Evidencing the Value of Human Performance: Towards Re-thinking Performers' Rights for an AI World

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This article concerns one strand of questions raised by AI technologies for intellectual property law: the statutory reform of performers' rights, contained in Part II of the UK Copyright Designs and Patents Act 1988. In 2022, Equity, the UK actors' trade union, published its campaign document *Stop AI Stealing the Show*, its 'fight for performers' rights in the digital age' of AI, and this includes two sets of proposals that would involve changes to the protection of performers by Part II CDPA.[2] First, at present, the scope of performers' rights is confined to copying from the recording.[3] Adopting the arguments of Mathilde Pavis in *Artificial Intelligence and Performers' Rights*, Equity proposes an increase in the scope of protection to encompass 'performance synthetisation' i.e. copying a performance by 'digital sound and look-alike' without directly taking from the recording.[4] Secondly, Equity proposes that the performers' moral rights of attribution and integrity[5] are extended also to audio-visual performances, as envisaged by the *Beijing Treaty on Audiovisual Performances* (2012) which the UK is yet to ratify. These proposals have been

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[2] Equity, Stop AI Stealing the Show, April 2022, available at www.equity.org.uk/campaigns, at p.3 and p.11-12. On Equity's proposals for the introduction of statutory image rights, see the forthcoming E.I.P.R. article by Emma Perot: E. Perot, 'Anticipating AI: A Partial Solution to Image Rights Protection for Performers', (2024) *E.I.P.R.*.

[3] See, for example, the definition of performers' property rights contained in s.182A (reproduction), s.182B (distribution), s.182C (rental and lending) and s.182CA (making available), Copyright Designs and Patents Act 1988. See also the discussion in R. Arnold, 'Performers' Rights and Artificial Intelligence' in R. Abbott (ed), Research Handbook on intellectual property and Artificial Intelligence, (Cheltenham and Northampton: Edward Elgar) p.p.218-224, p.221.

[4] Equity, Stop AI Stealing the Show, April 2022, p.11, quoting Mathilde Pavis, 'Artificial intelligence and Performers' Rights', Submission to the UK Intellectual Property Office, 30 November 2020, responding to the Response to the UK Intellectual Property Office, Call for Views on Artificial Intelligence and intellectual Property, 2020. See also M. Pavis, 'Rebalancing our Regulatory Response to Deepfakes with Performers' Rights', Convergence: The International Journal of Research into New Media Technologies, 2021, 974-998, 991, recommending, amongst other things, protection for the 'reproduction of performances via synthetisation.'

[5] S.205C and s.205D Copyright Designs and Patents Act 1988.

examined by two parliamentary Select Committees in 2022[6] and 2023[7]. These Committees followed on from a UK Government statement in 2022 that Part II CDPA would be 'kept under constant review to ensure it meets the challenges of modern technology as part of the usual policy process and as guided in the evidence'[8] and the UK Government's subsequent conclusion that:

> at this stage, the impacts of AI technologies on performers remain unclear. It is also unclear whether and how existing law (both in the IP framework and beyond it) is insufficient to address any issues. If intervention is necessary, the IP system may not be the best vehicle for this. We will keep these issues under review from an IP perspective.[9]

At the time of writing, the outcome of a consultation run by the UK Intellectual Property Office (UK IPO) on the UK Government's intended implementation of the Beijing Treaty is awaited,[10] and a further UK IPO consultation is also currently open: *The Extension of Rights in Sound Recordings and Performances to Foreign Nationals*.[11] Amendments to rules on qualifying performances under Part II CDPA, to ensure compliance with the Rome Convention for the Protection of Performers, Producers of Photographs and Broadcasting Organisations, are also being addressed by a Bill currently before the House of Lords.[12] Most recently, the House of Lords' Communications and Digital Committee published the report *Large Language Models and Generative AI*, which, in the context of AI training and data mining, recommends (amongst other things) the UK Government

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[6] Oral Evidence: A Creative Future', House of Lords Communications and Digital Committee, 11 October 2022, at Q.13-Q.17, hearing evidence from Paul Fleming (Equity), Dan Conway (Publishers Association), Dr Andres Guadamuz (University of Sussex).

