THE MENTAL STATE OF EXPRESSION: GENERATIVE AI AND THE LATENT MENS REA OF COPYRIGHT

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Artificial Intelligence has developed exponentially in recent years and has reached the point of creating pseudo-expressive content in areas previously only reserved for humans, ranging from writing, digital paintings, music, and much more. Termed "Generative A.I.," these models are created at arresting speeds and competence levels. The content created by Generative A.I. has called into question the fundamentals of copyright law, and what counts as an expressive work. This paper looks to explore how a latent mental state requirement has lurked in the background of copyright law. By bringing this mental state forward in conjunction with an understanding of how both generative A.I. and artists create work, it can illuminate that due to a lack of expression, A.I. generated works cannot be copyrighted, and how to best protect and encourage the works of artists going forward.

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INTRODUCTION

"Blessed are the legend-makers with their rhyme of things not found within recorded time."— from J.R.R Tolkien's 1931 Poem, Mythopoeia[1]

There are stories, and some say that none of them are new. The story is always: someone comes to town, or someone goes on a journey. There are variations to be sure, but it is always a retelling. The storyteller is the key, the storyteller makes the small changes, the slight twists, emphasizes different details, and has a different view of life they want to share. It is the same story, but there are as many expressions as there are storytellers.

Here's a story: a bright and curious young man, from a quiet part of his country, goes to war. The battles and violence are harrowing, and though the war was an echo of the devastating conflicts that came before, the ones that had ripped apart the land the young man was from, this war was its own unique horror. The young man survived and returned home, but he was never the same and spent the rest of his days in another land, one of myth.[2]

This is the story of J.R.R. Tolkien, who fought in the First World War and later went on to write the Lord of the Rings, the Hobbit, and other various works set in the lands of Middle Earth.[3] Some readers might also note that this story could also apply to the protagonist of the Lord of the Rings, Frodo.

Scholars tend to agree that Tolkien's work was more than simple tales.[4] Those who study Tolkien's work see the First World War in his writings. To use the example of Frodo, he comes home from the War of the Ring wounded in body and soul, and in the end he must leave the land of the living for the everlasting lands beyond the Grey Havens.[5] Tolkien even drafted the line that Frodo must go *"before the wound returns,"* not so different from some soldiers who could never again escape the traumas of the Great War, and as Tolkien might put it: left our shores never to return again.[6]

But Tolkien himself undermines those who have extensively studied his works, saying that "only one's Guardian Angel, or indeed God Himself, could unravel the real relationship between

1. *See,* J.R.R. TOLKIEN, TREE AND LEAF: INCLUDING MYTHOPOEIA AND THE HOMECOMING OF BEORHTNOTH (International Ed. 2001).

2. *See generally,* JOHN GARTH, TOLKIEN AND THE GREAT WAR: THE THRESHOLD OF MIDDLE-EARTH (5th ed. 2011).

3. *Id.*

4. *Id.* at XV.

5. J.R.R. TOLKIEN, THE RETURN OF THE KING 384 (69th ed. 1982).

6. J.R.R. TOLKIEN, THE HISTORY OF THE LORD OF THE RINGS PART FOUR: THE END OF THE THIRD AGE 112 (Christopher Tolkien et al. eds., 3rd ed. 2002).

personal facts and an author's works."[7] It is difficult to know what one should make of this. It is not clear if this is just a story, an allegory, or perhaps it is not quite either. However, what is clear, as many have tried to sort out over the years, is Tolkien poured untold hours and thought into his work, he wrote in particular ways for some reason, and he made specific choices to express something. What exactly he meant to express is up for debate, but the fact that his conscious choices created a rich expression is not. The debate alone is evidence of that.

