WHERE DOES CREATIVITY END AND INFRINGEMENT BEGIN? MAPPING THE BOUNDARIES OF COPYRIGHT PROTECTION IN THE AGE OF ARTIFICIAL INTELLIGENCE

by

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ABSTRACT

Creativity turns imagination into reality, helping us survive, adapt, and thrive, yet copyright law exists by drawing a line between what an author may claim and what must remain free for others to use. This paper examines where that line falls, tracing the doctrinal boundary between permissible inspiration and unlawful infringement across Indian and international copyright regimes. Using doctrinal and comparative legal research, the study analyses the idea-expression dichotomy, the standard of originality, and the fair use defences under the Indian Copyright Act, 1957, the Berne Convention, the TRIPS Agreement, and the United States Copyright Act. It evaluates landmark precedents such as R.G. Anand v. Delux Films, Eastern Book Company v. D.B. Modak, Feist Publications v. Rural Telephone Service, and Andy Warhol Foundation v. Goldsmith, alongside recent disputes involving generative artificial intelligence, including ANI v. OpenAI and Getty Images v. Stability AI. The paper concludes that the boundary between creativity and infringement is contextual and evolving and proposes calibrated statutory and judicial reforms suited to the algorithmic era.

Keywords: Copyright infringement, Idea-expression dichotomy, Originality, Fair dealing and fair use, Artificial intelligence and copyright law

ISSN: 2583-2794

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Indian Journal of Law and Jurisprudence | Licensed under Creative Commons — https://creativecommons.org/licenses/by/4.0/ | DOI: 10.5281/zenodo.24321682 | Title: Where Does Creativity End and Infringement Begin? Mapping the Boundaries of Copyright Protection in the Age of Artificia

1. Introduction

Every creative act builds, in some measure, on what has come before it. A novelist absorbs the grammar of narrative from the books she has read, a musician's ear is trained on the melodies of predecessors, a filmmaker's visual vocabulary is shaped by a century of cinema. Copyright law has never disregarded this. Instead, it has tried to strike a delicate balance of rewarding the individual author for the distinctive form her imagination presents an idea, while leaving the idea itself, and the output that comes after, free for others to use. This balance is codified in the "idea-expression dichotomy," a principle seen in Article 9(2) of the TRIPS Agreement[2] and followed, in one form or another, in more than 160 countries.

Yet the line between drawing inspiration and committing infringement has never been self-evident. Courts across jurisdictions have long struggled to decide when a subsequent work merely uses a common theme and when it appropriates the "form, manner and arrangement" the law protects. The difficulty has only intensified in the digital era. Sampling in music, fan fiction, remix culture, algorithmic content aggregation, and most disruptively generative artificial intelligence systems trained on billions of copyrighted images, articles and books, have multiplied the occasions on which the question "is this creativity or is this infringement?" must be answered. The Delhi High Court's interim order in ANI Media Pvt. Ltd. v. OpenAI Inc.[3] and the UK High Court's judgment in Getty Images v. Stability AI[4] illustrate how urgently this old doctrinal puzzle has resurfaced in a new technological guise.

This paper undertakes a doctrinal and comparative examination of the creativity, infringement boundary as it exists in Indian law and in leading international jurisdictions, the United States, the United Kingdom, and the multilateral treaty framework administered by the World Intellectual Property Organization (WIPO). It traces the historical evolution of the idea-expression dichotomy and the originality threshold, analyses landmark judicial pronouncements, and evaluates how courts and legislatures are beginning to respond to the challenges posed by generative AI. The paper concludes with policy suggestions aimed at recalibrating the boundary for a period in which both human and machine authorship compete for the same protective umbrella.

2. Research Questions

This study seeks to answer the following questions:

[2] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995), art 9(2).
[3] *ANI Media (P) Ltd. v. Open AI OPCO LLC,* 2026 SCC OnLine Del 5291
[4] *Getty Images (US) Inc v Stability AI Ltd* [2025] EWHC 2863 (Ch)

1. What doctrinal tests do Indian and international courts employ to distinguish protectable expression from unprotectable ideas, themes and facts, and how consistently are these tests applied?
2. How have differing standards of originality, the English "sweat of the brow" doctrine, the American "modicum of creativity" standard, and the Indo-Canadian "skill and judgment" test, shaped the threshold at which a work qualifies for copyright protection?
3. To what extent do the fair dealing defence under Section 52 of the Indian Copyright Act, 1957, and the fair use defence under Section 107 of the United States Copyright Act, 1976, function as workable safety valves that permit creative reuse without collapsing into a licence for infringement?
4. How is the traditional boundary between creativity and infringement being reshaped by generative artificial intelligence, and what legislative and judicial responses are emerging in India and abroad to address this shift?