[7] 'Oral Evidence: Governance of Artificial Intelligence', House of Commons Science, Innovation and Technology Committee, 10 May 2023, HC 945, at Q.327-Q.411, hearing evidence from Jamie Njoku-Goodwin (UK Music), Paul Fleming (Equity), Coran Darling (DLA Piper) and Hayleigh Bosher (Brunel University). This evidence led to the publication of *The Governance of Artificial Intelligence: Interim Report: Ninth Report of Session 2022-23*, House of Commons Science, Innovation and Technology Committee, HC 1769, August 2023, and *The Governance of Artificial Intelligence: Interim Report: Government Response to the Committee's Ninth Report: First Special Report of Session 2023-24* November 2023, HC 248, but neither address the specific question of reform of Part II CDPA.

[8] Lord Callanan on behalf of the Department for Business, Energy and Industry Strategy, responding to the question tabled by Lord Clement-Jones, see Hansard: House of Lords, 'Intellectual Property: Entertainers', 25 May 2022, UIN HL522.

[9] UK Intellectual Property Office, Artificial Intelligence and Intellectual Property: copyright and patents: Government response to consultation, 28 June 2022, available at https://www.gov.uk/government/consultations, 'Other issues raised by respondents', para. 83.

[10] *Consultation on the Options for Implementing the Beijing Treaty on Audiovisual Performances*, UK IPO, September 2023, which was open between September and November 2023. The result of this consultation is currently awaited.

[11] This consultation was published in January 2024, and will be open until 11 March 2024.

[12] Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill, [HL] Bill 53, Cl.5.

to consider legislative change 'to ensure copyright principles remain future proof and technologically neutral.'[13]

In this article, we step back from practical politics, the specifics of parliamentary debates and the details of campaign documents. Fusing insights from three co-authors with different professional and scholarly expertise, [14] we instead take some first steps in a blue-skies approach to re-thinking performers' rights for an AI world: we identify a theoretical basis for law reform, and, through literature review, uncover a number of questions for a substantial programme of future research.

This article follows on from a previous article published by one co-author (Cooper) in the *E.I.P.R.* last year - *AI and Performers' Rights in Historical Perspective* - which made a, perhaps, counter-intuitive claim: while AI technology presents new challenges for performers today, we can reflect on the present moment by looking backwards to legal history. Building on two previous opinions in the *E.I.P.R.*,[15] and the context of a wider burgeoning field of copyright history scholarship more generally,[16] that co-author argued that looking backwards, before looking forwards, enables us to consider present debates with a more critical eye and that this holds true as regards the present moment in the debate of performers' rights. Specifically, looking back from the present moment exposes the contingency of the current legislative framework - there is nothing natural or inevitable about the performers' rights rules in Part II CDPA.[17] Further, while we lack an in-depth monograph-length study on the history of the protection of performers,[18] it is clear that at least some of the reasons that historically separated performers from authors, and resulted in performers (through 'performers' rights', Part II CDPA) receiving lesser protection to authors (through 'copyright', Part I CDPA), would be subject to challenge today.[19] Looking

[13] House of Lords Communications and Digital Committee, *Large Language Models and Generative AI*, HL Paper 54, February 2024, p.70 para. 247.

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[15] E. Cooper, 'Copyright History as a Critical Lens', (2022) 43(3) EIPR 128-131; E. Cooper and R. Deazley, 'Interrogating Copyright History', (2016) 38(8) EIPR 467-470.

[16] A seminal work in the historical turn in intellectual property scholarship is B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law: The British Experience 1760-1911* (CUP, 1999).

[17] E. Cooper, 'AI and Performers' Rights in Historical Perspective', (2023) 45(8) EIPR 444-453.

[18] In the absence of a monograph-length study of the history of the protection of performers, the reader is referred to the account in R. Arnold, *Performers' Rights*, (Sweet & Maxwell, 6th Ed. 2021), Chapter 1.

[19] See Cooper, 'AI and Performers' Rights in Historical Perspective', 449.

backwards, before looking forwards, means we should not be confined by existing intellectual property categories.

Legal history, then, opens up the possibility for us to re-imagine the law today, and this article takes preliminary steps towards answering how we should do that. Specifically, we propose a new approach to researching performers' rights: that the questions opened up by legal history – as well as the possible historically inspired solutions that it brings to our attention - should be placed into direct conversation with independent empirical research – social science standard work, that evidences the operation of the law in the real world today. Framing our method in this way – that determining the way forward for legal doctrine now, should be embedded in joined-up research spanning *both* past and present, the doctrinal and the empirical - immediately highlights gaps in knowledge.