But this is not the purpose of this paper, this is about artificial intelligence and copyright law, not about the history of the First World War or a far green country that sprang from Tolkien's imagination during that conflict. The purpose of this tangent through the history is to demonstrate the many possible interpretations of a famous series of novels to display expression. To display that the *specific* choices of an author lead to *specific* expressions, a demonstration of purpose in an individual work – not randomness. A meaning, a tapestry, is woven together from every single word, sentence, paragraph, chapter, and verse written.

It is this expression that is protected under copyright law, not ideas. Tolkien does not have a monopoly on stories with wizards, only his expression of those stories.[8] This expression, which is created by an author's choices governed by their mental state, is the hallmark of an author; and from a legal perspective a work that qualifies for copyright. Without the mental state of the author, there is no choice being made, and it is those choices all strung together that we call expression. This mental state is what generative A.I. lacks, which explains why the content it creates is not protectable under copyright law.

Even generative A.I. models, which are capable of writing entire novels and creating digital paintings in the blink of an eye, lack a mens rea due to the way in which they generate content. This is because these models are predictive; for example, Chat GPT writes based on which words are most likely given the context of the prompt and the training it was given.[9] Because no choices are made, the models are bound to their predictions, so no mental state can be assigned to the output; and without the mental state there can be no expression.

This paper argues for a latent quasi-mens rea lurking beneath the surface of copyright law and that it serves as an explanation for

7. Webster, The Fictitious Characters of C.S. Lewis and J.R.R. Tolkien in Relation to Their Medieval Sources, (1972) (Ph.D. dissertation, Univ. Wis. Madison).

8. 17 U.S.C. § 102 (1976).

9. *See* Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295 (2023).

why the outputs of generative A.I. models and LLMs do not qualify for copyright protection. It intends to demonstrate why, in the light of generative A.I., this latent mens rea is now relevant and why it precludes A.I. generated works from creating expression and discusses the impacts and suggested policies related to this paradigm shift.

I. BACKGROUND

A. *What is Protected Under Copyright*

The average person conceptualizes copyright as protecting everything an author or artist creates. There is a belief that everything from the concept to the brushstrokes, notes, or words on the page are protected under copyright law. However, this is a misunderstanding. Copyright only protects expression.[10] The basics of what may be protected under copyright law are found in statute 17 USC § 102, which states that "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[11]

The statute defines a work being "fixed" in a "tangible medium of expression" when it is put down in a copy permanent enough "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[12] What constitutes an original work of authorship on the other hand has to be determined by the courts, which have routinely held that these works require a "modicum of creativity," better understood as an expression.[13] The statute clearly defines what is not protected under the copyright law; as explicitly stated in 102(b): "[i]n no case does copyright protection … extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery…"[14]

In short, copyright only protects the expression of any given author, not ideas or facts.[15] To return to Tolkien as an example,

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10. *See* Teresa M. Bruce, *In the Language of Pictures: How Copyright Fails to Adequately Account for Photography* 115 W. VA L. REV. 93 (2012).

11. U.S.C., *supra* note 8.

12. *Id.*

13. *See generally* Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991); Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951); Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).

14. U.S.C., *supra* note 8, at (b).

15. Mark A, Lemley, *How Generative AI Will Turn Copyright on its Head*, 25 COLUM. SCI. & TECH. L. REV. 21 (2024); *See also* Bruce, *supra* note 10.

what is protected under copyright law is his expression of his story and the words on the page, not the underlying concepts. For example, copyright protects his character, Gandalf the Gray, as an expression of the concept of a "Wise Wizard". However, copyright grants no protection over the idea of "Wise Wizards." This leads to a bedrock concept of copyright: the idea – expression dichotomy, sometimes called the fact – expression dichotomy.[16]

B. The Idea – Expression Dichotomy

"Copyright law has long recognized the existence of a division between the creative expression of a work and any function or functionality expressed therein."[17] Known as the Idea – Expression dichotomy, this principal is the "most fundamental limit on the scope of copyright protection… it does not extend to ideas … but only to the creator's particular way of expressing those ideas."[18] The Supreme Court has described it as axiomatic, and makes clear that copyright extends only to the "selection, coordination, and arrangement" of ideas, words, brushstrokes, scenes or any other element that culminates into a work.[19]

