The Emperor's New Clothes of Originality in the Post-Authorial Era Shaped by GenAI

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INTRODUCTION

In Andersen's tale of *The Emperor's New Clothes*, the sovereign parades through the city convinced he wears magnificent garments, while in reality he is naked.[1] The courtiers, unwilling to admit the obvious, sustain the illusion until a child speaks the truth. Copyright law now finds itself in a similar predicament. This article contends that originality functions like the Emperor's garment in our intellectual property system, perceptible only because the law insists on treating it as real. The rise of generative artificial intelligence (GenAI) has destabilized the legal and philosophical foundations of originality.

While copyright law has traditionally tied originality to the human author's creative spark, the proliferation of AI-generated outputs challenges the coherence of this paradigm.[2] This article demonstrates how U.S. litigation under the Digital Millennium Copyright Act (DMCA)[3], Actor-Network Theory (ANT)[4], and divergent judicial approaches in China exemplify distinct yet mutually implicated responses to the post-authorial condition by rephrasing originality.[5] The point of departure for understanding originality, long upheld as the sine qua non of copyrightability, is to trace the shifting historical frontiers through which it has been defined.[6]

Building on the pioneering scholarship of Martha Woodmansee, Peter Jaszi, and the *Authorship Project*, there is now a broad consensus that copyright law's insistence on exclusive authorship, grounded in the myth of the agonized, original genius, remains inseparable from the doctrinal framework forged in the Enlightenment, particularly through its radical reconfiguration of the concept of the "Author".[7] However, by referring to

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1 Hans Christian Andersen, *The Emperor's New Clothes*, LIT2GO, https://etc.usf.edu/lit2go/68/fairy-tales-and-other-traditional-stories/5637/the-emperors-new-clothes/ [https://perma.cc/8VJ3-YU2M].

2 *See generally* Ryan Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence*, 75 FLA. L. REV. 1141 (2023); Mira Moldawer, *The Shadow of the Law Versus a Law With No Shadow: Pride and Prejudice in Exchange for Generative AI Authorship*, 14 SEATTLE J. TECH., ENVT'L. & INNOVATION L. 1 (2024).

3 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

4 For the ANT, *see infra* Part II.

5 For the analysis of Chinese adjudication, *see infra* Part III.

6 Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505 (2009) ("Originality is the sine qua non of copyrightability. A work must be original to receive copyright protection.").

7 *See generally* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author*', 17 EIGHTEENTH-CENTURY STUD. 425 (1984); MARTHA WOODMANSEE & PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Duke Univ. Press 1994); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1019 (1990); Olufunmilayo B. Arewa, *The Freedom to Copy*: *Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007); James Boyle, *Is the Internet Over?! (Again?)*, 18 DUKE L. & TECH. REV. 32 (2019); LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT (2007).

the Enlightenment, authorship in its current design owes its theoretical infrastructure to Immanuel Kant, G. W. F. Hegel, and J. G. Fichte.

First, grouping these thinkers too neatly risks flattening the significant differences among them, for each advanced a distinct vision of the author's role and rights. Kant offered a rights-based, rather than value-based, account of authorship, framing it as a relationship between the author and the public.[8] In *What Is a Book*?, Kant argued that a book is a speech act, in which "the author speaks to his reader," rather than a commodity.[9] Unauthorized publication, therefore, constituted an illegitimate "agency without authority".[10]

On this view, publishers were legitimate only insofar as they mediated the author's voice to the public.[11] For this reason, scholars often trace the modern concept of "autonomy of expression" back to Kant.[12] Fichte developed this framework further by emphasizing the uniqueness of authorial expression, according to which each writer necessarily imparts a singular form to his thoughts, one that others cannot appropriate without distortion.[13] While this reinforced the link between authorship and individuality, it did not fully justify perpetual property rights.[14]

Hegel elaborated on the theory of authorship to develop a comprehensive property regime. For him, the creative work was an extension of the author's inner will and individuality, thereby warranting control over it as property.[15] Whereas Kant had blurred the line between writing and speaking by treating both as forms of authorial address, Fichte

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8 Maurizio Borghi, *Copyright and the Commodification of Authorship in 18th and 19th Century Europe*, *in* OXFORD RSCH. ENCYCLOPEDIA OF LITERATURE 341 (2018).

9 Immanuel Kant, *What is a Book?*, *in* THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 89 (W. Hastie, trans. 1887), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/359/Kant_0139_EBk_v6.0.pdf [https://perma.cc/B3ZW-3Z5B].

10 Friedemann Kawohl, *Commentary on Kant's Essay on the Injustice of Reprinting Books (1785)*, *in* PRIMARY SOURCES ON COPYRIGHT (1450–1900) 5 (L. Bently & M. Kretschmer eds., 2008) (demonstrating the failure of the Kantian concept of reprinting as "agency without authority" in copyright discourse: "It is not the author's property that is violated by a reprint, but the author's right to decide whom he will delegate to transfer his speech to the public.").

11 Kant, *What Is a Book?*, *supra* note 9, at 89–90.

12 KIM TREIGER-BAR-AM, POSITIVE FREEDOM AND THE LAW 170 (2019).

13 Johann G. Fichte, *Proof of the Illegality of Reprinting: A Rationale and a Parable*, *in* BERLINISCHE MONATSCHRIFT 451 (Martha Woodmansee trans., 1793) ("[E]ach writer must give his own thoughts a certain form, and he can give them no other form than his own because he has no other.").

14 *Id*. ("But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property.").

15 *See generally* Paul Redding, *Georg Wilhelm Friedrich Hegel*, STAN. ENCYCLOPEDIA OF PHIL. (rev. Sep. 19, 2025), https://plato.stanford.edu/entries/hegel [https://perma.cc/G53K-EEV4] (for claiming private property as a necessary vehicle for cultivating the individual, as it materializes her inner will. Hence, the creator has a given right to control her creation and exploit it solely); Stephen Houlgate, *Hegel's Aesthetics*, STAN. ENCYCLOPEDIA OF PHIL. (rev. Feb. 27, 2020), https://plato.stanford.edu/archives/win2021/entries/hegel-aesthetics [https://perma.cc/N6K6-8JNZ] (for the importance of Hegel's Aesthetics).

and Hegel insisted on distinguishing writing as the site where authorship became property.[16] In this move, Enlightenment philosophy supplied not only a moral but also a legal infrastructure for copyright, grounding ownership in the fusion of expression, individuality, and the creative will.[17]

The reconfiguration of authorship from a manifestation of personality to a property entitlement is premised on the notion that dominion over one's creations externalizes and extends the self. This link between personality and property underpins autonomy and freedom, a conception rooted in Kant's Categorical Imperative (CI) and elaborated by Hegel.[18] Kant's Categorical Imperative, through its formulations of universal law, humanity, and autonomy, requires agents to act on principles that treat humanity as an end and establish universally valid norms, thereby grounding dignity and rational freedom.[19]

The autonomous will, as the essence of humanity, underlies both the humanity formulation, mandating that individuals be treated as ends, and the autonomy formulation, requiring action according to self-imposed universal principles.[20] By framing every rational will as a legislator of universal law, the autonomy formulation both expresses human freedom and constitutes the source of moral authority.[21] Following Kant's legacy, while Fichte emphasized the author as the locus of creative expression, Hegel grounded property rights in human freedom, viewing private property as the materialization of the individual's inner will.[22]

Accordingly, the creator holds both the right to control her work and the exclusive right to exploit it.[23] It follows that even the consensual theoretical infrastructure, anchored in the Enlightenment, is far from homogeneous. Second, within the wider scope of Enlightenment thought, David Hume and

16 Kawohl, *supra* note 10, § 5.

17 JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 55 (1996).

18 GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 59 (S.W. Dyde trans., 2001) ("In property my will is personal. But the person, it must be observed, is this particular individual, and, thus, property is the embodiment of this particular will. Since property gives visible existence to my will, it must be regarded as "this" and hence as "mine". This is the important doctrine of the necessity of private property."); *see generally* Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (rev. Jan. 21, 2022), https://plato.stanford.edu/archives/spr2022/entries/kant-moral [https://perma.cc/YK22-SN4V].

19 Johnson & Cureton, *supra* note 18; HEGEL, PHILOSOPHY OF RIGHT, *supra* note 18, at 58 - 61.

20 IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 44 (1797) (discussing the amalgamation in Kant's philosophy between property and freedom, as the outcome of the Humanity formula).

21 Johnson & Cureton, *supra* note 18, at ch. 7.

22 Woodmansee, *supra* note 7, at 444–45 (quoting FICHTE, *supra* note 13); BOYLE, *supra* note 17, at 55.

23 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 18, at 61, at ¶ 51 ("In order to fix property as the outward symbol of my personality, it is not enough that I represent it as name and internally will it to be mine; I must also take it over into my possession. The embodiment of my will can then be recognized by others as mine.").

Arthur Schopenhauer offered contrasting frameworks for understanding the human condition, shaping debates over originality, autonomy, and creativity. In contrast to Kant and Hegel, Hume claims that reason is subordinate to the passions and that virtue arises from custom.[24]

By grounding belief and causality in habit rather than reason, Hume destabilized any universal or metaphysical foundation for knowledge.[25] Authorship, on this account, is not the realization of an abstract ideal but a contingent practice rooted in human experience, desire, and utility.[26] Kant, awakened by Hume from his "dogmatic slumber," sought to restore stability by relocating causality and knowledge within the a priori structures of the mind.[27] For Kant, objects conform to cognition, and reason provides the foundation for human freedom and authorship.

Yet this reconstruction tied authorship to rational autonomy and obedience, embedding copyright in the Enlightenment project of universal reason.[28] While Hume dismantled metaphysics by privileging experience, Kant reconstituted it through critique, elevating the author as a rational, autonomous subject.[29] Hegel carried this trajectory further by reconciling

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24 *See generally* William Edward Morris & Charlotte R. Brown, *David Hume*, STAN. ENCYCLOPEDIA OF PHIL (rev. Nov. 1, 2023), https://plato.stanford.edu/archives/win2023/entries/hume [https://perma.cc/6KC3-4EYA]; David Hume, *Section IX:, Conclusion*, *in* AN ENQUIRY CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 161 (L.A. Selby-Bigge, 2nd ed., 1902); *compare* David Hume, *Section V: Sceptical Solution of These Doubts*, *in* AN ENQUIRY CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 41 (L.A. Selby-Bigge, 2nd ed., 1902), *with* Immanuel Kant, *On the Form And Principles Of The Sensible And Intelligible World [Inaugural Dissertation]*, *in* THEORETICAL PHILOSOPHY 1755–1770, 373-406 (David Walford ed., Cambridge Univ. Press 1992).

25 David Hume, *Section IV: Sceptical Doubts Concerning The Operations of the Understanding*, *in* AN ENQUIRY CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 32 (L.A. Selby-Bigge, 2nd ed., 1902) ("No object ever discovers, by the qualities which appear to the senses, either the causes which produced it, or the effects which will arise from it; nor can our reason, unassisted by experience, ever draw any inference concerning real existence and matter of fact. This proposition, *that causes and effects are discoverable, not by reason, but by experience*, will readily be admitted with regard to such objects, as we remember to have once been altogether unknown to us.")

26 *Id*.; *see* Morris & Brown, *supra* note 24 (for Hume's three principles of association, resemblance, contiguity in time and place, and causation, out of which causation is the strongest).

27 Immanuel Kant, *Prolegomena to Any Future Metaphysics That will be Able to Come Forward As Science (1783)*, *in* THEORETICAL PHILOSOPHY AFTER 1781, 19-170 (Henry Allison & Peter Heath eds., Gary Hatfield, Michael Friedman, Henry Allison & Peter Heath trans., Cambridge Univ. Press 2002).

28 IMMANUEL KANT, WHAT IS ENLIGHTENMENT? 3, http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html [https://perma.cc/3T3J-BYTG] ("But only the man who is himself enlightened, who is not afraid of shadows, and who commands at the same time a well disciplined and numerous army as guarantor of public peace—only he can say what [the sovereign of] a free state cannot dare to say: 'Argue as much as you like, and about what you like, but obey!'").

29 *Compare id. with* David Hume, *Section II: Of the Origin Of Ideas*, *in* AN ENQUIRY CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 28 (L.A. Selby-Bigge, 2nd ed., 1902) ("But though our thought seems to possess this unbounded liberty, we shall find, upon a nearer examination, that it is really confined within very narrow limits, and that all this creative power of the mind amounts to no more than the faculty of compounding, transposing, augmenting, or diminishing the materials afforded us by the senses and experience. . . . Or, to express myself in philosophical language, all our ideas or more feeble perceptions are copies of our impressions or more lively ones.").

Platonic truth and Kantian rationality with artistic originality, thereby legitimating authorship as the rational expression of spirit.[30]

In Hegel's synthesis, originality distinguishes authentic works from imitation, grounding authorship in an unfolding of reason within culture.[31] Yet the fragility of this construction becomes evident when the idealist infrastructure collapses.[32] Hume had already revealed authorship as contingent on custom and belief rather than universal rationality, thus framing originality not as metaphysical truth but as a socially constituted practice, as emphasized in postmodern thinking.[33]

Schopenhauer's World as Will and Representation breaks the trajectory of the Enlightenment lineage, as represented by Kant and Hegel.[34] Kant grounds authorship in the autonomous will, aligning creativity with rational freedom and self-legislation. Hegel then reconciled Platonic truth and Kantian autonomy by elevating originality as the singular embodiment of spirit in art, thereby securing authorship as both rational and legitimate. By construing the self as mere representation, an illusion serving the blind and non-rational Will and Representation, Schopenhauer dissolves the presumed unity of personhood and authorship, anticipating a post-authorial legal order.[35]

In Schopenhauer's metaphysics, individuation and authorship are derivative illusions, products of cognition that fracture the unity of the Will and generate perpetual striving.[36] Genius, far from asserting autonomy or

30 1 GEORG WILHELM FRIEDRICH HEGEL, AESTHETICS: LECTURES ON FINE ART 291 (T.M. Knox trans., 1975) ("For, as subject, he has entirely identified himself with his topic, and fashioned its embodiment in art out of the inner life of *his* heart and *his* imagination. This identity of the artist subjectively with the true objectivity of his production is the third chief point which we still have to consider briefly, because in this identity we see united what hitherto we have separated as genius and objectivity. We can describe this unity as the essence of genuine originality.").