First, while there is now a burgeoning field in the history of copyright law (the rights of authors), there is no in-depth and longitudinal account which places the legal history of the protection of performers centre-stage. Secondly, there are an increasing number of empirical studies on copyright, but only a few studies (which we reference below) are dedicated to performers and none specifically document the challenges of AI. Further, the competing conceptualisations of performance in existing empirical literature often implies at best an uncertainty, and at worst a hierarchy, as to the value of performance: the performer is simultaneously derivative, dependent, a conduit for externalising a work to the world, or 'in servitude' to it.[20] Accordingly, in our view, at the present moment – as human performers begin to be replaced by AI - we need first to evidence an answer to a preliminary question: what is the nature and inherent value of *human performance* and why human performance matters in an AI saturated world? Our purposeful separation of the human from the artificial enables us to contrast performance with the technical processes which are obfuscated behind the framing of 'AI'. Resisting the connotations of 'AI' from popular culture, the human-esque android or superintelligence, helps us draw attention to the reality of multiple, related technologies (machine learning, language models and generative adversarial networks) and the power(s) behind them. This separation is not necessarily oppositional to AI technologies; rather, by situating the human performer as a central object of study and elevating their importance, their relationship can be reciprocal. With the increasing risk that AI becomes 'cannibalistic', acknowledging the value of the human

[20] C. Waelde and P. Schlesinger "Music and dance: beyond copyright text?" (2011) SCRIPTed 257, 8(3); A, Aguilar "'We want Artists to be Fully and Fairly Paid for their Work': Discourses on Fairness in the Neoliberal European Copyright Reform" (2018) JIPITEC 9(2); J. Heredia-Carroza, L. Palma and L.F. Aguago "Does copyright understand intangible heritage? The case of flamenco in Spain" (2019) International Journal of Heritage Studies, 29(6) and McDonagh, Performing Copyright (Bloomsbury Publishing, 2021).

performer could in fact be a mode of *sustaining* the development of these technologies, rather than quashing them.[21] Absent new, human-generated materials, the quality and diversity of AI-generated works will inevitably diminish.

Evidencing the Value of Human Performance

In our view, evidencing the value of human performance – through independent academic research - should be the first step for future research about re-thinking performers' rights. In the absence of independent data about the value of human performance, we foreground the insights of one co-author (Bouvard), from her first-hand experience of working for two decades in the performing arts. In so doing, we seek to identify a number of claims that future independent academic research should seek to test through objective evidence.

At the present time, human performers are used in more arenas than ever before: in the more traditional areas of theatre, television, film, and radio, of course, but also in video games, audiobooks, advertising, corporate work, e-learning, audio description, ADR, language learning, educational materials, audio drama, podcasts, and the list goes on. The essence of the arts in any form is that they centre around the human experience; the performing arts convey this by means of human voices, bodies, and movements powered by human emotions to express the vast universe of quirks, particularities, outliers, and differences which humanity encompasses.

AI, in contrast, is built to find the statistical norm of whatever it is trained on and is purposely designed to eliminate those very outliers and exceptions. Thus, from the viewpoint of a performer, what is lost in AI processes of pattern recognition and reuse, is precisely what makes human performing art so exciting: "diversity and difference… going for the outlier, and the different view and the twist on things'.[22] Rather than creating something new and fresh based on human individuality, AI technology is fed by preexisting training data, selecting out and discarding any deviation from the norm. While this might be helpful and appropriate when used for, say, scientific analysis, it could lead to a troubling amplification of the biases, inaccuracies,

[21] M. Wong (2023) AI Is an Existential Threat to Itself, https://www.theatlantic.com/technology/archive/2023/06/generative-ai-future-training-models/674478/

[22] Laurence Bouvard, panel contribution to AI/ML Media Advocacy Summit, March 2023, full proceedings are available online: https://www.aimlmediaadvocacy.com.The Summit, through regular on-line events (of which this was the first) aims both 'to help protect artist rights in the fast-growing AI and technology space' as well as 'to educate our community as well as the public' regarding unethical technological practice. Ibid. Bouvard's comments are quoted in Cooper, 'AI and Performers' Rights in Historical Perspective', 449-450.

and prejudices that lurk in those training sets when used in an arts context, which could have a detrimental impact on society if left unregulated.

As things stand currently, technology has advanced to a point where it can be used both to recreate a particular recognisable individual and/or a particular performance, and allow that recreation to be used without any accountability to the individual copied;[23] it can also grab the performances of numerous individuals, again without accountability, and exploit those multiple performances to create a single stereotype that, while not recognizable as any one particular performer, can replace an entire group of diverse performers.[24] Viewed from the perspective of human performers, new technologies pose a double threat: to the individual recognisable performer who loses control over how their image is used, *and* simultaneously to subsections of performers within the industry who are forced to compete with an artificial stereotype of the communities they represent.

