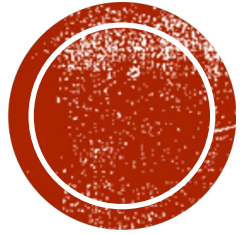




NEW NEIGHBORING RIGHT FOR AI DATA TRAINING AND AIGC, AND BEYOND

**16th IP
Conference,
CUHK, July
25, 2024**

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HKU and U.
of China
Academy of
Science**



AI'S INVASION IN COPYRIGHT SPACE AND THE STATUS QUO OF THE LAW

Challenges for AI tool developer and users:

- (1) AI generated content (AIGC) may not be copyrightable;
- (2) (2) Data training may face copyright infringement liability.

AUTHORSHIP AND COPYRIGHTABILITY OF AIGC

- Cases around the world
 - **Beijing Film Law Firm v Baidu Netcom Tech Co.**, [2018] Beijing Internet Court, No. 239
 - **Tencent Computer System v. Shanghai Yingxun** [2019] Shenzhen Nanshan District Court
 - **Li Yunkai v. Ms. Liu**, Beijing Internet Court, Dec. 2023.
 - **Acohs Pty Ltd v Ucorp Pty Ltd** [2012] FCAFC 16
 - **“Zarya of the Dawn”** copyright application (2023)
 - **Thaler v. Perlmutter**, USDC, Dist. Of Columbia 2023



“a recent entrance to paradise”



INFRINGEMENT & AI PLATFORM LIABILITY

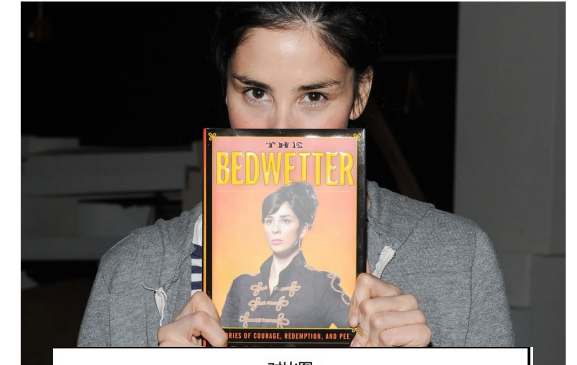
VULTURE

SUBSC

LAWSUITS | AUG. 11, 2023

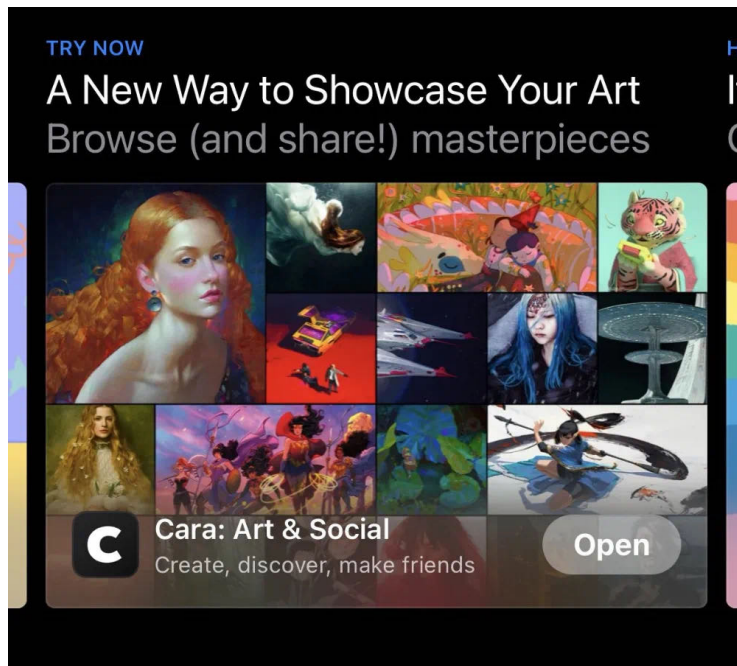
Can Sarah Silverman's AI Lawsuit Save Us From Robot Overlords?

