

“THE TIME IS OUT OF JOINT”: HOW GENERATIVE AI DRIVES THE DIGITAL DESUETUDE OF COPYRIGHT

MIRA MOLDAWER*

The time is out of joint. Oh, cursèd spite,
That ever I was born to set it right!¹

I.	Introduction.....	392
II.	Why Hume?	415
III.	Belief Versus Time: What Constitutes Legal Custom? 427	
A.	What is a Copy Regarding Gen AI?	428
B.	What is Fair Use Regarding Gen AI?	433
IV.	Licensing Versus Desuetude.....	445
A.	Licensing Nuances	445
B.	The Contrary Aspects of Digital Desuetude	449
V.	Conclusion	453

* Mira Moldawer, ORCID: 0000-0002-7989-6406. Attorney at Law; Director and Senior Acting Instructor, Beit Zvi, School of the Performing Arts, Israel; lecturer at the Peres Academic Center; B.F.A in Theatre & Directing (Cum Laude); Instructors Course Drama Centre, London, U.K; LL.B. Tel – Aviv University; MA Thesis Program in Law, Technology and Business Innovation, Harry Radzyner Law School, Reichman University (Summa Cum Laude); Ph.D. (Summa Cum Laude), Harry Radzyner School of Law, Reichman University. I wish to thank the team of IDEA: The Law Review of the Franklin Pierce Center for Intellectual Property for their sharp editorial eye, invaluable comments, and constructive criticism throughout the publication process.

¹ WILLIAM SHAKESPEARE, HAMLET, Act 1, sc. 5, ll. 195–96.

I. INTRODUCTION

It is hard to believe that only in November 2022, ChatGPT burst into our lives, reshaping anew our concepts about creativity by and large, and the superiority of humans over machines, in particular.² Thus, as we raise crucial issues regarding every aspect of our new lives with Artificial Intelligence (“AI”), we are losing the previous unquestionable premise of human sovereignty.³ This article argues that the unprecedented rapid technical evolution of Generative AI (“Gen AI”), transforming today’s inventions into sheer obsolescence tomorrow, is shaking our legal infrastructure regarding both the source of the law and the

² See generally Mira Moldauer, *The Shadow of the Law Versus a Law with No Shadow: Pride and Prejudice in Exchange for Generative AI Authorship*, 14:2:5 SEATTLE JOURNAL OF TECH., ENV’T & INNOVATION L. (demonstrating the fierce debate regarding Gen AI’s creativity as equal or superior to humans, and its legal implications); Kristi Hines, *History Of ChatGPT: A Timeline of The Meteoric Rise Of Generative AI Chatbots*, SEARCH ENGINE J. (June 4, 2023), <https://www.searchenginejournal.com/history-of-chatgpt-timeline/488370/> [<https://perma.cc/37YM-64VC>] (showcasing the history of ChatGPT till acquiring 100 million users and 200 plugins); U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY, A REPORT OF THE REGISTRAR OF COPYRIGHTS, (January 2025), <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf> [<https://perma.cc/WS4F-EG2M>] (denying Copyrightability to AI).

³ For General AI, which is often described as a form of AI that can perform any intellectual task that a human can, and characterized by advanced, automated, and autonomous digital tools in the era known as the 3A Era see 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, 664–66 (2017) https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1955&context=faculty_scholarship [<https://perma.cc/BFR5-H3XK>] (discussing the variety of uses of these systems in our daily life, substituting humans).

very existence and tools of copyright law, even if the legal system refuses to acknowledge it.⁴

The image that comes to mind, once reality does not match the rules, is the lamplighter in *The Little Prince*, whose profession was once reasonable, when the planet took its time to complete its circle.⁵ In those golden days, all he had to do was put the lamp out in the morning and light it again in the evening.⁶ However, while the orders have not been changed, the planet has turned more rapidly each year, thus making a complete turn every minute, forcing the unfortunate lamplighter to light his lamp and put it out every minute.⁷ In a sense, this is what happened

⁴ Marc Zao-Sanders, *How People Are Really Using Gen AI in 2025*, HARVARD BUS. REV., (April 9, 2025), <https://hbr.org/2025/04/how-people-are-really-using-gen-ai-in-2025> (summing up the enormous development regarding Gen AI in comparison with only a year ago) (“Since then, the hype around AI, gen AI, and large language models (LLMs) has only amplified. User interest has doubled, investment in AI is skyrocketing, governments are taking more emphatic and explicit positions, and the stakes are about as high as they get—the future of humanity, according to some.”). *Cf* Thaler v. Perlmutter, No. 1:22-cv-01564, slip op. at 8, (D.D.C. Aug. 18, 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 through new tools or into new media.” (quoting Judge Beryl A. Howell)).

⁵ ANTOINE DE SAINT-EXUPÉRY, *THE LITTLE PRINCE* 33–34 (Katherine Woods trans., 1943), <https://blogs.ubc.ca/edcp508/files/2016/02/TheLittlePrince.pdf> [<https://perma.cc/Z6YB-K2GV>].

⁶ *Id.*

⁷ *Id.*:

“I follow a terrible profession. In the old days it was reasonable. I put the lamp out in the morning, and in the evening I lighted it again. I had the rest of the day for relaxation and the rest of the night for sleep.”
“And the orders have been changed since that time?”
“The orders have not been changed,” said the lamplighter. “That is the tragedy! From year to year the planet has turned more rapidly and the orders

to our law, by and large, and copyright law, in particular, regarding Gen AI.

First, from a macro-perspective, time was always a major factor in our legal perception. Time's legal power as a source of law is twofold. First, as a legal infrastructure essential for an obligatory custom.⁸ Second, as the opposite of the first: once a legal norm is not enforced over a substantial period, it becomes obsolete due to misuse, i.e., desuetude or desuetudo.⁹ In English law, the ancient rule of law for a particular locality, amounting to an obligatory custom, was opposed to the common law of the country, and, therefore, for a custom to be a valid legal norm, it should be proved that it:

(1) has been practiced peaceably and continuously from time immemorial—in practice, as long as living testimony can recall; (2) is reasonable, certain, and obligatory; and (3) is confined to a specific locality.¹⁰

have not been changed!” “Then what?” asked the little prince. “Then—the planet now makes a complete turn every minute, and I no longer have a single second for repose. Once every minute I have to light my lamp and put it out!” “That is very funny! A day lasts only one minute, here where you live!” “It is not funny at all!” said the lamplighter. “While we have been talking together a month has gone by.”

⁸ *Custom*, *BRITANNICA*, <https://www.britannica.com/topic/custom-English-law> [<https://perma.cc/68YY-WM2H>] (last visited Feb. 4, 2018); see also E. K. Braybroolte, *Custom as a Source of English Law*, 50 MICH. L. REV. 71 (1951) (for the variety of meanings which have been attributed to the word custom).

⁹ Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J. L. PUB. POL'Y, 223, 226 (2016) (“Desuetude is the concept that a law may lose legitimacy by a protracted period of nonenforcement, often coupled with flagrant and open non-compliance by the people”).

¹⁰ *BRITANNICA*, *supra* note 8. For the requested proof needed to establish custom, *Customary Law*, JUDICIARIES WORLDWIDE, A

“The Time Is Out of Joint”: How Generative AI Drives the Digital Desuetude of Copyright 395

The most important factor requested is the time factor, stretched beyond human memory, the length of which is its utmost asset as a source of law, as expressed by William Blackstone:

In our law the goodness of a custom depends upon its having been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority.¹¹

While Blackstone requires seven traits for a custom to overcome the common law, which paradoxically is based on custom as well, such as immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent, once you can trace the beginning of a custom, it loses its ground.¹² Unless almost eternal, all the other traits are not

RESOURCE ON COMPARATIVE JUDICIAL PRACTICE, <https://judiciariesworldwide.fjc.gov/customary-law> [<https://perma.cc/5QYR-X88N>] (“Some national court systems require that customary law principles be proven as a question of fact, whereas others permit proof through written documents or prior legal decisions”).

¹¹ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 67 (Callaghan & Cockcroft eds., Chicago 1871), <https://repository.law.umich.edu/books/100/> [<https://perma.cc/R68C-MX97>]. See also *Bebb v. Law Society* [1914] AC 286 at 294. Cf. *Nairn v. University of St. Andrews* [1909] AC 147 (HL) 160 (appeal taken from Scot.) (Lord Loreburn, L.C.) (“Only the clearest proof that a different state of things prevailed in ancient times could be entertained by a Court of Law in probing the origin of so inveterate an usage. I need not remind your Lordships that numberless rights rest upon a similar basis. Indeed, the whole body of the common law has no other foundation.”).

¹² Compare David L. Callies & Ian Wesley-Smith, *Beyond Blackstone: The Modern Emergence of Customary Law*, 4 PROP. RIGHTS CONFERENCE J. 151, 153 (2015) (“To be valid, to be enforceable, to result in a right of an individual despite common-law principles to the contrary, a custom had to be immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent.”), with HANS Kelsen,

satisfactory to validate the custom in question as a binding source of law.¹³ Juxtaposing custom versus *desuetude*, the dominant time factor that initiated custom is the same that will cause it to die due to lack of use or enforcement beyond time immemorial.¹⁴

It follows that the length of time involved in either establishing custom as a source of law or in its abolishment is the pivot of legitimacy, as one concept mirrors the other. Hence, Hans Kelsen's definition of *desuetude* as a "negative custom," due to the function of the former to abolish the validity of the latter, by the same component that once rendered it enforceable: time.¹⁵ While scholars emphasize that deliberate nonuse and the express repudiation of a legal norm are essential alongside the temporal element, the sustained duration of these factors is

GENERAL THEORY OF LAW AND STATE 126 (1945) ("Thus it might be due to custom that custom is a law-creating fact.").

¹³ BLACKSTONE, *supra* note 11, at 76 ("1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.") (footnotes omitted).

¹⁴ See also Jan Wouters & Sten Verhoeven, *Desuetudo*, OXFORD PUBLIC INTERNATIONAL LAW (Nov. 2008), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1027?prd=MPIL> [<https://perma.cc/82RR-2CYT>] ("Consequently, *desuetudo* could be more generally defined as the rejection of a rule through subsequent non-enforcement or non-compliance"); see Richard Albert, *Constitutional Desuetude in Canada and the United States*, EDMONTON JOURNAL (August 7, 2013), <https://edmontonjournal.com/news/local-news/constitutional-desuetude-in-canada-and-the-united-states> [<https://perma.cc/8PG3-K5PT>] (defining constitutional *desuetude*).

¹⁵ HANS KELSEN, PURE THEORY OF LAW 213 (Max Knight trans., 2d ed. 1978); see PETER SUBER, THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE 236 (1990) (demonstrating how *desuetude* may achieve the equivalent of a constitutional amendment by custom).

indispensable; without it, their normative *raison d’être* or moral justification loses coherence.¹⁶

The ideology of the people’s acceptance of both custom and its abolishment is attributed to Julianus: “Wherefore very rightly this also is held, that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.”¹⁷ While *prima facie*, the doctrine of desuetude is not recognized in either the English common law tradition or the United States; H.L.A. Hart offers the rule of recognition as the standard to evaluate which rules are binding, although substituting the Julianus tacit concept of all by the legal elite, namely, the judges.¹⁸ Accordingly, the rule of recognition identifies when a constitutional rule is no longer binding, once political actors’ conduct demonstrates their nonconformity to it.¹⁹

This reasoning leads us to the second facet of the time factor from the micro-perspective of copyright law, in general, and Gen AI, in particular. Time was a crucial factor since its initiation in the Statute of Anne’s legacy, as the first copyright law in history.²⁰ The most significant debate in English law was the perception of the Statute of Anne, reflecting its legacy regarding the duration of

¹⁶ Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMPAR. L. 641, 651 (2014) (last modified Jan. 4, 2022) (“All three elements—the (1) sustained (2) conscious nonuse of a rule that has been (3) publicly repudiated by political actors—are necessary to render a rule desuetudinal.”).

¹⁷ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 190 n.2 (2d ed. 1948).

¹⁸ Albert, *supra* note 16, at 652; H.L.A. HART, *THE CONCEPT OF LAW* 256 (2d ed. 1994).

¹⁹ HART, *supra* note 18, at 94.

²⁰ The Statute of Anne 1710, 8 Ann. c. 19 (Eng.) [hereinafter *The Statute of Anne*]. For the Statute of Anne as the “exemplar” of copyright law followed by every common law jurisdiction, see Lior Zemer, *The Conceptual Game in Copyright*, 28 HASTINGS COMM. & ENT. L.J. 409, 420 (2006).

copyright.²¹ In *Millar v. Taylor*, the plaintiff, Andrew Millar, was a bookseller who had purchased the publishing rights to James Thomson's poem "*The Seasons*." After the term of the exclusive rights granted under the Statute of Anne expired, the defendant, Robert Taylor, began publishing the same poem.²²

Because the majority viewed copyrights as rooted in common law and therefore not nullified by the Statute of Anne, the court in *Millar v. Taylor* held that they existed in perpetuity as property rights.²³ However, *Donaldson v. Becket*, in which the plaintiff, Alexander Donaldson, a Scottish bookseller, was sued by the defendant to enjoin him from printing *The Seasons*, which was at the core of the *Millar v. Taylor* dispute, held that copyright in published works was subject to the statutory limits of the Statute of Anne.²⁴ Thus, reversing *Millar v. Taylor*, which

²¹ *Millar v. Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201 (KB), *overruled by* *Donaldson v. Becket* (1774) 4 Burr. 2408, 1 Eng. Rep. 837 (HL). The latter case is also reported as *Donaldson v. Beckett* (1774) 2 Bro. PC (2d ed.) 129, 1 ER 837.

²² See generally Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29, 77 (2012) (analyzing the blend of dignitary and pecuniary rights that led to a different focus in both precedents, leading to a contradictory perception of time duration in copyright law).

²³ See *id.* (demonstrating the argumentation of copyrightability as a perpetual right by Lord Mansfield) ("[I]t is just, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is just, that Another should not use his Name, without his Consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the Time, but the Manner of Publication; how many; what Volume, what Print. It is fit, he should choose to whose Care he will trust the Accuracy and Correctness of the Impression; in whose Honesty he will confide, not to foist in Additions"). *But cf id.* at 74 (Yates, J., dissenting) ("this action is merely vindictive: it is in personam; not in rem.").

