrighted originals, as long as those secondary uses are considered permittable, generally with reference to the four factors identified in the statute.[60] Under current case law, a Fair Use determination turns on whether the secondary work is a derivative or a transformative work.[61] A transformative work is Fair Use, while a derivative work is an infringement.[62]

A related issue discussed below in Section II(a)(iii) is the matter of who owns the copyright of the image generated by the ISM. If someone puts in a phrase describing a desired image, and the ISM creates the image, does the person who put in the prompt own the image, or does the ISM (or *its* creators/programmers/owners) own the resulting image? Is this analogous to a person using a camera to capture a photograph? Clearly, an ISM does a lot more work than a photographer's camera—should that mean artists using an ISM as a tool cannot not own the art they make? Is it more analogous to someone asking a photographer to take an interesting picture showing a specified topic or theme? This is already a source of controversy within the art community because it is clear to users that these questions do not yet have a definitive answer.[63]

There has been some guidance on the issue of who—the human or the computer—will own the output. In an early 2022 decision, the U.S. Copyright Office made clear that no registration (and by implication, no copyright protection) will be given to works that are missing the element of human authorship, because an AI cannot be a copyright holder.[64] Accordingly, a

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56 *See id.*
57 *Id.*
58 17 U.S.C. § 107.
59 *Id.*
60 *Id.*
61 *See infra* Section II.
62 17 U.S.C. § 107; *see infra* Section II.B.
63 Benj Edwards, *Fearing Copyright Issues, Getty Images Bans AI-generated Artwork*, ARS TECHNICA (Sept. 21, 2022), https://arstechnica.com/information-technology/2022/09/fearing-copyright-issues-getty-images-bans-ai-generated-artwork/.
64 Franklin Graves, *Thaler Loses AI-Authorship Fight at U.S. Copyright Office*, IPWATCHDOG (Feb. 23, 2022), https://ipwatchdog.com/2022/02/23/thaler-loses-ai-

seemingly firm initial foothold in the matter is that it is either the artist or the owner/creator of the ISM who will hold the right to the outputs.

From this perspective, the copyright landscape surrounding the use of these tools may look something like Google licensing the use of Imagen or OpenAI licensing the use of DallE2, in the same manner that Adobe currently licenses out Photoshop to users for a fee.[65] The difference, of course, is that Adobe does not own the fruit of the labor of its Photoshop subscribers, even though those subscribers utilized Photoshop to create their images.[66] Since these outputs of ISM like Imagen and DallE2 are themselves a new breed of art, it is much murkier who—the human using the tool or the humans who wrote it—contributed what. This creates an issue as to *which* human the law will recognize as the one to have contributed the "input or intervention from the human author" necessary to hold a copyright, and courts do not have a straightforward answer.[67]

II. APPLICABLE CASE LAW

As the doctrine stands now, determining whether the use of copyrighted works to train Image Synthesis Models constitutes copyright infringement of the individual works depends on whether the *use* of the works to train the models is considered *Fair Use* of the artworks.[68] If the outputs are found to be transformative, and thus a form of Fair Use, then the use of the original works (the images scraped from the internet) in training AI models will likely not constitute an infringement of those works.[69] According to current copyright precedent, the Fair Use question is analyzed by considering whether the outputs are transformative secondary works, or if they are derivative works.[70] The

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authorship-fight-u-s-copyright-office/id=146253/.

65 *See e.g.*, Alex Leilacher, *Lensa AI Review: Everything to Know About the Photo App*, BEINCRYPTO, https://beincrypto.com/learn/lensa-ai-review/ (May 12, 2023); *Image Use Rights*, ADOBE, https://www.adobe.com/legal/permissions/image-notice.html (last visited Feb. 19, 2024).

66 *Image Use Rights*, *supra* note 65.

67 Edwards, *supra* note 43 (quoting U.S. Copyright Off., Zarya of the Dawn, Opinion Letter, at 8 (Oct. 28, 2022)); Graves, *supra* note 64.

68 17 U.S.C. § 107.

69 *Id.*

70 This is because of the transformation-heavy analysis that has been drawn from Supreme Court analysis. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994); *see also* Google LLC v. Oracle America Inc., 141 S. Ct. 1183, 1202–03 (2021); *see* Brief of Professor Terry Kogan as Amicus Curiae in Support of Respondents at 1–2, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (No. 21-869). One can imagine a very technical argument that creating and maintaining a copy of a scraped image to train the ISM is a violation of the copyright in that image if done without appropriate permission, even when the output of the ISM itself is held to be transformative and thus Fair Use. Even if a human artist is inspired by an already-existing copyrighted work to create something transformative, that would not give her the right to, for example,

following cases illustrate how courts have applied the four Fair Use factors, why the analysis is so transformation-oriented, and where the Fair Use analysis may be headed in the near future.[71]

A. Key Issue Descriptive Cases

1. Aims of Copyright and Its Intersetion with Technology

Copyright, creative inspiration, and the use of technological mediums intersect to create legal disputes. Aside from the inherent complexity of technology-enhanced-and-mediated artistic creation, Fair Use determinations are highly fact-specific, and as a result, situations that are in some ways broadly similar may yield different results.[72] The evolution of copyright protected photographs highlights this inconsistency in the law. In *Rogers v. Koons*, professional photographer Art Rogers brought suit against artist and sculptor Jeff Koons for his sculptural reproduction of a Rogers photograph without Rogers' permission.[73] Koons' sculpture was an almost exact recreation of what was depicted in the original photograph.[74] Koons' defense to this rare case of direct copying was that the simple representation in the photograph of a couple holding a litter of puppies was an idea (which is uncopyrightable), something that could be imagined by anyone, and in the common domain of all people.[75]

The Second Circuit recognized in *Koons* that, although ideas are indeed "the inheritance of everyone," the unique expression of this particular idea by Rogers' capturing it with a camera in the specific way that he did fell within copyright protection.[76] The court made clear that Fair Use draws the line between inspiration from an existing work—which is permitted—and direct copying of an existing work—which is infringement.[77] The court found that Koons' sculpture was infringing because it copied the details that originated from Rogers' contribution (such as posing and shading) to the original

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take a photograph of the already-existing work hanging in a gallery next to a sign saying "No photos allowed." The discussion in this article assumes that the mere copying of the images used to train the ISM is not problematic.

71 *See generally Andy Warhol*, 598 U.S. 508 (2023).

72 *See* Brief of Prof. Terry Kogan as Amicus Curiae in Support of Respondents at 9–10, *Andy Warhol*, 598 U.S. 508 (2023) (explaining Fair Use analysis is very fact-specific and should not necessarily be applied across different mediums).

73 Rogers v. Koons, 960 F.2d 301, 303, 305 (2d Cir. 1992).

74 *Id.* at 308.