3. Conceptual Foundations: Creativity, Originality and the Idea-Expression Dichotomy

Copyright law does not protect creativity or idea, it protects the particular expression that a creative mind gives to an idea. The distinction traces back to the United States Supreme Court's 1879 decision in *Baker v. Selden,*[5] which held that a book explaining a system of book-keeping could not prevent others from using the accounting system itself, only from copying the particular explanation of it. The principle has since been absorbed into international law: Article 9(2) of TRIPS[6] provides that "copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such," a formulation echoed in Article 2 of the WIPO Copyright Treaty.[7]

Two subsidiary doctrines refine this dichotomy. According to the doctrine of merger, an expression cannot be protected by copyright when the idea and its expression are so closely related that there is only one, or very few, means to represent the idea. The expression merges with the idea and goes unprotected, because otherwise the first author would own the idea itself and it may create a monopoly situation. Similarly, according to the scenes à faire doctrine, it includes elements that are so prevalent, formulaic, or necessary for a particular location or genre. They cannot be monopolized by single author. For example, the corrupt

[5] *Baker v. Selden*, 101 U.S. 99 (1879)
[6] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995), art 9(2).
[7] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002), art 2.

police chief in a crime drama, or the star-crossed lovers from feuding families in a romance. For complex works, American courts have built structured tests. The best known is the abstraction-filtration-comparison method from *Computer Associates v Altai*,[8] which asks a court to separate a work into levels of generality, filter out the unprotectable material and compare only what is left.

The idea-expression dichotomy, however, only tells a court what may be protected, it does not tell a court how much originality a work must display before protection is given. Three competing standards have emerged internationally. The first, associated with English law, is the "sweat of the brow" doctrine, under which a work is original if the author has expended sufficient skill, labour and capital in its creation, irrespective of any creative spark, a standard traceable to *University of London Press Ltd. v. University Tutorial Press Ltd.* (1916)[9] and *Ladbroke v William Hill* (1964).[10] The second, the American standard, was announced by the United States Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991),[11] which held that a telephone directory's alphabetically arranged white pages lacked the "minimal degree of creativity" the Constitution requires, and that copyright rewards originality, not labour. The third is the intermediate "skill and judgment" standard first articulated by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004),[12] which requires more than mere labour but does not demand novelty or non-obviousness in the patent sense. As the following section shows, Indian law has, over time, migrated from the first standard toward the third.

5. The Indian Legal Framework Governing Creativity and Infringement

5.1 Relevant Provisions under the Copyright Act, 1957

The Indian Copyright Act, 1957 protects "original literary, dramatic, musical and artistic works" under Section 13,[13] without defining "original" in the statute itself , a gap that Indian courts have had to fill through interpretation. Section 14[14] enumerates the bundle of exclusive rights that constitute "copyright," including the rights to reproduce, issue copies, perform, and make derivative works. Section 51[15] defines copyright infringement, without licence, of

[8] *Computer Associates International Inc v. Altai Inc* 982 F 2d 693 (2d Cir 1992)
[9] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601
[10] *Ladbroke v William Hill* [1964] 1 All ER 465
[11] *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)
[12] *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13
[13] Copyright Act 1957 (India) s 13
[14] Copyright Act 1957 (India) s 14
[15] Copyright Act 1957 (India) s 51

anything that only the copyright owner is entitled to do, or the permitting of a place for profit to be used for such an act. Section 52[16] lists outs acts that fall under the exception to infringement. It states acts that "shall not constitute an infringement of copyright," including fair dealing for the purposes of private use, research, criticism or review, reporting of current events, reproduction by a teacher or pupil in the course of instruction, and reproduction of a judgment or order of a court that is open to the public. These exceptions function as the statutory safety valve that allows education, journalism, criticism.

5.2 Judicial Interpretation: Landmark and Recent Case Law

The Hon'ble Supreme Court of India's judgment in *R.G. Anand v. Delux Films* (1978)[17] remains as the landmark case on the idea-expression dichotomy. The plaintiff, a playwright, alleged that the film *New Delhi* had copied the plot of his play *Hum Hindustani*, both works dealing with the theme of regional prejudice between Punjabi and Madrasi families. The Court held that there can be no copyright in an idea, theme or plot, protection is confined to the particular "form, manner and arrangement" in which an author expresses that idea. It laid down what has since been called the "lay observer test" where infringement is established only where an ordinary observer, having read or seen both works, receives an unmistakable impression that the later work is a copy of the earlier one. Applying this test, the Court found the film's treatment of provincialism sufficiently distinct from the play's and dismissed the infringement claim.