By Victoria Bekiempis, who writes about courts and crime for Vulture and other outlets



- Cases around the world
 - ***Sarah Silverman, et al. v. Meta Platforms, Inc.*** Case No. 3:23-cv-03417, US Dist. Ct. N. Dist. of Cal. July 7, 2023
 - ***Authors Guild, John Grisham, Jodi Picoult, et al. v. OpenAI*** (2023)
 - ***The New York Times v. OpenAI*** (2023)
 - ***Tsuburaya Productions v. Chinese AI platform*** (AI image of Ultraman - the world 1st ruling of [copyright infringement by an AI firm](#) (2024))
 - ***Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc.*** (Dist of Delaware (2023))
 - ***Getty v. Stability AI*** (Feb. 2023)





Appeal process / : Luxembourg painter Jeff Dieschburg convicted of plagiarism, photographer Jingna Zhang wins



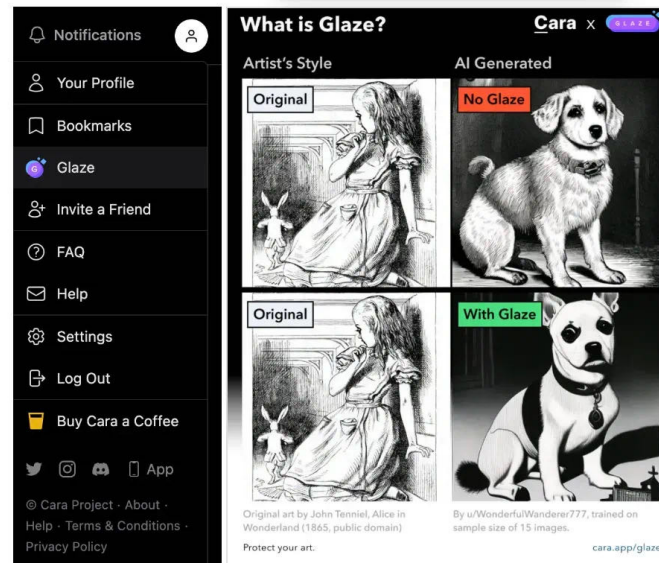
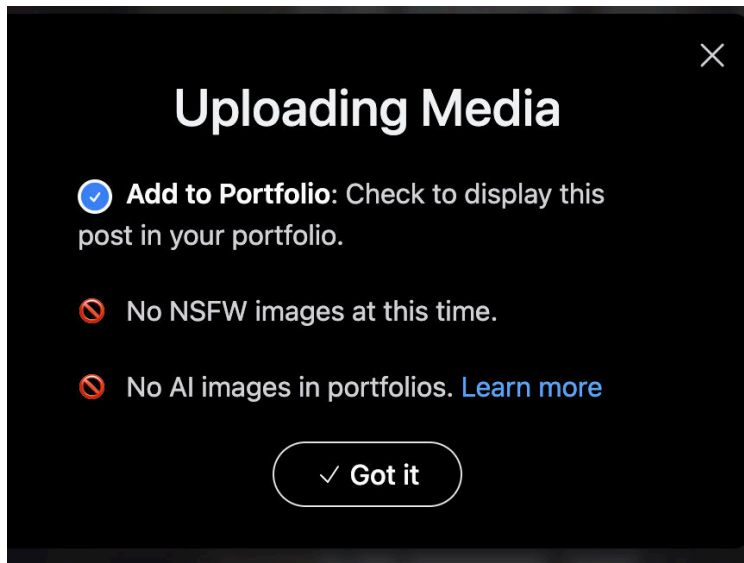
Direct comparison: On the right the photograph by Jingna Zhang, on the left the oil painting by Jeff Dieschburg Photo: twitter.com/zemotion

About Cara

Cara is a social media and portfolio platform for artists.

With the widespread use of generative AI, we decided to build a place that filters out generative AI images so that people who want to find authentic creatives and artwork can do so easily.

Many platforms currently accept AI art when it's not ethical, while others have promised "no AI forever" policies without consideration for the scenario where adoption of such technologies may happen at the workplace in the coming years.



The future of creative industries requires nuanced understanding and support to help artists and companies connect and work together. We want to bridge the gap and build a platform that we would enjoy using as creatives ourselves.

Our stance on AI:

- We do not agree with generative AI tools in their current unethical form, and we won't host AI-generated portfolios unless the rampant ethical and data privacy issues around datasets are resolved via regulation.
- In the event that legislation is passed to clearly protect artists, we believe that AI-generated content should always be clearly labeled, because the public should always be able to search for human-made art and media easily.