31 *Id*. at 47.

32 Michel Foucault, *What is Enlightenment?*, *in* THE FOUCAULT READER 32 (P. Rabinow ed., 1984); MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTICS OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 9 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002) ("Each human being has been endowed with a self of his or her own, different from all others, so that it could all the more surely be made the same. But because that self never quite fitted the mold, enlightenment throughout the liberalistic period has always sympathized with social coercion. The unity of the manipulated collective consists in the negation of each individual and in the scorn poured on the type of society which could make people into individuals.").

33 ROLAND BARTHES, *The Death of the Author*, *in* IMAGE MUSIC TEXT 142 (Stephen Heath trans., 1977); MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE 130–31 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977). For Foucault's and Barthes's influence on theories of authorship, including writing in a digital age, *see* Jakob Stougaard-Nielsen, *The Author in Literary Theory and Theories of Literature*, *in* THE CAMBRIDGE HANDBOOK OF LITERARY AUTHORSHIP 270, 284 (Ingo Berensmeyer, Gert Buelens & Marysa Demoor eds., 2019).

34 ARTHUR SCHOPENHAUER, THE WORLD AS WILL AND REPRESENTATION (1818/1844) (E.F.J. Payne trans., 1969) [hereinafter SCHOPENHAUER, WWR].

35 *Id*. at 185-86; *see generally* Robert Wicks, *Arthur Schopenhauer*, *in* STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/archives/spr2024/entries/schopenhauer/ [https://perma.cc/538R-XXGA].

36 SCHOPENHAUER, WWR, *supra* note 34, at 196 ("Essentially, it is all the same whether we pursue or flee, fear harm or aspire to enjoyment; care for the constantly demanding will, no matter in what form,

spirit, is defined as the suspension of the Will: a state of pure perception in which universal forms momentarily appear.[37] Authorship, accordingly, is not an act of mastery but an impersonal detachment.[38] This inversion collapses the legal conflation of identity and property, destabilizing copyright's reliance on personal authorship.

Schopenhauer's critique of literary commodification in *On Writing and Style* further reveals the cultural biases embedded in utilitarian justifications.[39] His denunciation of writing "for money" anticipates modern concerns that broad copyright regimes favor marketability over insight, weakening the public interest.[40] Therefore, Schopenhauer's aesthetic metaphysics provide a conceptual framework for rethinking authorship and ownership. Consequently, the Hume-Schopenhauer legacy directly challenges the pillars of originality and ownership, destabilizing and ultimately reshaping the semantic boundaries of Enlightenment thought.

The deeper question is why the Kantian–Hegelian legacy has remained hegemonic, while their contemporaries have been systematically marginalized. This persistence is not a neutral outcome of intellectual debate but a function of power.[41] Law consolidates around rational autonomy and dialectical progress, while suppressing frameworks that privilege experience, desire, or the detachment of the self. GenAI exposes this tension within copyright law, revealing how Enlightenment constructs of authorship continue to define legal agency, property rights, and originality even as their conceptual foundations falter in practice.

The concept of "artificial intelligence" defies easy definition.[42] Despite widespread use of the term, there is no generally accepted definition beyond broad descriptive accounts. In most contexts, "AI" refers to technologies designed to replicate or automate tasks that, when performed by humans,

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continually fills and moves consciousness; but without peace and calm, true well-being is absolutely impossible. Thus, the subject of willing is constantly lying on the revolving wheel of Ixion, is always drawing water in the sieve of the Danaids, and is the eternally thirsting Tantalus.").

37 *Id*. at 194 ("Now according to our explanation, genius consists in the ability to know, independently of the principle of sufficient reason, not individual things which have their existence only in the relation, but the Ideas of such things, and in the ability to be, in face of these, the correlative of the Idea, and hence no longer individual, but pure subject of knowing.").

38 *Id*. at 185-86 ("In other words, genius is the ability to leave entirely out of sight our own interest, our willing, and our aims, and consequently to discard entirely our own personality for a time, in order to remain *pure knowing subject,* the clear eye of the world.").

39 ARTHUR SCHOPENHAUER, PARERGA AND PARALIPOMENA: SHORT PHILOSOPHICAL ESSAYS 450, § 272 (Adrian Del Caro & Christopher Janaway eds. & trans., Cambridge Univ. Press 2015) (1851).

40 *Id*.

41 *See generally* Louis Althusser, *Ideology and Ideological State Apparatuses*, *in* LENIN & PHILOSOPHY & OTHER ESSAYS 85 (Ben Brewster trans., 1971); ROLAND BARTHES, MYTHOLOGIES (Annette Lavers trans., 1972); MICHEL FOUCAULT, ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE (A.M. Sheridan Smith trans., 1972); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Pantheon Books 1970); Foucault, *What is Enlightenment?*, *supra* note 32.

42 *Artificial Intelligence: Introduction*, 138 HARV. L. REV. 1554, 1555 (2025).

are typically associated with intelligence.[43] This usage encompasses a wide array of computational approaches, particularly machine learning methods, including large language models (LLMs). At the same time, "AI" has taken on a broader cultural and rhetorical role, functioning as a catchall label and, increasingly, as a marketing device, trading on the allure of technological innovation.[44]

This article examines how GenAI unsettles the foundations of copyright law by displacing traditional notions of authorship and originality. Part I discusses how DMCA litigation has evolved into a surrogate framework for disputes over originality in the GenAI era. The DMCA was not designed to determine what qualifies as an "original work". Its provisions are limited to protecting technological protection measures[45] and prohibiting the alteration or removal of copyright management information (CMI).[46]

Nevertheless, in recent litigation involving GenAI, the DMCA has assumed an unexpected role as an indirect adjudicator of originality. As authorship and originality have become increasingly fractured, plaintiffs have relied on § 1202 as a vehicle for asserting claims. The case law reflects this tension. For example, in *Raw Story Media, Inc. v. OpenAI, Inc.* (*Raw Story*)[47], the plaintiffs, Raw Story Media Inc. and AlterNet Media Inc., major online news organizations, sued OpenAI and affiliates under the DMCA, alleging that ChatGPT was trained on internet "scrape" containing thousands of their copyrighted works, from which CMI was removed, thus, violating § 1202(b)(1), preventing ChatGPT from providing proper attribution.[48]

The plaintiffs grounded their damages and injunctive relief on the substantial risk that the current versions would reproduce their works without CMI.[49] The Southern District of New York dismissed § 1202 claims for lack of a cognizable injury.[50] Under similar circumstances, and less than a month after the Raw Story ruling, the same court reached a contradictory result. Additionally, Intercept Media filed a suit against OpenAI and Microsoft, alleging that the defendants intentionally removed CMI from thousands of the plaintiff's online news articles used in ChatGPT's training

43 *Id.*; *see e.g., Artificial Intelligence: What It Is, How It Works and Why It Matters*, INT'L ORG. FOR STANDARDIZATION, https://www.iso.org/artificial-intelligence [https://perma.cc/45K4-C7UU].

44 *Artificial Intelligence: Introduction*, *supra* note 42.

45 *See* Digital Millennium Copyright Act, 17 U.S.C. § 1201.

46 *See* Digital Millennium Copyright Act, 17 U.S.C. § 1202; *see also* Mira Moldawer, *Cassandra's Curse or Cassandra's Triumph: Three Tales of Intellectual Property Revised,* 43 LOY. L.A. ENT. L. REV. 111, 118-23 (2023) (discussing the history and aim of the DMCA).

47 756 F. Supp. 3d 1 (S.D.N.Y. 2024).

48 *Id*. at 3-4.

49 *Id*.

50 *Id*. at 6.

sets, and that ChatGPT subsequently reproduced portions of these works without CMI, in violation of the DMCA.[51]

In *Intercept Media*, Justice Jed S. Rakoff viewed DMCA claims as engaging the same property-based harms traditionally recognized in copyright law.[52] While the defendants contended that the injury from lack of attribution was neither concrete nor analogous to a historically recognized harm, the court nevertheless found it to be a concrete injury, grounded in the evolving property rights of copyright holders.[53] Consequently, the Court permitted such claims to proceed, finding that plaintiffs plausibly alleged removal of attribution and met the statute's stringent "double scienter" requirement.[54]

Namely, not only does an alleged infringer need to know that the so-called CMI has been removed or altered, but the infringer also has to know that the removal would likely result in copyright infringement. Ironically, courts have split on whether the DMCA can substitute for traditional originality or must be read strictly according to its text.[55] In *Doe v. GitHub, Inc.* (*Doe)*, Justice Jon Tigar of the Northern District of California adopted a narrow reading of §1202(b), requiring removal of CMI from an identical copy of a work.[56] Because Copilot's outputs were usually altered rather than verbatim, plaintiffs' claims failed.

A similar "identicality" standard led to dismissal in *Andersen v. Stability AI Ltd.*[57] These rulings confine DMCA liability in the Ninth Circuit to cases of exact reproduction. By contrast, under similar circumstances and

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51 The Intercept Media, Inc. v. OpenAI, Inc., 767 F. Supp. 3d 18, 22-23 (S.D.N.Y. 2025). In the same line, *see* The New York Times Co. v. Microsoft Corp., 777 F. Supp. 3d 283 (S.D.N.Y. 2025); Doe 1 v. GitHub, Inc., 672 F. Supp. 3d 837 (N.D. Cal. 2023). In *The New York Times Co. v. Microsoft Corp.*, the Court granted [1] Microsoft's motions to dismiss the 17 U.S.C. § 1202(b)(1) claims in all three actions, [2] OpenAI's motion to dismiss the § 1202(b)(1) claim in the Times action, and [3] the dismissal of the § 1202(b)(3) claims against all defendants in all actions, each without prejudice, but denied OpenAI's motions to dismiss the § 1202(b)(1) claims in the Daily News and CIR actions. 777 F. Supp. 3d at 329.

52 *Intercept Media*, 767 F. Supp. 3d at 27.

53 *See* Safia Hussain & Jeff Prystowsky, *Intercept Media, Inc. v. OpenAI, Inc*., LOEB & LOEB LLP (Feb. 20, 2025), https://www.loeb.com/en/insights/publications/2025/02/intercept-media-inc-v-open-ai-inc [https://perma.cc/XBJ6-2QV3].

54 *See* Victor Elias Photography, LLC v. Ice Portal, Inc., 43 F.4th 1313 (11th Cir. 2022) (for the "double scienter" requirement).

55 *See*, *e.g.*, Mango v. BuzzFeed, Inc., 970 F.3d 167, 171–72 (2d Cir. 2020) (holding that the DMCA's "double scienter" requirement necessitates a showing that the defendant knew the removal of CMI would facilitate an infringement, regardless of the type of actor (i.e., third party) or time (i.e., future); Stevens v. CoreLogic, Inc., 899 F.3d 666, 674–75 (9th Cir. 2018) (requiring an affirmative showing that the defendant possessed specific intent or knowledge that their actions would induce or conceal infringement). *Compare* MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 950–52 (9th Cir. 2010) (adopting a strict textual reading that does not require a "nexus" between circumvention and traditional copyright infringement), *with* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202–04 (Fed. Cir. 2004) (ruling that the DMCA must be read in the context of the Copyright Act as a whole, requiring a link to the protection of an original work).

56 *Doe 1*, 672 F. Supp. 3d at 857-859.

57 Andersen v. Stability AI Ltd., 744 F. Supp. 3d 956, 971 (N.D. Cal. 2024).

allegations, in *The New York Times Co. v. Microsoft Corp.* (*The New York Times*), Justice Sidney H. Stein of the Southern District of New York allowed §1202(b)(1) claims by certain plaintiffs to proceed without requiring substantial similarity, recognizing ingestion-based CMI removal as a cognizable injury.[58]

This division highlights a deeper tension: whether the DMCA functions as a standalone protection or continues to depend on the current copyright's originality threshold. These developments reveal a broader doctrinal displacement within the GenAI context. Originality is no longer assessed by the presence of human creativity in the output, but rather by the integrity of metadata. The decisive legal question becomes whether machine systems preserve or strip the informational markers of prior authorship. This reorientation from human creativity to metadata integrity sets the stage for Part II, which shifts from legal frameworks to structural analysis.

Part II turns from this statutory displacement to a structural one. In DMCA litigation, originality serves less as a measure of individual genius than as a procedural threshold; plaintiffs need only show derivation by machines. This marks the rise of "assemblage authorship," echoing Gilles Deleuze and Félix Guattari's idea that creativity arises from heterogeneous elements brought into relation rather than from a single origin.[59] ANT develops this insight by tracing how humans, technologies, and institutions together constitute authorship, destabilizing the view that it is exclusively human.[60]

Where the DMCA redirects disputes into questions of metadata integrity, ANT interrogates the diffuse, distributed processes through which authorship itself is constituted, destabilizing the very notion of originality as a human-centered attribute. Michel Foucault's theory of the *dispositif* situates these networks within overarching legal and cultural frameworks, revealing how authorship is not inherent but constructed through the dynamic interaction of law, discourse, and systems of power.[61]

As a *dispositif* is best understood as a heterogeneous arrangement that links material and immaterial elements, organized through relations rather than essences, shaped by historical contingencies, and embodying the fusion

58 *The New York Times*, 777 F. Supp. 3d at 283 (mem. op. resolving motions to dismiss) (Stein, J.).

