

# Infinite Exclusivity: Generative AI's Endless Challenges to the “Exclusive Right” in European Copyright Frameworks

## Extended Abstract

“Oh, what a wonderful conference in Vienna / so many challenges for the future / of copyright law / for example / should I get to own this song?”

These lines are soulfully sung in the r&b song the author generated seconds before writing this sentence (available [here](#)). As generative AI (**GAI**) tools render contemporary works increasingly fluid and interactive, the modalities by which we engage with creativity are undergoing a paradigm shift, fundamentally challenging exclusivity-dependant modes of rights protection.

By directly engaging with pioneering current-state uses of GAI tools in contemporary music and art communities, the author presents a riposte to the mounting orthodoxy worldwide that we must determine a requisite level and nature of interaction with GAI tools to receive authorship over a work, exhibiting such an approach as expressly un-auditable and unenforceable. The paper is divided into the following five sections.

The *first* section of this paper exhibits the failing in utility of the European test in determining authorship over AI-assisted works. Its reliance on requisite authorial expression as a threshold for ownership renders it open to massively variable interpretation, and in turn, a grave risk to European copyright harmonisation and its single competitive market. For the copyright system to rely on watermarking or on creators documenting their workflows would require an extremely high level of accuracy, unlikely ever to be achieved. After decades of development of Digital Rights Management technologies, they are still circumvented with ease. This section exhibits how use of GAI tools renders creativity more beholden to the curation and arrangement of generated materials, such that a granular understanding of precisely what has been generated and how it has been changed by a human will become progressively more unmanageable and un-auditable. The author therefore argues that an inability to distinguish AI-generated from non-AI-generated components demands a copyright framework equally applicable to *all* creative products, regardless of the amount of AI-generation (i.e. the entire spectrum of human + AI combinations) used in their production.

The *second* section of this paper contextualises the current challenges posited to European copyright frameworks in a history of emerging technologies reshaping modalities of engagement with creative works, as they allow creative expression in modes previously impossible. This section introduces the concept of “copyleak”, wherein genre-specific compositional differences newly explorable due to emergent technological affordances, fall outside of copyright protection. The author argues that solely allowing ownership of outdated modalities undermines copyright’s ability to adapt to new forms of creativity enabled by GAI tools.

The *third* section of this paper expressly explores the fundamental dissonances between copyright mechanisms and the shifting modalities of AI-assisted works. As European case law has expressly incentivised using and modifying other artists’ work without attribution, provided it is unobservable that one has done so, this section exhibits how GAI tools now render such masking of reuse trivially achievable, undermining the rationale behind the

CJEU's decision. Furthermore, as GAI tools shatter traditional spatial and temporal boundaries for creative works, which can now be near-infinite in both size and length, they also allow for entirely fluid and interactive works, challenging the formal static boundaries around a work that copyright traditionally relies on. This section considers the emerging potential for interactive works that allow real-time consumer interaction to create live variations of a work, creating a challenging new spectrum – *the instrument to artwork spectrum*. If a work is able to re-generate variations of itself at the behest of the listener, then the work itself becomes something of an instrument to be played – reversing the autonomy of expression from the artist to the listener. This section explores the myriad challenges such a paradigmatic change imposes to our current exclusive rights systems which are fundamentally predicated on radically different modalities of creative engagement.

The *fourth* section of this paper collects the insights of the previous sections to clearly outline the dysfunction each of these interpretations will have in stimulating a competitive single market across Europe, as well as the profound risks such interpretative uncertainty has in disharmonising and therefore destabilising the single European market. In turn, it critically questions the sustainability of exclusive rights as a mechanism for market stimulation. As miniscule costs of investment now allow massive amounts of monopolised output, GAI tools fatally undermine the foundation of European copyright frameworks – that a rational actor would not invest in creation without being granted a monopoly over the product of their creation. In a core paradigm shift, music can now be “composed” faster than it takes to listen to it. Thus, to grant exclusive rights over tiny samples of component parts of massive works is inherently to incentivise mass generation of content. Although this stimulates *production*, it does not necessarily stimulate *innovation*. Thus, this section argues that European case law's reliance on exclusive rights over component parts of works (ie individual melodies) are expressly dysfunctional in stimulating innovation and a competitive market around creative works, either incentivising “creativity-mining” or allowing exploitation of the “independent creation” defense, especially in favour of larger artists against smaller artists.

Reliance on authorial intent as a pre-requisite to ownership does not mitigate these problems of scale, as authorial expressions can still be generated *en masse*. Ascertaining a requisite level of interaction with the tools for authorship is unpracticable and un-auditable. Yet, rejecting ownership of generated works *also* fails to stimulate innovation and a competitive market. To reject ownership of works that are unpredicted, as the US Copyright Office has done, is to either reject the formation of a market around these works outright or is to tacitly state that an exclusive right is not necessary in these works for a market to develop around them.

The *final* section thus posits that if exclusive rights in new works are no longer functional in achieving copyright's objectives, we must reconsider market incentives around contemporary creative products if generated materials are to form a significant part of these markets. The uncertainty around their ownership serves to fundamentally undermine copyright harmonisation efforts worldwide, with the potential for massive differences in legislative interpretation and policy destabilising international markets. This creates a legislative vacuum where private contracting by large stakeholders may take advantage of the uncertainty to direct legislative interpretation in their favour. This final section urges research into alternative models of rights protection and considers the potential benefits of attributional and profit-sharing models. The author concludes that we must not cling onto protection systems dependant on progressively more antiquated modalities of creative engagement, lest copyright serve to function as a temporally specific artifact of one era – no longer functional for the old or the new.