²⁴ Stern, *supra* note 22, at 35 (However, the transition of copyrights from dignitary rights into property rights was completed, as marked by Stern, "One of the ironies of the decision in *Donaldson v. Becket* (1774) is that, although the publishers lost the dispute over perpetual

held common-law property rights outlive the statute and rendered copyright as a perpetual right.²⁵

Paradoxically, time’s fluid and ever-changing nature in copyright law has remained its most constant feature, consistently embodying the very essence of its legal force. The U.S. Constitution, while giving Congress the power to pass copyright laws to incentivize creativity, grants copyrights only for “limited times”.²⁶ The question of what constitutes a legally limited term has received varying answers, both in terms of what qualifies as a protected work and how long that protection should last.²⁷ Tracking the expansion of “limited times” in the Copyright Clause—consistently justified by the incentive-based

protection, they won the argument over the premise for such protection - the premise that copyright was a form of property.”).

²⁵ *Compare* Millar v. Taylor (1769) 4 Burr. 2303, 98 Eng. Rep. 201, 252 (KB) (holding that the author’s right “is a property, as much as his house or money, which the statute did not take away”), *with* Donaldson v. Becket (1774) 4 Burr. 2408, 1 Eng. Rep. 837, 846–47 (HL) (rejecting the perpetual common-law right post-publication and holding that the Statute of Anne “hath taken away” any such previous right).

²⁶ *The Lifecycle of Copyright*, COPYRIGHT.GOV U.S. COPYRIGHT OFFICE, [https://www.copyright.gov/history/copyright-exhibit/lifecycle/\[https://perma.cc/X2JZ-TDW5\]](https://www.copyright.gov/history/copyright-exhibit/lifecycle/[https://perma.cc/X2JZ-TDW5]); U.S. Const. art. I, § 8, cl. 8 (“The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”).

²⁷ See John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1233, 1249–50, 1253–54 (2012) (reflecting the development of copyright law, which has increasingly favored original creators by expanding their control—often at the expense of artistic freedom—as works previously seen as independent are now more frequently deemed derivative of existing copyrighted content); see generally *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RSCH. LIBRS., [https://www.arl.org/copyright-timeline/\[https://perma.cc/25WW-FK64\]](https://www.arl.org/copyright-timeline/[https://perma.cc/25WW-FK64]) (last visited Nov. 17 2025) [hereinafter *Copyright Timeline*] (demonstrating the history of the copyright timeline in the United States).

rationale—reveals an irreconcilable disconnect between the original intent of copyright law and its present form.²⁸

The gist of the incentive approach, as summed up by Wendy Gordon and Robert Bone, “is to provide incentives for new production at fairly low transaction costs.”²⁹ Accordingly, copyright law’s constraints, such as its limited duration, the fair use doctrine, and the idea/expression dichotomy, all serve “to reduce deadweight loss and other costs within a larger structure that creates incentives” to enhance this approach.³⁰ The incentive approach, otherwise known as the utilitarian approach, is regarded by the Supreme Court as embedded in the core of Article I, Section 8, Clause 8 of the U. S. Constitution.³¹ The incentive approach is considered the dominant theoretical justification not only for copyright law but for all IP rights in American law.³²

Unlike utility patents, which typically last 20 years from the filing date of the application, copyright has followed a distinct and evolving framework for determining its duration since its inception.³³ The

²⁸ U.S. Const. art. I, § 8, cl. 8.

²⁹ Wendy J. Gordon & Robert G. Bone, *Copyright*, 2 ENCYC. OF L. & ECON. 189, 189 (2000).

³⁰ *Id.*

³¹ *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (holding that the main purpose of copyright is to “secure a fair return for an ‘author’s’ creative labor” by creating this incentive “to stimulate artistic creativity for the general public good.”).

³² Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1256 (2014) (“The major forms of IP—trademark, patent, copyright, and design patent—look different, but they do have at least one objective in common: they are generally concerned with the instrumental goal of providing individuals with an incentive to create something intangible that might otherwise be easily appropriated.”).

³³ *How Long Does a Patent Last?*, BRITANNICA (Jun. 3, 2025), <https://www.britannica.com/topic/How-Long-Does-a-Patent-Last>

Copyright Act of 1790, formally titled An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies, adopted the term structure established by the Statute of Anne, on which it was modeled, granting authors an initial term of fourteen years (14), with the possibility of renewal for another fourteen years (14) if the author was still living at the end of the first term.³⁴ The 1831 Amendment extended the copyright term to 28 years, with the option to renew for an additional 14 years, to equate American copyright protection with European standards.³⁵

The 1909 revision of the U.S. Copyright Act preserved the initial 28-year term of protection but extended the renewal period to 28 years.³⁶ The 1976 Revision of the U.S. Copyright Act, although enacted before the United States became a Berne signatory in 1988, was crafted with an eye toward eventual compliance with the Berne Convention of 1886 standards.³⁷ Consequently, preempting all previous copyright laws and aligning with the Berne Convention minimum, the term of copyright

[<https://perma.cc/XKS5-S3FU>] (“A patent typically lasts 20 years from the filing date of the application. This standard duration is common around the world, providing inventors with time to benefit from their creations before they enter the public domain. The two-decade term aims to balance inventors’ rights with the broader public interest.”); see *Patent essentials*, USPTO, <https://www.uspto.gov/patents/basics/essentials> [<https://perma.cc/Y5RW-HKLV>] (last visited Nov. 17, 2025); *Duration of Patent Protection Under Federal Law*, JUSTIA, <https://www.justia.com/intellectual-property/patents/duration-of-patent-protection/> (last visited Nov. 17, 2025) (showing other categories of patents and their duration, none of which exceeds the utility patent’s duration).

³⁴ *Copyright Timeline*, *supra* note 27.

³⁵ *Id.*

³⁶ *Id.*

³⁷ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 30 [hereinafter The Berne Convention].

protection was extended to the life of the author plus fifty (50) years posthumously, while works for hire were protected for seventy-five (75) years.³⁸

The 1992 Amendment to Section 304 of Title 17 made copyright renewal automatic, limiting the ability of works copyrighted before 1978 to enter the public domain.³⁹ In 1994, the U. S. entered into the Uruguay Round Agreements Act (URAA), which implemented the General Agreement on Tariffs and Trade (GATT), including provisions related to Trade-Related Aspects of Intellectual Property Rights (TRIPs).⁴⁰ According to this objective, the U.S. amended its Copyright Act effective January 1, 1996, to extend copyright protection to works originating in countries deemed eligible under the applicable international agreements.⁴¹

In 1998, the House and Senate passed S. 505, the Copyright Term Extension Act (CTEA), also titled the Sonny Bono Copyright Term Extension Act, according to which copyrightability was extended to seventy years posthumously after the author's death for a work created on or after January 1, 1978, and 95 years from publication or 120 years from creation for works made for hire, or

³⁸ *Copyright Timeline*, *supra* note 27.

³⁹ *Id.*

⁴⁰ *Id.* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS]; *Overview: The TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm [<https://perma.cc/AAB2-FZZW>] (last visited Nov. 17, 2025) (“The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data”).

⁴¹ *Copyright Timeline*, *supra* note 27.

“The Time Is Out of Joint”: How Generative AI Drives the Digital Desuetude of Copyright **403**

anonymous or pseudonymous works, whichever expires first.⁴² Additionally, the law extended the duration of copyrights in their renewal term at the time of the effective date of the act to 95 years from the date such copyrights were originally secured.⁴³

Consequently, while copyright protection was restored to works that had already entered the public domain, in *Golan v. Holder*, the Supreme Court upheld Congress’s power to do so, finding that neither the “limited Tim[e]” text of the Copyright and Patent Clause, nor the Court’s precedent excluded application of copyright protection to works in the public domain.⁴⁴ The question posed is: can the incentive-based rationale truly justify such extended durations, given that the original balance, established in the Statute of Anne and adopted into American law, capped protection at a maximum of 28 years, while current law grants copyright for the life of the author plus seventy years for works created after 1978?⁴⁵

⁴² S.505 - SONNY BONO COPYRIGHT TERM EXTENSION ACT, Pub. L. No. 105-298, § 102(b)(1)–(2), 112 Stat. 2827, 2827(1998) (amending 17 U.S.C. § 302 (a)–(b)); *id.* § 102(b)(3), 112 Stat. 2827, 2827–28 (amending § 302(c) to extend terms to 70 years after the author’s death and 95 or 120 years for works made for hire).

⁴³ *Id.* § 102(d), 112 Stat. at 2828; JAMES BOYLE & JENNIFER JENKINS, *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY—CASES & MATERIALS* 279 (5th ed. 2021), https://web.law.duke.edu/cspd/pdf/ipcasebook2024_6th_ed.pdf [<https://perma.cc/6GB6-RDV5>] (“In 1998, the term was further expanded to life of the author plus 70 years, and 95 years from publication for works of corporate authorship. This 20-year term extension did not just apply to new works but also retrospectively to works already in existence, meaning that no published works entered the public domain until 2019.”).

⁴⁴ *Golan v. Holder*, 565 U.S. 302, 13–19 (2012); *Id.* at 23–32 (additionally, the Supreme Court ruled that the First Amendment does not prevent previously public domain works from having their copyrights restored.).

⁴⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”);

Moreover, comparing various forms of intellectual property rights under American law undermines the credibility of the incentive-based approach, as greater investment often leads to drastically shorter periods of protection. While companies are willing to invest millions to protect their patents or to challenge those of their competitors for less than twenty years of protection at the most, the effort required for copyrightability that lasts for generations is minimal.⁴⁶ As stated by David Nimmer: “[a]ny ‘distinguishable variation’ of a prior work constitutes sufficient originality to support copyright if that variation is the product of the author’s independent efforts and is more than merely trivial.”⁴⁷

see Mazer v. Stein, 347 U.S. 201, 219 (1954) (showing the incentive approach as the dominant theoretical justification not only for copyright law but for all IP rights in American law, regarding the philosophy behind Article I, Section 8 Clause 8 of the United States Constitution, the Supreme Court has held the Incentive approach to be embedded in its core); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (claiming that the main purpose of copyright is to “secure a fair return for an ‘author’s’ creative labor” by creating this incentive “to stimulate artistic creativity for the general public good”); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994); Patrick Russell Goold & David A. Simon, *On Copyright Utilitarianism*, 99 IND. L.J. 1051, 1060 (2024) (“Promoting progress is valuable, not because it secures natural rights, nor because doing so aids democracy per se, but because promoting progress in turn promotes utility.”); FRITZ MACHLUP, AN ECONOMIC REVIEW OF THE PATENT SYSTEM 22 (1958).

⁴⁶ *Global Patent Filing Slowdown? Using Patent Landscapes and R&D Investment Trends to Assess*, TPR, TECH. & PAT. RSCH., (February 3rd, 2025), <https://www.tprinternational.com/global-patent-filing/> [https://perma.cc/X9VF-NT8C] (“Returning to the main question – the jury is still out on whether 2024 will ultimately be a record-breaking year or a momentary plateau for global patent filings. However, the data suggests that the broader innovation ecosystem remains robust, and that Betteridge’s law of headlines (any headline that ends in a question mark can typically be answered with ‘no’) may possibly hold.”).

⁴⁷ MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01[B][1] (rev. ed. 2025)

*“The Time Is Out of Joint”: How Generative AI Drives the
Digital Desuetude of Copyright* 405

Nimmer refers to *Bleistein v. Donaldson Lithographing Co.*'s (“*Bleistein*”) legacy.⁴⁸ George Bleistein, an employee of the Courier Lithographing Company, created several chromolithographs for a circus show owned by Wallace.⁴⁹ After the circus ran out of posters, the owner commissioned a rival firm, the Donaldson Lithographing Company, to reproduce three of the original designs in a smaller format.⁵⁰ The U.S. Supreme Court ultimately ruled that such advertisements were eligible for copyright protection.⁵¹ In a much-quoted paragraph, Justice Oliver Wendell Holmes crystallized the ideology of granting copyrightability for less than artistic grandeur:

The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That

⁴⁸ *Id.* (citing *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239, 249–51 (1903)).

⁴⁹ *Bleistein*, 188 U.S. at 248–49.

⁵⁰ *Id.*

⁵¹ *Id.* at 251–52 (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of the public, they have a commercial value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's rights”).

something he may copyright unless there is a restriction in the words of the act.⁵²

In the context of Gen AI, the element of time reveals contradictory roles. On the one hand, it supports copyright law in reinforcing protection for human creators for generations, even with minimal creativity. On the other hand, time serves as a key rationale for denying copyright to AI, framing creativity as an inherently human trait shaped by generations of understanding.⁵³ Therefore, when Justice Beryl A. Howell refers to “a consistent understanding that human creativity is the sine qua non at the core of copyrightability,” we should ask ourselves what “a consistent understanding” means time-wise.⁵⁴

Thanks to the pioneering scholarship of Marta Woodmansee, Peter Jaszi, and the “authorship project,” it is common knowledge that the doctrinal infrastructure that was designed in the Enlightenment era created the radical reformation of the “Author.”⁵⁵ The construction of the “author” in the Enlightenment era is a far cry from its

⁵² *Id.* at 250.

⁵³ *Thaler v. Perlmutter*, No. 1:22-cv-01564, slip op. at 8, (D.D.C. Aug. 18, 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 through new tools or into new media.” (quoting Justice Beryl A. Howell)), *aff’d*, *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025).

⁵⁴ *Thaler v. Perlmutter*, No. 1:22-cv-01564, slip op. at 8, (D.D.C. Aug. 18, 2023).

⁵⁵ *See, e.g.*, Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 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).

*“The Time Is Out of Joint”: How Generative AI Drives the
Digital Desuetude of Copyright* 407

perception by Western culture during the preceding millennia. Plato in *Ion* regarded inspiration as anything but human, stating: “For not by art does the poet sing, but by power divine.”⁵⁶ In *Phaedrus*, Plato developed his concept of authorship as “divine madness.”⁵⁷

Likewise, the poet as a vessel of the divine morphed into the “stewardship” theory in the Middle Ages, according to which the poet is a mere steward of gifts that are not her own.⁵⁸ Until the Statute of Anne, authors could be indicted for blasphemy, libel, or sedition. Thus, the only “asset” that could be attributed to an author was criminal conduct.⁵⁹ In addition, even when copyright laws, at the juncture of the 18th and 19th centuries, replaced a market initially regulated by a system of printing privileges, they were intended to defend the interests of publishers and booksellers, as best demonstrated by the Statute of Anne.⁶⁰

Consequently, if a mere account is sufficient to base a theory of “a consistent understanding that human

⁵⁶ 1 PLATO, *Ion*, in THE DIALOGUES OF PLATO 470 (Benjamin Jowett trans., Oxford Univ. Press, 3rd rev. ed. 1892) (“For the poet is a light and winged and holy thing, and there is no invention in him until he has been inspired and is out of his senses, and the mind is no longer in him”).