This long-held principle was put in place to prevent a copyright owner from controlling entire concepts or genres, and instead limits them to their particular work. For example, Tolkien's copyright extends only to Gandalf the wizard from the Lord of the Rings and the Hobbit, not to the stories that feature wise wizards.[20] This dichotomy protects copyright from overstepping onto the First Amendment and freedom of expression.[21]

This concept stems from the utilitarian and Lockean arguments that expression of ideas is an arduous process, and that the artist should own their effort as an incentive that encourages them to create.[22] Conversely, in a matter of moments, generative A.I. can produce content that is visually arresting or an entire novel that would otherwise take a writer hours upon hours to create a much rougher draft of.[23] Seemingly, generative A.I. replicates the expression that copyright protects; undermining the long-held

16. *See* Megan Svedman, *Artificial Creativity: A Case Against Copyright for AI-Created Visual Artwork*, 9 IP THEORY (2020); *See also* Bruce, *supra* note 10.

17. *Id.* at 9.

18. Lemley*, supra* note 15, at 26.

19. *See generally* Bruce, *supra* note 10, at 120.

20. Lemley, *supra* note 15.

21. *Id.* at 27.

22. *See generally* Svedman, *supra* note 16, at 18, and Lemley, *supra* note 15, at 27.

23. *See* CHATGPT, https://chat.openai.com/auth/login (last visited Oct. 21, 2023) [https://perma.cc/3JU2-QAPD]; DALL-E 3, https://openai.com/dall-e-3 (last visited Oct. 21, 2023) [https://perma.cc/BU4C-49KM]; MIDJOURNEY, https://www.midjourney.com/ (last visited Oct. 21, 2023) [https://perma.cc/4R8K-7RGT].

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Utilitarian and Lockean justifications for copyright law.[24] Importantly, this requires us to further define what expression actually is. In the following section we will discuss the legal definition and why that is not adequate alone to understand whether generative A.I. models are actually creating expression.

C. Expression

Expression is an elusive concept, as is the act of creation generally. Philosophers, artists, and scientists have agonized over it for centuries.[25] Fortunately, those larger questions do not need to be answered to discuss copyright, mens rea, and generative A.I. That begins with what traits can be assigned to expression, or put differently, what common building blocks can be understood to comprise it.

When an artist of any kind is asked what they are trying to express in their work, one is likely to get an in-depth answer about some idea they are trying to communicate.[26] For example, consider Tolkien's meditations on death; although he would contend that nobody could quite make out what he meant except for god, he did concede that there was *an* expression, that he meant something by the work.[27]

It is tempting to assume from an artist's words that what they mean by expression is the concept or the idea, which is something unprotected by copyright. However, that is because the question asked is misleading; asking *what* they are trying to express, is not asking what their expression is.[28] If the scholars of Tolkien are taken to be correct in their estimation of his work, then the understanding is that Tolkien was trying to express his take on the concept of death. But *how* he did so is the actual *expression*. Tolkien chose to put forward deathless, eternally youthful beings, elves, and have them die in wars anyway. He chose to have his protagonist, Frodo, not return to the Shire because the war left such scars on his mind and spirit that he had to leave the mortal world—much like many of his traumatized fellow veterans.[29] Even his choice of description of war, that struck his friend and fellow veteran C.S. Lewis, are characteristics of the first World War.[30]

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24. Lemley, *supra* note 15, at 28.
25. Guy Sircello, MIND AND ART: AN ESSAY ON THE VARIETIES OF EXPRESSION 3 (Princeton University Press 1st ed. 1972).
26. *Id*. at 156.
27. Garth, *supra* note 2, at XV.
28. Sircello, *supra* note 25, at 88.
29. Tolkien, *supra* note 6.
30. *Id*.