Later, in *Eastern Book Company v. D.B. Modak* (2008),[18] the Supreme Court confronted the originality threshold. The appellant, publisher of the law report- Supreme Court Cases (SCC), claimed copyright in its edited version of Supreme Court judgments, including headnotes, cross-references, and paragraph numbering. The respondents had reproduced this material on CD, ROMs. The Court rejected both the English "sweat of the brow" standard and the American "modicum of creativity" standard as unsuitable and instead adopted the Canadian "skill and judgment" test, holding that copyright could be claimed in derivative works , such as edited judgments , only where the author's skill and judgment went beyond a "flavour" of creativity that, while not novel or non-obvious, was more than a product of mere labour and capital. Raw judicial text, being "government work" under Sections 2(k)[19] and 17(d)[20] of the

[16] Copyright Act 1957 (India) s 52
[17] R.G. Anand v. Delux Films, (1978) 4 SCC 118
[18] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1
[19] Copyright Act 1957 (India) s 2(k)
[20] Copyright Act 1957 (India) s 17(d)

Act and expressly excluded from copyright by Section 52(1)(q)(iv),[21] remained in the public domain, only genuinely original editorial additions, headnotes and internal cross-referencing attracted protection. This ruling significantly raised the bar for claiming copyright in compilations and derivative works in India, aligning Indian law more closely with international standards of originality.

The tension between proprietary control and public access resurfaced in *University of Oxford v Rameshwari Photocopy Services* (2016),[22] popularly known as the "DU Photocopy case." Academic publishers sued a photocopy shop operating within Delhi University for reproducing course-pack excerpts from copyrighted textbooks. The Delhi High Court held that Section 52(1)(h)(i)'s[23] exception for reproduction "by a teacher or a pupil in the course of instruction" must be interpreted purposively, in light of the practical unaffordability of textbooks for a large proportion of Indian students, while nevertheless remanding the matter for a fact-specific inquiry into whether the extent of copying in each course pack was justified by instructional necessity.[24] The case remains an important illustration of how Indian courts read fair dealing provisions expansively where access to knowledge is at stake.

Most recently, in *ANI Media Pvt. Ltd. v. OpenAI Inc.* (2025),[25] the Delhi High Court confronted, for the first time in India, the question of whether training a large language model on copyrighted news content constitutes infringement. The news agency ANI alleged that OpenAI had used its copyrighted reports without authorisation to train ChatGPT and that the model had, on occasion, generated fabricated statements falsely attributed to ANI. OpenAI resisted the suit on jurisdictional grounds, arguing that training occurred on servers outside India, and on the merits, arguing that its use of publicly available content for training was a transformative process falling short of infringement. Justice Amit Bansal rejected the jurisdictional objection, holding that Indian courts may entertain the dispute where the effects of the allegedly infringing conduct are felt in India, and went on to hold, at the interim stage, that OpenAI's storage of ANI's literary works for the purpose of training its language model fell within the fair dealing exception under Section 52(1)(a)[26] of the Copyright Act and therefore did not, prima facie, amount to infringement under Section 51.[27] The Court expressly weighed the public interest in the continued availability of AI tools to millions of Indian users

[21] Copyright Act 1957 (India) s 52(1)(q)(iv)
[22] *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229.
[23] Copyright Act 1957 (India) s 52(1)(h)(i)
[24] Kartik Chawla, "Oxford University V. Rameshwari Photocopy Services - Reshaping The Copyright Discourse" (2017) 13(1) Indian Journal of Law and Technology
[25] *ANI Media (P) Ltd. v. Open AI OPCO LLC,* 2026 SCC OnLine Del 5291
[26] Copyright Act 1957 (India) s 52(1)(a)
[27] Copyright Act 1957 (India) s 51

against ANI's proprietary claim, declining to grant an interim injunction.[28] The underlying suit remains pending, and the Court's final view on liability, including on the separate and more difficult question of whether specific verbatim outputs infringe, is yet to be delivered.[29]

6. International and Comparative Legal Framework

6.1 The International Treaty Architecture

India's copyright regime does not operate in isolation. As a signatory to the Berne Convention[30] for the Protection of Literary and Artistic Works and a member of the World Trade Organization bound by TRIPS, India is obliged to extend automatic, formality-free copyright protection to literary and artistic works of member-state nationals and to observe the idea-expression dichotomy codified in Article 9(2) of TRIPS.[31] The WIPO Copyright Treaty (1996)[32] extends this framework to the digital environment, affirming in Article 4[33] that computer programs are protected as literary works and reiterating in Article 2[34] that protection does not extend to ideas, procedures or methods of operation. This treaty architecture supplies the common doctrinal vocabulary, “originality,” “idea-expression,” “fair use” , that allows courts in India, the United States and the United Kingdom to draw on one another's jurisprudence even in the absence of binding precedent across borders.