59 GILLES DELEUZE & CLAIRE PARNET, DIALOGUES II 69 (Columbia Univ. Press 2002); *see also* GILLES DELEUZE & FELIX GUATTARI, A THOUSAND PLATEAUS 73 (Univ. of Minn. Press 1987).

60 *See generally* Bruno Latour, *Third Source of Uncertainty: Objects Too Have Agency*, *in* REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK-THEORY (Oxford 2005); Michel Callon, *Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay*, *in* POWER, ACTION AND BELIEF: A NEW SOCIOLOGY OF KNOWLEDGE? 196–224 (John Law ed., Routledge & Kegan Paul 1986).

61 Michel Foucault, *The Confession of the Flesh*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 194 (Colin Gordon ed., Colin Gordon, Leo Marshall, John Mepham & Kate Soper trans., Pantheon Books 1980).

of power and knowledge, GenAI functions as such a *dispositif* of authorship. It is not merely a technical tool but a strategic network that connects law, technology, institutions, and cultural practices.[62] Legally, copyright doctrine privileges the human author, excluding AI, despite ample scholarship challenging this human-centered discourse.[63]

Institutionally, copyright offices, courts, and legislatures reinforce this definition, while comparative and international perspectives frame it within global IP governance.[64] Technologically, models like GPT and *Stable Diffusion* depend on vast datasets and infrastructures that centralize cultural and economic power. Practically, creativity shifts from composition to prompting, curation, and editing, while industries regulate how AI is used.[65] Strategically, AI responds to content abundance and efficiency demands, reaffirming Enlightenment ideals of originality while producing new subject-positions, most notably the AI prompter as a creative identity.[66]

Together, both the DMCA surrogacy and the different nuances of ANT, morphing into the *dispositif,* point to a post-authorial paradigm in which creativity is distributed, relational, and legally constructed. Part III extends this analysis into comparative law. The recent Chinese adjudication provides a critical test case, illustrating both the promise and the limits of this paradigm, as the *dispositif* of AI authorship produces outcomes that sometimes confirm and sometimes challenge its theoretical expectations.

China's approach to originality, particularly regarding AI-generated works, has evolved dynamically, reflecting an emerging tension between human-centered authorship and recognition of machine-assisted creativity. Landmark cases illustrate this trajectory. In *Tencent Company v Yingxun Company* (*Tencent v Yingxun*), the Shenzhen Nanshan District Court held that a financial report generated by Tencent's AI system, *Dreamwriter*, qualified as a copyrightable literary work, emphasizing the human preparatory inputs, data formatting, template selection, and algorithm training, as evidence of originality and creative control.[67]

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62 Alain Pottage, *The Materiality of What?*, 39 J.L. & SOC'Y 167, 181 (2012).

63 Thaler v. Perlmutter, 687 F. Supp. 3d 140, 147 (D.D.C. 2023). For a different perspective, *see, e.g.,* Abbott & Rothman, *supra* note 2.

64 U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 306 (3d ed. 2021); Sam Ricketson, *People or Machines: The Berne Convention and the Changing Concept of Authorship*, 16 COLUM. J. L. & ARTS 1, 21 (1991); Jane C. Ginsburg, *People Not Machines: Authorship and What It Means in the Berne Convention*, 49 INT' L REV. INTELL. PROP. & COMPETITION L. 131, 134 (2018).

65 *See generally Artificial Intelligence: Introduction, supra* note 42.

66 *See generally* Mark Lemley, *How Generative AI Turns Copyright Upside Down*, 25 COLUM. SCI. & TECH. L. REV. 21, 22 (2024) (for a new concept of "copyrightability" vis-à-vis generative AI).

67 Shenzhen Tencent Computer System Co. Ltd. v. Shanghai Yingxun Technology Co. Ltd., Nanshan Dist. People's Court Case No. Y0305MC No. 14010, Dec. 24, 2019 (China), WIPO LEX, https://www.wipo.int/wipolex/en/text/588678 [https://perma.cc/YDK7-5K4W] [hereinafter *Tencent v. Yingxun*].

Similarly, *Li v. Liu* recognized AI-assisted images as "artistic works," attributing authorship to the human user whose iterative prompt engineering, parameter adjustments, and selection of final outputs demonstrated sufficient intellectual investment.[68] By contrast, cases such as *Feng Moumou v. Dongshan* and *Lin* held in Guilin illustrate limits: works created through minimal or undocumented human input, or mere prompt design, were denied protection.[69] Chinese courts thus oscillate between a strict human-authorship model and a more flexible "creative control" approach, treating AI as a tool through which human originality may be expressed.

This jurisprudential evolution reflects broader doctrinal debates. Some scholars emphasize the irreducibility of human agency, grounding originality in authorship identity, while others advocate assessing the human role in the production process, distinguishing AI contributions from intellectual input.[70] Taken together, these developments highlight China's hybrid approach: originality and copyrightability are increasingly understood as relational products of human creativity, technological mediation, and institutional recognition, signaling a shift toward a post-authorship model aligned with contemporary AI-enabled creation. Lastly, I conclude.

I. SURROGATING ORIGINALITY: RETHINKING THE DMCA IN GENAI DISPUTES

Historically, prior to the DMCA, Section 230 of the Communications Decency Act (CDA) treated platforms as passive intermediaries, immune from liability; however, the rise of Web 2.0 undermined this rationale.[71] The

68 *Li Moumou v. Liu Moumou for Infringement Of The Right To Authorship Of Works And The Right To Disseminate Information On The Network*, INTELL. PRO. LAWS. NETWORK (Sep. 10, 2025), https://www.ciplawyer.cn/articles/157539.html [https://perma.cc/9E9R-LN3T] [hereinafter *Li v. Liu Case*].

69 Xu Kinming, *In the Era of AI, Intellectual Property Justice Ushered in New Challenges*, INTELL. PROP. LAWS. NETWORK (July 22, 2025), https://www.ciplawyer.cn/articles/157162.html [https://perma.cc/ZS2A-FKH9]; Edward Chatterton, Joanne Zhang & Liam Blackford, *Another Chinese Court Finds that AI-Generated Images Can Be Protected by Copyright: The Changshu People's Court and the "Half Heart" Case*, DLA PIPER (May 21, 2025), https://www.dlapiper.com/en-at/insights/publications/2025/05/another-chinese-court-finds-that-ai-generated-images-can-be-protected-by-copyright [https://perma.cc/5R88-JQ8F].

70 *Compare* Song Jianbao, *Discussion on the Copyright Infringement of Generative Artificial Intelligence Services*, INTELL. PROP. LAW. NETWORK (Oct. 7, 2023), https://www.ciplawyer.cn/articles/151643.html [https://perma.cc/5J7E-5VDQ], *with* Zhang Kaiye, *Authorship and Creation in Machines: From Photography to Generative Artificial Intelligence*, INTELL. PRO. LAWS NETWORK (Nov. 23, 2024), https://www.ciplawyer.cn/articles/155474.html [https://perma.cc/EXP9-NXVZ].

71 Oreste Pollicino & Giovanni De Gregorio, *A Constitutional-Driven Change of Heart: ISP Liability and Artificial Intelligence in the Digital Single Market*, 18 GLOB. CMTY. Y.B. INT'L L. & JURIS. 237, 238, 241 (2019). This marks the *Napster* case as a symbolic turning point, representing the start of Web 2.0, in which internet passivity was absent. *Id.* at 238; Historically, the rise of Web 2.0 undermined

transition from CDA §230's conception of platforms as passive intermediaries to the DMCA's framework of conditional safe harbors and anti-circumvention rules redefined online platforms as active regulators, with algorithmic filtering and AI enforcement mechanisms becoming central to the governance of digital content.[72]

Alongside vigorous lobbying by the entertainment industry, court rulings holding that Internet Service Providers (ISPs) could be liable for known or foreseeable infringement – and, in certain cases, even absent actual knowledge where the 4th fair use factor weighed against the use – facilitated the emergence of the U.S. anti-circumvention regime under the DMCA.[73] The DMCA, enacted in 1998 to implement the WIPO Copyright Treaty and Articles 18 and 19 of the WIPO Performances and Phonograms Treaty, introduced anti-circumvention rules (§ 1201) and protections for CMI (§ 1202).[74] While § 1202 was originally imagined as a technical safeguard for metadata in digital files, plaintiffs in GenAI litigation have reframed it as a doctrinal vehicle for enforcing attribution and authorship in a landscape where "originality" and "copying" are contested.[75]

This pivot is not accidental. The copyright infringement doctrine, requiring proof of protectable authorship and substantial similarity, sits uneasily with machine-learning technologies that ingest millions of works and output statistically generated text or images.[76] In this context, proving infringement often founders on two fronts: (1) uncertainty over whether

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the rationale of internet passivity. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–22 (9th Cir. 2001) (rejecting fair use defenses and holding Napster liable for contributory infringement).

72 Pollicino & Gregorio, *supra* note 71, at 238 ("From that moment on, the web has become a place to share content and other information. This first radical transformation of the online environment has also affected the role of online intermediaries, primarily, hosting providers. These entities provide access to, host, transmit, and index content, products and services originated by third parties on the internet or provide internet-based services to third parties.").

73 *See* Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs. Inc., 907 F. Supp. 1361, 1373 (N.D. Cal. 77 1995); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993); Sega Enters. Ltd. v. 78 Maphia, 948 F. Supp. 923, 932 (N.D. Cal. 1996).

74 17 U.S.C. § 1201(a)(1)(A) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title."); *see also* 17 U.S.C. § 1201(a)(2) (prohibiting the "manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof" designed to circumvent access controls); 17 U.S.C. § 1202(b) ("No person shall, without the authority of the copyright owner or the law . . . intentionally remove or alter any copyright management information . . . [or] distribute . . . copies of works . . . knowing that . . . [CMI] has been removed or altered without authority"); WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121, 36 I.L.M. 65 [https://perma.cc/ZW5U-NZHB]; WIPO Performances and Phonograms Treaty arts. 18-19, Dec. 20, 1996, 2186 U.N.T.S. 203, 36 I.L.M. 76 [https://perma.cc/ZW5U-NZHB] (requiring "adequate legal protection" against circumvention); S. Rep. No. 105-190, at 2, 11 (1998) (explaining that Title I of the DMCA was designed to "make the technical amendments" necessary to move the U.S. into compliance with the WIPO treaties).

75 *See, e.g.*, *Raw Story Media*, 756 F. Supp. 3d at 5; *Intercept Media*, 767 F. Supp. 3d at 26; *The New York Times*, 777 F. Supp. 3d at 300-01; *Doe 1*, 672 F. Supp. at 845.

76 *See* Theresa M. Weisenberger, *Case Tracker: Artificial Intelligence, Copyrights and Class Actions*, BAKERHOSTETLER, https://www.bakerlaw.com/services/artificial-intelligence-ai/case-tracker-artificial-intelligence-copyrights-and-class-actions/ [https://perma.cc/BYL3-WRRD] (detailing active cases that attempt to apply copyright doctrine to GenAI lawsuits).

outputs are "substantially similar" to any individual input, and (2) the difficulty of linking those outputs back to specific copyrighted works. Instead, § 1202's focus is not on output originality but on whether CMI was removed, altered, or falsified, thus surrogating originality, as discussed in the following section.

A. The Blurry Mechanism of DMCA Surrogacy

The most promising avenue for plaintiffs has been § 1202(b)(1), which prohibits "intentionally remov[ing] or alter[ing] any copyright management information" without authority and with knowledge that doing so will facilitate infringement.[77] This "double scienter" requires that plaintiffs allege both intentional removal and knowledge of infringement-enabling consequences.[78] However, this promise is a tricky one.

In *Stevens v. CoreLogic, Inc*. (*Stevens*), the Ninth Circuit upheld the district court's summary judgment in favor of CoreLogic in a DMCA case brought by real estate photographers.[79] The plaintiffs alleged that CoreLogic's software removed CMI from their photographs and then distributed them without attribution, in violation of 17 U.S.C. § 1202(b)(1)-(3).[80] The court clarified that liability under § 1202(b) requires, not only proof of CMI removal, but also affirmative evidence that the defendant knew the removal would likely induce, enable, facilitate, or conceal infringement.[81] Absent proof that CoreLogic knew its software posed even a significant risk of leading to infringement, the panel affirmed the district court's grant of summary judgment in favor of CoreLogic, the defendant.[82] The panel also affirmed the district court's refusal to grant the plaintiff's motion to compel the production of documents.[83]

In *Mango v. Buzzfeed, Inc.* (*Buzzfeed*), a photographer brought a DMCA claim against BuzzFeed for publishing his photo without proper attribution.[84] The district court awarded statutory damages, and BuzzFeed appealed, contending it could not be liable because it lacked knowledge that its conduct would lead to future third-party infringement.[85] The Second Circuit rejected that argument and affirmed. It held that the plain text of the DMCA does not require proof that a defendant anticipated downstream

77 17 U.S.C. § 1202(b)(1).

78 *Stevens*, 899 F.3d at 673.

79 *Id. at* 677.

80 *Id*. at 672-75.

81 *Id*. at 673 ("Both provisions thus require the defendant to possess the mental state of knowing, or having a reasonable basis to know, that his actions 'will induce, enable, facilitate, or conceal' infringement.").

82 *Id*. at 677.

83 *Id*. at 679.

84 *Buzzfeed*, 970 F.3d 167.

85 *Id*. at 171-72.

infringement; rather, liability attaches when the defendant knowingly removes or alters CMI or distributes a work with false or missing CMI.[86]

Applying that standard, the court concluded that BuzzFeed, through its journalist, distributed the photo with the photographer's credit removed or altered and replaced with a false credit line (Fisher & Taubenfeld), fully aware that doing so concealed the journalist's lack of authorization to use the image.[87] While *Stevens* reflects the Ninth Circuit's reluctance to impose liability absent evidence that CMI removal was knowingly tied to downstream infringement, the Second Circuit in *BuzzFeed* adopted a more textually grounded approach.