⁵⁷ 1 PLATO, *Phaedrus*, in THE DIALOGUES OF PLATO 438 (Benjamin Jowett trans., Oxford Univ. Press, 3rd rev. ed. 1892).

⁵⁸ ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW IN THE UNITED STATES 19 (Stanford Univ. Press 2010).

⁵⁹ Mark Rose, *The Author in Court: Pape v. Curll (1741)*, 21 CULTURAL CRITIQUE 211, 215 (1992).

⁶⁰ *Id.* at 223–24 (demonstrating the silence of the Statute of Anne regarding crucial issues of authorship, such as the basic distinction between the tangible property in which letters and texts are fixed and the intangible essence of what is expressed through them, due to its focus on publishers and not on authors); see also Stern, *supra* note 22, at 63 (focusing on property rights regarding The Statute of Anne, and the seminal precedents that designed copyrightability as property rights ever since).

creativity is the sine qua non at the core of copyrightability,” then millennia of authorship denial to humans are stronger than some odd two centuries since the Enlightenment era. In short, not only is our concept of time contradictory to authorship perceptions during major stages of Western culture, but it also fails to support its main theoretical justification, undermining the balance between enhancing creativity and the common good, and lacking consistency across different branches of IP law. Paraphrasing Hamlet: if our concept of time is out of joint, can we set it right, especially in copyright law, reflecting its greatest errors?⁶¹

The time crisis is merely the surface of a deeper issue: the failure of Enlightenment-era ideals embedded in copyright law to adapt to both modern technological advancements and perceptions. Until then, not only were poets considered a mere vessel of the divine, but they were regarded as the quintessence of falsehood, as their art was a third-rate imitation of the eternal truth.⁶² G.W.F. Hegel’s revolutionary perspective bridged Plato’s critique of art with the Enlightenment’s aspiration to guide humanity toward progress through reason and the pursuit of eternal truth by linking the artist, seen as the ultimate originator and sole custodian of originality, imitating no one, with art as a means of uncovering the desired eternal truth.⁶³

⁶¹ See WILLIAM SHAKESPEARE, *HAMLET*, Act 1, sc. 5, ll. 195–96.

⁶² PLATO, *THE REPUBLIC BOOK* (Benjamin Jowett trans., The Project Gutenberg eBook of the Republic ed., 1998), <https://www.gutenberg.org/files/1497/1497-h/1497-h.htm> [<https://perma.cc/CL3S-B67Y>] (“All poetical imitations are ruinous to the understanding of the hearers, and that the knowledge of their true nature is the only antidote to them.”).

⁶³ 1 G.W.F. HEGEL, *AESTHETICS: LECTURES ON FINE ART* 296 (T.M. Knox trans., 1975) [hereinafter HEGEL, *AESTHETICS*] (“The true work of art must be freed from this perverse originality, for it evinces its genuine originality only by appearing as the one personal creation of one spirit which gathers and compiles nothing from without, but

“The Time Is Out of Joint”: How Generative AI Drives the Digital Desuetude of Copyright 409

Indeed, other pillars of the Enlightenment era already shaped the Enlightenment ideology, on which Hegel builds his concept of authorship, which is embedded in our copyright system. In *What Is Enlightenment*, Immanuel Kant advocates for the paramount secular values of pure reason and rationality, which he regards as the very essence of enlightenment.⁶⁴ In his essay “*What Is a Book*”, regarding the wrongfulness of unauthorized publication of books, Kant perceives the book as a writing in which “[t]he author speaks to his reader.”⁶⁵ Thus, the perception of “book as speech” renders an unlicensed book unlawful because it becomes an “agency without authority.”⁶⁶ Therefore, scholars attribute “[t]he modern concept of the autonomy of expression” to Kant’s legacy.⁶⁷

J. G. Fichte enhanced the originality’s justification for the author as the quintessence of authorship, as he believed that “[e]ach writer must give his own thoughts a

produces the whole topic from its own resources by a single cast, in one tone, with strict interconnection of its parts, just as the thing itself has united them in itself.”); *id.* at 48 (referring to art) (. . . has the capacity and the vocation to mitigate the ferocity of desires”).

⁶⁴ IMMANUEL KANT, *WHAT IS ENLIGHTENMENT?*, (Mary C. Smith trans.), [hereinafter KANT, *WHAT IS ENLIGHTENMENT?*], <http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html> [<https://perma.cc/5C3H-NYWT>].

⁶⁵ IMMANUEL KANT, *What is a Book? The Unauthorized Publishing of Books is Contrary to the Principles of Right, and is Rightly Prohibited*, in *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 31(II), 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/4MQ3-NQL6>].

⁶⁶ FRIEDEMANN KAWOHL, *Commentary on Kant’s Essay On the Injustice of Reprinting Books* (1785), in *PRIMARY SOURCES ON COPYRIGHT (1450-1900)* (L. Bently & M. Kretschmer eds., 2008), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_d_1785 [<https://perma.cc/WA4G-TLHR>].

⁶⁷ KIM TREIGER-BAR-AM, *POSITIVE FREEDOM AND THE LAW* 170 (2019).

certain form, and he can give them no other form than his own because he has no other.”⁶⁸ However, Hegel addressed the tension between truth and its representations by introducing a new dialectical approach, resulting in authorship eligible for property rights.⁶⁹ While remaining grounded in Enlightenment ideals, where absolute truth and reason were seen as synonymous, he resolved Plato’s concern that art stirs uncontrollable emotions and desires.

Hegel did this by uniting the concept of originality as the ultimate source with the idea of art’s vocation “[t]o unveil the truth in the form of sensuous artistic configuration, to set forth the reconciled opposition just mentioned, and so to have its end and aim in itself, in this very setting forth and unveiling.”⁷⁰ Thus, enabling the concept of human authorship. While our system keeps Hegel’s legacy, the question is: how can it be reconciled with the fall of the Enlightenment’s “big stories” of rational

⁶⁸ Woodmansee, *supra* note 55, at 445 (quoting JOHANN G. FICHTE, PROOF OF THE ILLEGALITY OF REPRINTING: A RATIONALE AND A PARABLE (M. Woodmansee trans., 1793)) (“Hence, each writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other. 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.”).

⁶⁹ See generally Paul Redding, Georg Wilhelm Friedrich Hegel, STANFORD ENCYC. OF PHIL. (Feb. 13, 1997), <https://plato.stanford.edu/entries/hegel> [<https://perma.cc/925D-A7SX>] (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*, STANFORD ENCYC. OF PHIL. (Jan. 20, 2009), <https://plato.stanford.edu/archives/win2021/entries/hegel-aesthetics> [<https://perma.cc/SH4G-AU4H>] (demonstrating the importance of Hegel’s Aesthetics).

⁷⁰ Houlgate, *supra* note 69, at 55; *id.* at 294 (showing Hegel relates to the artistic product as: “its external form both in the essence and conception of a definite species of art and also appropriately to the general nature of the Ideal”).

“The Time Is Out of Joint”: How Generative AI Drives the Digital Desuetude of Copyright 411

thinking and absolute truth, after their collapse due to the enormous catastrophes of Fascism and Totalitarianism, which led to their replacement by the “little stories” of postmodern thinking?⁷¹

Whereas the Enlightenment’s foundations, despite nuanced disagreements over authorship and property, rested on a shared belief in rationalism as the engine of human progress, our contemporary society is grounded in contradictory values of spectacle, image, and desire.⁷² Thus, a fundamental contradiction emerges between the ideology of the thinkers who inspired our current copyright framework and the values of a society expected to follow rules that neither align with its cultural ethos nor adapt to its continual transformations brought about by new technologies.

⁷¹ See generally MAX HORKHEIMER & THEODOR W. ADORNO, *The Culture Industry: Enlightenment as Mass Deception*, in DIALECTICS OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 98 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984) (“Simplifying to the extreme, I define postmodern as incredulity toward metanarratives.”) [hereinafter LYOTARD, *THE POSTMODERN CONDITION*].

⁷² See KAWOHL, *supra* note 66 (showing the different approaches of Kant, Fichte, and Hegel regarding IP in terms of property). For our current culture as a culture based on spectacle, narcissism, and compulsive consumption that manipulates us to purchase illusory images in our eternal quest for the artificial satisfaction of our desires, see GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* 60 (Fredy Perlman et al. trans., Black & Red rev. ed. 1977); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHED EXPECTATIONS* (1979); JEAN-FRANÇOIS LYOTARD, *LIBIDINAL ECONOMY* (Iain Hamilton Grant trans., Indiana Univ. Press 1993); see also GILLES DELEUZE & FELIX GUATTARI, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* (Robert Hurley, Mark Seem & Helen R. Lane trans., Univ. of Minnesota Press 1977) (regarding society as a mechanism of desiring machines manufactured by Consumer Capitalism).

Ironically, if the legitimacy of human authorship is traced back to the Enlightenment, then not only is the time argument flawed, but the very foundation of that trajectory is either illusory or irrelevant. Consequently, a different reconciliation is suggested to bridge the flawed trinity of encouraging creativity, the ever-changing time factor in the era of Gen AI, and the theoretical justification that might unite them all. Part II of this article argues that David Hume’s philosophy offers us the desired bridge. The answer to ‘Why Hume?’ is multilayered: at its core is his profound influence on the theoretical framework underpinning copyright law.⁷³

Yet his philosophy aligns even more closely with our era, one shaped by a culture of sensory experience and the emergence of a revolutionary concept of time through the evolution of Gen AI. Hume’s first prong, asserting the primacy of passions over reason, aligns more closely with the postmodern condition, which has become increasingly skeptical of the Kantian conflation of rationality and obedience as the basis for human progress.⁷⁴ Furthermore, this claim functions as a conceptual bridge to the incentive-based model, paving the way for the articulation of Hume’s

⁷³ See generally William Edward Morris and Charlotte R. Brown, *David Hume*, STANFORD ENCYC. OF PHIL., (Edward N. Zalta & Uri Nodelman eds., Winter 2023 ed.) <https://plato.stanford.edu/archives/win2023/entries/hume> [<https://perma.cc/D6HQ-HH38>]. While Hume is rightly regarded as one of the greatest philosophers of the Enlightenment, this article uses the Enlightenment title when focusing on the thinkers, Kant, Fichte, and Hegel, who reconfigured the concept of authorship by anchoring it in the paradoxical pursuit of reason, ultimate truth, and the Ideal. For Hume, titled as “the great Enlightenment thinker,” see HUME TEXTS ONLINE, <https://davidhume.org/> [<https://perma.cc/JZ7T-S2L5>] (developed and maintained by Amyas Merivale, edited by Amyas Merivale and Peter Millican).

⁷⁴ Morris and Brown, *supra* note 73.

*“The Time Is Out of Joint”: How Generative AI Drives the
Digital Desuetude of Copyright* 413

second prong: the formation of the virtuous or morally cultivated individual.⁷⁵

As Hume posits, custom relies on belief for its crystallization; when the corresponding custom is disrupted, that belief is inevitably destabilized.⁷⁶ It follows that the fragmentation of temporal continuity gives rise to distinct forms or dimensions of belief. Part III discusses the present analysis of Gen AI and its role in shaping foundational concepts of copyright law, affirming this dynamic. First, a jurisprudential shift is underway, characterized by a revived emphasis on the idea/expression dichotomy.⁷⁷

This development is exemplified by *Thomson Reuters Enterprise Centre GmbH and West Publishing Corp. v. Ross Intelligence Inc.* (“*Thomson Reuters*”), wherein elements previously regarded as unprotectable ideas, or as expressions inseparable from those ideas, are now increasingly treated as original expressions eligible for

⁷⁵ DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS § IX, at 161 (Selby-Bigge 2d ed., 1902) [hereinafter HUME, AN ENQUIRY OF MORALS].

⁷⁶ HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING § V, at 41 (Selby-Bigge, 2d ed., 1902) [hereinafter HUME, HUMAN UNDERSTANDING].

⁷⁷ 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, 395 (1989) argues 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.

copyright protection.⁷⁸ Consequently, within less than two years, the legal standards for determining direct copying and “substantial similarity” have undergone a significant transformation.

Second, within less than two years, new evaluative criteria have emerged for assessing fair use in the context of Gen AI. The traditional reliance on substantial similarity as the principal standard for identifying copying is being supplanted by a legal shift toward the fourth fair use factor, namely, whether generative uses augment the value of copyrighted works or function as market substitutes, thereby posing a risk of undermining or displacing existing markets.⁷⁹

Consequently, Part IV examines the evolving market practices supported by the U.S. Copyright Office Report: Copyright and Artificial Intelligence Part 3: Generative AI Training, A Report of the Register of Copyrights (“the Copyright Office Report”), highlighting the growing reliance on licensing copyrighted works for training Gen AI models.⁸⁰ This trend persists despite the

⁷⁸ *Compare* Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc., 765 F. Supp. 3d 382, 390 (D. Del. 2025) (“A smart man knows when he is right; a wise man knows when he is wrong. Wisdom does not always find me, so I try to embrace it when it does—even if it comes late, as it did here. I thus revise my 2023 summary judgment opinion and order in this case.”), *with* Fed. R. Civ. P. 54(b) (stating that any order that adjudicates fewer than all the claims “may be revised at any time before the entry of a judgment adjudicating all the claims”), *and* Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc., 694 F. Supp. 3d 467 (D. Del. 2023) (granting in part and denying in part the parties’ cross-motions for summary judgment prior to the court’s subsequent 2025 revision).

⁷⁹ *See, e.g.*, *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025); *Kadrey, et al. v. Meta Platforms Inc.*, 788 F. Supp. 3d 1026 (N.D. Cal. 2025).

⁸⁰ U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 3: GENERATIVE AI TRAINING, A REPORT OF THE REGISTER OF COPYRIGHTS (May 2025) [hereinafter THE COPYRIGHT OFFICE REPORT],

potential applicability of fair use, largely due to the continued legal uncertainty surrounding fair use in Gen AI litigation. However, as the marketplace increasingly prioritizes contract law, the effect is the imposition of contractual terms on uses that may ultimately qualify as fair use. This dynamic contributes to a form of digital desuetude.

