**AI, Creative Endevours and**

**IP Law:**

**A Historical Perspective**

By Jacqueline LaBarge

I want to start this piece with an explanation as to why it took so long to write. You see, I was asked to make my writing as non-political as possible. But to be clear here we are talking about property rights, who owns what and why. There is nothing more fundamentally political, but I will do my best.

AI news is always changing, although I do my best to keep up with it’s current place in copyright law, I will always be out of date. So let’s go the other way.

What is copyright law from a historical point of view? What did it apply to or not and what was the rational for that?

*1710*, England under the rule of Queen Anne. The Statute of Anne was a groundbreaking piece of legislation in that it granted copyright to authors over a prescribed period of time before the work fell into public domain. However it was problematically vague about what was meant by authors and it only applied to pamphlets and books.

With even the most cursory reading it is easy to see that the europian approach to copyright law at this time was a matter of encouraging learning and responding to public complaints of censorship.

In 1783 a committee of the [Continental Congress](https://en.wikipedia.org/wiki/Continental_Congress) concluded "that nothing is more properly a man's own an the fruit of his study, and that the protection and security of literary property would greatly tends to encourage genius and to promote useful discoveries."[[5]](https://en.wikipedia.org/wiki/Copyright_Act_of_1790#cite_note-PatryTCC-5)

Well, this sounds like more encouraging learning, doesn’t it? And by the time a clause was added to the constitution to allow congress to pass copyright law (1787)it’s stated purpose for this power was  "to promote the progress of science and useful arts".[[7]](https://en.wikipedia.org/wiki/Copyright_Act_of_1790#cite_note-Yu143-7)

Unfortunately this is of little use to our artist friends, but worry not, for things are about to change! It will only take one legal definition and a Supreme Court case to get us there.

1790, the congress passes a copyright law that explicitly covers maps and charts,in 1802 they add engravings and etchings.

So, we finally get to *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)and the unanimous opinion authored by chief justice Miller. Photographs where brand spanking new and Napolean Sarony, master of the art took a picture of Oscar Wilde. Being such a spectacular picture Burrow-Giles decided to print and sell it without permision, after all it was not a map, chart, etching. “It is insisted in argument, that a photograph being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which the producer is the author.”

The counter and final opinion being that Sarony “made the same ... entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit."

The courts definition leaves issues with nature photography because of the wording(woe be to Ansel Adams) but as long as the lines are planned by the author it spreads copyright to an incredible degree. As long as you arrange it yourself instead of simply capturing nature.

Now to look at this in comparison to algorithmic image generation we need to understand how it is seeing the database. After all, we are inspired by our own databases every day, but the accusation is that the AI is just copying the work. So let’s talk about Abstract Image Recognition Algorithms and how we all learn.

In middle school I had an art project and I remember that I wanted to render a scene in my head in an particular Anime style. I studied. I studied how they represented perspective and how that changed with intent and angle. I did the same for faces and clothes and clouds ad infinitum.

I built an internal relational database of manga art in the styles I was interested in. Did that mean I was copying previous art or is there a seperation created by the limited context, a degree of fair use created by the fact that all I copied was the angle to present the scene in, the general styles of nose and eyes.

Both artists and algorithms have wholesale copied sections of art and both have proven the possibility of learning and producing unique works inspired by others. The responsibility in both cases is to limit bad actors and encourage good actors.

And yet you may notice that I left the concepts of “authorship” and intentional subject placement as it relates to copyright out of this.

What portion of placement must an artist plan? What complications arise from this for the likes of Ansel Adams landscapes or Jackson Pollocks flung paint? And what about the AI engineer who is also an artist?

I will admit that I do not know the answers to these questions, but if you do we would love to hear from you.