In *BuzzFeed*, the court made clear that § 1202(b) does not require proof that the defendant foresaw or intended subsequent third-party infringement; rather, liability attaches when the defendant knowingly distributes a work with altered or false CMI that conceals a lack of authorization. By contrast, *Stevens* left unresolved whether a defendant's own infringing conduct could satisfy the second scienter requirement under § 1202(b)(3), as the plaintiffs there argued only that metadata removal increased the risk of third-party infringement.

Thus, the two cases illustrate a growing divergence: while the Second Circuit emphasizes the statutory language's focus on the defendant's knowledge of falsification or removal, the Ninth Circuit requires a more robust showing connecting CMI removal to actual infringement. Yet, the evidentiary threshold is not the only doctrinal hurdle to the viability of § 1202 claims in the Gen-AI context; equally unresolved is the question of standing, which continues to generate uncertainty in both scope and application.

As demonstrated in *Raw Story* versus *Intercept Media*, courts have not yet clarified whether the diffuse and often indirect harms alleged, arising from the ingestion of works during training or the subsequent appearance of CMI-stripped material in model outputs, constitute a cognizable injury.[88] In *Raw Story*, Justice Colleen McMahon dismissed the DMCA claims for lack of Article III standing, holding that allegations of metadata removal were

86 *Id*. at 171 ("The question presented on appeal is whether the DMCA requires proof that a defendant knew, or had reasonable grounds to know, that its conduct would lead to future, third-party infringement. Because the plain language of the statute does not require such evidence, the district court did not err in finding BuzzFeed liable.").

87 *Id*. at 172 ("We thus reject the argument that a defendant must know or have reason to know about likely future infringement by third parties. Instead, Section 1202(b)(3) also encompasses 'an infringement' that, upon distribution, 'will [. . .] conceal' the fact of *that* infringement.").

88 *See generally*, *Raw Story Media*, 756 F. Supp. 3d at 5 contradicting *Intercept Media*, 767 F. Supp. 3d at 26.

insufficiently concrete in the absence of demonstrable dissemination-related harm.[89]

Justice McMahon drew a sharp line between the DMCA and the Copyright Act, refusing to let § 1202 operate as an originality surrogate and cautioning against its use as a backdoor expansion of copyright protection. Justice McMahon stated:

> For one thing, Plaintiffs are wrong that Section 1202 'grant[s] the copyright owner the sole prerogative to decide how future iterations of the work may differ from the version the owner published'. Other provisions of the Copyright Act afford such protections, . . . 17 U.S.C. § 106, but not Section 1202. Section 1202 protects copyright owners from specified interferences with the *integrity of a work's CMI.* In other words, Defendants may, absent permission, reproduce or even create derivatives of Plaintiffs' CMI intact.[90]

In *Intercept Media*, Justice Jed S. Rakoff framed DMCA claims as engaging the same property-based harms that have long been recognized under copyright law.[91] Although defendants argued that the non-attribution injury was not concrete and lacked a traditional legal analogue, the district court held that it was nonetheless a concrete injury, rooted in the evolving property rights of copyright owners.[92] By linking the DMCA violation to the same type of actionable harm and creative incentives as traditional copyright claims, Justice Rakoff effectively extended the property-rights paradigm of copyright into DMCA enforcement.

Consequently, courts have yet to determine whether and how plaintiffs can establish a cognizable injury when the alleged removal of CMI occurs in the course of AI training or manifests indirectly through model outputs. This uncertainty reveals a deeper structural limitation of § 1202. The divergent adjudications demonstrate that §1202 operates not simply as a procedural mechanism, but as a substantive redefinition of injury within the AI context. By framing harm as the loss of attributional integrity rather than the loss of originality, plaintiffs reposition the DMCA as a functional substitute for copyright's originality threshold. However, the old concept of originality still rules, as demonstrated in the following section.

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89 *Raw Story*, 756 F. Supp. 3d at 6 ("Moreover, I am not convinced that the mere removal of identifying information from a copyrighted work-absent dissemination-has *any* historical or common-law analogue.").

90 *Id.* at 6.

91 *Intercept Media*, 767 F. Supp. 3d at 28.

92 Hussain & Prystowsky, *supra* note 53.

B. From Classical Standards to Digital Codes: Originality Across Copyright and the DMCA

Ironically, while some courts have sought to use the DMCA as a surrogate for traditional notions of originality, others still rely on its specific statutory requirements. In *Doe*, the plaintiffs alleged that defendants intentionally designed their GenAI tool, Copilot, to remove CMI from licensed code it generated, in violation of §1202(b) of the DMCA.[93] On January 22, 2024, in the Northern District of California, Justice Jon Tigar interpreted §1202(b) narrowly, holding that liability requires the removal of CMI from an identical copy of a copyrighted work.[94]

Because plaintiffs acknowledged that Copilot's outputs were typically modifications of their works rather than exact copies, the alleged removal of CMI did not satisfy §1202(b), given the transformative nature of Copilot's outputs.[95] On April 16, the News/Media Alliance filed an amicus brief supporting the plaintiffs on appeal to the Ninth Circuit.[96] The brief urged the court to reject GitHub's claim that §1202(b) imposes an identicality requirement, arguing that liability should arise even when CMI is removed from non-identical copies.[97]

It emphasized that imposing an identicality requirement would add language to the statute that Congress did not include, undermine rightsholders' protections, conflict with case law, and run contrary to the U.S.'s implementation of the WIPO Internet Treaties. The brief was filed alongside the Association of American Publishers, the Authors' Guild, and the International Association of Scientific, Technical, and Medical Publishers.[98] The court has certified the identicality question for interlocutory appeal, and it now awaits review by the Ninth Circuit.[99]

Likewise, in *Andersen v. Stability AI Ltd.*, the court dismissed § 1202(b) claims with prejudice.[100] Plaintiffs alleged that Stability's diffusion models were trained on their artworks with CMI stripped, but because no outputs

93 *Doe 1*, 672 F. Supp. 3d at 844, 853–54.

94 Doe 1 v. GitHub, Inc., No. 22-cv-06823-JST, 2024 WL 235591, at *5 (N.D. Cal. Jan. 22, 2024).

95 *Id*. at *6.

96 *News/Media Alliance Calls on the Ninth Circuit to Reject Section 1202 Identicality Requirement*, NEWS MEDIA ALLIANCE (Apr. 18, 2025), https://www.newsmediaalliance.org/news-media-alliance-calls-on-the-ninth-circuit-to-reject-section-1202-identicality-requirement/ [https://perma.cc/A7JA-5BSC].

97 Brief of Amici Curiae News/Media Alliance et al. in Support of Appellants and Reversal at 6–10, Doe 1 v. GitHub, Inc., No. 24-6136 (9th Cir. Apr. 16, 2025).

98 *Id.*

99 Doe 1 v. GitHub, Inc., No. 22-cv-06823-JST, 2024 WL 3251213, at *2 (N.D. Cal. July 1, 2024); James Gatto & Sam Smith, *Andersen Plaintiffs Strategically Dismiss § 1202(b) Claims Pending Interlocutory Appeal in Github Case*, JDSUPRA, (Nov. 27, 2024), https://www.jdsupra.com/legalnews/andersen-plaintiffs-strategically-3901814/ [https://perma.cc/PPN9-22XG].

100 Andersen v. Stability AI Ltd., 744 F. Supp. 3d 956, 971 (N.D. Cal. 2024).

reproduced their works verbatim, the claims failed under the identicality standard.[101] The court also rejected a § 1202(a) "false CMI" theory, reasoning that *Stability*'s licensing materials, attributing copyright to the company, did not constitute false CMI as to plaintiffs' specific works.[102] These rulings sharply limit the use of the DMCA as a surrogate for originality in the Ninth Circuit. Absent "regurgitation," where models output verbatim reproductions, plaintiffs cannot rely on § 1202 to bypass originality analysis.[103]

By contrast, in *The New York Times*, Justice Sidney H. Stein of the Southern District of New York allowed certain plaintiffs, the *Daily News* and the Center for Investigative Reporting (CIR), to pursue § 1202(b)(1) claims for loss of attribution without showing substantial similarity.[104] The plaintiffs alleged that the defendants stripped metadata, bylines, and copyright notices when ingesting news articles into training datasets, thus enabling downstream dissemination without attribution.[105]

On the first scienter requirement, Justice Stein held that both actions adequately alleged removal of CMI at the pleading stage, noting this Circuit's lenient standard for scienter on a motion to dismiss.[106] Accepting the allegations as true, the court credited claims that OpenAI intentionally used both its Dragnet and Newspaper algorithms to "create redundancies," and that OpenAI deliberately declined to extract author and title information when using the Newspaper algorithms to maintain consistency with Dragnet, which typically cannot extract such data.[107] These allegations plausibly allege the removal of CMI from CIR's works in the course of building training datasets.[108]

On the second scienter requirement, Justice Stein likewise found plausible CIR's and the *Daily News*'s allegations that OpenAI knew or should have known that its removal of CMI would induce, enable, facilitate,

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101 *Id.* at 971 ("Because there are no allegations that any output from Stable Diffusion was identical to a plaintiff's work, the DMCA section 1202(b) claim fails as well.").

102 *Id*. at 970 ("The generic license that accompanies use of Stable Diffusion on its face claims rights to Stable Diffusion as a work, not to the LAION dataset and not any works that were used to create the LAION dataset. It is implausible that a viewer reading the license disclosure for Stable Diffusion would understand that Stability is claiming rights to or conveying any false information regarding the rights of the plaintiffs whose copyrighted works are among the billions of images in the LAION datasets.").

103 Gatto & Smith, *supra* note 99 (reporting that plaintiffs in *Andersen v. Stability AI* dismissed with prejudice their DMCA §1202(b) claims to preserve reconsideration if the Ninth Circuit overturns the "identicality" requirement adopted from *Doe v. GitHub*).

104 *See The New York Times*, 777 F. Supp. 3d at 309-10.

105 *Id*. at 314-15.

106 *Id*. at 315.

107 *Id*.

108 *Id*. ("Plaintiffs in both the *Daily News* and *CIR* actions have satisfied their burden at the pleading stage of alleging removal of CMI, especially given this Circuit's leniency when evaluating scienter on a motion to dismiss.").

or conceal infringement.[109] While in the SDNY, courts have implicitly sustained ingestion-based § 1202(b)(1) claims, allowing plaintiffs to vindicate the loss of attribution without demonstrating substantial similarity, in California, the identicality rule reinscribes copyright's originality logic, tethering DMCA protection back to the presence of verbatim reproduction.

It follows that whether the DMCA is independent of, or ancillary to, copyright's originality remains unsettled. Whereas the DMCA confines inquiry to whether machine outputs preserve or strip informational markers of prior authorship, it cannot fully capture the distributed, networked processes that generate creative outputs in AI systems. This gap illustrates the need for a structural lens, which shifts the focus to the dense networks of human and non-human actors, algorithms, datasets, platforms, and institutions that collectively produce and circulate creative work, as discussed in the following Part.

II. RETHINKING ORIGINALITY: A STRUCTURAL LENS THROUGH ACTOR-NETWORK THEORY

The reorientation from human creativity to metadata integrity sets the stage for a structural analysis of authorship in the GenAI context. In DMCA lawsuits, originality becomes an evidentiary threshold rather than a substantive concept. Plaintiffs must prove derivation by the machine, not originality of their own. Tracing the complex networks of human and non-human actors that collectively constitute originality and authorship, as reflected by the Gen AI phenomenon, proves the transformation of originality into micro-sites of intervention. The author no longer originates the whole, but assembles components into an expressive structure.[110]

Thus, we face what might be called *assemblage authorship*, where originality survives not as a natural attribute of human genius but as a juridical necessity, a fragmented, procedural device by which law manages the circulation of human and machinic works.[111] *Assemblage* refers to the core of ANT, which offers an alternative lens for understanding originality and authorship in the GenAI context by interrogating the diffuse, distributed processes through which authorship itself is constituted, destabilizing the very notion of originality as a human-centered attribute.[112] Yet ANT is

109 *Id.* at 316.

110 *See generally* Lemley, *supra* note 66.

111 *See, e.g.*, *Thaler*, 687 F. Supp. 3d at 146 ("Human authorship is a bedrock requirement of copyright."); U.S. COPYRIGHT OFF., *supra* note 64, § 313.2 (3d ed. 2021); Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16191–92 (Mar. 16, 2023) (all insisting on human authorship solely regarding GenAI).

112 *See generally* MANUEL DELANDA, ASSEMBLAGE THEORY (Edinburgh Univ. Press 2016).

nuanced, with its framing shaped by its evolution from the *assemblage*, as the following section discusses.

A. From Assemblage to ANT: The Evolution of a Framework

Formulated by Deleuze and Guattari, the concept was intended to render the nuance of *agencement*, a term that encompasses both the operative process of arranging or assembling heterogeneous elements (*agencer*) and the product of such an operation, namely an ensemble in which the parts articulate with one another.[113] In their words:

> What is an assemblage? It is a multiplicity which is made up of many heterogeneous terms and which establishes liaisons, relations between them, across ages, sexes and reigns – different natures. Thus, the assemblage's only unity is that of co-functioning: it is a symbiosis, a 'sympathy'. It is never filiations which are important, but alliances, alloys; these are not successions, lines of descent, but contagions, epidemics, the wind.[114]

As Manuel DeLanda observes, tracing assemblages across human history brings to the fore a central challenge for any serious engagement with historical thought: determining the nature of the social entities that may be regarded as legitimate agents.[115] While one option is to restrict agency to human beings, whether conceived as rational decision-makers, as in microeconomics, or as phenomenological subjects, any attempt to move beyond this requires an adequate concept of the social whole.[116] Thus, the whole exists on the same level of reality as its parts.[117]

Unlike traditional hierarchical models, which position the whole as something standing above or beyond its constituents, this view treats the

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113 *Id*. at 3.