6.2 United States Jurisprudence

In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith.*[35] In this case, Andy Warhol's silkscreen portraits of the musician Prince, based on a photograph taken by Lynn Goldsmith. Applying the four-factor fair use test under Section 107 of the Copyright Act, 1976,[36] a test whose modern “transformative use” gloss originated in the Court's 1994 decision

[28] Gaurav Bhalla and Parag Singhal, ‘AI Training, Fair Dealing and Copyright Infringement by AI Platforms: Analysing Delhi High Court’s Order in ANI Media v OpenAI’ (*Bar & Bench*, 1 August 2026) https://www.barandbench.com/law-firms/view-point/ai-training-fair-dealing-and-copyright-infringement-by-ai-platforms-analysing-delhi-high-courts-order-in-ani-media-v-openai accessed 16 November 2026.
[29] Alishan Naqvee, Saher Gandhioke and Amir Shejeed, ‘India’s First AI Copyright Ruling: The Delhi High Court in ANI v OpenAI’ (*Legal 500*, 12 August 2026) https://www.legal500.com/intelligence/india/intellectual-property/indias-first-ai-copyright-ruling-the-delhi-high-court-in-ani-v-openai accessed 16 November 2026.
[30] Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, as revised at Paris 24 July 1971)
[31] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995), art 9(2)
[32] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002)
[33] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002), art 4
[34] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002), art 2
[35] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith* 143 S. Ct. 1258 (2023)
[36] Copyright Act of 1976, (US) s 107.

in *Campbell v. Acuff, Rose Music, Inc.*,[37] involving a rap parody of a Roy Orbison song, the Court held, that the commercial licensing of Warhol's "Orange Prince" image for a magazine cover was not a transformative fair use, because it served substantially the same illustrative purpose as Goldsmith's original photograph. Justice Sotomayor clarified that a work may add new meaning or message to an earlier work and still fail the fair-use factor if its purpose and character remain too closely aligned with the original, particularly where both works are exploited commercially in a similar market.[38] The decision narrows the broad reading of "transformativeness" that lower courts had adopted since *Campbell*, and its reasoning is already being cited in disputes over whether AI-generated outputs that emulate an artist's style constitute fair use.

6.3 The United Kingdom and Comparative Common Law

Under the Copyright, Designs and Patents Act, 1988, English courts apply a "substantial part" test broadly comparable to the Indian "lay observer" test. In *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*,[39] a dispute between two floral fabric designs, the House of Lords found that a design which was not an exact copy still took a substantial part of the claimant's design, and stressed that the more abstract and commonplace the element taken, the less likely it is to count as a substantial part. More recently, the England and Wales High Court's decision in *Getty Images (US) Inc. v. Stability AI Ltd.* (2025)[40] addressed, for the first time in a major common law jurisdiction, the copyright status of a generative AI model itself. Getty alleged that Stability AI's Stable Diffusion model had been trained on millions of copyrighted images without a licence and could reproduce outputs substantially similar to Getty's photographs, including a modified version of Getty's watermark. Justice Joanna Smith dismissed the primary copyright infringement claim, holding that the trained model did not store or reproduce copyrighted works within the meaning of the Copyright, Designs and Patents Act, 1988, because the model's parameters do not constitute a copy of the training images in any legally cognizable sense, though the Court upheld a narrower trademark infringement claim relating to the reproduction of Getty's watermark in certain outputs.[41] The

[37] *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994)
[38] Pamela Samuelson, 'Andy Warhol Foundation v Goldsmith: The Supreme Court Revisits Transformative Fair Uses' (*Kluwer Copyright Blog*, 9 May 2022) https://legalblogs.wolterskluwer.com/copyright-blog/andy-warhol-foundation-v-goldsmith-the-supreme-court-revisits-transformative-fair-uses/ accessed 16 November 2026
[39] Designers Guild v Russell Williams [2001] FSR 113
[40] *Getty Images (US) Inc v Stability AI Ltd* [2025] EWHC 2863 (Ch)
[41] Barry Sookman, 'Copyright Infringement and AI: Insights from Getty v Stability AI' (*barrysookman.com*, 5 November 2025) https://barrysookman.com/2025/11/05/copyright-infringement-and-ai-insights-from-stability-ai-v-getty/ accessed 16 November 2026.