RELEVANT LEGISLATIONS AND ADMIN GUIDANCE

- US case law: copyright only protects “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *Feist v Rural Telephone*. 499 U.S. 340 (1991)
- US Copyright Office’s 2016 interpretation
 - The office “will refuse to register a claim if it determines that a human being did not create the work.” and exclude works “produced by machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”
- US Copyright Office Guidance on “Works Containing Material Generated By Artificial Intelligence” (March 2023)
 - AI-generated works are not copyrightable due to lack of human authorship
 - The use of AI to generate a work need to be disclosed in copyright applications.
 - No disclosure is required in cases where works make "de minimis" use of AI.



■ PRC Copyright Law

- art. 3: Works, as used in this law refers to **intellectual achievements** in areas such as literature, arts, and sciences, that have originality, which can be fixed in certain forms
- art. 11: “copyright belongs to **the author**, except provided otherwise in this law.” “The author is a **natural person** who creates the work.”
- art. 12: “**The natural person, legal person, or non-legal person organization whose name is attributed to the work** is the **author** of the work and has corresponding rights in the work, except where there is evidence to the contrary.”

■ The UK (and HK, India, Ireland, and New Zealand)

- “In the case of a literary, dramatic, musical or artistic work which is **computer-generated**, **the author** shall be taken to be **the person by whom the arrangements necessary for the creation** of the work are undertaken.” [CDPA s. 9(3)]
- a computer-generated work as one that “is generated by computer in circumstances such that there is **no human author** of the work” [CDPA s. 178]



EU AI ACT (2024)

■ Exceptions for text and data mining

- **Article 4(3)** of the Digital Single Market (DSM) Directive :
 - It is permissible to make copies of lawfully accessible works for the purposes of text and data mining, including commercial purposes.
 - But the copyright holder can “opt out” of this exception by expressly reserving the right of text and data mining, in an appropriate manner”.
- **Recital 105 of the AI Act** allows the use of text and data mining to retrieve and analyze the text, images, videos, data etc. that are required to train general purpose AI models, but such use must obtain the authorization of copyright-holders, unless a copyright exception applies.
- **Recital 106** allows copyright holder to “opt out” from TDM exception by requiring providers of general purpose AI models to put in place a policy to ensure that they comply with any reservation of rights under DSM Art. 4(3), which is reflected in Art. 53.1(c) of the AI Act.
- **Recital 109** recognized the need of SME and startups for such an exception.



■ **Transparency Requirements for GPAI Systems**

- Art. 53.1(d) (Recital 107) mandates GPAI providers to **make publicly available a sufficiently detailed summary** (or relatively high level explanation) **of the datasets** used for training their models in accordance with a templated provided by the EU AI Office, to enable copyright holders to determine whether the data are “lawfully accessible” data sources.
- Recital 108 states that the AI Office will provide a **standardized template** for drafting the summary, and to monitor compliance by GPAI providers.

■ **Long arm jurisdiction for copyright -- compliance in all jurisdiction**

- Art. 53.1(c) and Recital 106 require all GPAI providers who place GPAI models on the EU market must comply with the above laws and implement a policy for doing so, including the TDM exception, **irrespective of where the copyright related AI training occurs, where the GPAI provider locates, and what the copyright laws of those countries are.**





ACADEMIC DISCOURSE ON AI COPYRIGHT



HUMAN-CENTRIC APPROACH FOR AI DATA TRAINING & AIGC?

- The anthropocentric deontological theories – IP is awarded to human
 - Locke's natural right (labor) theory
 - Hegel's personality theory
 - Mill and Bentham's utilitarian (reward) theory
- Represented by the current US case law and USPTO guidance, and PRC CL.
- “As long as there is a sufficient ‘human link’, labor is conducted, a reward deserved, personality expressed. In contrast, once human impact or guidance falls below a certain critical level, deontological justification fails.” (Hilty, Hoffmann and Scheuerer, “IP Justification for AI, 2021)
- The application of anthropocentric deontological theories to protect AI tools and AIGC would result in an unjustified “over-reward” or “copyright stockpiling” (Robert Yu, “The Machine Author,” 2017)



THE CONSEQUENCES OF THE HUMAN-CENTRIC APPROACH

- No human author → “authorless” → not protectable → same original works being treated differently (e.g., AI work in Baidu case “reflects certain originality with the selection, judgment and analysis of data, but not copyrightable due to lack of human author) → AIGC is left in public domain?
- But not so in practice:
 - The court of Baidu case: let the user of the AI tool assert “relevant rights and interests” in a reasonable manner, and being charged a licensing fee by the AI developer.
 - The court of Tencent case: using “human involvement” instead of “natural person” approach to justify the protection of the AI work.
- Other models in existing national laws and their pros and cons:
 - The UK’s “sweat of the brow” standard and “necessary arrangement” provision
 - China’s “legal person” concept
 - US’ “work-made-for-hire” doctrine