At the heart of the rapidly evolving interpretations of copying and fair use lies a critical question: can the doctrine of desuetude be extended to the duration of copyright in the age of AI? If the widespread and unchallenged use of copyrighted content by major tech platforms and Gen AI systems continues, it may signal the emergence of such a phenomenon. Conversely, the growing reliance on large-scale licensing sidesteps the fair use inquiry entirely, allowing private contractual arrangements to supplant judicial interpretation and legislative guidance. Lastly, I conclude that as the unprecedented velocity of Gen AI precipitates a state of “digital desuetude,” the Enlightenment-era foundations of copyright, built on slow, rationalist accretion, are effectively collapsing. This article argues that by shifting toward a Humean framework of custom and sentiment, legal theory can move past this broken metaphysics to find a legitimacy rooted in the actual temporal and normative realities of the digital age.

II. WHY HUME?

A testament to Hume’s profound influence, Kant, the quintessential figure of the Enlightenment, confessed that Hume had awakened him from his “dogmatic

<https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf>
[<https://perma.cc/23NA-WSN6>].

slumbers.”⁸¹ Similarly, Jeremy Bentham, whose utilitarianism remains the cornerstone of American copyright justification, remarked, “[t]hat reading Hume ‘caused the scales to fall from his eyes.’”⁸² The next step, therefore, is to assess the implications of Hume’s influence for copyright law, beginning with Kant—who established the philosophical foundations of authorship—and extending to Bentham, whose utilitarianism provides its most compelling justification.

Hume’s revolutionary philosophy, which posits that nothing can ever be discovered by arguments *à priori*, attacks the very process of reasoning concerning matters of fact, which seem to be founded on the relation of *Cause and Effect*.⁸³ Through that relation alone, we can transcend the evidence of our memory and senses. The knowledge of this relation “[a]rises entirely from experience, when we find, that any particular objects are constantly conjoined with each other.”⁸⁴ Hume states:

⁸¹ Morris and Brown, *David Hume*, *supra* note 73 (quoting IMMANUEL KANT, *Prolegomena to Any Future Metaphysics That Will Be Able to Come Forward as a Science* (1783), in IMMANUEL KANT: THEORETICAL PHILOSOPHY AFTER 1781, 53 (H. Allison and P. Heath, eds., Gary Hatfield trans., Cambridge University Press, 2002)) (“I freely admit that the remembrance of David Hume was the very thing that many years ago first interrupted my dogmatic slumber and gave a completely different direction to my researches in the field of speculative philosophy.”).

⁸² Morris and Brown, *David Hume*, *supra* note 73 (quoting J. BENTHAM, A FRAGMENT ON GOVERNMENT, ch. 1, ¶ 36 n.2, (J.H. Burns and H.L.A. Hart, eds., Cambridge University Press, 1977)).

⁸³ DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 19 (Peter Millican ed., Oxford World’s Classics, 2007).

⁸⁴ *Id.* at 20 (“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.”).

“The Time Is Out of Joint”: How Generative AI Drives the Digital Desuetude of Copyright 417

When it is asked, *What is the nature of all our reasonings concerning matter of fact?* The proper answer seems to be, that they are founded on the relation of cause and effect. When again it is asked, *What is the foundation of all our reasonings and conclusions concerning that relation?* It may be replied in one word, Experience.⁸⁵

Prima facie, Hume and Kant seem to be opposite, as Kant argues that we are capable of thinking about objects through pure intellect.⁸⁶ While Hume scholars thought of Kant as simply his opponent, Abraham Anderson regards Kant as a devoted heir to Hume, whose work is “[t]he execution of Hume’s problem in its widest possible elaboration.”⁸⁷ Instead of jumping to conclude that Hume’s attack on metaphysics ends with the conclusion that “the concept of cause does not derive from reason but is a ‘bastard of the imagination,’” Anderson shifts the focus from the necessity of experience to the concept of cause to whether causality can be justified through the structures of the human mind, deriving from reason, thus enabling thinking about objects beyond experience, such as God.⁸⁸

However, reconciling Kant’s conception of the mind with Hume’s proves nearly impossible. For whereas

⁸⁵ *Id.* at 23; see Morris and Brown, *supra* note 73 (describing Hume’s three principles of association, *resemblance, contiguity in time and place, and causation*, out of which *causation* is the strongest).

⁸⁶ IMMANUEL KANT, *On the Form and Principles of the Sensible and the Intelligible World*, in *THEORETICAL PHILOSOPHY, 1755-1770*, 373–406 (David Walford & Ralf Meerbote ed. & trans., Cambridge Univ. Press, 1992).

⁸⁷ ABRAHAM ANDERSON, *KANT, HUME, AND THE INTERRUPTION OF DOGMATIC SLUMBER*, Preface (Oxford Univ. Press 2020).

⁸⁸ *Id.* at Preface xvii (“The question posed by the objection of David Hume, in other words, is not whether the concept of cause is necessary and correct for experience, but whether the concept of cause derives from reason, and might therefore be used to think an object beyond experience, such as God; it is this question that really matters to Hume, as Kant emphasizes in the *Critique of Practical Reason*”).

Hume posits that knowledge arises from sensory impressions, Kant contends that objects conform to the a priori structures of our cognition rather than our knowledge conforming to external objects, thus introducing a fundamentally opposed epistemological hierarchy. As already discussed in this article, Hegel managed to bridge Plato's absolute truth with artistic originality as a source that excludes imitations, thus rendering human authorship legitimate. What happens to this construction once its infrastructure collapses?

First, the catastrophic experiences of fascism and totalitarianism marked the collapse of grand narratives, giving way to the 'little narratives' that define the postmodern condition. Jean-François Lyotard coined the term 'postmodern condition' to express skepticism toward the totalizing tendencies inherent in universal frameworks, particularly the Enlightenment's metanarratives, which upheld the promise of human progress through rationalism, accompanied by the ideals of political liberty, human solidarity, and aesthetic redemption through art.⁸⁹

Second, despite encompassing a diverse array of schools and theoretical frameworks, postmodern approaches are unified in their rejection of the monolithic Ideal or Idea, an absolute source of singular, superior meaning or authority that marginalizes alternative narratives. This critique inherently challenges the dominance of white, masculine, and Eurocentric hegemony.⁹⁰ As Max Horkheimer and Theodor W. Adorno

⁸⁹ See generally LYOTARD, THE POSTMODERN CONDITION, *supra* note 71 ("Simplifying to the extreme, I define postmodern as incredulity toward metanarratives.").

⁹⁰ See, e.g., HORKHEIMER & ADORNO, *supra* note 71; Lyotard, THE POSTMODERN CONDITION, *supra* note 71; HOMI K. BHABHA, THE LOCATION OF CULTURE (1994); Louis Althusser, *Ideology and Ideological State Apparatuses (Notes towards an investigation)*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 85 (Ben Brewster trans., 1971); ROLAND BARTHES, MYTHOLOGIES (Annette Lavers trans., 1972)

contend, the Enlightenment, in replacing religious absolutism with the dogma of rationalism, ultimately instrumentalized reason as a means of domination, thereby turning its emancipatory promise into a mechanism for the suppression of human freedom.⁹¹

Third, although interpreting Kant's conception of reason as 'instrumental' and reducing individuals to interchangeable units within a totalitarian bureaucratic apparatus that views human beings as mere numbers may appear reductive or even sacrilegious, a closer reading of Kant suggests a more nuanced understanding.⁹² For Kant, the essence of Enlightenment lies in the imperative to "[h]ave the courage to use your understanding," particularly in the context of the public use of reason, which he insists must remain free at all times, even as he

[hereinafter BARTHES, MYTHOLOGIES]; 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); MICHEL FOUCAULT, *What is Enlightenment?*, in *THE FOUCAULT READER* 32 (Paul Rabinow ed., 1984). Jeffrey Mehlman, *The "Floating Signifier": From Lévi-Strauss to Lacan*, 48 *YALE FRENCH STUD.* 10 (1972).

⁹¹ HORKHEIMER & ADORNO, *supra* note 71, at 4 ("For the Enlightenment, only what can be encompassed by unity has the status of an existent or an event; its ideal is the system from which everything and anything follows. Its rationalist and empiricist versions do not differ on that point."). *Id.* at 9 ("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.").

⁹² *Id.* at 4 ("For the Enlightenment, anything which cannot be resolved into numbers, and ultimately into one, is illusion.").

simultaneously upholds the necessity of obedience within the private sphere.⁹³ Kant stated:

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!'⁹⁴

Consequently, conceiving of humanity in the aftermath of the metanarrative's collapse entails a reconceptualization of the modern subject, no longer driven by Enlightenment ideals of rationalism but instead by fantasies and desires and is irreducible to a purely rational or thinking entity.⁹⁵ Hume, notably, did not need to wait for this shift to recognize such complexities. Whereas Hegel's reconciliation with Plato, which Kant heavily influenced, is based on reason and the Ideal as superior to our senses and desires, Hume holds a contradictory view.⁹⁶

Accordingly, sensual experience frames our minds, as "[a]ll our ideas or more feeble perceptions are copies of

⁹³ KANT, *supra* note 64.

⁹⁴ *Id.*

⁹⁵ See generally Mehlman, *supra* note 90 (explaining the signification catastrophe following the fall of the Enlightenment's metanarratives).

⁹⁶ Compare Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STANFORD ENCYC. OF PHIL. (Feb. 23, 2004), <https://plato.stanford.edu/archives/spr2022/entries/kant-moral> [<https://perma.cc/5LJ3-729B>] (giving a better understanding of how Hegel's perception, culminating in property rights as embedded in the creative will, is highly influenced by Kant's vision of an autonomous will, which we must develop as the quintessence of humanity), with Morris and Brown, *supra* note 73 (explaining not only are ideas the mere copy of impressions, but *Impressions* offer their specific hierarchy, as Hume distinguishes between the *original impressions we get from our five senses, and impressions of reflection, or secondary impressions, such as desires, emotions, passions, and sentiments*).

our impressions or more lively ones.”⁹⁷ Hence, Hume states what comes next naturally: “[r]eason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.”⁹⁸ Hume reversed the Platonic view that provoking desires and imitating the Idea made art an inferior occupation that merits exile from his Republic.⁹⁹ Not only does Hume offer a revolutionary concept of what counts as a source, rendering the intellectual reasoning to be a mere copy of the experience, but he also reshapes the concept of custom anew.

Hume contends that our ability to infer the future from past experience arises not from rational deduction but from habit or custom. As a result, causal inferences rely on the habitual association formed in our minds, which generates the perceived necessary connection between cause and effect. This association, rooted in belief, underlies the Principle of Uniformity and leads us to anticipate that the future will resemble the past.¹⁰⁰ Hume states:

⁹⁷ HUME, HUMAN UNDERSTANDING, *supra* note 76, §2, at 28:

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.

⁹⁸ DAVID HUME, A TREATISE OF HUMAN NATURE 283 (L.A. Selby-Bigge ed., Oxford Clarendon Press, 1896) (reprinted).

⁹⁹ See PLATO, *supra* note 62. As Morris and Brown, *supra* note 73, phrases the question: “[d]o ideas cause impressions or do impressions cause ideas?”

¹⁰⁰ Morris and Brown, *supra* note 73.

For wherever the repetition of any particular act or operation produces a propensity to renew the same act or operation, without being impelled by any reasoning or process of the understanding; we always say, that this propensity is the effect of Custom.¹⁰¹

Hume’s first prong claim regarding the primacy of the passions over reason resonates more profoundly with the postmodern condition, which has grown increasingly disillusioned with the Kantian conflation of rationality and obedience as the foundation for human progress. Moreover, this claim serves as a conceptual bridge to the incentive-based model, facilitating the articulation of Hume’s second prong: the constitution of the virtuous or morally cultivated individual. As William Edward Morris and Charlotte R. Brown conclude, “Hume offers the claim that we admire four sorts of character traits—those that are useful or immediately agreeable to the agent or to others—as an empirical hypothesis.”¹⁰² Hume states:

Every quality of mind, which is useful or agreeable to the person himself or to others, communicates a pleasure to the spectator, engages his esteem, and is admitted under the honourable denomination of virtue or merit.¹⁰³

The Benthamian approach, according to which human behavior aims to achieve pleasure and avoid pain, measures the ethics of rights by the criterion of causing “the greatest happiness of the greatest number.”¹⁰⁴ Hume’s influence, regarding both our experience derived from our senses and the consequences of this premise, echoes in the

¹⁰¹ HUME, HUMAN UNDERSTANDING, *supra* note 76, § V, at 41.

¹⁰² Morris and Brown, *supra* note 73.

¹⁰³ HUME, AN ENQUIRY OF MORALS *supra* note 75, § IX, at 161.

¹⁰⁴ JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 393 (J.H. Bums & H.L.A. Hart eds., 1977).

utilitarian ideology embedded in our IP system. Scholars refer to the Benthamian approach as “quantitative hedonism.”¹⁰⁵ “[I]t is ‘hedonistic’ because what matters is happiness; and it is ‘quantitative’ because the amount of happiness an action produces determines how to evaluate the action against other potential actions.”¹⁰⁶

While generally speaking, the utilitarian/incentive approach is easily classified as a goal-based right, aiming to improve the general welfare, regarding copyright law, it follows that “[i]ts principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”¹⁰⁷ Accordingly, the utilitarian approach of copyright law incorporates the Benthamian value of increasing the

¹⁰⁵ Goold & Simon, *supra* note 45 (“Promoting progress is valuable, not because it secures natural rights, nor because doing so aids democracy per se, but because promoting progress in turn promotes utility.”).

¹⁰⁶ *Id.*

¹⁰⁷ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 171–72 (1977); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 2 (2011):

Current convention has it that IP law seeks to maximize the net social benefit of the practices it regulates. The traditional utilitarian formulation the greatest good for the greatest number— is expressed here in terms of rewards. Society offers above-market rewards to creators of certain works that would not be created, or not created as soon or as well, in the absence of reward. The gains from this scheme, in the form of new works created, are weighed against social losses, typically in the form of the consumer welfare lost when embodiments of these works are sold at prices above the marginal cost of their production. IP policy, according to this model, is a matter of weighing these things out, of striking the right balance.

common good by granting creators property rights to incentivize their enriching contributions to society.¹⁰⁸ The crucial question is for how long?

If the current time-scope is touching on eternity, aren't we emptying the incentive approach of its essence? This is not to say that the incentive approach is justified from other aspects. Even relatively restrained critiques of the "quantitative hedonism" paradigm cast doubt on the premise that an accumulative model—advocating for the proliferation of artistic works based primarily on volume—necessarily yields an increase in overall societal welfare.¹⁰⁹ In short, the causal nexus between the quantity of production and the enhancement of happiness is, at best, speculative.