ruling stands in some tension with the ongoing, and far larger, Getty Images v. Stability AI[42] litigation in the United States District Court for the District of Delaware, where Getty's damages claim has grown to as much as US$1.7 billion, and where the underlying merits, whether the initial act of scraping and training itself infringes, independent of output similarity, remain to be adjudicated.

7. The New Frontier: Generative Artificial Intelligence and the Blurring Line

Generative artificial intelligence complicates the creativity, infringement inquiry along two distinct axes. The first is the "input" problem: large language models and image generators are typically trained on vast, scraped corpora that include copyrighted text and images, usually without the rights-holder's consent or compensation. Whether this training process itself infringes is a question on which jurisdictions currently diverge. The Delhi High Court's interim view in *ANI v. OpenAI*[43] and the London High Court's final ruling in *Getty v. Stability AI*[44] both lean, for different doctrinal reasons, toward treating training as non-infringing, the former through the fair dealing exception in Section 52(1)(a),[45] the latter through a finding that no copy is "stored" within the model's parameters.[46] The pending American litigation, by contrast, has yet to resolve this question definitively, and the scale of damages sought, running into the billions of dollars, reflects how much commercial value is thought to be at stake.

The second is the "output" problem: whether a specific piece of AI-generated text, image or music is itself substantially similar to an identifiable, copyrighted source, such that its generation and distribution infringes irrespective of how the underlying model was trained. This question is, in principle, no different from the classical substantial similarity inquiry undertaken in *R.G. Anand*[47] or *Designers Guild,*[48] except that the sheer scale and automaticity of AI generation multiplies the opportunities for both accidental and systematic reproduction, and the "black box" nature of large models makes it harder for a plaintiff to prove access and copying.

A third, related controversy concerns the authorship of AI-generated works themselves. In *Thaler v. Perlmutter* (2023),[49] United States courts held that a work generated entirely by an

[42] *Getty Images (US), Inc. v. Stability AI, Ltd.*, 3:25-cv-06891, (N.D. Cal.)
[43] *ANI Media (P) Ltd. v. Open AI OPCO LLC,* 2026 SCC OnLine Del 5291
[44] *Getty Images (US) Inc v Stability AI Ltd* [2025] EWHC 2863 (Ch)
[45] Copyright Act 1957 (India) s 52(1)(a)
[46] Aparajita Lath, 'ANI vs OpenAI: India's Copyright Act is Outdated. Can it Deal with New Legal Conundrums?' (*SpicyIP*, 10 February 2025) https://spicyip.com/2025/02/ani-vs-openai-indias-copyright-act-is-outdated-can-it-deal-with-new-legal-conundrums.html accessed 16 November 2026.
[47] R.G. Anand v. Delux Films, (1978) 4 SCC 118
[48] Designers Guild v Russell Williams [2001] FSR 113
[49] *Thaler v Perlmutter* 687 F Supp 3d 140 (2023)

AI system, without human creative input, cannot be registered for copyright because the Copyright Act requires human authorship. India's Copyright Office briefly registered an artwork with an AI tool named RAGHAV listed as a co-author before withdrawing the registration and issuing a show-cause notice, reflecting the same unresolved tension between rewarding human creative direction and refusing protection to purely machine-generated output. The European Union has approached the problem from a regulatory rather than a purely doctrinal angle: the EU Artificial Intelligence Act imposes transparency obligations on providers of general-purpose AI models, requiring them to publish a sufficiently detailed summary of the copyrighted content used for training, without itself resolving whether such training infringes copyright.[50] Taken together, these developments suggest that the creativity-infringement boundary, long calibrated to human authorship, is being renegotiated simultaneously in courts, copyright offices and legislatures, with no single jurisdiction yet offering a complete answer.

8. Comparative Analysis and Critical Observations

As per the jurisdictions of India, the United States, the United Kingdom, and the European Union, it has been established that copyright protects expression and not ideas, a convergence attributable to the harmonising effect of the Berne Convention and TRIPS. All employ some variant of a “substantial similarity” test to determine infringement once a work is found original and protectable, whether styled as the “lay observer test” in India, the “ordinary observer test” in much of the United States, or the “substantial part” test in the United Kingdom, differences of vocabulary more than of substance.