114 DELEUZE & PARNET, *supra* note 59, at 69; DELEUZE & GUATTARI, *supra* note 59, at 73 ("A single assemblage can borrow from different strata, and with a certain amount of apparent disorder; conversely, a stratum or element of a stratum can join others in functioning in a different assemblage. Finally, the machinic assemblage is . . . also in touch with the plane of consistency and necessarily effectuates the abstract machine.").

115 *Compare* DELANDA, *supra* note 112, at 8, *with* VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 3 (Oxford Academic 2019) ("The cases above are not merely instances of employing similar terms and phrases—such as 'person', 'legal person', and 'legal personhood'—in saliently dissimilar circumstances. Rather, all of them actually make reference to a *conceptual scheme* extant in Western legal systems: the person/ thing distinction, or as I will call it, person/ nonperson distinction.").

116 DELANDA, *supra* note 112, at 8; GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS 42 (New York: Viking 1977) ("We no longer believe in a primordial totality that once existed, or in a final totality that awaits us at some future date. We no longer believe in the dull gray outlines of a dreary, colorless dialectic of evolution, aimed at forming a harmonious whole out of heterogeneous bits by rounding off their rough edges. We believe only in totalities that are peripheral. And if we discover such a totality alongside various separate parts, it is a whole of these particular parts but does not totalize them; it is a unity of all those particular parts but does not unify them; rather it is added to them as a new part fabricated separately.").

117 DELANDA, *supra* note 112, at 10.

whole as immanent, emerging from and coexisting with its parts, rather than transcending them.[118] The key point in applying assemblage theory to GenAI is that the "virtual" should not be understood as the opposite of the real, but as distinct from the actual. In this sense, the virtual constitutes a real dimension of an object, a realm of latent possibilities or potentials in which the object is partially immersed and that can be actualized in multiple ways.[119]

Hence, the turn to ANT, developed within science and technology studies by Bruno Latour, is a logical step, as it provides a framework for analyzing the complex interactions among humans, technologies, objects, and institutions as interconnected "actants".[120] This perspective is especially valuable in the context of GenAI, where agency is distributed across both human and nonhuman entities, and authorship emerges from the networked interplay of these components rather than from any single source.

Latour's work emphasized the complex and heterogeneous relationships among both human and nonhuman agents.[121] In Science in Action, Latour rejected the notion of "the social" as an independent causal force, instead conceptualizing it as a network of associations.[122] Drawing on the Roman god Janus, often regarded as the god of beginnings and depicted with two contradictory faces, Latour contrasted "ready-made science" with "science in the making".[123] From this dual perspective, he offered three dicta.[124]

First, we must abandon the pursuit of "knowledge about knowledge".[125] Second, we should prioritize obtaining the most efficient machine rather than debating abstract definitions of efficiency.[126] Third, once the machine functions, it will persuade people and not only work once consensus has

118 *Id.* DeLanda builds upon Deleuze's and Guattari's notion of "assemblage" by introducing parameters that can vary across contexts to reflect their diverse uses of the concept in different philosophical domains. The first parameter measures the degree of territorialization and deterritorialization within an assemblage. *Id*. at 16–17; The second, its degree of coding and decoding. *Id*. at 17; And the third concerns language. *Id*. at 36. As DeLanda cautions, "Although for analytical purposes it is convenient to distinguish these three assemblages . . . and a given language as an assemblage—it is clear that in any concrete case all three levels operate simultaneously and influence one another." *Id*. at 36–37.

119 GILLES DELEUZE, DIFFERENCE AND REPETITION 208-09 (Columbia Univ. Press 1994) ([t]he "virtual is not opposed to the real but to the actual . . . Indeed, the virtual must be defined as strictly a part of the real object – as though the object had one part of itself in the virtual into which it is plunged as though into an objective dimension.").

120 *See generally* Latour, *Third Source of Uncertainty: Objects Too Have Agency*, *supra* note 60.

121 Noah Tesch, *Bruno Latour*, ENCYCLOPEDIA BRITANNICA (June 18, 2025), https://www.britannica.com/biography/Bruno-Latour [https://perma.cc/4XMJ-QJHE].

122 BRUNO LATOUR, SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY 1–13 (Harvard Univ. Press 1987).

123 *Id*. at 4-10; *see Janus*, ENCYCLOPEDIA BRITANNICA (Sep. 2, 2025), https://www.britannica.com/topic/Janus-Roman-god [https://perma.cc/ST35-JGLU] (for the Roman god Janus' history and legacy).

124 LATOUR, *supra* note 122, at 7-10.

125 *Id*. at 7.

126 *Id*. at 9.

been reached.[127] Latour later refined these insights in *Reassembling the Social*, where he argued that agency arises from interactions among heterogeneous entities, not solely from humans.[128]

In that work, Latour observed that sociology has long recognized the role of external forces in shaping action, while also exposing the enduring hierarchies, asymmetries, and inequalities that organize social life. These conditions, as intractable as pyramids, constrain individual agency and establish society as a sui generis reality.[129] To deny such asymmetries, Latour argued, is as misguided as denying the force of gravity. This perspective evolved into what became known as ANT, whose influence quickly extended beyond the field of science and technology studies.

Rooted in relational ontology, ANT emerged in the early 1980s and has consistently focused on how social order is constructed, highlighting the role of material elements and other nonhumans in these processes.[130] By moving beyond traditional human-nonhuman dualisms, ANT has made a significant contribution to human geography and related disciplines. Michel Callon's classic study of scallops in St. Brieuc Bay illustrated this method: scientists, fishermen, scallops, and technical devices co-constituted a network, such that no single human agent could be considered the "author" of the knowledge produced.[131]

John Law further refined ANT as a methodology for studying institutional messiness, including law, arguing that methods do not just describe social realities but also help to create them.[132] The implications of this argument are significant. It follows that methods are always political, and this raises the question of what kinds of social realities we want to create.[133] It is no wonder legal scholars have adapted ANT to examine how

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127 *Id*. at 10.

128 *See generally* Latour, *supra* note 60.

129 *Id.* at 63.

130 G.T. Jóhannesson, & J.O. Bærenholdt, *Actor-Network Theory*, *in* 1 INT'L ENCYCLOPEDIA OF HUM. GEO. 33-40 (A. Kobayashi, ed., 2d ed., 2020).

131 Callon, *supra* note 60.

132 JOHN LAW, AFTER METHOD: MESS IN SOCIAL SCIENCE RESEARCH 144 (Routledge 2004):

> I have also argued that method assemblage can be understood as *resonance*. This is because it works by *detecting and creating periodicities in the world*. The picture of reality that lies behind this removes us from the most common version of Euro-American metaphysics – the sense that the real is relatively stable, determinate, and therefore knowable and predictable. The alternative metaphysics assumes out-thereness to be overwhelming, excessive, energetic, a set of undecided potentialities, and an ultimately undecidable flux. Sometimes, however, and in method assemblage, out-thereness crystallises into particular forms or (a different metaphor) collapses for a moment into decidability. If method assemblage can be seen as resonance then this is because it detects all the periodicities, patterns or waveforms in the flux, but attends to, amplifies, and retransmits only a few whilst silencing the others. The question is: what does standard method assemblage silence? Which possible realities does it refuse to enact in its dominant insistence on that which is smooth? And how might it be crafted differently?

133 *Id*. at 145:

law itself is produced through networks of documents, technologies, and expertise.

Mariana Valverde used ANT to show how courts translate technical expertise into binding authority.[134] Sharing Foucault's philosophy that knowledge is power, Valverde examines how law's power can be studied through its modes of knowledge production. In *Law's Dream of a Common Knowledge*, Valverde shows through case studies, from police assessments of drunkenness and indecency to judicial determinations of sexuality and obscenity, that legal decision-making cannot be reduced to a simple opposition between science and common sense.[135] Instead, law operates through a hybrid collage of facts, values, and codes drawn from incompatible sources, producing dynamic effects.

Using Foucaultian and other tools, Valverde demonstrates how multiple forms of knowledge, and thus power, coexist within legal processes; this, highlights the importance of studying knowledge formation to understand how law operates in contemporary society.[136] Likewise, Annelise Riles traced how bureaucratic paperwork circulates in international law, destabilizing the idea that legal power resides solely in sovereign states.[137] Alain Pottage, drawing from Latour's notion of hybrid actants, argued that law's meaning depends on material infrastructures, including artifacts and technologies.[138]

Even prior to the rise of GenAI, Pottage's 2012 account identified ANT's multi-dimensional insights as crucial for understanding such novel technological formations. Pottage argues:

> I have suggested that dominant Euro-American enactments produce and presuppose forms of manifest absence that are *independent* and *prior* to an observer; *definite* in shape and form; and also *singular* (there is only one reality). Along the way I have also noted that Euro-American method assemblage usually assumes *constancy* (there are general and invariant laws and processes, and nothing changes unless it is caused to change), *passivity* in the objects that it discovers (they stay the same until they are caused to change) and *universality* (what is absent is generally the same in all possible locations).

134 MARIANA VALVERDE, LAW'S DREAM OF A COMMON KNOWLEDGE (Princeton Univ. Press 2003).

135 *Id.*

136 *Compare id.* at 23, *with* PHILIP STOKES, PHILOSOPHY: 100 ESSENTIAL THINKERS 187 (Paul Whittle ed., 2006) ("The theme that underlies all Foucault's work is the relationship between power and knowledge, and how the former is used to control and define the latter. What authorities claim as 'scientific knowledge' are just means of social control. Foucault shows how, for instance, in the eighteenth century 'madness' was used to categorize and stigmatize not just the mentally ill but the poor, the sick, the homeless, and, indeed, anyone whose expressions of individuality were unwelcome."); *see also* MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 109–10 (Richard Howard trans., 1964).

137 ANNELISE RILES, THE NETWORK INSIDE OUT 1 (Univ. Mich. Press 2001).

138 Pottage, *supra* note 62, at 168 ("Bruno Latour's notion of hybrid actants makes it clear that agency is not inherently either human or non-human; it is an emergent effect of the composition of humans and non-humans, or of their reciprocal engagement or co-variation as moments in the unfolding of an actor-network.").

> Given that distinctions are not inscribed in the world, but are inflicted upon it by observers, law exists only as the competence or know-how that animates its founding distinction. And legal know-how is not an attribute of human actors; it is immanent in a medium which prefigures any of its users, and which has vastly more complexity or potentiality than any participant could possibly grasp.[139]

Pottage links the Latourian actor-network theory with Foucault's conception of the *dispositif* as her starting point.[140] Foucault offered his most comprehensive definition of the *dispositif*, as an apparatus, assemblage, arrangement, network, or device, in a 1977 interview conducted shortly after the publication of *The History of Sexuality*.[141]

Thus, a *dispositif* is a heterogeneous ensemble of discourses, institutions, laws, administrative measures, scientific statements, and social practices that together form a network of relations producing and sustaining a certain regime of truth and power. It is not reducible to a single element (such as a law or a discourse), but rather describes the way multiple elements cohere and function strategically. The significance of these new nuances to new concepts of originality and authorship is discussed in the following chapter.

B. Generative AI as a Dispositif of Authorship

Foucault employed the term *dispositif* (apparatus) to describe a heterogeneous arrangement of discourses, institutions, and practices that together produce regimes of truth and power.[142] The *dispositif* is not

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139 *Id*. at 177.

140 *Id*. at 180.

141 *Id*. at 181.

> [F]irst, an essentially heterogeneous ensemble, composed of discourses, institutions, architectural formations, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral, and philanthropic arguments; these are the elements of a *dispositif* – in short, what is said as much as what is unsaid [*du dit aussi bien que du non-dit*]. The *dispositif* itself is the network that might be established between these elements.
>
> Second, what I want to identify in a *dispositif* is precisely the nature of the linkage that exists between these heterogeneous elements [. . .] These elements, whether they are discursive or non-discursive, are linked by something like a game, with changes of position or modifications of functions that can themselves be very different.
>
> Third, by *dispositif* I mean a kind of formation which has in a particular historical moment been given the important function of addressing some kind of some urgent situation. Therefore, a *dispositif* has a pre-dominantly strategic function, [which involves] a rational and concerted intervention in relations of force, either so as to develop them in a particular direction or so as to block them, stabilize them, or exploit them.

142 Foucault, *The Confession of the Flesh, supra* note 61, at 194.

reducible to a single institution; it is the system of relations among elements that governs conduct, constitutes subjects, and emerges historically in response to specific problems. Foucault himself defined it as follows:

> What I'm trying to pick out with this term is, firstly, a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions—in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the system of relations that can be established between these elements.[143]

Foucault emphasized that *dispositifs* are historically situated, emerging in response to specific social, political, or economic problems.[144] Giorgio Agamben later expanded this notion, arguing that a *dispositif* is any system that captures, directs, or orients the behaviors and gestures of living beings.[145] Therefore, the key characteristics of a *dispositif* are:

1. *Heterogeneity*: Including both material (laws, institutions, technologies) and immaterial (discourses, knowledge, norms) elements.
2. *Relations, not essences*: It is the system of connections and functions that matter, not the isolated existence of its parts.
3. *Historical contingency*: Each *dispositif* arises at a specific historical juncture to respond to a problem.
4. *Power/Knowledge nexus*: The *dispositif* embodies the fusion of power mechanisms and truth-production.

GenAI should be understood as a *dispositif* of authorship. It operates not merely as a technical tool but as a strategic network linking law, technology, and cultural practice.[146] First, regarding the legal discourse, it insists on the human author as the sole bearer of originality and copyrightability, thereby excluding GenAI from authorship.[147] Yet, ample scholarship argues for the

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143 *Id.*

144 *Id*. at 194-228.