Criticism of the utilitarian framework extends beyond its empirical inadequacies and engages with the doctrine on theoretical and normative grounds. First, the incentive-based approach, though rooted in classical

¹⁰⁸ Corinna Coors, *Morality, Utility, Reality? Justifying Celebrity Rights in the 21st Century*, 44 SYRACUSE J. INT' L L. & COM. 215, 223 (2017).

¹⁰⁹ Christopher Buccafusco & Jonathan S. Masur, *Intellectual Property Law and the Promotion of Welfare*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 98 (Ben Depoorter, Peter Menell, & David Schwartz eds., 2019). Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 346 (2017), criticizes the accumulative approach, arguing:

Thus, while a strong accumulationist model of progress is typically applied to scientific-technological progress, in which the goal is to accumulate ever-better scientific and technological achievements, a weak accumulationist model is typically applied to aesthetic progress. In the latter, the focus is not on better works but simply on more works. The weak accumulationist account of aesthetic progress retreats to the quantitative in an effort to disengage from the qualitative.

*“The Time Is Out of Joint”: How Generative AI Drives the
Digital Desuetude of Copyright* 425

economic theory, insufficiently accounts for the multifaceted nature of artistic motivation, which often transcends pecuniary incentives.¹¹⁰ Second, from an interpretive perspective, while the Copyright Clause of the U.S. Constitution expressly states its objective as “[t]o promote the Progress of Science and useful Arts,” it omits any direct reference to utility or welfare maximization.¹¹¹

This textual silence has led a number of legal scholars to question the normative coherence and constitutional legitimacy of utilitarian interpretations of copyright.¹¹² Moreover, the evolution of the utilitarian approach into a predominantly market-driven, accumulative doctrine has been criticized for its conceptual narrowness, particularly in its failure to accommodate core democratic principles such as equitable access to cultural goods.¹¹³

¹¹⁰ Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 101, 106 (2008) (“The drive to assimilate every creative act to the formal market economy is a mistake both of fact and of value. Money isn’t everything, and it can prove destructive to particular creative practices.”).

¹¹¹ Beebe, *supra* note 109, at 373 (criticizing Justice Holmes’s approach in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)) (“[I]nstead, to find evidence that the works promoted progress, Holmes retreated to the market’s judgment of their worth or otherwise to the infringer’s judgment of their worth.”).

¹¹² See generally MERGES, *supra* note 107, at 102–36 (advocating distributive justice as the plausible ground for IP rights); NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 81–108 (Oxford University Press 2008) (arguing that copyright serves a “democratic paradigm” by fostering an independent sector of expression, but warns that its expansion can paradoxically stifle public discourse); Goold & Simon, *supra* note 45, at 1072–75 (critiquing the “incentive-to-create” model and arguing that modern copyright law has drifted from its original utilitarian purpose of serving the public interest).

¹¹³ Jonathan Gingerich, *Remixing Rawls: Constitutional Cultural Liberties in Liberal Democracies*, 11 NE. U. L. REV. 401, 587–88 (2019) (advocating for democratic control of culture to enable everyone to have an equal opportunity to accessibility and creativity, following Rawls’ legacy: “[b]uilding a legitimate constitution requires that we all

Finally, not only does empirical evidence fail to conclusively support the utilitarian justification for copyright, but in many instances, it appears to undermine it.¹¹⁴

The dominance of the incentive approach does not stop at its current time-scope, but is used by scholars as a theoretical infrastructure for what constitutes authorship, especially regarding Gen AI.¹¹⁵ Accordingly, while certain scholars invoke economic reasoning to argue against the recognition of AI-generated works based on insufficient incentive structures, others, relying on the very same doctrinal framework, reach the opposite conclusion.¹¹⁶ Nevertheless, the temporal dimension emerges as a central

come to see one another as ‘coworker[s] in the kingdom of culture’ and that our laws and institutions embody this respect”).

¹¹⁴ GLYNN LUNNEY, *COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* 44–46 (2018) (suggesting that from 1962 to 2015, more money for creators not only did not lead to more or better music, but quite the contrary).

¹¹⁵ See Daniel J. Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053, 2091 (2020) (arguing that because AI systems “do not need the incentive of a copyright” to produce works, the utilitarian infrastructure of copyright law requires a “human cause” to maintain the link between authorship and creative incentives).

¹¹⁶ Compare Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1185–1200 (1986) (discussing economic arguments against AI-generated works and the lack of incentives), and Daniel J. Gervais, *supra* note 115, at 2062 (arguing that machines need no economic incentive), with Robert Denicola, *Ex Machina: Copyright Protection for Computer-Generated Works*, 69 RUTGERS U. L. REV. 251, 283 (2016) (using incentive-based reasoning to argue that neither AI nor programmers are appropriate authors of AI-generated works), and Ryan Benjamin Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence*, 75 FLA. L. REV. 1141, 1188 (2023) (“The incentive may simply be needed further upstream in the process than is generally the case with human creativity. Substantial investment may also be needed to continue improving an AI to generate better output.”).

theme in this debate, with leading proponents of human authorship relying heavily upon it in the absence of explicit textual support within the foundational instruments of copyright law, namely, the Berne Convention and the Intellectual Property Clause of the U.S. Constitution.¹¹⁷

If, as Hume posits, custom requires belief for its crystallization, what becomes of that belief once the corresponding custom is disrupted? Furthermore, does the fragmentation of temporal continuity give rise to distinct forms or dimensions of belief? The current survey of Gen AI in its formation of fundamental concepts of copyright law answers the question affirmatively, as discussed in the following section.

III. BELIEF VERSUS TIME: WHAT CONSTITUTES LEGAL CUSTOM?

AI companies are currently engaged in a competitive race to develop generative artificial intelligence models, software capable of producing text, images, video, or audio based on data it has been previously “trained” on. Given that the effectiveness of such models hinges on the volume and quality of training data, many companies have opted to use copyright-

¹¹⁷ See generally, 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 INTELL. REV. OF INTELL. PROP. & COMPETITION. 131, 134 (2018) (“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.’” (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)).

protected materials without obtaining authorization from the rights holders or compensating them for the use of their works. Every recent case dealing with this practice poses the same questions: Does this conduct amount, to copying as meant by the copyright law, and is it fair use?¹¹⁸

A. What is a Copy Regarding Gen AI?

The quick time shift in perceiving what constitutes copying regarding Gen AI is demonstrated by Justice William Orrick of the Northern District of California in *Andersen et al v. Stability AI Ltd. et al* (“*Andersen v. Stability I*”), who at first, due to the final output not being “substantially similar” to the input, refused to regard those practices as infringing copyright law.¹¹⁹ The case was

¹¹⁸ Compare Hugh C. Hansen, *Fair Use: Its Application, Limitations and Future*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1017, 1077–78 (2007) (characterizing fair use as a permitted derivative work), with Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 462, 470–71 (Michael Geist ed., 2005) (arguing that fair use is a user right in its own merit).

¹¹⁹ *Sarah Andersen et al. v. Stability AI Ltd.*, 700 F. Supp. 3d 853, 867–68 (N.D. Cal. 2023). (“Even if that clarity is provided and even if plaintiffs narrow their allegations to limit them to Output Images that draw upon Training Images based upon copyrighted images, I am not convinced that copyright claims based a derivative theory can survive absent “substantial similarity” type allegations.”); see Zach Schor, *Andersen v. Stability AI: The Landmark Case Unpacking the Copyright Risks of AI Image Generators*, N.Y.U. J. INTELL. PROP. ENT. L. (Dec 2, 2024), <https://jipel.law.nyu.edu/andersen-v-stability-ai-the-landmark-case-unpacking-the-copyright-risks-of-ai-image-generators/> [https://perma.cc/NE6V-MDST] (showing the history of Andersen’s lawsuit); see also *Kadrey v. Meta Platforms, Inc.*, No. 23-CV-03417-VC, 2023 WL 8039640, at *1 (N.D. Cal. Nov. 20, 2023) (“The plaintiffs are wrong to say that, because their books were duplicated in full as part of the LLaMA training process, they do not need to allege any similarity between LLaMA outputs and their books to maintain a claim based on derivative infringement. To prevail on a theory that

brought as a class-action lawsuit by Andersen and several other artists against Stability AI, Midjourney, and DeviantArt, alleging that their copyrighted artworks were unlawfully used to train the Gen AI program STABLE DIFFUSION via the LAION dataset, a massive collection of 5 billion images scraped from the internet.¹²⁰

However, this was only the first step.¹²¹ After the lawsuit was amended to include claims of copyright infringement, in *Andersen v. Stability II*, Justice Orrick denied Stability AI’s motion to dismiss, concluding that it was premature, at this stage of litigation, to determine as a matter of law whether infringement occurred during the training or operation of the STABLE DIFFUSION model.¹²² He allowed the case to proceed to the discovery phase, finding that both the direct and induced copyright infringement claims were plausible and should be addressed at the summary judgment stage.¹²³

LLaMA’s outputs constitute derivative infringement, the plaintiffs would indeed need to allege and ultimately prove that the outputs ‘incorporate in some form a portion of ‘the plaintiffs’ books.’); *but see* Tremblay v. OpenAI, Inc., 716 F. Supp. 3d 772, 777–78 (N.D. Cal. 2024).; *see also* Mot. to Dismiss at 7–8, Silverman v. OpenAI, Inc., No. 3:23-cv-03223-AMO (N.D. Cal. Aug. 28, 2023) (applying similar derivative-infringement logic).

¹²⁰ Andersen, 700 F. Supp. 3d at 859–60 (detailing the plaintiffs’ allegations that the defendants “scraped and copied” over five billion images from the internet into the LAION-5B dataset to train their Stable Diffusion model); *see also* Class Action Complaint at 11–13, Andersen v. Stability AI Ltd., No. 3:23-cv-00201 (N.D. Cal. Jan. 13, 2023) (describing the training process and the role of the LAION dataset in the alleged infringement).

¹²¹ Sarah Andersen et al. v. Stability AI Ltd., 744 F. Supp. 3d 956, 965 (N.D. Cal. 2024) (clarifying that the only claim that survived was the direct infringement claim against Stability was, “based on Stability’s alleged “creation and use of ‘Training Images’ scraped from the internet into the LAION datasets and then used to train Stable Diffusion.” October 2023 Order at 7.”).

¹²² *Id.* at 964–65, 968–69, 973.

¹²³ *Id.* at 968.

Justice Orrick’s decision on the inducement claim relied in part on a statement by Stability AI’s CEO, who asserted that the company compressed 100,000 gigabytes of image data into a two-gigabyte file capable of “recreating” the original images.¹²⁴ Supporting academic research also demonstrated that training images could be reproduced using precise prompts.¹²⁵ These factors led the judge to view the plaintiffs’ inducement claim, namely, that Stability’s distribution of Stable Diffusion to third parties enables downstream copyright infringement, as facially plausible.¹²⁶ If proven, this would infringe the plaintiffs’ exclusive right to control the distribution of their works.¹²⁷

As for the direct infringement claims, Justice Orrick held that they could proceed, finding both the “Model Theory” and the “Distribution Theory” to be legally viable.¹²⁸ The “Model Theory” posits that Stable Diffusion itself constitutes an infringing “statutory copy” or a “statutory derivative work,” insofar as it embodies a transformation of the plaintiffs’ copyrighted material.¹²⁹ The “Distribution Theory” equates the act of distributing the Stable Diffusion model with unlawfully distributing the plaintiffs’ original works.¹³⁰

Accordingly, “[t]his ruling suggests that copyright holders may be able to pass the first hurdle of an infringement claim by simply relying on this publicly accessible tool, without needing to show specific data of which copyrighted works were used.”¹³¹ The rapid shift in

¹²⁴ *Id.* at 969

¹²⁵ *Id.*

¹²⁶ *Andersen*, 744 F. Supp. 3d at 969.

¹²⁷ *Id.* at 974.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Scott M. Douglass & Dominic Rota, *The Fast-Moving Race Between Gen-AI and Copyright Law*, BAKER DONELSON, (July 10,

perspective that led to Justice Orrick’s significant change in approach was echoed by his judicial colleagues. Notably, Justice Stephanos Bibas openly acknowledged this transformation when revisiting his earlier summary judgment, issued two years prior, in *Thomson Reuters Enterprise Centre GmbH and West Publishing Corp. v. Ross Intelligence Inc.* (“*Thomson Reuters*”).¹³²

The plaintiff operates Westlaw, one of the largest legal research platforms, which contains a wide array of legal materials, including state and federal statutes, regulations, case law, treatises, law journals, editorial commentary, and annotations, most notably, headnotes that summarize key legal principles and case holdings. The defendant developed a competing legal research platform using Bulk Memos, which were derived from Westlaw’s headnotes.¹³³ The defendant argued that these headnotes

2024), <https://www.bakerdonelson.com/the-fast-moving-race-between-gen-ai-and-copyright-law> [<https://perma.cc/J7TA-CP5E>].

¹³² *Compare* *Thomson Reuters Enter. Ctr. GmbH v. ROSS Intelligence Inc.*, 765 F. Supp. 3d 382, 390 (D. Del. 2025). (“A smart man knows when he is right; a wise man knows when he is wrong. Wisdom does not always find me, so I try to embrace it when it does—even if it comes late, as it did here. I thus revise my 2023 summary judgment opinion and order in this case.”) *with* Fed. R. Civ. P. 54(b) (providing that interlocutory orders “may be revised at any time before the entry of a judgment adjudicating all the claims”), *and* Memorandum Opinion, *Thomson Reuters Enter. Ctr. GmbH*, 765 F. Supp. 382 (2025) (No. 1:20-cv-613-SB) (explaining the court’s decision to reconsider the “intermediate copying” and “public interest” factors of fair use in the context of AI training), *and* Order for Partial Summary Judgment, *Thomson Reuters Enter. Ctr. GmbH*, 765 F. Supp. 382 (2025) (No. 1:20-cv-613-SB) (vacating the prior grant of summary judgment to allow the jury to determine the transformative nature of Ross’s AI training data), *and* *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, 694 F. Supp. 3d 467, 481–83 (D. Del. 2023) (originally granting partial summary judgment by finding that Ross’s use of Westlaw’s headnotes was not transformative as a matter of law).