75 *Id.*

76 *Id.*

77 *See* 17 U.S.C. § 107.

photograph.[78] Koons' "inspiration" defense was unsuccessful because his sculpture was not merely a recreation of the idea captured in Rogers' photograph (a couple holding dogs), but an "identical expression of the idea that Rogers created."[79]

The Second Circuit used an "ordinary observer" standard to determine if the two expressions (photograph and sculpture) were identical, which exemplifies the generally agreed upon concept that copyright protects the *expression* of a particular idea, rather than the idea itself.[80] This concept remains applicable no matter what medium of creation is being adjudicated.[81] However, the ordinary observer standard is not always the relevant test, as will be discussed below.

As applied to AI image-generators, outputs do not always cross the line from inspiration to copying—in most cases, it would likely be impossible to tell whether any one image was used in training the ISM simply by looking at the output.[82] However, the issue does not end there. This is only one example of how an analysis of an infringement across different mediums applies to the AI-image issue. The issue here is that images are scraped from the internet then used to build text-to-image models, the outputs of which will make images from which the models' creators and the person using the models will both profit. The fact that outputs are not exact copies does not necessarily mean that they will be non-infringing. A key distinguishing factor in the case of ISM-generated images is that the context involves the mechanical copying *and then* processing of tens of thousands of images—a matter of different scale.[83] How do we apply inspiration-related Fair Use analysis based on the idea of a human artist being inspired by what she sees when a computer, not a human, is the entity supposedly receiving the inspiration?

Some argue that LLMs are doing the same thing artists have always done—observing and taking inspiration from other art.[84] This argument is untenable because no single artist has ever viewed billions of works, absorbed the styles and techniques necessary to execute those works, and then produced those works (regardless of content or complexity) at the scale of these models.[85] In this

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78 *Rogers*, 960 F.2d at 307.

79 *Id.* at 308.

80 *Id.*

81 Stephen Auvil & Michael Gonzalez, Squire Patton Boggs, *In Assessing Design Patent Infringement, The Devil Is in The Details*, XIV NATL. L. REV., no. 49, July 2020, https://www.natlawreview.com/article/assessing-design-patent-infringement-devil-details.

82 *See generally* Joe Fedewa, *The Best AI Image Generators You Can Use Right Now*, HOW-TO GEEK, https://www.howtogeek.com/830870/best-ai-image-generators/ (Mar. 24, 2023).

83 *Id.*

84 *See, e.g.*, Will Knight, *When AI Makes Art, Humans Supply the Creative Spark*, WIRED (July 13, 2022), https://www.wired.com/story/when-ai-makes-art/.

85 *See generally AI Image Generators: How They Work and Why They Are Important*,

respect, industry supremacy of these models is imminently coming regardless of what the legal system may say.[86] How can we protect people in the time between now and then? Is it morally right for courts to side with Google, Meta, or OpenAI under the Fair Use exception when their computers are engaging in copying at a scale far outside human capability, instead of siding with Jacques, the painter from down the street?

2. Sony *and Contributory Infringement*

Sony Corp. of America v. Universal City Studios, Inc. is an important 1984 case at the intersection of copyright and technology.[87] Universal Studios sued Sony, alleging that Sony's home video tape recorders ("VTRs") constituted a copyright infringement by Sony (specifically, a contributory infringement), because the technology enabled consumers to record Universal's works while those works were being broadcast on television, an alleged violation of Universal Studios' copyright.[88] Universal Studios claimed that Sony built and made VTR technology available for consumption and was allowing third-party consumers to violate Universal's copyright through this technology.[89]

The Supreme Court found for Sony by reasoning that Sony could not be held liable as a contributory infringer because VTRs were capable of substantial non-infringing uses.[90] The Court understood the VTRs' function as effectively allowing for private time-shifting of broadcasts by consumers.[91] This action by consumers had been approved by some of the owners of the copyrighted materials being broadcast.[92] The Court also found that the underlying act of time-shifting was Fair Use by consumers.[93]

Using *Sony* as an analogy for the modern use of ISMs, Sony would be a producer of the text-to-image models, Universal would be an artist whose work is being scraped or copied without consent, and the consumers buying and using VTRs would be the users of the ISM's—the third party. An important similarity is that in both the ISM context and in *Sony*, the technologies are taking advantage of a sort of common property that plays a part in the use: the electromagnetic

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HYPOTENUSE AI (Oct. 11, 2022), https://www.hypotenuse.ai/blog/ai-image-generator.

86 *Id.*

87 *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

88 *Id.* at 419–20.

89 *Id.* at 420.

90 *Id.* at 442.

91 *Id.*

92 *Id.* at 444–45.

93 *Id.* at 442, 447.

spectrum used to broadcast television shows in *Sony* and the internet used by ISMs.[94] On the other hand, a key difference is that in *Sony*, the artists who created the television broadcast had already been paid for their work, and the broadcast was fully authorized.[95] The same cannot be said for most of the images posted on the internet and used to train ISMs, as most people are not paid for what they post on the internet. Some variant of this argument, however—"this is publicly available on the internet, so my using it is not illegal"—is cited in analogous discussions.[96] The underlying assumption of this argument seems to be that placing an image on the internet inherently gives permission for a certain amount of uncompensated copying and use.[97] Nevertheless, the legal question is whether, under the *Sony* interpretation of Fair Use, internet scraping can fall under the substantial non-infringing defense, based on the fact that not all of the images being scraped claim copyright ownership?[98]

The holding in *Sony* permitted the VTR maker to avoid liability largely on the ground that there were substantial non-infringing situations in which over-the-air recording could occur.[99] Because the VTRs could record programs owned by companies who did *not* object to the recording, Sony defended itself by arguing that it should not be liable for a third-party consumer's unauthorized recording when the product *could* be used as intended—that is, legally.[100] In *Sony*, the VTR maker was ultimately not contributorily liable for copyright infringement, even though at least some consumers may have used their VTRs to infringe copyright.[101] Without diving too deeply into the intricacies of that defense and whether it applies to software as well as physical machines like VTRs, it should be noted that there is space to find that online models could use the same defense.[102]

If applicable, the *Sony* defense could be used to argue both ways in regard to the text-to-image models. To support their legal validity, producers of ISMs can highlight that models can be substantially trained on images by creators who

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94 *Id.* at 419–20.

95 The broadcast networks would be paid by selling advertisements along with the programming. Presumably their concern was that their advertising revenue would be negatively affected by recording and time-shifting. *See id.* at 452–53 n.36.

96 *What is Web Scraping? How to Legally Extract Web Content*, KINSTA, https://kinsta.com/knowledgebase/what-is-web-scraping/ (Apr. 22, 2024).

97 *See id.*

98 *See Terms of Use*, COCO, https://cocodataset.org/#termsofuse (last visited Apr. 15, 2024); *Sony Corp.*, 464 U.S. at 454–55.

99 *Sony Corp.*, 464 U.S. at 442.

100 *Id.*at 443–46; *see also* 18 U.S.C. § 1030.

101 *Sony Corp.*, 464 U.S. at 442.