145 GIORGIO AGAMBEN, WHAT IS AN APPARATUS? 14 (David Kishik & Stefan Pedatella trans., Stan. Univ. Press 2009).

146 Pottage, *supra* note 62, at 181 ("What becomes of 'law' in the configuration of a *dispositif*-network? First, instead of presuming 'law', one would begin with a set of raw elements: texts, institutions, statements, gestures, architectural and material forms, formalized roles and competences, and self-descriptions (people often characterize themselves as practitioners or participants in 'law'). And, instead of abstracting to a field, medium, code or rationality in which these elements cohere into 'law', one would explore the ways in which elements are assembled into *dispositifs*.").

147 *Compare Thaler*, 687 F. Supp. 3d at 146 (D.D.C. 2023) ("Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled

contrary, illustrating Foucault's statement that the heterogeneous ensemble included "the said as much as the unsaid".[148]

Second, regarding the link between institutions and law, copyright offices, courts, and legislatures enforce the human-centered definition of authorship.[149] Internationally, some scholars situate AI authorship within global intellectual property governance, embedding the *dispositif* across jurisdictions.[150] Hence, among the six principles offered by Jane Ginsburg through her comparative survey of three common law jurisdictions (the United States, United Kingdom, and Australia), three civil law jurisdictions (France, Belgium, and Holland), and one mixed jurisdiction (Canada), the second principle is that "authorship vaunts mind over machine".[151]

Third, regarding technologies, models such as GPT, MidJourney, and Stable Diffusion drive a "platformisation paradigm," as by relying on massive datasets and infrastructure, these tools facilitate mass cultural production while centralizing economic and regulatory power within a few corporate actors.[152] Thus, shaping both the availability of authorship and the

through new tools or into new media"), aff'd, 130 F.4th 1039, 1044 (D.C. Cir. 2025) (holding that the Copyright Act "requires all eligible work to be authored in the first instance by a human being"), *with* Robert Denicola, *Ex Machina: Copyright Protection for Computer-Generated Works,* 69 RUTGERS L. REV. 251, 283 (2016) (arguing for AI Authorship due to the incentive mechanism as the core of American copyrightability), *and* Tom Comitta, *Death of an Author Prophesies the Future of AI Novels*, WIRED (May 9, 2023), https://www.wired.com/story/death-of-an-author-ai-book-review/ [https://perma.cc/YU4F-E4D9] *and* Abbott & Rothman, *supra* note 2, at 1198 (arguing for AI owners as the most appropriate default copyright owners: "Beyond the legal justification for AI owners being default copyright holders, they are the most appropriate copyright owners for policy reasons. Having owners as right holders encourages investments in developing AI systems—and it encourages owners to license their AI systems. All of which should result in the further creation and dissemination of works."); *cf.* Shlomit Yanisky-Ravid, *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era—The Human-Like Authors are Already Here—A New Model*, 2017 MICH. ST. L. REV. 659, 707 (2017) ("I claim that we should view AI systems as working for the users, and hence the users should bear accountability for the systems' production, in addition to the benefits thereof."); Annemarie Bridy*, Coding Creativity: Copyright and the Artificially Intelligent Author,* 5 STAN. TECH. L. REV. 12, 22 (2012) (for the Work Made for Hire doctrine as applicable to GenAI authorship); Moldawer, *The Shadow of the Law Versus a Law With No Shadow*, *supra* note 2, at 45-47.

148 FOUCAULT, *The Confession of the Flesh*, *supra* note 61, at 194.

149 U.S. COPYRIGHT OFF., *supra* note 64, § 306 ("[t]he U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being.").

150 Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1078–79 (2003); *see generally* Ricketson, *supra* note 64, at 21; Ginsburg, *People Not Machines: Authorship and What It Means in the Berne Convention*, *supra* note 64, at 134 (quoting Sam Ricketson and following his survey of the Berne Convention according to which the "leitmotiv" of human authorship is anchored in most of the articles of the Convention: "On the other hand, acknowledging that Berne harbors incentive rationales for copyright is hardly the same thing as contending that Berne embraces a concept of copyright in which incentive/investment rationales supply the sole justification for exclusive rights. The latter concept entertains the expulsion of human authors, and, given Berne's humanist cast, that would purge copyright of its 'soul'.").

151 Ginsburg, *The Concept of Authorship in Comparative Copyright Law, supra* note 150, at 1074.

152 Lilian Edwards et al., *Private Ordering, Generative AI and the 'Platformisation Paradigm': What Can We Learn from Comparative Analysis of Models Terms and Conditions*?, 1 CAMBRIDGE FORUM ON AI: LAW & GOVERNANCE 1 (2025).

distribution of cultural capital.[153] Fourth, regarding practices, creative practices shift from composition to prompting, curating, and editing AI outputs. Industries replace human labor with algorithmic generation, while companies implement policies to govern AI usage. The *dispositif* thus reorganizes creative labor at multiple scales.[154]

Fifth, regarding strategic function**,** the *dispositif* of AI responds to a saturated cultural economy, marked by content abundance and efficiency demands.[155] By insisting on human authorship as a legal threshold, copyright law enforces a regime of truth that privileges Enlightenment notions of originality and personhood. At the same time, it produces new subject-positions. When it comes to GenAI, everything old might be new again.[156] GenAI can give us the freedom to create and express ourselves in ways older communications technologies never could.[157] The AI prompter, as the AI artist, constitutes a new identity within this apparatus.

As discussed in Part I, by centering the integrity of attribution rather than the originality of expression, DMCA litigation in the Gen-AI era signals the rise of a "post-authorial" paradigm: one in which the law safeguards the relational markers of authorship (names, bylines, metadata) even when traditional originality doctrines lose traction. Viewing GenAI through the lens of the *dispositif* underscores that authorship is not an ontological given but a contingent legal construction.

AI thus operates as *a dispositif* of authorship: a socio-legal apparatus that regulates cultural production by delineating who may be recognized as an author. This perspective calls for moving beyond the Enlightenment model of solitary authorship toward a post-authorial copyright paradigm attuned to networked and hybrid forms of creativity. Yet, when examined in the international context, the *dispositif*'s heterogeneity reveals its potential for contradictory outcomes, as illustrated by recent Chinese adjudication addressed in the following Part.

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153 *See* Yanisky-Ravid, *supra* note 147, at 664-66 (for the variety of uses of these systems in our daily life, substituting humans); *Artificial Intelligence: Introduction, supra* note 42, at 1555 (for the shifting meaning of AI).

154 *Beyond Section 230: Principles For AI Governance*, 138 HARV. L. REV. 1657, 1680 (2025). ("When it comes to GAI, everything old might be new again. GAI can give us the freedom to create and express ourselves in ways older communications technologies never could.").

155 *See, e.g.*, Abbott & Rothman, *supra* note 2, at 1155 (regarding the market value of AI-generated works, such as the Portrait of Edmond Belamy, sold for $432,500 in 2018, or Hanson Robotics' self-portrait, sold for $700,000 in 2021).

156 *See generally* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, DUKE L.J. 455 (1991) (tracing Romantic conceptions of authorship in copyright doctrine)**;** Michel Foucault, *Truth and Power*, *in* POWER/KNOWLEDGE 109, 131–33 (Colin Gordon ed., 1980) (articulating the concept of "regimes of truth"); Lemley*, supra* note 66 (for GenAI turning upside down all our previous concepts about copyrightability).

157 *See generally* Lemley, *supra* note 66 (for a new concept of "copyrightability" vis-à-vis Gen AI).

III. SHIFTING GROUNDS: AI AND ORIGINALITY IN CHINESE COPYRIGHT LAW

The Chinese court decisions collectively reflect a nuanced approach to authorship in the age of GenAI, aligning with the post-authorship framework that emphasizes the relational and contextual aspects of authorship over traditional notions of individual creation. In the same breath, Chinese adjudication highlights the contradictions of post-authoritarian law. While some courts cautiously experiment with recognizing AI-assisted works as protectable, other courts adhere to a human-centered originality, thus creating contradictory trajectories. The first trajectory, pointing towards new perceptions of originality and authorship, is discussed in the following section.

A. The New Paradigms of Originality and Authorship

China's approach to originality has proven to be more adaptive to AI-generated works than American law, particularly regarding authorship. This shift is exemplified by the landmark case of *Tencent v Yingxun*, where the court recognized copyright protection for an AI-generated report by focusing on the originality of the creative process and the final output, rather than adhering to a strict human-only authorship requirement.[158] In 2015, Tencent Technology (Beijing) Co., Ltd. (Tencent Beijing) developed Dreamwriter*,* a data- and algorithm-based writing assistance system.[159] In May 2019, Tencent Beijing registered the software copyright and licensed Tencent Shenzhen exclusive rights to use Dreamwriter and to own copyrights in its outputs, retroactive to August 2015.[160]

The article-generation process in Dreamwriter consisted of several stages, including: (1) data collection and database construction; (2) condition evaluation and automated drafting; and (3) proofreading/review.[161] A team of operators (the Team) oversaw these processes and carried out preparatory tasks, including: (1) formatting and inputting data; (2) setting trigger conditions, selecting templates, and establishing the text corpus; and (3) training the proofreading algorithm.[162] On August 20, 2018, Dreamwriter generated a financial report (the article) within two minutes of the stock market's close, which Tencent Shenzhen published on its website.[163]

158 *Tencent v. Yingxun*, *supra* note 67. For English translation*, see* Xiaoshuai Ren, ''*Tencent Dreamwriter'': Decision of the People's Court of Nanshan (District of Shenzhen) 24 December 2019-Case No. (2019) Yue 0305 Min Chu No. 14010*, IIC 51, 652–659 (2020) [hereinafter Ren].

159 Ren, *supra* note 158, at 653.

160 *Id.* at 653-54.

161 *Id*. at 654.

162 *Id*. at 655.

163 *Id*. at 653-54.

That same day, Shanghai Yingxun Technology Co., Ltd. (Yingxun) republished the article on its own site without authorization. Tencent Shenzhen sued, inter alia, for copyright infringement.[164] A central issue was whether an article generated by software could qualify as a copyrightable work. On December 24, 2019, the Nanshan District People's Court held that the article constituted a copyrightable literary work. Under Article 2 of the Regulations for the Implementation of the Copyright Law, a protectable work must: (1) be reproducible in a tangible form; and (2) be original.[165] The article satisfied both conditions.[166]

Regarding originality, the article was independently created and shows a minimal degree of creativity. It analyzed stock market data in a logical and structured manner. Thus, this proves an independent creation and creativity.[167] Also, the team's preparatory work, including data input, trigger conditions, template, and corpus selection, was deemed intellectual activities directly linked to the article's generation, thereby reflecting creative judgment and individualized decision-making. Although Dreamwriter generated the article in two minutes, its operation depended on human input and reflected the Team's choices and skills.[168]

The court further observed that, while in traditional works, creative choices occur simultaneously with writing, in software-generated works, preparatory choices precede generation.[169] This lack of simultaneity is inherent to software authorship but does not undermine the originality of the resulting work. This ruling stands in contrast to the U.S. approach, which is that absent identifiable human authorship, copyrightability is denied, failing to cross the threshold for originality. By contrast, the Chinese court anchored originality in the human preparatory inputs surrounding the automated process, effectively shifting the focus from authorship of the final text to creative control over the generative system.

This marks a flexible approach that acknowledges human-AI collaboration, contrasting with the earlier decision in *Feilin v. Baidu*, where a lack of human authorship precluded protection.[170] On September 9, 2018,

164 *Id*. at 653.

165 *Id.*

166 *Id*. at 656-58.

167 *Id*. at 656.

168 *Id*. at 657.

169 *Id.*

170 Beijing Internet Court, Civil Judgment (2018) Jing 0491 Min Chu No. 239, https://www.chinadaily.com.cn/specials/BeijingInternetCourtCivilJudgment(2018)Jing0491MinChuNo.239.pdf [https://perma.cc/C42A-NYCN]; Ju Yoen Lee, *Artificial Intelligence Cases in China: Feilin v. Baidu And Tencent Shenzhen v. Shanghai Yingxin*, 7 CHINA & W.T.O. REV. 211, 212 (2021), https://pdfs.semanticscholar.org/b61c/cb98fd748b7ee654895ee133d5363e4d8556.pdf [https://perma.cc/ZN65-7KLT]. This claims the two cases to be similar "as they acknowledged copyright of AI-assisted, not AI-generated, written works and recognized these works as a work of a legal entity, not as a work of a natural person(s)".

Beijing Feilin Law Firm (Feilin) published a legal data-driven report on the entertainment industry on WeChat using the Wolters Kluwer Database.[171] The next day, a user reposted a shortened version on Baidu's Baijiahao platform without authorization. Feilin sued Baidu before the Beijing Internet Court, alleging infringement of its rights of authorship, integrity, and communication.[172]

The key issue was whether the Feilin Report qualified as a "work" under Chinese Copyright Law.[173] With the parties' consent, the court generated two comparison reports directly from the Wolters Kluwer Database. It found that the graphs lacked originality, but that the texts of all reports met the originality threshold.[174] Nonetheless, the automatically generated reports did not constitute protectable works, since they lacked creation by a natural person.[175] By contrast, the Feilin Report, written and shaped by Feilin's lawyers, satisfied both originality and human authorship, and was thus protected.[176] Baidu was found to have infringed.[177]

On appeal, the Beijing Intellectual Property Court upheld the ruling, additionally recognizing infringement of Feilin's right of integrity.[178] Notably, the Beijing Internet Court embraced an objective test for originality, holding that machine-generated outputs may be original but do not constitute works without human authorship. At the same time, the Shenzhen Nanshan District Court applied a subjective standard, focusing on the creative input of Tencent's employees.[179] Ju Yoen Lee argues that the Beijing Internet Court, unlike the Shenzhen court, declined to foreclose the possibility of legal protection for machine-generated outputs, thereby leaving open a doctrinal trajectory toward their recognition.[180]

Shenzhen, by contrast, rigidly tied originality to human creativity and set a path that excluded such protection.[181] The paradox is that the Beijing decision, long remembered as the first to deny copyright to AI-generated works, in fact articulated a more receptive framework, one that subsequent cases, such as *Tencent v Yingxun*, have begun to confirm. These divergent paths illustrate the tension within Chinese copyright law between a human-centered conception of originality and an emerging openness to recognizing creativity beyond the human author.