This choice of themes, character, words, metaphor, and allegory in writing is expression. In terms of visual arts, expression includes the brushstrokes, color choice, subject choice, and the lighting. Expression in creative works are the choices made by the artist.[31]

Expression is the choices made and copyright protects the author's choice on how to communicate an idea. If a choice is what is required for expression, then there must be something that makes clear that a choice has been made and what constitutes it. In the law, this is sometimes described as a mental state, or a mens rea.

II. THE LATENT MENS REA

A. What is mens rea?

According to the definition laid out in Cornell's Legal Information Institute, mens rea "refers to criminal intent."[32] "Mens rea is the state of mind statutorily required in order to convict a particular defendant of a particular crime."[33] Typically, a requirement of mens rea is based upon the concept "that one must possess a guilty state of mind and be aware of [their] misconduct;" essentially the actor must chose to commit the crime.[34]

Currently most states use the Model Penal Code's ("MPC") hierarchy of mens rea to differentiate between different mental states, deciding on the levels of culpability by linking them to the levels of prior knowledge and conscious choice involved in the criminal action taken.[35] The order of most knowing to least is as follows: (i) acting purposely, (ii) acting knowingly, (iii) acting recklessly, and (iv) acting negligently.[36]

Cornell and the MPC define these various mens rea to mean the following: (i) acting with purpose means that the defendant had an "underlying conscious object to act[;]" (ii) acting knowingly is defined as the defendant being practically certain that the conduct will cause a particular result; (iii) reckless action is understood as being when the defendant consciously disregarded a substantial and unjustified risk; and (iv) negligent action is where the

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31. *Id.*
32. *Mens Rea*, Legal Info. Inst., CORNELL L. SCH., https://www.law.cornell.edu/wex/mens_rea (last visited, 11/30/2023) [https://perma.cc/F9XQ-98R6].
33. *Id.*
34. *Id.*
35. *Id.*; *See also* MODEL PENAL CODE (1980).
36. *Id.*

defendant was not aware of the risk, but should have been aware of such.[37]

Underlying each of these mens rea is an understanding that for the law to apply to a person in a criminal context, they must make a choice with a certain level of knowledge, or intention, behind it. In the context of acting knowingly for example, it means that the actor was nearly certain that their action would result in the effect created. In the criminal context, mens rea makes explicit what many take for granted: the greater the knowledge or purposefulness of an action determines the intensity of the application of the law, in the case of criminal law the more purposeful the criminal act, the more severe the punishment meted out by the judicial system.

B. Mens Rea and Copyright

Mens rea is a concept that only exists in criminal law, so the concept may seem strange or foreign to apply to copyright law. However, here it is intended to function not as a "culpable mind" in a punitive sense but merely in the sense of describing a mind that is culpable for the art it created. The quasi-mens rea that lurks beneath the expression protection in copyright is a tool for describing what has been there all along.

As established earlier, copyright specifically protects the expression created by an artist, not the underlying ideas.[38] Additionally, expression is best understood as the series of conscious choices that build up into a total work.[39] Copyright has all along protected the choices of the artist. But what defines a choice in terms of a choice as an action is that a choice requires an actor choosing one thing over another thing.

Humans do this in a myriad of ways. Perhaps the artist is a "Tolkien," who agonized over each detail in a trilogy of books; one could describe that as purpose. However, imagine less effort is put in, imagine a painter chooses cool tones and soft lines to evoke peace, knowing that these choices often have such an effect on the viewer. On the other hand, an artist like Pollock might with reckless abandon throw paint on canvas. Or perhaps still the artist prefers to leave things up to fate, like composer Cage's 4 minutes and 33 Seconds, in which the pianist does not play a single note instead letting the small noises of the room be the music.[40] Even

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37. *Id.*
38. *See generally* Lemley, *supra* note 15; Bruce, *supra* note 10; Svedman, *supra* note 16.
39. *See generally* Sircello, *supra* note 25, at 88-131.
40. John Cage, 4'33" (Edition Peters 1952).

randomness is accepted resulting in copyrightable expression, like the film Chasing Ice which used regularly timed photography to produce time lapses by taking photos of whatever happened to be in frame at the time and stringing them together. However, the choice to use some element of random chance simply hides an extremely conscious choice of the artist to use that chaos as their choice of expression. The act of neglecting to choose exact expression, results, paradoxically, in a very specific brand of it.