¹³³ *Thomson Reuters*, 694 F. Supp. 3d at 391.

were based on uncopyrightable judicial opinions.¹³⁴ In evaluating the plaintiff's claim of direct copyright infringement, the central issue was whether the plaintiff's work contained protectable elements eligible for copyright protection.¹³⁵

Previously, courts applying the traditional "substantial similarity" standard were inclined to find that outputs generated by Gen AI did not infringe copyright, often concluding that such outputs lacked sufficient resemblance to protected works. However, a jurisprudential shift is emerging, marked by a renewed focus on the idea/expression dichotomy. *Thomson Reuters* illustrates this development: elements that might once have been dismissed as unprotectable ideas, or as expressions merged with underlying ideas, are now increasingly being recognized as original expressions subject to copyright protection.¹³⁶

Judge Bibas initially viewed the question of originality as hinging on "how much the headnotes overlap with the [uncopyrightable text of] opinions," thus echoing the "substantial similarity" criterion.¹³⁷ The turning point was drawing a clear distinction between the non-

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 392 ("And I explained that the Key Number System's originality was a jury question because Ross alleges that 'most of the organization decisions are made by a rote computer program and the high-level topics largely track common doctrinal topics taught as law school courses.'") (internal quotation marks omitted); *but see id.* at 393 ("The text of judicial opinions is not copyrightable. And even if it were, Thomson Reuters would not get that copyright because it did not write the opinions. But a headnote can introduce creativity by distilling, synthesizing, or explaining part of an opinion, and thus be copyrightable. That is why I have changed my mind.").

¹³⁷ *Id.* at 392.

copyrightable judicial opinions themselves and the headnotes, which were held to be protectable.¹³⁸

First, the court found that the compilation of headnotes met the “minimal degree of creativity” required by copyright law because the editor’s “choices as to selection and arrangement” constituted original expression, even in cases where the headnotes are quoted directly from judicial opinions.¹³⁹

Second, the Westlaw Key Number System, the taxonomy underlying the platform’s organization, was likewise deemed to possess sufficient originality to warrant protection.¹⁴⁰ Thus, enjoying the status of an original expression, eligible for copyrightability, in contrast to unprotected ideas, which are legally considered unoriginal. As a result, the legal interpretation of what qualifies as direct copying or “substantial similarity” has undergone a marked transformation in less than two years. Regarding fair use’s legal transformation, the time factor is much more intensive, as demonstrated in the following section.

B. What is Fair Use Regarding Gen AI?

In the context of fair use, courts and commentators offer a wide, and often conflicting, range of views on two cardinal issues. First, whether outputs generated by AI systems should be considered infringing derivative works or whether original works are protected by copyright due to their transformative nature. This debate spans from a minimalistic to a maximalist interpretation of fair use.¹⁴¹

¹³⁸ *Id.* at 393.

¹³⁹ *Thomson Reuters*, 694 F. Supp. 3d at 393 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991)).

¹⁴⁰ *Id.*

¹⁴¹ Ariel Soiffer & Aric Jain, *Copyright Fair Use Regulatory Approaches in AI Content Generation*, TECH POLICY PRESS (Aug. 8, 2023), <https://techpolicy.press/copyright-fair-use-regulatory-approaches-in-ai-contentgeneration/> [<https://perma.cc/D7YP-L7TU>].

Under the minimalistic view, each AI-generated output is presumptively an infringing derivative work, irrespective of any lack of substantial similarity to the training inputs.¹⁴² In contrast, the maximalist perspective maintains that every AI-generated output constitutes a transformative use, akin to traditional creative processes that draw inspiration from preexisting works, and thus falls within the scope of fair use.¹⁴³

Second, it is argued that Gen AI poses a risk of supplanting the original works it draws upon, thereby violating the economic prong of the fair use analysis.¹⁴⁴ Specifically, the fourth factor, which was never intended to permit uses that function as market substitutes for the original.¹⁴⁵ The dominance of these arguments is demonstrated through recent cases, regardless of their specific results, as stated by Justice Vince Chhabria in *Richard Kadrey, et al. v. META Platforms INC.* (“*Kadrey v. META*”), despite letting the defendants win under the specific circumstances.¹⁴⁶ “So by training Gen AI models

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *E.g.* *The N.Y. Times Co. v. Microsoft Corp. & OpenAI, Inc.*, No. 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023) (alleging that Microsoft and OpenAI are building a market “substitute” for plaintiffs’ news content; consolidated by Magistrate Judge Ona T. Wang with *Daily News, L.P. v. Microsoft Corp. & OpenAI, Inc.*, No. 1:24-cv-03285 (S.D.N.Y. filed Apr. 30, 2024), brought by eight newspaper publishers asserting similar claims; consolidation reflected at No. 1:23-cv-11195-SHS-OTW, ECF No. 243 (S.D.N.Y. Sept. 13, 2024)).

¹⁴⁵ *E.g. Id.* (alleging that Microsoft and OpenAI are building a market “substitute” for plaintiffs’ news content; consolidated by Magistrate Judge Ona T. Wang with *Daily News, L.P. v. Microsoft Corp. & OpenAI, Inc.*, No. 1:24-cv-03285 (S.D.N.Y. filed Apr. 30, 2024), brought by eight newspaper publishers asserting similar claims; consolidation reflected at No. 1:23-cv-11195-SHS-OTW, ECF No. 243 (S.D.N.Y. Sept. 13, 2024)).

¹⁴⁶ *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026, 1035 (N.D. Cal. 2025).

with copyrighted works, companies are creating something that often will dramatically undermine the market for those works, and thus dramatically undermine the incentive for human beings to create things the old-fashioned way.”¹⁴⁷

The traditional standard of substantial similarity as the benchmark for copying is giving way to a new legal conflict: whether generative uses serve to enhance copyrighted works or instead replace them entirely, thereby threatening to erode or eliminate their existing markets.¹⁴⁸ Consequently, in *Thomson Reuters*, the plaintiff ultimately prevailed on the fair use analysis due to the predominance of the first and fourth fair use factors.¹⁴⁹ Although the defendant succeeded on the second factor (the nature of the original work) and the third factor (the amount and substantiality of the portion used), the failure on the fourth factor, the effect of the use on the market, proved fatal, as this factor is “undoubtedly the single most important element of fair use.”¹⁵⁰

Justice Bibas assessed the “likely effect [of the defendant’s copying] on the market for the original” of the fourth fair use factor to encompass not only the existing market for legal research platforms but also the emerging derivative market for licensing data to train legal AI systems.¹⁵¹ The creation of a market substitute became

¹⁴⁷ *Id.*

¹⁴⁸ *Dow Jones & Co. v. Perplexity AI, Inc.*, No. 24-cv-7984 (S.D.N.Y. filed Oct. 21, 2024) (alleging that Perplexity, a generative artificial intelligence company, misleads users by claiming to provide accurate, up-to-date news while encouraging them to “skip the links” to original publishers’ websites); see also *What is Perplexity?*, PERPLEXITY AI, <https://www.perplexity.ai/help-center/en/collections/8934263-what-is-perplexity> [<https://perma.cc/Q4VM-DYUJ>] (describing Perplexity’s service as allowing users to “Skip the Links.”).

¹⁴⁹ *Thomson Reuters Enter. Ctr. GmbH v. ROSS Intelligence Inc.*, 765 F. Supp. 3d 382, 401 (D. Del. 2025).

¹⁵⁰ *Id.* at 400–01.

¹⁵¹ *Id.* at 400.

central to this evolving approach, which increasingly rejects fair use defenses in the context of AI.¹⁵² The defendant’s appeal to the public interest in broadening access to legal information was unpersuasive, as the court applied an incentive-based rationale: under copyright law, the public benefits from intellectual property only insofar as its creators are financially compensated for their contributions.¹⁵³

In less than two years, new criteria has emerged for evaluating fair use in the context of Gen AI. Moreover, a shifting temporal dimension is becoming apparent, one that echoes the lamplighter’s dilemma in *The Little Prince*, caught in a cycle of accelerating change.¹⁵⁴ Less than two months after *Thomson Reuters*, and within just two days, two cases that initially appeared to favor the defendants, upon judicial review, revealed a markedly different and contradictory trajectory.

The first case, *Bartz v. Anthropic PBC* (“*Bartz v. Anthropic*”), heard by Senior U.S. District Judge William Alsup of the Northern District of California, involved allegations that Anthropic unlawfully downloaded millions of copyrighted books from pirate websites to train its flagship AI system, Claude.¹⁵⁵ Alongside these unauthorized copies, the defendant also purchased physical books, some of which overlapped with the pirated ones, disassembled and scanned them to create a searchable digital archive intended to preserve “all the books in the world.”¹⁵⁶

The archive was used to train the large language models behind Claude, launched in March 2023, and

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ ANTOINE DE SAINT-EXUPÉRY, *supra* note 5, at 33–34.

¹⁵⁵ *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007, 1014 (N.D. Cal. 2025).

¹⁵⁶ *Id.*

followed by seven updates.¹⁵⁷ Claude is available at no cost for limited use, but enterprise clients and heavy users are charged, resulting in annual revenues exceeding one billion dollars.¹⁵⁸ Although the system did not generate verbatim the books or overtly derivative content, the underlying archive contained works authored by the plaintiffs, prompting their copyright infringement claims.¹⁵⁹ The central question on summary judgment was whether and to what extent these uses qualified as “fair use” under Section 107 of the Copyright Act.¹⁶⁰

The first indication that a different strategy was necessary came from Anthropic, which, rather than moving to dismiss the amended complaint as previously suggested, requested permission to file an early motion for summary judgment on the issue of fair use before class certification.¹⁶¹ Concerning the first fair use factor, the purpose and character of the use, Justice Alsup found that the defendant’s use of the works to train large language models constituted a transformative use.¹⁶² In contrast to *Thomson Reuters*, Justice Alsup compared the defendant’s practice to a reader aspiring to be a writer, emphasizing that the LLMs were trained on the works not to replicate them, but to generate something new and distinct.¹⁶³

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1017.

¹⁶⁰ *Id.* at 1014.

¹⁶¹ *Bartz*, 787 F. Supp. 3d at 1018 (referring to Dkt. No. 37).

¹⁶² *Id.* at 1021 (“Regardless, the ‘purpose and character’ of using works to train LLMs was transformative—spectacularly so.”); *see also* 17 U.S.C. § 107(1).

¹⁶³ *Id.* at 1022 (“In short, the purpose and character of using copyrighted works to train LLMs to generate new text was quintessentially transformative. Like any reader aspiring to be a writer, Anthropic’s LLMs trained upon works not to race ahead and replicate or supplant them — but to turn a hard corner and create something different. If this training process reasonably required making copies

However, concerning the pirated copies, Justice Alsup rejected Anthropic’s assumption that incorporating them into a central library could be justified as fair use simply because some of the works might later be used to train LLMs.¹⁶⁴ Justice Alsup states, “[i]n sum, the first factor *points against* fair use for the central library copies made from pirated sources — and no damages from pirating copies could be undone by later paying for copies of the same works.”¹⁶⁵

While the second fair use factor, the nature of the copyrighted work, points against fair use for all copies alike, regarding the third fair use factor, the amount and substantiality of the portion used, the dichotomy between pirated and legitimate works recurs.¹⁶⁶ As there is no claim that Claude’s outputs can be directly linked to the Authors’ works, the copying involved in training the LLMs behind Claude was therefore particularly reasonable.¹⁶⁷ Since the use of such a large volume of works was reasonably necessary, the inclusion of any single work was no more or less reasonable than any other.¹⁶⁸ As a result, the third fair use factor weighs in favor of fair use concerning the training copies.¹⁶⁹ However, in the case of the pirated

within the LLM or otherwise, those copies were engaged in a transformative use.”).

¹⁶⁴ *Id.* at 1025 (“This order doubts that any accused infringer could ever meet its burden of explaining why downloading source copies from pirate sites *that it could have purchased or otherwise accessed lawfully* was itself reasonably necessary to any subsequent fair use.”).

¹⁶⁵ *Id.* at 1029.

¹⁶⁶ *Id.* at 1020; *see also* 17 U.S.C. § 107(3).

¹⁶⁷ *Bartz*, 787 F. Supp. 3d at 1030 (“What matters [] is not so much ‘the amount and substantiality of the portion used’ *in making a copy*, but rather the amount and substantiality of *what is thereby made accessible* to a public [in the purported secondary use] for which it may serve as a competing substitute [for the primary use].” (quoting *Authors Guild v. Google* 804 F.3d 202, 222 (2d Cir. 2015))).

¹⁶⁸ *Id.* at 1030.

¹⁶⁹ *Id.* at 1031.

library copies, Anthropic had no legitimate right to possess the books in the first place.¹⁷⁰ Consequently, the third fair use factor weighs against fair use for those copies.¹⁷¹

Justice Alsup declined to interpret the fourth fair use factor, the effect of the use on the potential market or value of the copyrighted work, as a shield against competition.¹⁷² This stands in contrast to the plaintiffs’ argument that training LLMs would lead to a surge of works that compete with their own.¹⁷³ However, the pirated copies used to create a *central library* clearly undermined the market for the Authors’ books on a one-to-one basis. Accordingly, the fourth fair use factor weighs against fair use concerning these copies.¹⁷⁴

Consequently, the path toward licensing as the preferred method for minimizing legal risk is now clearly established. While the use of copies to train specific LLMs was deemed fair use, with all factors but the nature of the work weighing in favor, the opposite holds for pirated copies. The use of such copies to construct a *central library* was not protected under fair use, as all four factors weighed against it.¹⁷⁵ Although *Richard Kadrey, et al. v. Meta Platforms Inc.* (“*Kadrey v. Meta*”) initially granted summary judgment in favor of the defendant, finding similar practices to constitute fair use, a closer examination

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 17 U.S.C. § 107(4).

¹⁷³ *Bartz*, 787 F. Supp. 3d at 1032 (“But Authors’ complaint is no different than it would be if they complained that training schoolchildren to write well would result in an explosion of competing works. This is not the kind of competitive or creative displacement that concerns the Copyright Act. The Act seeks to advance original works of authorship, not to protect authors against competition.”).

¹⁷⁴ *Id.* at 1033.

¹⁷⁵ *Id.*

suggests it may prove to be a Pyrrhic victory in the long term.¹⁷⁶

In this case, heard by U.S. District Judge Vince Chhabria of the United States District Court for the Northern District of California, thirteen well-known fiction writers have filed a lawsuit against Meta, alleging that the company downloaded their books from online “shadow libraries” and used them to train its gen AI models, specifically its large language models known as Llama.¹⁷⁷ Although the Llama models are available for free download, Meta projects that its Gen AI revenue will reach between \$2 and \$3 billion in 2025, and between \$460 billion and \$1.4 trillion over the next decade.¹⁷⁸

The premise of Justice Chhabria, while presenting the question of “whether such conduct is illegal,” is clear: “[a]lthough the devil is in the details, in most cases the answer will likely be yes.”¹⁷⁹ The incentive-based rationale at the heart of copyright law underlies the pivotal shift in fair use analysis toward emphasizing the avoidance of market substitution in the context of Gen AI.¹⁸⁰ This stands

¹⁷⁶ *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026, 1036 (N.D. Cal. 2025).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1040.