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171 *Id.*
172 Lee, *supra* note 170, at 213.
173 *Id.*
174 *Id.* at 213-14.
175 *Id.* at 214.
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.* at 217-18.
180 *Id.* at 218.
181 *Id.* at 217-18.

The landmark 2023 decision of the Beijing Internet Court in *Li v. Liu* represents a pivotal moment in the judicial treatment of AI-generated works.[182] On February 24, 2023, the plaintiff employed the open-source software, Stable Diffusion, to generate the disputed image by inputting a prompt word and subsequently published this image on the Xiaohongshu platform under the title *Spring Breeze Brings Tenderness,* including a signature watermark.[183] On March 2, 2023, the plaintiff ascertained that a certain Baijiahao account had released an article entitled *March Love, Among Peach Blossoms,* in which the disputed image was reproduced as an illustration.[184]

The defendant, without the plaintiff's authorization, removed the plaintiff's signature watermark affixed to the image on the Xiaohongshu platform, thereby inducing public misunderstanding as to the authorship of the work.[185] The plaintiff alleged infringement of both the right of authorship and the right of online dissemination and sought damages and a public apology.[186] The defendant, Liu, contended that the disputed images were obtained through an online search and were used merely as illustrations for his original poem titled *March Love, Among Peach Blossoms*.[187]

The defendant argued that he could not identify the exact source of the images or explain the presence of watermarks on them and expressed uncertainty about whether the plaintiff had rights to the images in question. Liu claimed that his publication focused on the original poetry rather than the images, emphasizing that the use was non-commercial, which shows a lack of intent to infringe. The court outlined the issues as follows: (1) whether the image titled *Spring Breeze Brings Tenderness* qualifies as a work under the law, and if so, what type of work it is; (2) whether the plaintiff has copyright in the disputed image; and (3) whether the defendant's alleged actions constitute infringement, thereby creating legal liability.[188]

The court found in favor of the plaintiff.[189] Regarding the first issue, whether the pictures involved meet the definition of works, and under what

182 *Li v. Liu Case*, *supra* note 68. For the official English translation of Li v. Liu, *see* https://english.bjinternetcourt.gov.cn/pdf/BeijingInternetCourtCivilJudgment112792023.pdf [https://perma.cc/2TME-WU5Q] [hereinafter Li v. Liu translation].

183 Li v. Liu translation, *supra* note 182, at 1.

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id*. at 10.

189 *Id.* at 17-18; *see also* Seagull Song, *China's First Case on Copyrightability of AI-Generated Picture*,
KING & WOOD (Dec. 7, 2023), https://www.kwm.com/cn/en/insights/latest-thinking/china-s-first-case-on-copyrightability-of-ai-generated-picture.html [https://perma.cc/57Z4-6XY6].

category, the court held that the disputed images qualified as "artistic works" within the meaning of copyright law, since they exhibited aesthetic form and reflected the plaintiff's intellectual input.[190] Although AI assisted in the creation process, the plaintiff's contributions, designing character presentation, crafting prompts, adjusting parameters, refining outputs, and selecting the final versions, reflected sufficient intellectual effort and individualized expression to satisfy the originality requirement.

Regarding the second issue of authorship, the court emphasized that copyright law recognizes only natural persons, legal entities, or organizations as authors.[191] Thus, the AI system itself could not hold rights. Instead, authorship was attributed to the plaintiff, whose intellectual investment directed and shaped the outputs. Consequently, regarding the third issue, the court further ruled that the defendant's actions infringed both the plaintiff's right of authorship (by removing the watermark) and right of dissemination (by publishing the images without permission). It ordered the defendant to apologize and pay statutory damages of 500 yuan.[192]

The court's reasoning, as reflected in the judge's statement, drew on scholarly debate regarding the copyrightability of GenAI, and was organized around the framework of "one inheritance" and "two considerations".[193] The "inheritance" stems from adhering to the Human-centric authorship required by paragraph 1 of Article 11 of the Copyright Law.[194] Thus, prima facie, no new category of AI rights is created by strictly applying the PRC Copyright Law's definition of a work as an intellectual achievement of a natural person.

By treating AI as a sophisticated "drawing tool" rather than an independent creator, the court preserves the continuity of existing copyright law.[195] Thus far, the "inheritance" factor of *Li v. Liu* aligns with *Feilin v. Baidu*. However, regarding the human agency essential to copyrightability, the former involves both more sophisticated AI tools and the plaintiff's substantial intellectual input, thereby warranting a more nuanced inquiry into the scope of protection. These decisions pave the way to the "two considerations".[196]

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190 Li v. Liu translation, *supra* note 182, at 10-14.

191 *Id*. at 14.

192 *Id*. at 15-17.

193 *Id.*

194 *Id.* at 14 (summing up Article 11 of the Chinese Copyright, aligning with its inheritance). Therefore, an artificial intelligence model cannot be deemed as an author under China's copyright law. As a result, although the picture involved is "drawn" by the artificial intelligence model involved, the model is not the author of the picture". *Id*.

195 *Id*. at 12-13.

196 *See* BIC's *Top 10 Typical Cases In 2023- (2023) Jing 0491 Min Chu No. 11279*, BEIJING INTERNET CT., (Feb. 28, 2024), https://english.bjinternetcourt.gov.cn/2024-02/28/c_695.htm [https://perma.cc/9NXS-RBF4]

Hence, the court's analysis highlighted two broader questions. The first is whether traditional copyright doctrines should evolve in response to new technological contexts. The court argued for a "future-oriented" judicial philosophy: while traditional copyright presumed manual creation, AI tools alter the creative process without eliminating human agency in arranging, selecting, and refining works.[197] Thus, doctrine must adapt to sustain copyright's incentive structure in the age of GenAI. To rigidly apply outdated standards would fail to capture this reality. The law must adapt to ensure both effective rights protection and foster industrial growth.[198]

Second, the court stressed that originality involves both legal and value judgments.[199] Since no jurisdiction defines originality with precision, courts worldwide develop standards incrementally, balancing socio-economic needs, industrial policy, and public expectations. Against the backdrop of China's rapid AI development, the court concludes that recognizing AI-generated images as "works," and treating human users as their "creators," serves multiple objectives. It incentivizes the use of AI tools in creative expression, thereby advancing copyright law's fundamental purpose of promoting creativity. It ensures transparency by requiring disclosure of AI-generated content, protecting the public's right to know. Furthermore, it reinforces the central role of human agency in technological progress, thereby fostering the innovative and sustainable development of artificial intelligence.[200]

Leading scholars praised the decision's global significance. Professor Cui Guobin (Tsinghua University) highlighted its doctrinal innovation: AI-generated images were classified within the existing category of "artistic works" rather than relegated to a residual clause, aligning law with public perception.[201] He further emphasized the court's nuanced evaluation of originality, noting that a user's iterative prompt engineering and parameter adjustments constitute a creative process.[202] Even if the AI's specific output

[hereinafter BIC's *Top 10 Typical Cases*] (for Li v. Liu, valued among the Beijing Internet Court (BIC)'s top cases because it outlined the dual policy considerations of encouraging human creation via new tools and fostering the generative AI industry).

197 Li v. Liu translation, *supra* note 182, at 12-13.

198 *Id*. at 13 ("The core purpose of the copyright system is to encourage creation. And creation and AI technology can only prosper by properly applying the copyright system and using the legal means to encourage more people to use the latest tools to create. Under such context, as long as the AI-generated images can reflect people's original intellectual investment, they should be recognized as works and protected by the Copyright Law.").

199 *Id*. at 10-12, 14.

200 *See* BIC's *Top 10 Typical Cases*, *supra* note 196, focusing on these argumentations as the core of Li v. Liu's significance.

201 Cao Yin, *Ruling Sparks Debate on AI Technology: Court Says Image Generated by Software Is Artwork Under Copyright Protection*, CHINA DAILY (Jan. 30, 2024), https://www.chinadaily.com.cn/a/202401/30/WS65b82bcca3104efcbdae88fc.html [https://perma.cc/FFM4-5U6G].

202 *Id.*

cannot be fully predicted, the user's systematic refinement of the prompts represents a deliberate creative contribution that qualifies for copyright protection.

His approach stands in contrast to the U.S. Copyright Office's restrictive position in the *Zarya* decision, which rejects user authorship on the grounds of unpredictability.[203] Cui further argues that when a user actively steers an AI, refining expressive details and making personalized choices throughout the creative process, they are likely contributing original expression.[204] In such cases, the user should be entitled to claim copyright over the final output. He posits that denying authorship because a user cannot perfectly predict or control every pixel of an AI's output is a flawed argument.

To Cui, this is as reductive as claiming photographers aren't authors because they don't manually draw lines or mix pigments. Ultimately, he suggests that refusing to recognize this human-led AI creation contradicts the core purpose of copyright law, which is to incentivize innovation, and fails to serve any constructive public policy.[205] Professor Hu Ling (Peking University) underscored the creative labor involved in using professional, open-source models like Stable Diffusion.[206]

Generating images is far from a "push-button" task; it demands technical skill, iterative experimentation, and careful prompt design. It follows that copyright protection in such cases preserves users' investment and incentivizes further exploration of advanced creative tools.[207] Without protection, incentives to develop expertise in generative software might diminish, slowing the evolution of creative industries. By clarifying that copyright vests in users who make substantial contributions, while excluding AI model developers as authors, the ruling supports a business ecosystem in which users, developers, and operators can coexist and benefit.[208] However, the contradictory trajectory, preserving the old paradigms of originality and authorship, is still alive and kicking, as detailed in the following section.

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203 Robert J. Kasunic, *Zarya of the Dawn* (Registration # VAu001480196), U.S. COPYRIGHT OFF., https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [https://perma.cc/Z5EM-DSEB].

204 Cui Guobin, *User-generated Original Contributions in AI-generated Content*, INTELL. PRO. LAWS. NETWORK (Jan. 8, 2024), https://www.ciplawyer.cn/articles/152519.html [https://perma.cc/L9BM-NA9G].

205 *Id*. The traces of Li v. Liu's "two considerations," namely, encouraging creation and the AI industry, are evident, even if tacitly.

206 Yin, *supra* note 201.

207 Jinpeng Li, *China Protects AI-Generated Image Copyright: What are Beijing's Criteria and How Do China and the U.S. Differ in Their Approach to AI Artwork Copyrights*, THE ABACUS (Jan. 11, 2024), https://theabacus.beehiiv.com/p/copyright-china-case [https://perma.cc/4WSE-S84S].

208 Guobin, *supra* note 204.

B. Back to the Old Paradigms of Originality and Authorship

In *Feng v. Dongshan Cultural Commc'n Co., Ltd (Feng v. Dongshan),* concerning AI-generated designs for the *Phantom Wing Transparent Art Chair*, the Zhangjiagang Municipal People's Court emphasized that copyright protects concrete expression rather than abstract ideas.[209] Namely, the court considered prompt words that users enter into GenAI systems as mere ideas and thus not copyrightable; a simple prompt, in itself, does not constitute a work, and referencing it does not amount to infringement.[210]

In early 2023, designer Feng created a series of works using AI tools such as Midjourney, which she published on the social media site Little Red Book (Xiaohongshu) under the title *Midjourney | This is so cute | Where is the seller? Seeking mass production.*[211] On August 20, 2023, defendant A (Mr. Zhu) approached the plaintiff to request a license to mass-produce these designs through defendant B (Kuashi Plastic Manufacturing). The plaintiff refused this proposal as she was currently engaged in licensing negotiations with a separate third party.[212]

Despite this refusal, in January 2024, defendant A began promoting children's chairs on the Little Red Book that were substantially similar to the plaintiff's designs. These chairs were manufactured and sold by defendant C (Dongshan Company) and featured a trademark owned by defendant D (Shenzhou Company). Following the unauthorized commercialization of these designs, the Plaintiff initiated the underlying copyright infringement and unfair competition action.[213] The court found that Feng's creative process involved only entering simple prompts and setting parameters, without maintaining records or documentation (e.g., drafts, flowcharts) evidencing original intellectual investment throughout the production process.[214] Consequently, the images did not meet the statutory requirements of a "work" and were not eligible for copyright protection.[215] Unlike *Li v. Liu*, where the Beijing Internet Court recognized

209 Feng Runjuan yu Zhangjiagang Dongshan Wenhua Chuanbo Youxian Gongsi Qinhai Zhuzuoquan he Buzhengdang Jingzheng Jiuifen An (丰润娟与张家港东山文化传播有限公司侵害著作权和不正当竞争纠纷 案) [Feng Runjuan v. Zhangjiagang Dongshan Cultural Commc'n Co., Disp. Concerning Copyright Infringement & Unfair Competition], (2024) Su 0582 Min Chu No. 9015, Zhangjiagang People's Ct. (2025) (China); Feng v. Zhangjiagang (冯某诉张家港东山文化传播有限公司) [Feng v. Zhangjiagang Dongshan Cultural Commc'n Co., Ltd.], (2024) Su 05 Min Zhong No. 4840, Suzhou Interm. People's Ct. (2025) (China) (dismissing the appeal).

210 Seagull Song & Huang Jiaona, *Chinese Court Found AI-Generated Pictures Not Copyrightable — Convergence with the U.S. Standard*?, KING & WOOD, (Apr. 25. 2025), https://www.kwm.com/cn/en/insights/latest-thinking/chinese-court-found-ai-generated-pictures-not-copyrightable-convergence-with-the-us-standard.html [https://perma.cc/2QB9-9LMK].