WHEN DEVELOPERS & USERS OF AI TOOLS ARE SUED

- Two questions:
 - What will be their liabilities?
 - Will the fair use defence or TDM exception sufficient to protection them, and incentivize their creativity?
- My arguments on granting remixers a “remix right” (Li, “The age of remix and copyright law reform,”) are applicable to AIGC and data training:
 - AIGC \neq derivative work
 - Fair use: an affirmative defence that has uncertainty, inconsistency and unpredictability.
 - TDM **exception** under EU DSM Directive and EU AI Act: **opt-out** option





NEW NEIGHBORING RIGHT FOR AI DATA TRAINING, AIGC AND ANY DIGITAL REMIXED WORKS

“Neighboring rights are those rights that grant protection to a non-author third party involved in the work, or to a creator of otherwise non-copyrightable works.” (Survey result report, “Copyright and neighboring rights in outputs made by or made by means of AI systems, 2023)

THE LESSON OF ROME CONVENTION

- ***Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)***
- The technical developments of the new methods of making copyrighted works and performances available to the public by means of sound recordings, film and radio (e.g., recorded rolls, cylinders, gramophone records, and wireless broadcasting, etc.) → “technological unemployment”
- **The arguments for the protection of performers:**
 - Unjust to allow a 3rd party to record and transmit a performance via radio with the permission of only the composer but not the performer.
 - “A performance merits protection as a secondary work.” “A new situation merits a new right; legal theories must be adapted to new economic situation so that we should not hesitate to recognize the performance of an artist as itself an artistic work....”
 - “The commercial value of radio broadcasting depends to a great extent on the art of performers. For this reason, the art of performance should be protected.”

Source: Gillian Davies, “The Origins of the Rome Convention – 1926-1961”



- **The arguments for the protection of producers of phonograms:**
 - “The process of making phonographic discs was a highly-qualified activity, which required the investment of large amounts of capital, not only because of the manufacturing costs but also in order to be able to attract the cooperation of the most reputable performers.”
- **The arguments for the protection of broadcasts:**
 - “broadcasting was also a highly-qualified activity which benefited national culture and other interests of the general public.”
- **The counter-arguments for the neighboring rights in Rome Convention:** (1) no national law, (2) the beneficiaries are not true creators, and should not be protected as authors.
- “We must free ourselves to some extent from the traditional conceptions of copyright. [...] In any case, [...] the line of demarcation between what is and is not regarded as eligible for copyright as a literary or artistic work is drawn differently in different countries [...]; in practice the frontier of the territory to be protected by copyright is flexible.” (Bodenhausen, the Rapporteur General of the Committee of Experts at Rome in 1951)



TIME FOR NEIGHBORING RIGHTS FOR AI DATA TRAINING & AIGC

- “A neighboring rights approach makes it possible to avoid overprotection and potential negative effects that may result from broad exclusive rights and a long duration of protection. ... the grant of a tailor-made neighboring right can be appropriate to stimulate the full development of the creative abilities of AI systems and encourage the dissemination of resulting literary and artistic productions.” (Senftleben & Buijtelaar, “Robot creativity: an incentive-based neighboring rights approach,” 2020)
 - A mere right to equitable remuneration, e.g., the phonogram producer’s right
 - A shorter term, e.g., 2 years for the press publisher’s right under DSM Directive art. 15(4).
- “The neighboring rights approach is able to accommodate AI-generated contents without offending the originality standard, as they can be deemed ‘unoriginal’ but still enjoy a certain degree of protection.” (He, “The sentimental tools and the fictitious authors,” 2020)
- Other benefits of neighboring rights; e.g., less destructive to copyright system



SPECIFIC PROPOSALS

- Exploring the possibility of amending Berne Convention, TRIPS. and WIPO Internet Treaties, or drafting a new neighboring right Convention (as Rome Conv.) to add a new neighboring right for AIGC and AI data training.
- This neighboring right can be grouped together with another neighboring right for digital remix.
- The neighboring rights are limited to the right to equitable remuneration, and 10-15 years in duration.
- The neighboring right holders (AI developers and users, and remixers) are obligated to give attribution and reasonable remunerations to the original copyright holders or their works.
- To promote further creativity, the new neighboring rights incorporate the features of copyleft (or public) licenses, e.g., CC's share-alike license.



THANK YOU!

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