¹⁷⁹ *Id.* at 1034.

¹⁸⁰ *Id.* at 1034–35:

What copyright law cares about, above all else, is preserving the incentive for human beings to create artistic and scientific works. Therefore, it is generally illegal to copy protected works without permission. And the doctrine of “fair use,” which provides a defense to certain claims of copyright infringement, typically doesn’t apply to copying that will significantly diminish the ability of copyright holders to make money from their works (thus significantly diminishing the incentive to create in the future). Generative AI has the potential to flood the market with endless amounts of images, songs, articles,

in contrast to the maximalist perspective, which holds that training Gen AI constitutes fair use due to its transformative nature.

Justice Chhabria rejects any such correlation; rather, he asserts that when the copying of protected works, however transformative, results in a product capable of significantly damaging the market for the original works, it fundamentally threatens the incentive structure essential to human creativity.¹⁸¹ In his critique of *Bartz v. Anthropic*, Justice Chhabria contends that transformativity alone is insufficient to satisfy the fourth fair use factor.¹⁸² The plaintiffs lost their case because they were focusing on the wrong arguments, while neglecting the one that mattered, namely, providing evidence that the defendant would cause market dilution to the plaintiff’s work by flooding the market with similar ones.¹⁸³

Similar to Bartz v. Anthropic, Kadrey v. Meta held that both Meta’s ultimate use of the plaintiffs’ books and

books, and more. People can prompt generative AI models to produce these outputs using a tiny fraction of the time and creativity that would otherwise be required. So by training generative AI models with copyrighted works, companies are creating something that often will dramatically undermine the market for those works, and thus dramatically undermine the incentive for human beings to create things the old-fashioned way.

¹⁸¹ *Kadrey*, 788 F. Supp. 3d at 1036 (“Under the fair use doctrine, harm to the market for the copyrighted work is more important than the purpose for which the copies are made.”).

¹⁸² *Id.* at 1035; *see also* *Romanova v. Amilus Inc.*, 138 F.4th 104, 117 n.9 (2d Cir. 2025) (linking the incentive approach with the risk of substitution for the original work in the marketplace).

¹⁸³ *Kadrey*, 788 F. Supp. 3d at 1036–37 (“And, as should now be clear, this ruling does not stand for the proposition that Meta’s use of copyrighted materials to train its language models is lawful. It stands only for the proposition that these plaintiffs made the wrong arguments and failed to develop a record in support of the right one.”).

Meta's downloading of those books were transformative.¹⁸⁴ Thus, fair use factor one, the purpose and character of the use, favors Meta, as "[t]he purpose of Meta's copying was to train its LLMs, which are innovative tools that can be used to generate diverse text and perform a wide range of functions."¹⁸⁵

Likewise, as in *Bartz v. Anthropic*, the second fair use factor also favors the plaintiffs in *Kadrey v. Meta*, regarding the highly expressive nature of their copyrighted works.¹⁸⁶ However, the second factor is a weak factor on the whole, especially considering works that are already published; winning on this factor does not move the needle on the plaintiff's behalf.¹⁸⁷

Concerning the third fair use factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, Justice Chhabria ruled in favor of the defendant, notwithstanding the complete copying of the plaintiff's books, citing the transformative nature of the use.¹⁸⁸

However, the most important factor of fair use is the fourth one, the effect of the use upon the potential market for or value of the copyrighted work.¹⁸⁹ Justice Chhabria delineates the three possible ways for plaintiffs to prove this factor regarding Gen AI.¹⁹⁰

¹⁸⁴ See *id.* at 1060; *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007, 1033–34 (N.D. Cal. 2025).

¹⁸⁵ *Kadrey*, 788 F. Supp. 3d at 1044.

¹⁸⁶ *Id.* at 1048.

¹⁸⁷ *Id.* (“The second factor, however, ‘has rarely played a significant role in the determination of a fair use dispute.’ And it applies ‘with less force’ when the copied works have already been published and the secondary user therefore cannot interfere with the creator’s right to control the first public appearance of their work.”) (citations omitted).

¹⁸⁸ *Id.* at 1050.

¹⁸⁹ *Id.* (referring to *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

¹⁹⁰ *Id.* at 1051.

First, the conventional argument asserts that the outputs are substantially similar to the original works, thereby enabling users to obtain those works—or effective substitutes—at no cost through the model.¹⁹¹ Second, the plaintiff may argue that there exists a potential market for licensing their works for AI training, and that unauthorized copying not only harms this market but also impedes its development.¹⁹² Third, the plaintiff may contend that, even if the model does not reproduce their works verbatim or generate substantially similar versions, it can still produce outputs sufficiently similar in subject matter or genre to compete with the original works, thereby functioning as an indirect substitute.¹⁹³

The plaintiff’s inability to present sufficient evidence on the critical issue of market dilution—despite the unique nature of the technology, which can generate millions of competing outputs with minimal time and creativity—ultimately prevented the case from proceeding to a jury.¹⁹⁴ Justice Chhabria, however, offers a forward-

¹⁹¹ *Kadrey*, 788 F. Supp. 3d at 1051.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1055, 1060:

Because the issue of market dilution is so important in this context, had the plaintiffs presented any evidence that a jury could use to find in their favor on the issue, factor four would have needed to go to a jury. Or perhaps the plaintiffs could even have made a strong enough showing to win on the fair use issue at summary judgment. But the plaintiffs presented no meaningful evidence on market dilution at all. Absent such evidence and in light of Meta’s evidence, the fourth factor can only favor Meta. Therefore, on this record, Meta is entitled to summary judgment on its fair use defense to the claim that copying these plaintiffs’ books for use as LLM training data was infringement.

looking assessment of the challenges the industry may face in light of potential copyright infringement risks:

In cases involving uses like Meta's, it seems like the plaintiffs will often win, at least where those cases have better-developed records on the market effects of the defendant's use. No matter how transformative LLM training may be, it's hard to imagine that it can be fair use to use copyrighted books to develop a tool to make billions or trillions of dollars while enabling the creation of a potentially endless stream of competing works that could significantly harm the market for those books.¹⁹⁵

The answer to these challenges is either to pay for licenses or use uncopyrighted books.¹⁹⁶ Justice Chhabria's assessment is gaining substantial support from both the U.S. Copyright Office and the broader market, perhaps not despite the ongoing uncertainty surrounding fair use in Gen AI litigation, but precisely because of it, as explored in the following section.¹⁹⁷

¹⁹⁵ *Id.* at 1059.

¹⁹⁶ *Id.*

¹⁹⁷ *Kadrey*, 788 F. Supp. 3d at 1059:

Presumably, where copying for AI training isn't fair use, AI developers will simply figure out a way to license the works they wish to use as training data. Meta's contention that markets for this licensing can't or won't develop is hard to believe. If books are as good for LLM training as Meta says they are, then it seems nearly certain that LLM developers would be willing to pay for licenses. (Indeed, Meta itself was willing to pay to license books—it just found licensing too logistically difficult.) Even if the value of any particular book as training data is too low to justify negotiating licensing deals book by book, LLM developers would still presumably be interested in licensing large numbers of books at once. Publishers may not currently hold the subsidiary rights necessary to make group licensing possible.

IV. LICENSING VERSUS DESUETUDE

Justice Chhabria’s assessment, according to which “[p]resumably, where copying for AI training isn’t fair use, AI developers will simply figure out a way to license the works they wish to use as training data,” is anything but simple, as the gist of the unsolved matter is still what constitutes fair use.¹⁹⁸ The Copyright Office Report offers a thorough examination of the challenge of balancing technological innovation with incentivizing creativity in the training of Gen AI; however, its conclusions stand in stark contrast to the decisiveness shown by Justice Chhabria, as discussed in the following section.¹⁹⁹

A. *Licensing Nuances*

The Copyright Office Report is premised on the notion that, although the training of datasets and models for Gen AI may, at first glance, infringe upon the reproduction rights of copyright holders, actual infringement arises only when the resulting output exhibits substantial similarity to the original works.²⁰⁰ On one hand, the cases decided just two months prior to the release of the Copyright Office Report render its premise outdated, as the notion of substantial similarity has significantly evolved since its

But it’s hard to believe that they won’t soon start negotiating those rights with their authors so that they can engage in large-scale negotiation and licensing with LLM developers—assuming they haven’t already started to do so.

¹⁹⁸ *Id.*

¹⁹⁹ THE COPYRIGHT OFFICE REPORT, *supra* note 80, at 107–08.

²⁰⁰ *Id.* at 30 (“As discussed above, the use of those works in preparing a training dataset and training a model implicates the reproduction right, but copying the resulting weights will only infringe where there is substantial similarity.”).

original formulation.²⁰¹ On the other hand, the Report's fair use analysis treats Gen AI training as a prima facie infringement, thereby aligning with the trajectory anticipated in *Kadrey v. Meta*.²⁰²

The innovative argument of the Copyright Office Report is to weigh transformative use against substitutes for the works used to train the Gen AI models, while discussing the first fair use factor, and not the fourth.²⁰³ Furthermore, the Copyright Office Report not only rejects the maximalist approach but, unlike Justice Alsup in *Bartz v. Anthropic*, declines to classify AI training as inherently transformative merely because it resembles human learning.²⁰⁴ In doing so, it aligns more closely with Justice Chhabria's reasoning in *Kadrey v. Meta*. In short, "[c]opyright law should not afford greater latitude for copying simply because it is done by a computer."²⁰⁵

Considering unlawful access, the Copyright Office Report, while generally opting against fair use, leaves room for a contradictory conclusion.²⁰⁶ However, generally speaking, aligning with both the DMCA and recent cases, the Copyright Office Report regards pirated access as a step beyond copying legally protected works despite the

²⁰¹ Thompson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc., 765 F.Supp. 3d 382 (D. Del. 2025).

²⁰² THE COPYRIGHT OFFICE REPORT, *supra* note 80, at 32 ("To the extent that acts involved in developing and deploying a generative AI model constitute prima facie infringement, the primary defense available is fair use.").

²⁰³ *Id.* at 40 ("By contrast, copying to make available information about the content of the works copied can be transformative where it does not provide substitutes for those works.").

²⁰⁴ *Id.* at 47–48.

²⁰⁵ *Id.* at 48.

²⁰⁶ *Id.* at 52 ("In the Office's view, the knowing use of a dataset that consists of pirated or illegally accessed works should weigh against fair use without being determinative.").

“The Time Is Out of Joint”: How Generative AI Drives the Digital Desuetude of Copyright 447

owners’ denial of permission, thus amounting to unfair use.²⁰⁷

The Copyright Office Report further reflects judicial consensus with *Bartz v. Anthropic* and *Kadrey v. Meta* in its treatment of the second fair use factor. It affirms that the use of highly expressive or unpublished works without authorization militates against a finding of fair use under this prong of the analysis.²⁰⁸ Similarly, concerning the third fair use factor, the Copyright Office Report aligns with the reasoning in *Bartz v. Anthropic* and *Kadrey v. Meta*, recognizing that the extent of use, potentially encompassing entire works, may be justified when linked to a transformative purpose under the first fair use factor, particularly in the context of training Gen AI models.²⁰⁹

Considering the fourth fair use factor, the Copyright Office Report nuances Justice Chhabria’s categories by relating to lost sales, market dilution, and lost licensing

²⁰⁷ *Id.* (“Copyright owners have a right to control access to their works, even if someone seeks to obtain them in order to make a fair use. Gaining unlawful access therefore bears on the character of the use.”); see Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of the U.S. Copyright Act of 1976); see generally Rachel Aridor-Hershkovitz, *Antitrust Law – A Stranger in the Wikinomics World? Regulating Anti-Competitive Use of the DRM/DMCA Regime*, 27 J. MARSHALL J. COMPUT. & INFO. L. 1, 34 (2009) (explaining how the DMCA was created as a new IP right – the right to control any access).

²⁰⁸ THE COPYRIGHT OFFICE REPORT, *supra* note 80, at 54.

²⁰⁹ *Id.* at 60:

In sum, AI developers ordinarily copy entire works and make use of their expressive content for training, weighing against fair use. But in cases where there is a transformative purpose, and where there is a need to train on a large volume of works to effectively generalize, the copying of entire works may be reasonable. This is especially true where little or none of the copied material will be made accessible to the public, whether due to training techniques or choices made in deployment.

opportunities.²¹⁰ Whereas Justice Chhabria focused on market dilution, the Copyright Office Report dwells on the licensing opportunities at great length.²¹¹ In doing so, the Copyright Office Report correlates the field far better than its judicial counterpart, generally recommending voluntary licensing and holding that “government intervention would be premature at this time.”²¹²

As Gen AI litigation redefines fair use, the media industry is moving faster, assuming that AI companies must license copyrighted training materials.²¹³ Though costly, licensing is seen as less risky than litigation. Since Gen AI models rely on diverse content, text, images, music, and video; blanket licenses offer an efficient, all-in-one solution.²¹⁴ The Spotify model, favoring broad licensing over specialization, seems like a win for copyright holders, even before legal rulings.²¹⁵ But is it?

Musicians have long criticized Spotify’s low payouts, which range from \$0.003 to \$0.0084 per stream, depending on user type, region, and contract terms.²¹⁶

²¹⁰ *Id.* at 61.

²¹¹ *See id.* at 85–94.

²¹² *Id.* at 107.

²¹³ *See* Bill Rosenblatt, *The Media Industry’s Race To License Content For AI*, FORBES (Jul. 18, 2024), <https://www.forbes.com/sites/billrosenblatt/2024/07/18/the-media-industrys-race-to-license-content-for-ai/> [https://perma.cc/Z46J-CRYP]:

The amount of licensing activity for AI that is taking place before any substantial results from the courts or Congress is unprecedented. It dwarfs, for example, the amount of such activity that took place in the music industry in the MP3 era between the Napster litigation in 1999-2001 and the establishment of popular licensed music services such as Apple iTunes.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *How Much Do Artists Make On Spotify (Case Studies)*, FREE YOUR MUSIC (Feb. 4, 2024), <https://freeyourmusic.com/blog/how-much-do->

While top artists like Taylor Swift earn millions, most receive almost nothing. Since April 2024, artists must reach 1,000 annual streams to earn anything at all.²¹⁷ This mirrors the current Gen AI debate, tech giants profit while most creators are left behind. However, while the marketplace is letting contract law prevail, the result is forcing contractual terms on what might finally be decreed as fair use. Thus, leading to digital desuetude, as discussed in the following question.