102 JAMES GRIMMELMANN, INTERNET LAW: CASES & PROBLEMS 493 (Lydia Pallas Loren & Joseph Scott Miller, eds., 11th ed. 2021); A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001).

have either waived their copyright interests or have no copyright interests at all.[103] Consider, though, a model that is trained using a mix of public domain images and full copyrighted images. A mix-trained model may constitute something that is capable of both infringing and non-infringing use, depending on what phrase the third-party user inputs. Opponents of the use of internet-scraped images to train models could argue that producers of the models do not fall under the *Sony* defense because the scrape-trained models—by virtue of being trained on at least some fully copyrighted images—are incapable of non-infringing use, because *every* image the model produces is in some sense derived from those copyrighted materials. Accordingly, opponents could argue that producers of ISMs are absolutely on notice about their products' potential for contributory infringing use. This is just one example of the difficulty in applying existing legal frameworks to non-physical technologies.

Another fact the *Sony* court relied on, which differs from the issue of training ISMs, is that the only point of contact between Sony and the VTR users—those persons actually infringing on copyright interests—was at the moment of sale of the VTRs.[104] The consumers *owned* their recorders; Sony only manufactured them.[105] Unlike VTRs, ISMs are owned by their producers and must be accessed by entering the producers' web domains.[106] As a result, the relationship between the users and ISM producers is much more connected than the relationship between consumers and VTR manufacturers in *Sony*. Indeed, outright *sale* of software is rare.[107] Even in the future, it is likely that ISMs will be licensed to users rather than sold to users (similar to licenses to use Microsoft Word or Adobe Photoshop today). That said, consumer licensing of software can be similar to a sale, so this difference may not matter much in future analyses.

Sony illustrates a potential analogous argument under which ISM producers could be protected by Fair Use when using images caught in these internet scrapes.[108] However, this is only one possible defense.

3. Rearden *and Who Owns the Output*

No one argued that Ticonderoga—the well-known pencil maker—owned the sketches that Andy Warhol made using these tools. However, things are different

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103 *See, e.g.*, Growcoot, *supra* note 48; *see also Creative Commons*, *supra* note 34.
104 *Sony Corp.*, 464 U.S. at 437–38.
105 *Id.* at 419–20.
106 DALL-E2, OPENAI, https://openai.com/dall-e-2/ (last visited Apr. 15, 2024).
107 Adrian Bridgewater, *Why Buying Software Is so Difficult*, FORBES (Aug. 12, 2019), https://www.forbes.com/sites/adrianbridgwater/2019/08/12/why-buying-software-is-so-difficult/?sh=77c9a1f11d9e.
108 *Sony Corp*., 464 U.S. at 439.

when there are multiple artists involved and when those artists use different and more sophisticated tools. Now that tools are capable of doing so much on their own, new questions arise as to when a tool has to put enough work into something that the tool itself—or its owner—may legitimately have some sort of ownership right over the output.[109]

In *Rearden LLC v. Walt Disney Co.*, the "lion's share of the work" test provided somewhat of an answer to this question.[110] Rearden, the creator of a motion-capture program that facilitated live-action film production using computer-created characters, alleged that he had an ownership interest in some of the films produced using his software by studios such as Disney, Fox, and others.[111] The technology converted the faces of actors into digital creations, such as the Beast in *Beauty and the Beast*.[112] The court rejected Rearden's claim based on the theory that, when a piece of technology contributes to the creation of art in collaboration with a user, the copyright in the final product does not extend to the owner/creator of the technology, unless the program did the heavy lifting, or the "lion's share."[113]

The lion's share test is best explained in two ways. In one instance, the output is the product of an end-user producing a work reflecting their own creativity, aided by a technical tool, such as a graphic designer using Adobe Photoshop.[114] In this case the user, not the tool, does the work. On the other instance, an end user could simply contribute guidance to a technical tool, which then does the majority of the production without substantial contribution from the end-user.[115] This is how the court in *Rearden* set up the framework for analysis, and the court then concluded that the actors and directors of the films, not the software, did the lion's share of the work.[116]

From one perspective, *Rearden* is useful in that it gave a clear test and came out with a clear answer. Either you do most of the work, or you do not.[117] This legal framework becomes complicated when it is not clear who actually does what, particularly in cases involving human interaction with complex technology. It makes sense from a legal perspective to want to have clear answers as to who owns what, because muddled ownership rights can interfere with incentives to produce new creations.[118] But what if the motives behind

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109 *The Promise and Perils of Large Language Models*, *supra* note 11.
110 Rearden LLC v. Walt Disney Co., 293 F. Supp. 3d 963, 970 (N.D. Cal. 2018).
111 *Id.* at 968.
112 *Id.* at 971.
113 *Id.*
114 *Id.* at 970–71.
115 *See id.* at 970.
116 *Id.* at 971–71.
117 *See id.*
118 David Sarokin, *Why Are Copyright Laws Important?*, CHRON., https://smallbusiness.chron.com/copyright-laws-important-52601.html (Apr. 24, 2019).

creation are already shifting, lowering, or perhaps even eliminating the need for such black-and-white answers? The best way to promote production today may not be to separate the owners from non-owners, but instead to provide a framework that bars abuse.

Art is a good subject for this study. The motivation behind the creation of art is often not production for profit, but production for its own sake.[119] The purpose behind copyright law is to protect the incentive to produce.[120] What if those incentives are no longer necessary because people will continue to produce regardless of whether their creations are protected under copyright? In that case, current legal doctrine may well be inhibiting production, not encouraging it. This is a rich area of debate and worth mentioning briefly because it may be another reason that the legal frameworks being applied to AI-generated art are not as readily applicable as courts would hope.

B. Are AI-Generated Works Fair Use of the Images They Used in Training?

1. The Fair Use Factors

From the perspective of copyright law, it is clear that an AI-generated image is not identical to the images on which the model was trained; the generated images are new creations.[121] To reach a conclusion of noninfringement, 17 U.S.C. § 107 states that if a copying work meets certain factors, it is not infringement of a copyright, but rather, Fair Use of the original work.[122] For some, this analysis has been a question of whether the new work is *transformative*—and thus not an infringement under Fair Use principles—or whether it is instead merely *derivative*—in which case it is an infringement.[123] In 2023, the Supreme Court's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* reiterated that all of the Fair Use factors are to be weighed equally, and that transformation is only one consideration for one of the factors.[124] These factors are applicable to the issue of AI-art, and as lawsuits make their way through the courts, these factors will be applied to determine the rights that artists have or do not have against ISMs. If the outputs are deemed

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119 *See generally Why We Make Art?*, THEARTIST, https://www.theartist.me/art/why-we-make-art/ (Oct. 21, 2023).

120 Sarokin, *supra* note 118.

121 *See generally* 17 U.S.C. § 107.

122 *Id.*

123 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994); *see also* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1203 (2021).

124 Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1273–74 (2023).

Fair Use, then both creators of the models and the people using them have an affirmative defense against an artist's copyright claims.[125] Therefore, to address the possibility of ISM outputs not being an infringement, an understanding of the Fair Use factors is necessary.

