

Protection on Art Tech, Digital Humanities, also Copyright on Fair Dealing

Sam YIP

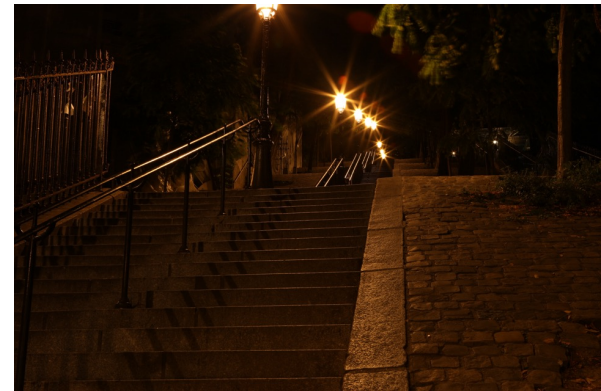
(1 December 2023)

What is copyright?

- A copyright is a type of IP that gives its owner the exclusive right to copy, distribute, adapt, display, and perform a creative work.
- Copyrightable works: literary, dramatic, musical, artistic works, sound recordings, films, broadcasts, cable programmes, typographical arrangement of published editions
- Different countries have different copyright durations, usually 50-100 years after the creator's death.
- Uniqueness/novelty is not needed, only originality
- Some countries need the work to be “fixed”
- Some countries need registrations

What is copyrightable?

- How about a building?
 - Yes, then does it mean I violate someone's copyrights when I shoot a film in the city without permission from every single building owner?
 - HK – no problem as long as the building can be seen by **public**
 - US – yes problem for buildings built **after Nov 1990**, and **cannot be viewed from public space**



What is copyrightable?

- How about an App / Game?
 - Yes, both source code and object code
 - Also the user guide, graphics, animation, UI design
 - Even ok for a database containing even non-copyright data
 - But need at least some selection / coordination / arrangement
 - But not for the algorithms, maths
- What about the output of the App?
 - Copyright ownership depends on who did the “lion’s share of the work” - the user? or the App itself?
 - EULA of the App can ensure ownership, but **need sufficient notice and user’s agreement**

What is copyrightable?

How about AI-generated contents?



A Blessed Entrance to Paradise

- Thaler v. Perlmutter (Aug. 18, 2023, US)
 - Works generated entirely by AI are NOT copyrightable for lack of human authorship
 - Like in Naruto v. Slater (2018)
 - A photo taken by a monkey was not protected by copyright
- Unanswered question
 - How much human input is necessary to qualify the user of an AI system as an 'author' of a generated work
- Evolving: Andersen v. Stability AI Ltd.
 - AI-generated image based on training data of copyright works

Fair Dealings / Fair Use and Transformative Use

- Exemption in copyright law, a defense for infringement
 - Ok to use the copyrighted work w/o permission if:
 - Dealing is fair; and one of:
 - research, private study, criticism, review/comment, news reporting, education, public administration (not in the US)
 - Factors to consider:
 1. Purpose and character of the use (commercial or nonprofit) Nature of the copyrighted work
 2. Size of the portion of the copyrighted work used
 3. Effect of the use upon the potential market / value of the copyrighted work

Fair Dealings / Fair Use and Transformative Use

- Derivative vs. Transformative
 - Derivative works
 - New work that bases on a preexisting work
 - New work (the new materials added, transformation, modification) must be original and different enough to be separately copyrightable
 - No fair use
 - Translations, cinematic / game adaptations, musical arrangement
 - Transformative works
 - New work that builds on a previously created original work in a different manner or for a different purpose
 - Yes fair use
 - Parody, caricature, pastiche, satire (not in the US)

Fair Dealings / Fair Use and Transformative Use

- Gayload v. USPS (2015)
 - USPS never obtained permission to use the sculptures in the Korean War Veteran Memorial on the stamp
 - The stamp used a photo of the sculptures taken during a snowstorm
 - No fair use
 - USD540k damage against USPS



Fair Dealings / Fair Use and Transformative Use



- *Fairey v. AP* (2011)
 - Street artist Shepard Fairey used AP's photo of Obama to make the HOPE 2008 presidential campaign poster
 - Which photo exactly did Fairey use was important – a solo Obama, or Obama w/ George Clooney
 - If latter, might be transformative enough for fair use
 - Settled w/o court decision

Fair Dealings / Fair Use and Transformative Use

- Perfect 10 v. Amazon.com and Google (2007)
 - Google provides thumbnail copies of Perfect 10's images in its image search result
 - Amazon.com used / hyperlinked Google's thumbnails
 - Courts said fair use because turning images into thumbnails for search engine were highly transformative use
 - Also, the value to the public outweigh the commercial value to Google

The Future

- GenAI / ChatGPT
 - Uses Copyrighted material to create “new” answers to your questions or to generate images, novels, analysis reports, etc.
 - Fair/transformative use? Derivative work?
 - Simply generate new i.e., AI-character from prompts
 - Who owns the copyright to the new AI-news reporter?
- Autonomous AI-generated contents?
- Stay tuned
 - Interesting cases to be coming in the future

Who We Are

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A background image showing a person's hands working at a desk. On the left, a laptop screen displays a business strategy dashboard with a bar chart and a 'Company's Growth' section showing '85%'. In the center, a person's hands are holding and looking at a document with technical drawings. To the right, there is a notebook with a pen, a small white coffee cup, and a striped folder. The overall scene is dimly lit, focusing on the workspace.

HOW WE CAN HELP

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We appreciate that every business is different. Our IP professionals are devoted to learning about your needs and committed to being at your service, so that an IP strategy that best fits your business needs is always on offer.

We practice directly before the United States Patent and Trademark Office (USPTO), Hong Kong Intellectual Property Department (HKIPD), China National Intellectual Property Administration (CNIPA), Taiwan Intellectual Property Office (TIPO), European Intellectual Property Office (EUIPO), and the World Intellectual Property Office's International Bureau (IB). And of course, with our network of associates, we handle IP matters worldwide.

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