211 Tianxiang He, *Distinguishing Copyrightable from Non-Copyrightable AI-Generated Content—Butterfly Art Chair*, 74 GRUR INT'L 772, 772–73 (2025).

212 Song & Jiaona*, supra* note 210.

213 *Id.*

214 He*, supra* note 211, at 774.

215 *Id*. at 775.

AI-assisted images as copyrightable due to the plaintiff's substantial and iterative intellectual input, *Feng v. Dongshan* illustrates that courts will deny protection when human creative contribution is minimal or undocumented.[216]

The conflicting judicial verdicts are still far from settled. On 7 March 2025, the Changshu People's Court (Jiangsu Province) rendered judgment in *Lin Chen v. Changshu Qin Hong Real Estate Development Co., Ltd. and Hangzhou Gaosi Airdome Tech. Co., Disp* (2024), (commonly known as the "Half-Heart" case), regarding the recurring dilemma, whether AI-generated works may attract copyright protection under Chinese law.[217] The dispute concerned an image created by the plaintiff, Lin, (online alias "Tudou_man"), using the GenAI tool Midjourney, subsequently refined with Photoshop. The work depicted a half-heart floating on water before a cityscape, the reflection of which "completed" the heart.[218] Lin posted the image on social media and secured copyright registration in China as a two-dimensional (2D) artistic work.[219]

Two defendants, an inflatable model company and a real estate company, used substantially similar images on their social media accounts and in the company's 1688 online store.[220] They also constructed a 3D installation replicating the half-heart design at a real estate project. The court ruled in favor of the plaintiff, ordering the inflatable model company to publish a three-day apology on its Xiaohongshu account and requiring both defendants to pay RMB 10,000 in damages and expenses. Neither party appealed, and the judgment is now final.[221]

The court began by reviewing Midjourney's user agreement, which generally allocates rights in the generated outputs to the users.[222] It then emphasized Midjourney's iterative process, whereby users may refine outputs through prompt modification and parameter adjustment.[223] Lin's choices in prompt design and Photoshop refinement, the court found, reflected unique choices and arrangement sufficient to render the work an original artistic creation. Accordingly, the 2D image qualified as a

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216 Song & Jiaona, *supra* note 210.

217 Ruixue Ran, et. al., *China GenAI Litigation Update: Implications for Service Providers,* 9 THE J. ROBOTICS, A.I. & L. 65, 68 (2026) (quoting Lin Chen yu Hangzhou Gaosi Qimo Jishu Youxian Gongsi Changshu Shi Qinhong Fangdichan Kaifa Youxian Gongsi Qinhai Zhuzuoquan Jiufen An, (林晨诉杭州高斯气膜技术有限公司著作权侵权纠纷案) [Lin Chen v. Hangzhou Gaosi Airdome Tech. Co., Disp. Concerning Copyright Infringement], (2024) Su 0581 Min Chu No. 6697, Changshu People's Ct. (2024) (China)); *see also* He, *supra* note 211, at 776; Chatterton, Zhang & Blackford, *supra* note 69.

218 Yu Du, *China's Second AI-Generated Image Copyright Infringement Case,* MMLC GRP. (Nov. 19, 2024), https://mmlcgroup.com/china-ai-copyright-second/ [https://perma.cc/6239-EHQ3].

219 *Id.*

220 Chatterton, Zhang & Blackford, *supra* note 69.

221 *Id.*

222 *Id.*

223 *Id.*

copyrightable work.[224] The court, however, articulated a crucial jurisprudential distinction between idea and expression—a doctrinal motif that is poised to recur in future adjudication.[225]

Lin's rights extended only to the registered 2D image, not to the abstract concept of a half-heart installation. Because the installation embodied an idea common in prior works, its construction did not infringe on Lin's copyright. The infringement arose only from unauthorized reproduction and dissemination of the 2D image. In a WeChat post, Hu Yue, Deputy Director of the Intellectual Property Tribunal, observed: "The premise for AI-generated content to be recognized as a work is that it should reflect the original intellectual input of a human".[226]

Hu characterized the decision as a "reassurance" for creators using AI tools, confirming that works with innovative design and expression can be protected. At the same time, he stressed that reliance on another's ideas does not constitute infringement, preventing overprotection and encouraging innovation.[227] Prima facie, this decision contributes to a doctrinal development in Chinese adjudication, affirming that copyright may subsist in AI-assisted works where the human user exercises sufficient intellectual control through prompt refinement, artistic direction, and iterative editing.[228]

Thus, it is alluring to assume that a jurisprudential divergence emerges. While both U.S. and Chinese frameworks underscore the role of human input, Chinese courts have demonstrated a greater doctrinal readiness to locate originality in user-guided AI outputs. However, not all Chinese courts align with Changshu. In late 2024, the Guilin Diecai District People's Court dismissed a plaintiff's claim to copyright in AI-generated photographs, holding that AI-generated photographs are ineligible for copyright protection where the user's role is limited to prompt design.[229] The court

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224 *Id*. *See also* Ran *et al., supra* note 217, at 68.

225 *See* Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 393-98 (1989) for the importance of the idea/expression principle in copyright law since its inception. *See also* BOYLE, *supra* note 17, at 55 (claiming that the idea/expression dichotomy links the originality of the "spirit converted into an originality of form" to a property right to which the author, as the sole owner of originality, is entitled.)

226 Chatterton, Zhang & Blackford, *supra* note 69.

227 *Compare with* Yen, *supra* note 225, at 395. The author argued that the idea/expression dichotomy is:

> [P]erhaps the most important limit on the unwarranted expansion of copyright. It operates by denying protection to the ideas which underlie copyrightable works. Consequently, only the original "expressions" contained in these works can actually receive copyright protection. This makes certain portions (the "ideas") of every work freely available for others to copy. Such permitted borrowing from copyrighted works ostensibly keeps copyright from unduly restricting speech and running afoul of the First Amendment.

228 *Tencent v. Yingxun*, *supra* note 67; *Li v. Liu Case*, *supra* note 68.

229 *Are AI-Generated Images Protected by Copyright Law? Guilin's First Case Verdict Announced,* GUILIN DIECAI DIST. PEOPLE'S CT. (Aug. 18, 2025), https://www.ciplawyer.cn/articles/157366.html [permalink].

distinguished the utilization of software tools from the act of original creation, finding that providing instructions to an AI does not equate to personally creating the resulting image. [230]

In this case, the court emphasized the random variability of AI outputs in the absence of the user's substantial creative judgment. Consequently, the works lacked the originality required by copyright law.[231] Chinese scholarly discourse remains divided. Prominent commentators advocate for the centrality of the human factor, grounding copyright analysis in authorship identity, subjectivity, and the irreducibility of human creative agency.[232] Hence, some scholars contend that the broader transition from Internet 1.0 to Internet 3.0 has not altered the substantive core of network information content.[233]

Consequently, what has shifted is merely the method of production, not the conceptual essence of legal originality. Conversely, some scholars emphasize control as the decisive factor in determining originality.[234] Under this view, originality should be assessed based on the process by which a work is produced, rather than the mere appearance of the machine-generated output. The author is defined as the individual who conceives of the work and directs its execution. Analysis of AI-generated content, therefore, requires distinguishing between the contributions of the AI and the human participant, and evaluating whether the human role satisfies the criteria of conception and control.

Key considerations include whether a sufficiently detailed creative plan guided the work's preparatory phase, whether the choices made within that plan meet originality requirements, and whether the human exerted meaningful control over the AI's execution. A court must make a determination on a case-by-case basis and consider the nature of the AI system, the activities performed by designers and users, and the expressive elements central to the work. This divergence carries significant jurisprudential implications.

While the former perspective encourages adjudicators to treat AI merely as an updated tool of production, leaving the doctrinal structure of authorship intact, the latter invites courts to recalibrate the originality threshold around demonstrable human intellectual control. China's

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230 As summed up in *id*. (The user's act of inputting the aforementioned prompts constitutes 'instructional operation,' not 'creative expression' protected by copyright law).

231 *Id.* ("The key to obtaining copyright protection for AI-generated content lies in whether the user goes beyond simple instruction input and deeply participates in the substantive creative process.").

232 Wang Yukai, *On the Exercise of the Right of Authorship*, PEKING UNIV. INT'L PRO. REV. (Mar. 23, 2025), https://www.ciplawyer.cn/articles/156265.html [https://perma.cc/Y3J6-E4GV].

233 Song Jianbao, *supra* note 70. For the internet transition, *See* Xiong Qi, *Artificial Intelligence and Copyright, Path Selection of Legal Inclusion Technology*, CHINA COPYRIGHT MAG. (Aug. 7, 2023), https://www.ciplawyer.cn/articles/151138.html [https://perma.cc/AVK3-VWJ6].

234 Kaiye, *supra* note 70.

evolving jurisprudence reflects tensions in global copyright law. On the one hand, courts like Changshu adopt a "creative control" model, treating AI as a tool that can embody human originality. On the other hand, cases like Guilin stress the machine's autonomy and deny that human prompts alone constitute authorship.

Taken together, this survey highlights China's pivotal role in shaping global discourse on AI authorship. It reveals a hybrid model in which courts oscillate between human-centered originality and recognition of AI's generative capacity, exposing contradictions within foundational concepts of authorship, originality, and the idea/expression dichotomy. At the doctrinal level, this reflects a shift from the Enlightenment-era fixation on authorship as an individualistic act of creation toward a "post-authorship" model, where authorship is understood relationally, as a product of human input, technological mediation, and institutional recognition. This shift implements ANT.

CONCLUSION

This article argues that three arenas, namely, U.S. DMCA jurisprudence, ANT's insights into distributed agency, and China's evolving recognition of user-guided AI outputs, form a post-authorial paradigm of authorship. This paradigm reconceives originality as emerging from the interplay of human direction, machine processes, and institutional validation rather than from isolated human creativity. In this way, our prevailing paradigms of originality and authorship appear no more substantial than the Emperor's new clothes, clinging to illusions of value while concealing their emptiness.

Regarding the first arena, the trajectory of Gen-AI litigation demonstrates that the DMCA, particularly §1202, has emerged as a surrogate for copyright's originality threshold, but only in unstable and contested ways. Courts remain deeply divided: The Second Circuit has permitted §1202 claims without requiring proof of downstream infringement or substantial similarity, while the Ninth Circuit has curtailed them through a strict identicality requirement. District courts likewise oscillate between treating CMI removal as an actionable injury in and of itself and dismissing such claims as too abstract or beyond the statute's reach. What emerges from the unsettled case law is not simply a split over evidentiary thresholds, but a deeper structural paradox.

While §1202 was never designed to resolve questions of authorship or originality, plaintiffs invoke it precisely to fill that void in the Gen-AI context. As a result, the DMCA currently functions as both a proxy for originality and a limit on it, alternately expanding or collapsing depending on jurisdiction. By shifting the inquiry from the creative quality of outputs to the integrity of attributional markers, §1202 reframes authorship as a

question of informational trace rather than expressive substance. This shift highlights the conceptual drift between originality and attribution, underscoring the need for a post-authorial framework that can accommodate the structural dynamics of AI-driven cultural production.

Turning to the second arena, the shift from originality as an expression of individual genius to originality as a juridical device of attribution marks a decisive evolution in the age of GenAI. ANT and Foucault's notion of the *dispositif* reveal that authorship today emerges not from a single human source but from distributed networks of humans, machines, institutions, and practices. GenAI functions as such a *dispositif* of authorship, organizing law, technology, and culture into a regime that both preserves and destabilizes Enlightenment ideals of originality.

On the one hand, copyright law continues to enforce the human author as the bearer of rights. On the other hand, AI systems, corporate infrastructures, and creative practices expose the fragmented, hybrid, and procedural nature of authorship itself. The result is a "post-authorial" paradigm in which attributional markers, rather than expressive originality, become the focal point of legal protection. This structural lens underscores originality not as a natural fact but as a contingent legal construct. Yet this insistence on human authorship is not uniform across jurisdictions.

Finally, when looking at the third arena, recent Chinese adjudication demonstrates a more dynamic and at times contradictory approach to originality in the GenAI context. Chinese case law on AI authorship reflects an evolving yet inconsistent conception of originality. Early cases, such as *Feilin v. Baidu*, stressed that copyright subsists only in works created by natural persons, thereby excluding machine outputs. Subsequent rulings have moved toward a more flexible model. In *Tencent v. Yingxun*, originality was located in the human team's preparatory inputs. However, *Li v. Liu* and the "Half-Heart" case extended protection to AI-assisted works where users exercised substantial intellectual control through prompt engineering, refinement, and editing.

Decisions such as *Feng Moumou v. Dongshan,* however, reaffirm the limits of protection and deny authorship where human involvement was minimal or merely directive. This evolving jurisprudence illustrates two competing paradigms. One conceives originality as rooted in the enduring human author and treats AI as a mere tool. The other reconceives originality in terms of human "creative control" over generative processes and acknowledges authorship as relational and technologically mediated. The tension between these models positions China at the forefront of a global doctrinal shift: away from Enlightenment individualism and toward a post-authoritarian framework.

In sharp contrast, the United States has entrenched a rigid formalism, with courts and the Copyright Office categorically denying protection to AI-

generated works absent identifiable human authorship, a stance that underscores the doctrinal inflexibility of U.S. copyright law when set against China's more adaptive, if uneven, jurisprudence. Ultimately, these arenas mark the emergence of a post-authorial framework, in which originality is no longer grounded in the solitary genius of the Enlightenment author but in the interplay of human intention, algorithmic processes, and institutional recognition.

This trajectory, while uneven, offers a more adaptive and future-oriented model for copyright law. Taken together, these developments signal a global recalibration of copyright doctrine. Post-authorial authorship shifts the focus from the Enlightenment ideal of the solitary creator to a networked, technologically mediated ecosystem, raising both opportunities and challenges for the law's capacity to incentivize, regulate, and recognize creative production in the AI era, instead of clinging to the Emperor's new clothes.