Copied works are infringement of a copyright unless there is a justification for copying or an exception finding Fair Use, such as criticism, comment, news, reporting, teaching, scholarship, or research.[126] To find Fair Use, courts must undertake a fact-heavy analysis guided by the four Fair Use factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[127]

The next section discusses how the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* addressed these factors, and how the transformative analysis of the first factor was followed by a legacy that almost swallowed Fair Use doctrine, as lower courts read the opinion narrowly to reach transformation-determinative conclusions.[128] This transformation-heavy analysis of Fair Use will be further illustrated and then remedied in the discussion of *Warhol*, where the Court reiterated that the original intent of § 107 was not for the first factor to dictate the whole analysis.[129]

2. Campbell – *The Supreme Court's Interpretation of the Fair Use Factors*

The *Campbell* Court had already made clear that all of the Fair Use factors were "to be explored, and the results weighed together, in light of the purposes of copyright"—protecting ownership of creative efforts while, at the same time, not stifling creativity through restrictive property protections that leave no room for inspiration.[130] The idea that the factors must be weighed against the backdrop of the purpose for copyright protection will be visited again in the analysis of *Cariou v. Prince* and then *Warhol.*[131] This view is directly relevant to AI-

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125 *See* 17 U.S.C. § 107.

126 *Id.*; *see also Campbell*, 510 U.S. at 576, 578.

127 17 U.S.C. § 107.

128 *Campbell*, 510 U.S. at 583–85; *see also* Brief for Senator Marsha Blackburn as Amicus Curiae Supporting Respondents, *Andy Warhol*, 143 S. Ct. 1258.

129 *Andy Warhol*, 143 S. Ct. at 1287.

130 *Id.*; *Campbell*, 510 U.S. at 578.

131 *See* Cariou v. Prince, 714 F.3d 694, 705 (2d Cir. 2013); *Andy Warhol*, 143 S. Ct. at

generated art; specifically, the definition of what constitutes "transformation," as well as the role of transformation in the Fair Use analysis, will be critical in determining whether outputs of ISMs will be considered Fair Use.

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court outlined how to apply the § 107 factors to determine whether a work constitutes Fair Use.[132] Music publishing firm Acuff-Rose Music, owners of the iconic "Oh, Pretty Woman" song by Roy Orbison, brought a copyright infringement claim against the rap group 2 Live Crew for allegedly infringing Orbison's ballad in their parody "Pretty Woman."[133] 2 Live Crew's song was a parodic composition aimed at poking fun at the original's naïve portrayal of street love.[134] The copyright claim against the rap group was unsuccessful at the United States District Court for the Middle District of Tennessee, which found 2 Live Crew's version was Fair Use after the court conducted the four-factor analysis.[135] The Court of Appeals for the Sixth Circuit then reversed the ruling on the ground that the commercial nature of the song required a presumption against Fair Use.[136]

In reversing the Sixth Circuit, the Supreme Court made clear that the four Fair Use factors are to be explored and weighed *together* in light of copyright's purpose.[137] The Sixth Circuit had erred in putting too much emphasis on the commercial nature of the new work.[138] Using this broader perspective, the Court found the parody song to be Fair Use, despite the fact that it was made for commercial release, by considering all the factors listed in § 107,[139] with a focus on the transformative nature of parodies.[140]

i. First Factor – Campbell

The first factor— "the purpose and character [of the use of the original work], including whether such use is of a commercial nature or is for nonprofit

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1273–74.

132 *See Campbell*, 510 U.S. at 578, 586–87, 590.

133 *Id.* at 572–73.

134 *Id.* at 583.

135 *Id.* at 573.

136 *Id.* at 573–74.

137 *Id.* at 578 (emphasis added) (explaining that the court of appeals erred in applying a commercial presumption against Fair Use).

138 *Id.* 583–84.

139 *See id.* at 594.

140 *See* Brief for Senator Marsha Blackburn as Amicus Curiae Supporting Respondents, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 5 U.S. 508 (2023) (No. 21-869) at 5; Cariou v. Prince, 714 F.3d 694, 705–06 (2d Cir. 2013).

educational purposes"[141]—focuses on whether the secondary work is produced for the same purpose as the original.[142] The Court determined the first factor's central purpose is to ask whether the new work "'supersede[s] the objects' of the original creation."[143] In their interpretation of what exactly this prescription means, the Court in *Campbell* concluded that the point of the first factor was to determine whether the new work was *transformative*. The Court stated that a transformative secondary work adds "something new, with a further purpose or different character, altering the [original work to show a] new expression, *meaning, or message*."[144]

Notably, the Court declared that the other factors are of lesser importance if a work is transformative, even after stating the factors are meant to be weighed together.[145] Just two pages after the Court stated that all the factors must be considered, it stated unequivocally that "the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use."[146] Do the two statements contradict each other? More likely, the two ideas are meant to be read together, *not* requiring that courts first conduct an analysis of whether or not a work is transformative at the beginning and end of the analysis.[147] Although at first glance, the statement that transformation weighs heavier than the other factors may seem like a shortcut to a Fair Use defense promised land, when read as a whole, the opinion is very clear that, although a finding of transformation in the first factor is important and promotes a finding of Fair Use, it is not the end of the analysis. The other factors may still outweigh the transformative value in support of finding infringement.

While declaring the importance of whether or not a work is transformative in analyzing the first Fair Use factor, *Campbell* did not answer the question of what does or does not constitute transformation. Instead, it noted a secondary work is transformative when it changes the meaning or message of the original work.[148] Though the Court did not give much guidance as to what makes a secondary work transformative as opposed to derivative, *Campbell* nonetheless left legal scholars with a clear impression that the importance of the first factor works as

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141 17 U.S.C. § 107(1).

142 *See Campbell*, 510 U.S. at 580–81; *see also* 17 U.S.C. § 107(1).

143 *Campbell*, 510 U.S. at 579; Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 550 (1985).

144 *Campbell*, 510 U.S. at 579 (emphasis added).

145 *Id.* at 578–79.

146 *Id.* at 579.

147 Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, Ltd., 598 U.S. 508, 529 (2023) (affirming this contention).

148 *Campbell*, 510 U.S. at 579 (explaining there is no need to delve into an analysis of what makes a work transformative as the art in issue was a parody and parody "has an obvious claim to transformative value").

follows: either a work is transformative and thus makes the first factor outweigh the other three in favor of Fair Use, or a work is not transformative, and the role of the first factor is to determine whether the derivative work was produced for commercial purposes or not (potentially supplanting the original work in the same market).[149] The primary takeaway was that the entire analysis almost certainly turns on whether a work is transformative or derivative.[150] This does not suggest that a finding of transformation necessarily means a finding of Fair Use, but that the weight of each factor changes depending on whether transformation is found.[151] As will be illustrated later, *Warhol* provided additional clarification that all the factors are to be weighed the same.[152]

ii. Second Factor – Campbell

The second factor— "the nature of the copyrighted work"[153]—is briefly mentioned and not fully developed beyond the Court stating that parodies are almost always copies of the original works. The Court stated, "[T]his factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that Fair Use is more difficult to establish when the former works are copied."[154] What the Court seemed to say is that when a work is more closely related to what the Copyright Act was attempting to protect, this second factor will weigh against a finding of Fair Use more so than it would in the case of, for example, a headline from a newspaper being copied for purposes of art-making.[155] This short reference to the second factor, paired with statistics showing the relatively small amounts of time courts spend considering this factor, signals the relative unimportance of this part of the analysis.[156]

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149 *Id.* at 578–579, 585 (explaining the Court does not share this latter part without diminishing the weight against Fair Use if the use *is* found to be commercial; a work's commercial nature is only one element of the first factor enquiry into its purpose and character); *see also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinion Updated, 1978*-2019, 10 N.Y.U. J. INTELL. PROP. & ENT. L., vol. 1, at 19.