A quasi-mens rea acts as a lens through which one can look at a requirement for expression that has always lurked in copyright law: that the creator had some purpose, knowledge, or other mental presence when translating the idea into an expression. The quasi-mens rea speaks to the moment between the concept pulled from the human experience and the brushstroke. It is the ingredient, the thought, and the purpose that transforms ideas into expression itself. The recipe goes as follows: mental state to choice to expression. The expression and the mental state are inseparable from one another because the expression is every choice made along the way, and those choices require a mental state.

Until now, this has not been important because humans could create images, novels, or music that could arrest an audience, so it has been assumed that there is choice behind the expression. But with the advent of generative A.I., this simply is no longer true. Generative A.I. creates very differently from the way a human does.

C. *How A.I. Generates Content or Quasi-Expression*

The process by which generative A.I. creates text or images is done on the backs of learning models known as large language models, or LLMs.[41] LLMs are "machine learning models trained on large quantities of unlabeled text" and are "made possible by … a new kind of model called a transformer."[42] The major advancement in these models allows them to track the position of information in relation to other information. In the case of creating text, an LLM is able to understand what a word means in various contexts and which words are likely to surround it by "paying attention to all the words in [a] source text."[43] Essentially, an LLM can determine "that 'server' is a restaurant waiter in one context and a computer in another."[44] Thus, the LLM allows the model to determine what words are most likely in a given context. To give another example in the image generation context, a model like DALL-E will

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41. Sag *supra* note 9, at 299.

42. *Id*. at 314.

43. *Id*.

44. *Id*. at 314-15.

deconstruct the connections of its original inputs,[45] then, in response to a prompt, create the result using vectors that contain the most statistically probable pixel arrangements in response to the prompt given.[46]

As Matthew Sag puts it, "GPT is a text prediction tool that responds to prompts with statistically well-informed guesses about what the next word should be, and the word after that, and so on."[47] In short, generative A.I. is making "well-informed guesses rather than… attempt[ing] to convey an internal mental state[.]"[48]

Though there is a similarity between the training of these models and the way humans hone their own abilities, the method of creation is far different.[49] Humans make expressions and choices, while A.I. uses statistical probabilities.

III. Does A.I. meet the Mens Rea Requirement?

Now that the basics of copyright protection, expression, a mens rea, and mechanics of generative A.I. are clear, the pieces can be put together regarding how generative A.I.'s creation process fits into the various categories of mens rea, including purposeful action, knowing action, reckless action, and negligent action. Answering this will determine if content created by generative A.I. qualifies as copyrightable expression and is thus protectable under copyright law.[50]

A. Purpose

The most culpable mens rea category is purposeful action, meaning that the act was done with the most careful and attributable intent.[51] As previously defined, purpose requires the actor have an "underlying conscious object to act[.]"[52] It is easy to see purpose in human created works. To return to the Tolkienian example, see the purposeful decision to take the reader to battlefield after battlefield.[53] While the meaning might be contested, the choice was repeated and displayed a purpose.[54]

Conversely, it is difficult to assign generative A.I. models the level of consciousness required to be described as acting with

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45. *Id.* at 316.
46. *Id.* at 318-19.
47. *Id.* at 321.
48. *Id.*
49. Svedman *supra* note 16, at 4.
50. *See* CORNELL *supra* note 32.
51. *Id.*
52. *Id.*
53. *See generally* Garth, *supra* note 2; *see also* Tolkien, *supra* note 5.
54. *Id.*

purpose. Models like Chat GPT and DALL-E function using predictive models.[55] The work is created using probability estimates, one word at a time. No single word or pixel is chosen specifically, only selected because of its contextual likelihood.[56] This makes it difficult to describe any of the work done by these models as purposeful. Though, it is important to note, that perhaps the prompts could be understood as having the purposeful input, though that does not make the output an 'expression.'