The sharper divergence lies in the originality threshold and in the treatment of generative AI. India, having moved from an early “sweat of the brow” doctrine to the intermediate “skill and judgment” test in *Eastern Book Company v. D.B. Modak*,[51] now occupies a middle position between the historically low English threshold and the comparatively higher American “modicum of creativity” standard. On generative AI, both India and the United Kingdom have, at least provisionally, been reluctant to treat the training process itself as infringing, India through a generous reading of fair dealing, the United Kingdom through a technical finding about the absence of storage within model weights, while the America’s take remains unresolved and the European Union has opted for transparency regulation over doctrinal adjudication. This divergence is significant because it means that the same AI model, trained

[50] Regulation (EU) 2024/1689 (Artificial Intelligence Act), art 53(1)(d)
[51] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1

identically, could face different legal outcomes depending on where the training or the resulting harm is deemed to occur, creating a genuine risk of forum shopping and regulatory arbitrage in an inherently borderless technology.

9. Conclusion and Suggestions

There is no clear or single portable rule to decide where creativity ends and infringement begins but there exist tests like - idea-expression, originality, substantial similarity, and fair dealing that courts apply contextually, weighing the degree and qualitative significance of copying against the purpose of the subsequent use and its effect on the market for the original work. *R.G. Anand*[52] and *Designers Guild*[53] show that the same theme, differently expressed, escapes infringement whereas *Eastern Book Company v. D.B. Modak* and *Feist*[54] show that not every product of labour deserves protection. The DU Photocopy case established that even substantial copying may be excused where education and access to knowledge are served and *Andy Warhol Foundation v. Goldsmith*[55] held that if a secondary work and the original have a substantially similar commercial purpose, for example, both being licensed to illustrate a magazine article about the same subject, even a secondary work with a distinct artistic style or "meaning and message" may fail the first factor of the fair use inquiry. At present, Generative artificial intelligence multiplies the oldest question in copyright law at an unprecedented scale and speed, rather than introducing a new one.

On the basis of this analysis, the paper offers the following suggestions:

First, the Indian Parliament should consider amending Section 52 of the Copyright Act, 1957,[56] to include an explicit, calibrated text and data-mining exception for AI training, comparable to Article 4 of the European Union's Digital Single Market Directive,[57] that permits training on lawfully accessed works subject to a rights-holder's ability to opt out, rather than leaving courts to stretch the general fair dealing clause in Section 52(1)(a)[58] to cover a use its drafters could not have anticipated.

Second, transparency obligations modelled on the EU AI Act's[59] requirement that providers of general-purpose AI models disclose a summary of copyrighted training content should be

[52] R.G. Anand v. Delux Films, (1978) 4 SCC 118
[53] Designers Guild v Russell Williams [2001] FSR 113
[54] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1
[55] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith* 143 S. Ct. 1258 (2023)
[56] Copyright Act 1957 (India) s 52
[57] Directive (EU) 2019/790, art 4
[58] Copyright Act 1957 (India) s 52(1)(a)
[59] EU AI Act, art 50

considered in India and other common law jurisdictions so that rights-holders can meaningfully assess and, where appropriate, license or object to the use of their works.

Third, courts should move toward codifying structured tests, such as the abstraction, filtration, comparison method already used for software, for assessing substantial similarity in AI-generated outputs, since the traditional "lay observer" and "ordinary observer" tests were designed for human-authored works and may prove unpredictable when applied to outputs generated by statistical models trained on millions of underlying works.

Fourth, statutory clarity is needed on the authorship and ownership of AI-assisted (as distinct from wholly AI-generated) works, distinguishing cases of substantial human creative direction, which should attract protection in the human contributor, from wholly autonomous machine output, which most jurisdictions currently, and in the author's view rightly, decline to protect.

Finally, given the inherently cross-border nature of AI training and distribution, WIPO[60] should be encouraged to convene a dedicated multilateral dialogue, building on its existing work on AI and intellectual property, to prevent the fragmentation of standards that currently allows the same technology to be treated as lawful in one jurisdiction and unlawful in another. Only through such calibrated, internationally coordinated reform can copyright law continue to perform its foundational task, rewarding the individual spark of creativity without extinguishing the common flame from which all creativity draws.

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ISSN: 2583-2794

[60] World Intellectual Property Organization, *WIPO Conversation on Intellectual Property and Artificial Intelligence* (WIPO 2024).