150 *Campbell*, 510 U.S. at 589, 593.

151 *Id.* at 583–84.

152 *Andy Warhol*, 598 U.S. at 550–551.

153 17 U.S.C. § 107.

154 *Campbell*, 510 U.S. at 586.

155 *Id.* (referencing *Warhol* and the meaning of "justification").

156 Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L., vol. 1, at 19.

iii. Third Factor – Campbell

Factor three considers "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"[157] and whether the portion copied is reasonable in relation to the purpose of the copying.[158] This factor basically asks how much of the original work was used in the allegedly infringing work and whether or not that amount is permissible.[159] The Court eloquently stated that "the extent of permissible copying varies with the purpose and character of the use."[160] This direction sets courts up to know that this third factor is very fact-driven. As an example, the Court referenced the case of a magazine copying 300 words out of former President Gerald Ford's, at the time unpublished, memoir—a small portion of the original whole by word count.[161] Despite this, that small copying was held not to be Fair Use, and the Court explained that the "amount of use" test is not focused on a numerical analysis, but instead on a "heart of" the work test.[162] The 300 words the magazine had used were held to be infringing, because they were the heart of Ford's memoir.[163]

In *Campbell*, the Court applied the "heart of the work" test as follows: "copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."[164] The third factor was remanded for consideration in light of (1) parody, (2) transformation, and (3) potential for market replacement.[165] One perspective that should be considered about the third factor is that the amount permissible for copying does not necessarily depend on the heart of the work, but rather depends on all of the other factors. The Court articulated this "heart of the work" test but it did not articulate how it applied; instead, the test considered the significance of the other factors.[166] Ultimately, it seems the Court was saying that the third factor only matters when it is clear that too much was copied; otherwise, the extent of the copying allowed depends on the other factors.[167]

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157 17 U.S.C. § 107.

158 *Id.*

159 *See Campbell*, 510 U.S. at 586.

160 *Campbell*, 510 U.S. at 586–87.

161 *See e.g.*, *Harper & Row*, 471 U.S. 539 (1985).

162 *Harper & Row*, 471 U.S. at 564–65.

163 *Campbell*, 510 U.S. at 587 (citing *Harper & Row*, 471 U.S. at 541) (exemplifying how the Court's analysis in *Campbell* is not directly applicable to our issue as it was analyzing a song parody issue; however, it does conjure up the question of how to apply the heart of the work test. Can it be argued that the AI models are literally looking for art with the same "heart" that it wants to have in its output?)

164 *Campbell*, 510 U.S. at 588.

165 *See id.* at 589.

166 *Id.* at 590.

167 *See id.* at 586–89.

iv. Fourth Factor – Campbell

The fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," calls for consideration of how the secondary work affects the market for the original, potentially infringed work.[168] This factor best exemplifies the importance of *Campbell*'s legacy in the first factor's transformation analysis, dictating the light in which to view the rest of the factors.[169] It asks whether the new work is a substitute for the original work in the affected markets.[170] If it is, market harm to the original is inferred and weighs against Fair Use.[171] In short, the Court held that when the secondary use is transformative, market harm consideration either is not as easily inferred or just does not matter in the same way because competition among different products is not what copyright protects.[172] As applied to *Campbell*, the Court found the secondary work did serve as a market replacement, but because parody works serve a different market function from their originals, the parody was still Fair Use.[173] Under this reasoning, a secondary work, even if directly competitive, will likely be considered Fair Use if it is transformative because, in that case, it functions as a different product, not as a different version of the same product.[174] But does this apply to non-parody transformations? Specifically, does it apply to the case of AI-generated art? Parodies clearly serve a different function from the art that they are parodying.[175] You do not listen to Weird Al's "Eat It" when you are in the mood for Michael Jackson's take on a potentially violent conflict among young men.[176]

The same cannot be said, however, for AI-generated art that looks like the work of an artist—in fact, many in the art community are enraged by the fact that the market cannot tell that the art displacing their creations is generated by AI and not by an actual human artist.[177] Even those in support of AI art contend that they do replace the work of digital artists.[178] Regardless of which argument

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168 *Id.* at 590.
169 *Id.* at 591.
170 *See id.* at 590.
171 *Id.* at 591.
172 *Id.* at 591.
173 *Id.* at 592–94.
174 *See id.* at 593–94.
175 *See id.* at 593–94.
176 *See* Jacob Uitti, *"Weird Al" Yankovic's Top 10 Songs*¸ AM. SONGWRITER (Oct. 23, 2021), https://americansongwriter.com/weird-al-yankovics-top-10-songs/.
177 *See generally* Steven Zapata Art, *The End of Art*, YOUTUBE (Oct. 17, 2022), https://www.youtube.com/watch?v=tjSxFAGP9Ss.
178 *See* Olivio Sarikas, *The END of Art is a NEW Beginning - Why AI Art Will Save Us – Reaction to Steven Zapata Art*, YOUTUBE (Oct. 24, 2022), https://www.youtube.com/watch ?v=th-YcQh_ZQo.

better applies, *Campbell* is not clear on whether the market replacement factor weighs less against Fair Use in the case of non-parodic, transformative works.[179] This is yet another reason why the Court's decision in *Warhol* may be determinative for AI art—it will likely answer this question.[180]

Though the Court in *Campbell* did not directly address whether the analysis of the fourth factor remains the same in non-parody cases, it does mention that the complaining party's claim of infringement was hurt by its failure to address the effect of the secondary work on the original work's market.[181] This suggests that the market impact of an allegedly infringing work is a factor that carries great weight.[182] This factor is foundational to our topic—the entire issue with AI-generated art centers on the displacement of the original works' artists by the secondary outputs of the machines. Overall, *Campbell* stands for the point that the commercial nature of secondary works does not disqualify it from a finding of Fair Use and serves as a useful example of how the Fair Use factors themselves are to be weighed against each other.