B. Knowledge

Instead, one could look to knowledge to find a requisite mens rea for A.I. generated work. Knowledgeable action occurs when the actor is all but certain that the conduct will create a particular result.[57] In a human artistic context, this might look like the use of or description of particular colors in order to convey an emotional resonance to the audience. While the artist cannot be certain in the outcome, the action is taken with the knowledge that certain color choices traditionally serve such roles and can be used confidently as such.

For generative A.I. models, knowledge is also difficult to assign to the content created by them. An argument could be made that because words or pixels are assigned based on the probabilities of their usage in a particular context as prompted this is a sort of "knowledge"[58] because the probabilities of certain words being correct in a particular context equates to understanding that a particular act will lead to a particular result. However, this is a misunderstanding of A.I. because it is a probability machine.[59] If one were to compare it to an ancient probability machine, such as dice, one might consider things differently. If one were to roll two six-sided dice together, 7 is the most likely outcome, however one would not plausibly assign a knowledgeable mental state based on such an outcome. Neither should generative A.I. be understood to be putting forth images or words in a way that indicates knowledge of the outcome of such an action, only that it is rolling content-creating-sevens, so to speak.

C. Recklessness

Turning to recklessness, it is likely one of the strongest contenders for actually being an assignable mens rea to generative

55. *See generally* Sag, *supra* note 9, at 321.

56. *Id.*

57. *See* CORNELL, *supra* note 32.

58. *See generally* Sag, *supra* note 9, at 317–324.

59. *Id.*

A.I. models, due to the lower legal standard. Reckless action is a conscious disregard for an understood outcome. In a criminal context, that outcome is a risk.[60] However, in a copyright and content creation context that outcome need not be a risk. As discussed earlier, the quintessential example of reckless expressive choice would be the work of Jackson Pollock.[61] The understanding that splatter-painting a canvas might create an inscrutable work was consciously done, and in this way may even circle back around to knowledge or purpose.[62]

Similarly, A.I. follows its probabilities, which are created using the data provided to it;[63] and then once prompted, the outcome of words or images falls where it may. This is not unlike how once cast from brush or bucket, Pollock's paint would hit the canvas where the physics determined it would. This metaphor breaks down though when the requirement of conscious disregard is considered; because the choice to rely on randomness is missing, and generative A.I. is inherently random, it cannot create with conscious chaos.[64] Again, LLMs like Chat GPT and DALL-E function off their predictive models, they do not consciously disregard careful expression in the creation of words or images. Instead, like Pollock's reckless painting, the LLMs have no other option but to function as the technology demands.

D. Negligence

Finally turning to negligence, the mens rea for negligence requires the least amount of culpability.[65] A negligent mental state, wherein one was unaware of the outcome but should have been,[66] can be understood as using near-pure randomness in the creation of a work. However, even this cannot be met by the creations of an A.I., because it is impossible to say that a predictive model, using probability alone, *should* know the outcome of its selections.

The words and pixels selected simply are the most likely based on its training and the prompting.[67] What is made is the outcome, not an outcome it should have expected. Perhaps the prompter of the A.I., or the creator of the A.I. could be said to expect a certain outcome; but not the A.I. itself.

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60. *See* CORNELL, *supra* note 32.

61. Jackson Pollock, *Number 1, 1950 (Lavender Mist)* (illustration), (1950).

62. *See* CORNELL, *supra* note 32.

63. *See generally* Sag, *supra* note 9, at 313-327; *see also* Svedman, *supra* note 16.