B. The Contrary Aspects of Digital Desuetude

The core issue arising from the rapid transformation in our understanding of copying and fair use is whether the principle of desuetude might apply to copyright duration in the AI era. If widespread, unchallenged use of copyrighted material by major tech platforms and AI systems persists, does this signal a form of digital desuetude? Conversely, the shift toward large-scale licensing circumvents the fair use debate altogether, allowing contractual terms to replace legal interpretation or legislative clarity.

Formally, copyright is governed primarily by international treaties, and it is implausible that emerging customs could override the Berne Convention or the TRIPS Agreement, which set binding minimum standards for copyright duration, regardless of their perceived obsolescence.²¹⁸ Some commentators have also contended

artists-make-on-spotify [<https://perma.cc/U5JR-WVR9>]; see also Andris Muceniks, *How much do artists make on Spotify in 2025?* PRINTIFY (Dec. 20, 2024), <https://printify.com/blog/how-do-artists-make-money-on-spotify/> [<https://perma.cc/E7DD-V8LA>] (for breaking down Spotify’s royalty system in comparison with other streaming platforms).

²¹⁷ PRINTIFY, *supra* note 216 (breaking down Spotify’s royalty system in comparison with other streaming platforms).

²¹⁸ The Berne Convention, *supra* note 37; TRIPS, *supra* note 40, at 304–05.

that the United States, as a signatory to international treaties, is obligated to prohibit the unlicensed use of copyrighted works for AI training.²¹⁹ Likewise, the U.S. Copyright Act is unlikely to be displaced by desuetude, a doctrine that courts are notably hesitant to apply.²²⁰

However, drawing on Hume’s insight that custom derives its force from belief, one might argue that even if desuetude holds no formal legal status, it can nonetheless exert normative influence.²²¹ The evolving interpretations of both copying and fair use exemplify desuetude in practice, if not in name. Judicial understandings have shifted markedly, sometimes within a single year, and even within the rulings of the same judge.²²² Moreover, it is not only the judiciary that is reshaping the landscape. Industry actors themselves, AI firms and investors, are propelling the transformation, fueling a \$67.5 billion AI content licensing market, even as the legal terrain remains unsettled.²²³

²¹⁹ THE COPYRIGHT OFFICE REPORT, *supra* note 80, at 83 (referring to The Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 30; WIPO Copyright Treaty art. 10, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty art. 16, Dec. 20, 1996, 36 I.L.M. 76).

²²⁰ *See generally* Albert, *supra* note 16 (constitutions can be informally amended through the process of desuetude, but courts often enforce the letter of the law rather than new conventions).

²²¹ DAVID HUME, A TREATISE OF HUMAN NATURE, *supra* note 98, at 153.

²²² Thomson Reuters Enter. Ctr. GmbH v. ROSS Intelligence Inc., 765 F. Supp. 3d 382, 390 (D. Del. 2025) (“A smart man knows when he is right; a wise man knows when he is wrong. Wisdom does not always find me, so I try to embrace it when it does—even if it comes late, as it did here. I thus revise my 2023 summary judgment opinion and order in this case.”).

²²³ Jaimie Isaias, *Start-ups drive \$67.5bn AI content licensing market amid legal battles*, NOAH NEWS (May 13, 2025), https://noah-news.com/start-ups-drive-67-5bn-ai-content-licensing-market-amid-legal-battles/?utm_source [<https://perma.cc/LU66-JCQ9>].

While legal obsolescence remains a subtle and indirect process, the licensing market presents a more explicit dynamic, which I will title as a “reverse desuetude.” Rather than norms fading through disuse, licensing practices actively accelerate the obsolescence of core copyright doctrines intended to balance creativity and public access.²²⁴ The focus shifts from legal standards to the terms of private contracts, effectively sidelining the traditional constraints of copyright law. Ironically, this scenario echoes the case of *ProCD v. Zeidenberg*, decided by Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit.²²⁵

The respondent bought a CD-ROM containing a \$10 million database of over 3,000 phone directories, priced lower for non-commercial users.²²⁶ Posing as such, he intended to resell the data to marketers at lower prices than the appellant’s commercial rates.²²⁷ The packaging included a shrink-wrap notice about an enclosed license, with further terms shown during installation and stored on the CD.²²⁸ The appellant sued for breach of contract and copyright infringement.²²⁹ The U.S. District Court for the Western District of Wisconsin ruled that the shrink-wrap license was unenforceable and, following *Feist Publications, Inc. v. Rural Telephone Service Co.*, (“*Feist*”), found the database uncopyrightable as a mere

²²⁴ Gordon & Bone, *supra* note 29, at 189 (justifying the existence of copyright law’s constraints such as the fair use doctrine and the idea/expression dichotomy, as designated “to reduce deadweight loss and other costs within a larger structure that creates incentives”).

²²⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448 (7th Cir. 1996).

²²⁶ *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis. 1996).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *ProCD*, 908 F. Supp. at 644, *rev’d*, 86 F.3d 1447 (7th Cir. 1996).

collection of facts, thus no copyright infringement occurred.²³⁰

The 7th Circuit Court of Appeals reversed, holding the shrink-wrap license enforceable under the Uniform Commercial Code, as users could review and reject it by returning the product.²³¹ While acknowledging *Feist*, the court emphasized that copyright law does not preempt contract law.²³² Judge Easterbrook clarified that contracts govern only the parties involved and do not confer the universal “exclusive rights” of copyright.²³³ Therefore, contracts can impose additional restrictions, including on non-copyrightable material and reverse engineering, without violating preemption.²³⁴

ProCD v. Zeidenberg addressed a novel form of contracting shaped by the emerging technologies of its time, specifically, mass-market licenses embedded in software packaging. The case marked a turning point by reinforcing the enforceability of such private agreements, even when they extended beyond the protections of copyright law. In doing so, it inadvertently weakened copyright’s traditional safeguards by allowing contract law to fill in, or even override, gaps left by copyright’s limitations.²³⁵

²³⁰ *ProCD*, 908 F.Supp. at 647, 655, *rev’d*, 86 F.3d 1447 (7th Cir. 1996); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

²³¹ *ProCD*, 86 F.3d at 1450; U.C.C. § 2-207(1) (A.L.I. & UNIF. L. COMM’N 1977).

²³² *ProCD*, 86 F.3d at 1454–55.

²³³ *Id.* at 1455.

²³⁴ See Brian Covotta & Pamela Sergeeff, *ProCD, Inc. v. Zeidenberg*, 13 BERKELEY TECH. L.J. 35, 41–42, 51 (1998).

²³⁵ *ProCD*, 86 F.3d at 1449 (holding that “shrinkwrap licenses” included within the packaging of software are enforceable contracts); see also *id.* at 1454–55 (concluding that a contract restricting the use of uncopyrightable data is not preempted by the Copyright Act because “[a] copyright is a right against the world,” while “[a] contract, by

Today, the normative foundation of copyright is eroding not because the law has become ineffective, but because it remains overly rigid and too powerful in a rapidly evolving digital environment. The temporal continuity that once sustained legal custom has fractured, unable to keep pace with technological change. As a result, we are witnessing a new kind of *digital desuetude*, where legal norms are gradually displaced, not by legislative repeal, but by widespread practices and contractual workarounds that render them functionally obsolete.

V. CONCLUSION

Since the public emergence of Gen AI technologies in late 2022, notably with the release of ChatGPT, the legal terrain of copyright has been destabilized, not through formal doctrinal reform, but by the unprecedented velocity of technological adoption outpacing the law’s temporal foundations.²³⁶ This article contends that the phenomenon of digital desuetude has emerged as a critical lens for understanding the growing disconnect between copyright law’s theoretical infrastructure and its functional erosion in the face of AI.

At the core of this argument is the law’s historical reliance on time as both a generative and destructive force. From Blackstone’s requirement that customary norms be “immemorial,” stretching beyond the memory of man, to

contrast, or at least the sort of contract involved here, binds only as between the parties”).

²³⁶ See Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, 30 MICH. TECH. L. REV. 1, 2–5 (2024) (arguing that the November 30, 2022, release of ChatGPT represents a revolutionary “inflection point” that outpaces traditional legal evolution and necessitates a reimagining of authorship and information creation); see also *Introducing ChatGPT*, OPENAI (Nov. 30, 2022), <https://openai.com/blog/chatgpt> (announcing the public release that precipitated the current widespread adoption of generative AI).

the modern application of the doctrine of desuetude, legal validity has long hinged upon the slow accretion or erosion of normative behavior over extended periods.²³⁷ Time, in this view, serves as both the crucible of legal legitimacy and the mechanism of its dissolution, operating in both cases as the axis upon which legitimacy turns.

The emergence of Gen AI has created a temporal crisis. Legal norms that traditionally required decades or centuries to form, be challenged, or fall into desuetude are now being redefined or disregarded within months. As a result, copyright law faces desuetude not through legislative repeal, but through market practices, technological capabilities, and widespread non-enforcement, all accelerated by the disjointed temporality of the digital age. The metaphor of the lamplighter from *THE LITTLE PRINCE* aptly captures this crisis: legal orders conceived for a slower world persist unchanged, even as the planet, now fueled by AI innovation, spins ever faster.²³⁸

The temporal lag between legal recognition and technological transformation results in a structural misalignment: while statutes continue to expand copyright's duration and scope, the very conditions required to sustain its legitimacy, namely, stable temporality and normative coherence, are collapsing. The temporal crisis exposed by Gen AI reflects a deeper fracture: the inability of Enlightenment-era ideals, long embedded in copyright law, to accommodate the pace and cultural logic of modern technological change.

Rooted in the rationalist frameworks of Kant, Fichte, and Hegel, the modern concept of authorship emerged as a product of human originality, reason, and the pursuit of universal truth. Hegel's dialectical resolution of

²³⁷ See BLACKSTONE, *supra* note 11, at 67.

²³⁸ See ANTOINE DE SAINT-EXUPÉRY, *supra* note 5, at 33–34.

Plato’s suspicion of art, by aligning originality with sensuous truth, helped secure authorship as a property-bearing identity. Yet, this system remains tied to ideals of rational autonomy that no longer resonate in a cultural landscape dominated by spectacle, fragmentation, and machine-generated outputs.

The collapse of Enlightenment “grand narratives” under the weight of historical catastrophe and postmodern critique has revealed a growing dissonance: the rules derived from rationalist epistemologies now govern a world that no longer believes in their premises. As such, the theoretical foundations of copyright appear both temporally and normatively out of joint. This article proposes a shift, from Enlightenment rationalism to David Hume’s philosophy, as a more adaptable and temporally attuned framework.

Hume’s emphasis on custom, habit, and the primacy of sentiment over reason provides an alternative model grounded not in abstract rationality but in lived experience and evolving belief. In contrast to Kantian autonomy or Hegelian originality, Hume situates legitimacy in social practice sustained over time. Crucially, he recognizes that once continuity is broken, once customs no longer align with practice, belief erodes, and norms lose their force.²³⁹

In the context of Gen AI, where the pace of change has disrupted the temporal stability required for legal custom to form or persist, Hume offers a compelling conceptual remedy. His framework acknowledges that norms must evolve with the beliefs and behaviors of the communities they govern.²⁴⁰ By centering time not as an

²³⁹ *Of The Effects of Other Relations and Other Habits*, in HUME, A TREATISE OF HUMAN NATURE, *supra* note 98, at book I, pt. III, § IX (discussing how “time and custom” reconcile the mind to authority and property).

²⁴⁰ *Of The Rules, Which Determine Property*, in HUME, A TREATISE OF HUMAN NATURE, *supra* note 98, at book III, pt. II, § III (positing

inert metric but as an active force in shaping legitimacy, Hume's thought allows for a reimagination of copyright not as a static system rooted in Enlightenment metaphysics, but as a dynamic, practice-sensitive domain responsive to the temporal realities of the digital age.

This classical model finds deeper philosophical articulation in David Hume's theory of custom, which emphasizes the formation of normative belief through habitual experience rather than reason.²⁴¹ For Hume, the authority of law rests not on abstract principles, but on repeated social practices that cultivate belief through temporal continuity.²⁴² However, Hume also recognizes that the disruption of custom leads to a corresponding erosion of belief, a conceptual framework that illuminates the fragility of legal norms amid rapid technological

that "public utility" and the "common interest" require rules that adjust as society forms new habits of possession and exchange).

²⁴¹ *Of The Reason Of Animals*, in HUME, A TREATISE OF HUMAN NATURE, *supra* note 98, at book I, pt. III, § XVI (explaining that all our reasonings concerning causes and effects derive from nothing but custom, and that belief is more properly an act of the sensitive, than of the cogitative part of our natures.) Interestingly, Hume places this definitive statement about the nature of belief in the section titled *Of the Reason of Animals*, to illustrate his point. *Id.* If animals can form beliefs without complex "reason," then human belief must also be a product of habit and custom (sensitive) rather than logic (cogitative). *Id.* Thus, aligning with this article, that our current customary perception of Gen AI is a sensitive response to habitual use, rather than a reasoned doctrinal shift.

²⁴² *Of The Origin Of Justice And Property*, in HUME, A TREATISE OF HUMAN NATURE, *supra* note 98, at book III, pt. II, § II (arguing that the "stability of possession" is not a product of abstract reason but a "convention" that arises from a "slow progression" and "long-continued" social practice much like "two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other"). The Rowing Analogy, suggests that users and developers are "pulling the oars" together to create a new norm of use, even without a formal social contract or legislative change. *Id.* at 332.

“The Time Is Out of Joint”: How Generative AI Drives the
Digital Desuetude of Copyright 457

change.²⁴³ When Gen AI disrupts the continuity necessary for custom to crystallize, it destabilizes the very belief systems upon which legal authority rests.

In this context, we are witnessing the emergence of digital desuetude: a jurisprudential condition in which copyright law’s authority wanes not through repeal, but through disuse, displacement, and irrelevance. The widespread, unchallenged, and increasingly normalized use of copyrighted content by AI systems, often outside the framework of fair use, but legitimized through private licensing, signals a quiet but profound disintegration of the public legal order. In this environment, contract supplants doctrine, custom cannot form, and the law’s temporal logic is fundamentally out of joint.

²⁴³ *Of Scepticism With Regard To The Senses*, in HUME, A TREATISE OF HUMAN NATURE, *supra* note 98, at book I, pt. IV, § II, (discussing how a disruption of the continuity of an object’s existence in the mind leads to a fluctuation of belief and a loss of that vivacity which normally attaches to stable customs).