3. Cariou – *Second Circuit Application of* Campbell *and Other Jurisdictions' Positions*

To best understand *Warhol*, a quick digression into the Second Circuit's interpretation of the Fair Use factors in *Cariou v. Prince* is helpful. *Cariou* also helps show where the Fair Use factors differ in interpretation and how they are weighed in different factual circumstances. In *Cariou*, a photographer brought an infringement action against an artist who used many of his photographs without consent, but the artist also engaged in a large amount of editing, arguably creating a transformative, rather than derivative, work.[183] The Second Circuit found most of the artist's secondary works to be Fair Use of the original photograph due to their transformative nature.[184] Under the *Cariou* court's interpretation of transformative secondary works, AI-generated art would likely be considered Fair Use based on their transformative nature. The court's decision in *Cariou* was referenced repeatedly and extensively relied on in *Warhol*,[185] so it is important to understand *Cariou* in order to understand the issue addressed by the Supreme Court in *Warhol*.

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179 *Campbell*, 510 U.S. at 592.

180 First Amended Complaint Class Action Demand for Jury Trial, Andersen v. Stability AI Ltd., No. 3:23-cv-00201-WHO at 1 (N.D. Cal. Nov. 29, 2023).

181 *See Campbell*, 510 U.S. at 593.

182 *Id.* at 593–94.

183 *See* Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

184 *Id.* at 698–99.

185 Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, Ltd., 598 U.S. 508, 516–17 (2023).

As stated in *Campbell*, whether a secondary work is transformative as opposed to derivative is the first part of the first factor.[186] The *Cariou* court answers the question simply: a secondary work is transformative when the images are visibly different to a reasonable observer.[187] This finding was tied to the ruling that subjective intent to change the image (or not to) by the alleged infringer is not determinative and, in fact, irrelevant to the question of whether the work is transformative.[188] The key aspects of the transformative works were that they had "a different character, [gave complainant's] photographs a new expression, and [employed] new aesthetics with creative and communicative results distinct from [the original]."[189]

This interpretation of what constitutes a transformative work is the issue that was appealed to the Supreme Court in *Warhol*,[190] and this is what could be decisive to the question of whether AI-generated art infringes on the copyrights of images used to train the model and produce the art-output. As it stands, the answer is not clear because there are reasonable arguments on both sides. The outputs of an ISM are not clearly transformative; depending on the model, they do not have a clearly different character, new expression, or different aesthetic from the works of some of the complaining artists.[191]

Further, *Cariou* illustrates the importance of the preliminary determination of whether a work is transformative.[192] The commercial purpose consideration in the first Fair Use factor under the statute "must be applied with caution" as its weight heavily depends on whether or not the work is transformative.[193] This is because "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of Fair Use."[194] The *Cariou* court then skipped ahead to the fourth factor, the market considerations for the copyrighted work, to determine that the commercial purpose determination, in relation to the fourth factor, does not look to whether the secondary work competes with the original (which can be Fair Use if the secondary work is transformative); the court instead looks to whether the

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186 *Campbell*, 510 U.S. at 594.
187 *Cariou*, 714 F.3d at 707.
188 *Id.*
189 *Id.* at 708.
190 *Andy Warhol*, 598 U.S. at 508–09.
191 *See* Beatrice Nolan, *Artists Say AI Image Generators Are Copying Their Style to Make Thousands of New Images—and It's Completely Out of Their Control*, BUS. INSIDER (Oct. 17, 2022), https://www.businessinsider.com/ai-image-generators-artists-copying-style-thousands-images-2022-10.
192 *See generally Cariou*, 714 F.3d 705.
193 *Id.* at 708.
194 *Id.* (citing Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994) (internal quotation marks omitted)).

secondary work "usurps" the original.[195] Essentially, the court set up a test of market *replacement* (which the court did not view to be Fair Use) rather than a test of market competition (which can be Fair Use).[196] Again hinging on whether or not the work is transformative, the court stated that "the more transformative the secondary use, the less likelihood that the secondary use substitutes for the original," even if the secondary commercial product harms or destroys the market for the original.[197]

In direct application to AI art, this analysis could go either way. On the one hand, this factor weighs against Fair Use—the audience for the AI's outputs is the same as the audience for the work of the human artists. On the other hand, it could also be argued that people who want art from artists will go to an artist, not a machine. However, the real-world application will likely look like market replacement.[198] Much of the market for art is commercial in nature, not private, and machine-generated art will likely be cheaper; this may significantly displace the market for human-made originals.[199] In fact, one criticism of ISMs is *precisely* that the models are producing the same kind of material being used to train them.[200]

The second factor, the nature of the work, as applied in *Cariou*, underscores the point that the other factors are not as important when transformation is found, and the decision hinges on that determination.[201] The court succinctly noted: "we consider '(1) whether the work is expressive or creative . . . with a greater leeway being allowed to a claim of Fair Use where the work is factual or informational and (2) whether the work is published or unpublished, with the scope for Fair Use involving unpublished works being considerably narrower.'"[202] As applied to AI-generated art, this factor, too, could go either way, depending on the situation of the complaining party. The outputs of an ISM are likely to be considered as expressive and creative, which is really the only determinative factor. Whether the material used in training was published or unpublished would be a factual determination, and artists are likely to argue that a simple posting on the internet does not constitute publishing for purposes of a Fair Use analysis. Artists could argue their work is of the same nature as the outputs, but the owners and users of ISMs could respond that not all pictures used in training

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195 *Id.*

196 *See generally id.*

197 *Id.* at 709.

198 *See, e.g.*, Alex Lielacher, *Lensa AI Review: Everything to Know About the Photo App*, BE(IN)CRYPTO, https://beincrypto.com/learn/lensa-ai-review/ (May 12, 2023).

199 Meg Rae (@megraeart), X (Dec. 2, 2022, 5:28 PM), https://mobile.twitter.com/megraeart/status/1598806459004985363.

200 *See* Nolan, *supra* note 191.

201 *Cariou*, 714 F.3d at 709–10.

202 *Id.* (quoting Blanch v. Koons, 467 F.3d. 244, 256 (2d Cir. 2006)).

are of the same nature, an analogous argument to the *Sony* defense.

The third factor, the amount of the work used in relation to the original work as a whole, addresses how much of the original work is used, not how much of the secondary work is made up of the original.[203] Recall that the *Campbell* Court also analyzed this factor in terms of how much of the original work was used (there, a minimal amount) and applied the "heart of the work" test from *Harper & Row*.[204] The *Cariou* court did not apply the same test; instead, the court opted to analyze the issue in terms of *how much* of the original work was needed in order to create the secondary work.[205] In this regard, the *Cariou* court was not entirely clear, stating that "'the third-factor inquiry must take into account that the extent of permissible copying varies with the purpose and character of the use," that the court "consider[s] not only the quantity of the materials taken but also 'their quality and importance' to the original work," and that "the secondary use 'must be [permitted] to 'conjure up' *at least* enough of the original' to fulfill its transformative purpose."[206]

III. *WARHOL* – TO TRANSFORM OR NOT TO TRANSFORM, DOES IT MATTER?

The Supreme Court's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, Ltd.* has changed the way we must look at the question of whether or not the way ISMs train themselves constitutes Fair Use.[207] In *Campbell* and *Cariou*, and even in the lower courts' analysis of the issue in *Warhol*, the inquiry has centered around the "transformative or not" framework.[208] In *Warhol*, the Supreme Court clarified what the first Fair Use factor actually focuses on: the actual *use* of the secondary work.[209] To determine whether or not a use is *Fair Use*, transformation should not be determinative and is only meant to serve as a guide for whether or not the *secondary use is similar to the original work's use*.[210]

It should be noted that the decision in *Warhol* addressed only the first Fair

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[203] *Id.* at 710; *see* 17 U.S.C. § 107(3).