64. *See* CORNELL, *supra* note 32.

65. *Id.*

66. *Id.*

67. *See generally* Svedman, *supra* note 16, at 4.

Which brings us to the heart of the issue: there can be no mental state assigned to generative A.I. models. There is no known consciousness to give purpose, knowledge, recklessness, or negligence to. Without a mental state fueling a choice, there is no expression, no brushstrokes, no crafted prose, or gripping characters to protect in the first place. Only glorified dice rolls. Copyright does not protect the outcome of the roll of dice.

IV. IMPACTS AND POLICY

A. *Potential Impacts of a Mens Rea in Copyright*

Adapting a mens rea requirement to copyright law from the foreign context of criminal law comes with a number of significant impacts, not only in the realm of A.I. but all areas of copyright. While mens rea already lurks beneath the surface of copyright law, making it explicit changes its influence on how the law is interpreted.

How then should mens rea be applied? First, it would be necessary to define what level of mens rea is required for copyright. Further, we need to decide how to show that mens rea exists in the first place. Proving the existence of a mens rea may sound like a potentially thorny issue, but, once the methods are settled, juries routinely handle determining such factual outcomes.

One potential impact of a mens rea requirement could be increased litigation. If a mens rea requirement became an explicit requirement for copyright, it would open the doors to a whole new class of lawsuits to determine if a copyright is valid. The increased litigation may be costly, time-consuming, and would increase strain on the court system. However, a relief to this potential strain could be establishing a rebuttable presumption that human made work meets the mens rea standard, though that could shift the inquiry towards what counts as a human made work.

Another open question for the courts would be: what is the proper mens rea? While purpose may be tempting, a narrow interpretation would restrict access to copyright which currently is a very accessible form of legal protection. Unless this was legislated into law by congress or state legislative bodies, this would fall to the courts to decide, resulting in years of litigation as cases worked their way through the system and into a well understood and solidified state.

The obvious outcome of a copyright mens rea would be the barring of A.I. generated works from gaining the protection of copyright as a legal matter. The potential impacts here are unclear. It could protect human creators' livelihoods by making their work

more valuable than A.I. generated works. Conversely, the speed and quantity of content created by A.I. may be too overwhelming for the limited economic protections granted by copyright. Additionally, there are issues regarding whether prompts for A.I. are copyrightable. Determining what is and is not an A.I. generated work is already challenging enough and will not get easier with time. This opens the door to questions like: how much added expression is enough to transform an A.I. generated work into a protectable work?

B. Policy Considerations and Advocations

This paper argues for the existence of a quasi-mens rea in the realm of copyright law and that the creations of generative A.I. models and LLMs do not possess the requisite mental state required to produce genuine expression that may be copyrighted. However, the scrutiny placed here reveals a deeper issue surrounding the purpose of copyright law is, and what role should it serve in society.

Traditionally, economic and utilitarian justifications for copyright stood above justifications based upon labor or personhood.[68] The monopoly granted by copyright was meant to reward, incentivize, and offset the costs of creation.[69] The hope being that this offset would incentivize more creation, thus benefiting society as a whole.[70] However, this utilitarian theory is heavily undercut by generative A.I. because now useful, aesthetically pleasing, and passably human content can be created in moments at no cost.[71] This undermines the argument that there must be an incentive for someone to invest the time and money to create.

This leads to another classic justification that an original work has been "infused [with] a sense of the author herself."[72] This theory argues for the protection of a work based on the humanist sense that one's own creation belongs to oneself. This justification rests on the idea that copyright protects the self, and that copying another's work is a moral wrong. As a result, a consideration going forward is if this moralistic justification should supplant the utilitarian justification. However, if this becomes both the justification and purpose of copyright, then the allowance for

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68. Svedman, *supra* note 16, at 10.
69. *Id.*
70. *Id.* at 14.
71. *Id.* at 1-2.
72. *Id.* at 10.

corporations to own copyrights becomes fraught, as a corporation does not possess the same moral grounding for such a justification.

A.I. forces us not only as a legal community, but as a society and as individuals to reconsider the purpose of making things like novels, poetry, films, and the rest. In a market-driven society, significant pressure is placed upon financial success. However, if content created by generative A.I. models untouched by human artists can be useful, entertaining, and even mesmerizing, then perhaps the purpose of human made work needs to be reconsidered. Art has always been something done by humans for connection, communication, growth, and criticism. What a lack of mens rea tells us is that, as Sag puts it, A.I. is not "speaking to us in an attempt to convey an internal mental state[.]"[73] The content made by A.I. is hollow, like an automated text, or a recorded voice over a phone: something has been said, but there is nobody on the other end.

This leaves copyright law in an unstable state because the policy justifications that have long upheld copyright are undercut by the generative outputs of A.I.. As a result, the legal community surrounding both A.I. and copyright is in need of two things.

First, clear policy goals. The purpose of intellectual property rights in the realm of creative works must be determined. Incentivization no longer seems to be the answer. Is the goal to protect the works of an artist so that they might retain autonomy over the works that are in a sense part of themselves?[74] Or is it to ensure that artists have the potential to earn a living in their chosen art?[75] These questions are just on the surface, but more deeply, we need to determine what intellectual property law is meant to protect. Ideally, it would be the artists themselves, instead allowing for the control of creative works merely for financial gain.

Secondly, we need a reworking of intellectual property law, specifically copyright law, to aid with the deeper policy goals set forth. Perhaps copyright needs to become more difficult to obtain and have an explicit mens rea requirement. This could mean reconfiguring the law such that corporations no longer can obtain or own copyright, incentivizing them to retain, hire, and employ creatives for their copyrights. Ultimately, copyright law has fallen behind and is not the correct vehicle for handling this new age of intellectual property creation.

The changes to the world of creative endeavors have been forever changed by the advent of generative A.I. models. It could be that society sits on the precipice of a mass democratization of

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73. *See generally* Sag, *supra* note 9, at 317-324.
74. Svedman, *supra* note 16, at 10.
75. *Id*.

creative skill, a renaissance of human crafted work, and the sharing of human creativity. It is just as likely, however, that history is about to witness the loss of human artists in all but the most physical of mediums, such as live performances, sculpture, or hand-painting, at least in terms of those artists no longer being financially supported. Time will tell. But relevant for the legal field is the simple fact that the law, as it stands, does not allow for the copyright of A.I. generated content, while simultaneously being woefully unequipped to grant whatever protection that content deserves. This may be in the form of thinner copyright, or something else entirely, but regardless, it is underprepared for preserving some value in human work. If that is the law's place at all.

CONCLUSION

"Roads go ever on and on, Under cloud and under star, Yet feet that wandering have gone Turn at last to home afar." — from J.R.R Tolkien's The Hobbit[76]

Deep in every work created are a thousand steps, a thousand pen strokes, a thousand pixels, and a thousand different notes. Each is placed somehow and by someone. Human artists do so with purpose, sometimes with each stitch carefully chosen and in other moments songs are sung with reckless abandon. Choices, be they careful or careless, make up expression. It is this expression that is protected under copyright law. It is this expression that generative A.I. models cannot replicate though the words and images made by them. This purpose, this choice, this expression, is best understood as a mental state, a mens rea, that has lurked under the surface in copyright law until A.I. reached a point where it was forced to emerge. A.I. generates works via calibrated random generation, no choices are made and therefore there is no mens rea. This results in works with   no copyrightable expression. Consequently, copyright is not the proper method of protecting A.I. generated content. But more importantly, this issue highlights significant deficiencies in the law and shows that, in the wake of this new technology, there is an urgent need for new intellectual property laws designed to protect and improve society.

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76. J.R.R. TOLKIEN, THE HOBBIT 283-284 (5th ed. 2001).