[204] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994) (referencing Harper & Row, Publishers, Inc. v. Nation Enters. 471 U.S. 539, 564 (1985)).

[205] *Cariou*, 714 F.3d at 710.

[206] *Id.* (first quoting Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006; then quoting *Campbell*, 510 U.S. at 587–88)).

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

[208] *Campbell*, 510 U.S. at 579, 587–89; *Cariou*, 714 F.3d at 705–06; *Warhol*, 598 U.S. at 522.

[209] *Id.* at 532–33.

[210] *Id.* at 570.

Use factor. The Court reiterated that *all* of the Fair Use factors should be considered and given equal weight but analyzed only the application of the first factor.[211] For the reasons outlined above,[212] this opinion is determinative in the AI-generated art issue. The main question is no longer whether the ISM outputs are transformative. Instead, the question is now whether *all* of the Fair Use factors point to non-infringement, starting with whether or not the *use* of the outputs is of a different character or purpose than the use of the works they were trained on.[213] The opinion does not necessarily read as the deletion of *Campbell*'s more-transformation-less-everything else idea, but instead reads as a clarification that although a secondary work's meaning or message is important in deciphering whether it has a different character than the original, such meaning or message is not the main consideration of the first Fair Use factor.[214]

In *Warhol*, the Andy Warhol Foundation ("AWF") brought suit seeking a declaratory judgment of non-infringement against photographer Lynn Goldsmith, who had informed AWF that she believed the foundation had infringed her copyright.[215] In 1981, Goldsmith took a set of pictures of the performing artist Prince, and in 1984, one of these photos was licensed by Vanity Fair to serve as "an 'artist reference for an illustration.'"[216] Vanity Fair hired renowned artist Andy Warhol to create the illustration.[217] The license that Goldsmith granted only allowed for a single use of her one photograph for an illustration and for one appearance in the magazine's 1984 issue.[218] The magazine used the illustration once and credited her work as photographer,[219] and Warhol did create an illustration from the image, which was printed in the 1984 issue.[220] However, he also created fifteen other works based on the photograph.[221] Goldsmith did not know of the other secondary works until 2016, when the AWF licensed one of the works to Condé Nast, which later published one of these other Warhol works, called "Orange Prince."[222] Goldsmith was neither credited nor paid for the use of her photograph as the source work in the 2016 article.[223] Goldsmith's counterclaim asserted that Warhol's Prince Series

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211 *Id.* at 509.
212 *Supra* Section II.B.
213 *Warhol*, 598 U.S. at 527.
214 *See generally id.*
215 *See generally id.*
216 *Id.* at 517.
217 *Id.* at 508.
218 *Id.* at 517.
219 *Id.* at 518.
220 *Id.*
221 *Id.*
222 *Id.* at 518–19.
223 *Id.* at 515.

violated her copyright of the photograph she took of Prince.[224]

The district court granted summary judgement to AWF.[225] The analysis relied heavily on *Cariou*, using the four Fair Use factors and concluding that "Orange Prince" was transformative, and thus non-infringing Fair Use.[226] Most notably, the district court followed the path set out in *Cariou* and diminished the weight of the latter three Fair Use factors after finding transformation based on the first factor.[227] It reasoned, "[T]he Prince Series works are transformative, and therefore the import of their [limited] commercial nature is diluted."[228] The district court took the role of art critic in finding transformation, specifically citing that Warhol's work "can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure."[229] On appeal, the Second Circuit reversed this judgement.[230]

The Second Circuit considered its decision in *Cariou* and provided some clarifications, ultimately deciding that the Prince Series did in fact infringe upon Goldsmith's copyright.[231] Most importantly, the circuit court took the chance to narrow its interpretation of what constitutes a transformative secondary work, stating that transformation is not necessarily found where the secondary work has a "different character, new expression [or] employs new aesthetics," as the district court (and arguably *Cariou*) had held.[232] The circuit court recognized that while Warhol's images of Prince were, in important respects, different in character and purpose from Goldsmith's photograph, Warhol's new images were "derivative" for copyright purposes—not transformative—because the works retained "the essential elements of the Goldsmith Photograph without significantly adding to or altering those elements."[233]

This determination highlighted the difficulty in differentiating between transformative works and derivative works, showing that there are secondary works that add new expression or meaning from the point of view of a reasonable

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224 *Id.* at 526 (claiming that the 2016 *licensing* to Condé Nast was the infringement, not the making of the Prince series itself, though this detail is likely due to litigation strategy in avoiding statute of limitations issues).

225 *Id.* at 522.

226 Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F.Supp.3d 312, 326 (S.D.N.Y. 2019).

227 *Id.*

228 *Id.* at 325.

229 *Id.* at 326.

230 Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 59 (2d Cir. 2021), *cert. granted*, 558 U.S. 508 (2023).

231 *Id.* at 38.

232 *Id.* (quoting Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F.Supp.3d 312, 325–26 (S.D.N.Y. 2019)).

233 *Id.* at 30.

observer (the Second Circuit's stated test), and yet are not transformative.[234] To illustrate the difficulty in determining the difference, the Second Circuit gave an example of a derivative work that adds new expression without being transformative: film adaptations of books.[235] Film adaptations clearly change the aesthetics of the original, move it to an entirely new medium, add and change quite a bit of content, but still keep the same *meaning or message* and are clearly derivative of the original work.[236] The Second Circuit disagreed with the district court's determination that the four factors pointed to Fair Use.[237] The circuit court also changed its transformation analysis, moving away from the "judge-as-art-critic" precedent of *Cariou*.[238] However, the Second Circuit still maintained the framework of treating transformation as a dispositive factor in the Fair Use analysis.[239] Whether or not the Second Circuit's difference of opinion on what delineates a work as transformative makes sense, one thing was clear from the procedural history of *Warhol*: there was too much riding on whether something was considered transformative.

This transformation-led analysis of the first Fair Use factor was limited by the Supreme Court in its 2023 *Warhol* decision. While agreeing with the Second Circuit that Goldsmith's copyright was infringed and the secondary work was not Fair Use, they clarified the correct way to conduct a proper Fair Use first factor analysis.[240] On appeal to the Supreme Court, many expected the Court to simply clarify what makes a secondary work *transformative* under the first Fair Use factor.[241] Instead, the 7–2 Court, led by Justice Sotomayor, did us one better and reiterated that whether or not something is transformative does not rule the analysis: "Whether the purpose and character of a use weighs in favor of fair use is, instead, an objective inquiry into what use was made, i.e., what the user does with the original work."

On appeal to the Supreme Court, the AWF appealed only the Second Circuit's determination that the first Fair Use factor did not weigh in favor of Fair Use, so that is the only factor the Court addressed.[242] The AWF believed the proper test for the first factor was that where the meaning or message of the secondary work is different from the first, the secondary work is transformative and thus, the first

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234 *See id.*at 38.

235 *Id.* at 39–40.

236 Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 541 (2023).

237 *Andy Warhol*, 11 F.4th at 51.

238 *Id.* at 38, 41; *see also* Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013).

239 *Warhol*, 11 F.4th at 38.

240 *Warhol*, 598 U.S.at 525.

241 Oral Argument at 00:33, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023) (No. 21-869) https://www.supremecourt.gov/oral_arguments/audio/2022/21-869.

242 *Id.* at 525.

factor weighs in favor of Fair Use.[243] To this, the Court's answer was simple: new expression, without more, is not dispositive on the first factor.[244] The proper focus of the first Fair Use factor, the Court pronounced, is whether an allegedly infringing use has a *further purpose* or *different character* than that of the original work.[245] This, the Court further explained, should be weighed against other factors, specifying commercialism as an important consideration.[246] This means in a Fair Use evaluation, when asking whether factor one weighs for or against Fair Use, the first question is *what* is the secondary work being used for, and how does it compare to that of the original?[247] In *Warhol*, this was detrimental to the AWF, because Conde Nast's use of "Orange Prince" was for a Prince tribute.[248] This same purpose was shared by the original work—Goldsmith's photo.[249] In fact, Goldsmith's other pictures of Prince had been licensed by other magazines at that time for the *exact same purpose*.[250]

To drive the point further, the Court stated that the first factor demands courts to consider whether the copying use is of a commercial nature.[251] The commercial nature of secondary works analysis is dispersed across different areas of the Fair Uses factors, but in *Warhol*, the Court was very specific in its prescription that commercial use is to be considered *against* the backdrop of similar or further use/purposes to help measure the *degree of difference* between the two works.[252] In practice, this means that after considering the uses of original and secondary works, the difference or similarity of the uses between the two works have to be further weighed by whether one or both of them were for commercial use.[253] If two works are for similar uses—like the Prince tributes—and the secondary work is used for commercial purposes, the first factor would weigh more heavily against Fair Use than it would in a case where the secondary work is used for something like an educational purpose.[254] If the secondary work—like Warhol's "Orange Prince"—were being displayed in a museum for all to see, rather than being licensed for commercial use, the first factor would not weigh as heavily against Fair Use.[255]

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243 *Id.* at 540.
244 *Id.* at 541.
245 *Id.* at 544; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
246 *Warhol*, 598 U.S.at 525.
247 *Id.* at 542.
248 *Id.* at 519–20.
249 *Id.* at 550.
250 *Id.* at 520.
251 *Id.* at 525.
252 *Id.*
253 *Id.* at 532–33.
254 *Id.*
255 *Id.* at 528–29.

This analysis may seem stickier and harder to follow than the simple *additional-meaning-or-message-means-transformation-which-means-fair-use*, but it is fully supported by the intent of the Copyright Act and the core purpose of the Fair Use defense. The Act wants creators to be able to control the market for their creations—granting licenses and receiving compensation—and also wants to promote creativity and public access to arts.[256] The *Warhol* opinion returns the reality of commercial competition to the Fair Use analysis, while leaving room for non-commercial secondary works to take advantage of the Fair Use defense.[257] The outcome in *Warhol* promotes a legal framework that mandates compensation for an artist like Goldsmith when a secondary work is being used for the same purpose of the original and in a commercial nature.[258]

The Court's decision on this point will likely be determinative in deciding whether AI-generated art is Fair Use. The decision redefines how the Fair Use defense has been employed since the *Campbell* decision began to be interpreted narrowly, resulting in transformation-heavy analysis.[259] Under *Warhol*, the first factor will no longer be a sole question of whether or not a work is transformative, and the latter three factors will not lose any more ground to that misconstruction. This could affect the AI issue: even if the image output is held to be transformative, the other three Fair Use factors may once again be elevated to equal importance (or at least to greater importance than they are now typically accorded),[260] and this point is crucial to an argument for artists' rights in their internet-scraped images. ISM technology may be such that, when it comes to the secondary works, the outputs *are* found to be transformative versions of the images used to train them, yet other factors such as market replacement and the substantiality of the portion used in relation to the copyrighted work will nevertheless open a clear line of argument for artists' rights. Before *Warhol*, all may have been lost for artists if ISM owners successfully argue that outputs are transformative versions of the pictures they use to train.

Further, consider what a win for Goldsmith means: the first Fair Use factor weighs less than it did before, but still equal to the others—giving a nod to the importance of the commercial nature of secondary works. If transformation is no longer outcome determinative,[261] more weight can be placed on the argument that market replacement weighs heavily against Fair Use. This is precisely what

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256 *See id.* at 526.
257 *See id.* at 528–29.
258 *See id.*
259 *See generally id.*
260 *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 550 (1985).
261 *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 167 (2019) (explaining that a study found that a determination of transformation led to a finding of Fair Use in a large majority of cases).

artists are claiming in their infringement suits against AI-generated art.[262] The claimants in *Anderson v. Stability AI* make it clear that what they desire is for their images to be licensed before being included in an AI-image training data set.[263]

CONCLUSION

This comment focuses on the copyright issues that arise when ISM developers use copyrighted images without permission to train ISMs. As technology continues to evolve, these issues will only get more complicated. What happens when it is not images based on text, but videos based on text, or animations based on text? These developments will occur quickly and, as a result, will not readily allow for the after-the-fact course correction that has worked in the past. Instead, these changes will occur virtually overnight, and artists everywhere may be out of work. An Instagram artist who once made a living off commissions for pieces such as tarot cards will see her customers use ISMs instead, despite the fact that those ISMs made free use of her work to replace her. Artists now make their livings producing art for games, TV, books, websites, magazines, advertisements, and much more. It is vital to protect people in the transition period between now and whenever the law adapts to the new technology.

The point of this comment is not that ISMs are bad, nor is it that all images and information must be protected from being used in ISM training sets. Innovation is a net good for society, and these models will do amazing and useful things. The point is that at its best, the law moves with the times and makes way for people to be protected while also leaving enough space for innovation. Fair Use was conceived when innovation moved at a pace that was served well by the litigation process. Today, things change so quickly that before we know it, new technology is commonplace, and artists, courts, and legislators must catch up and find solutions at the same time.

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262 First Amended Complaint Class Action Demand for Jury Trial, Andersen v. Stability AI Ltd., No. 3:23-cv-00201-WHO at 3 (N.D. Cal. filed Nov. 29, 2023).

263 *See* Brief for Senator Marsha Blackburn as Amicus Curiae Supporting Respondents at 2, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023) (No. 21-869) (representing that the licensing issue is also what Amicus Curiae in Warhol want the Court to turn their heads to, but the Court did not address it at length).