Human Performers and Diversity in the Performing Arts

These claims, made from the standpoint of performers, about the consequences of unregulated AI require serious study, particularly as they compound pre-existing issues in the performing arts' sectors, borne out by independent research. Concerns about the lack of diversity in the performing arts, in terms of, for example, gender, ethnicity and social class, have long been voiced. In 2018, the first sociological study on social mobility in the cultural industries was published - the *Panic!* Report - by a team of academics at the Universities of Edinburgh and Sheffield. Adopting an intersectional approach to workforce inequalities, the *Panic!* Report found there to be significant social and economic barriers to those from working class origins, women and those from Black, Asian and Minority Ethnic (BAME) backgrounds participating in the performing arts, as well as a number of other sectors of the cultural and creative industries.[25] Therefore, while labour displacement often follows technological change, some groups - those from groups least well represented in the performing arts at the present time – are very likely to be systematically and disproportionately affected by current job losses relating to AI, over others, due to their more precarious position in the labour market.

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[23] "Tom Hanks unwillingly cloned by AI to sell dental plans: The Hollywood star says he has nothing to do with his digital facsimile" reported Oct. 4, 2023 on https://www.techspot.com/news/100380-tom-hanks-unwillingly-cloned-ai-sell-dental-plans.html accessed January 2024.

[24] Murf.ai is a company that purports to provide "a voice for every creator" with categories such as "Author," "Corporate Coach," "Podcaster" among others on https://murf.ai/ accessed January 2024.

[25] D. O'Brien, O. Brook and M. Taylor, *Panic! It's an Arts Emergency*, Report published by Create London and Arts Emergency, April 2018. See also the essays in S. Mahfouz (ed.), *Smashing It: Working Class Artists on LIfe, Art and Making it Happen* (Westbourne Press, London).

The *Panic!* Report, which dates from 2018, indicates that challenges to maintaining a performing career were already in existence before AI came along, which included not only unstable pay and conditions but also a paucity of opportunities for those from marginalised social and economic groups. While the first-hand experience in performing arts of one co-author (Bouvard) is that much effort has gone into addressing these imbalances in recent times (e.g. there has been a wider understanding of the importance of diversity and inclusion in the arts for a healthier representation of society) various economic headwinds, including the COVID-19 pandemic and arts funding cuts, had already started to chip away at these advances, forcing practitioners out of the industry. The concern, then, from a performer's perspective, is that the introduction of AI technology, if left unregulated, could accelerate this trend and lead to a hollowing out of the industry whereby only a few stars and amateurs remain, with the remaining ecosystem of performers in between removed, eliminating any meaningful diversity in performers.

In our view, evidencing these wider social implications of AI for diversity in the arts, is a crucial first step for academic research now. We should recognise that human performers are *not* a monolithic group and, in recalibrating performers' rights for an AI world, we should situate legislative policy in the broader context of evidence about how best to promote diversity in our culture and creative markets. Accordingly, with the objective of foregrounding the human performer, and considering also the social context for the promotion of diversity in our culture, we now look to legal theory, specifically to Neil Netanel's seminal article published in Yale Law Journal in 1996, at the advent of the internet: *Copyright and a Democratic Civil Society*.[26] Taking inspiration from Netanel's paradigm - which concerned authors not performers, was written in response to 1990s digital technology, not AI, and concerned expressive diversity, not demographic diversity - we contemplate how performers' rights could be radically re-thought to provide the legal underpinning for a future diverse, independent and pluralist civil society.

Performers' Rights and Legal Theory: Democratic Civil Society in an AI World

In *Copyright and a Democratic Civil Society*, Neil Netanel put forward a theoretical underpinning for copyright law, distinct from neoclassical economics and its minimalist critics, as 'a state measure that uses market institutions to enhance the democratic character of civil society' through two 'democracy enhancing functions'.[27] First, the 'production function', providing 'an incentive for creative expression on a wide array of political, social, and aesthetic issues', in turn 'bolstering the discursive foundations for democratic culture and civic association'. Secondly, a

[26] N. Netanel, 'Copyright and a Democratic Civil Society', 1996, 106(2) The Yale Law Journal, 283-387.

[27] Netanel, 'Copyright and a Democratic Civil Society', 290.

'structural function': supporting 'a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy'. Copyright's 'primary goal', on this view, is 'not allocating efficiency, but the support of a democratic culture'.[28]

A democratic paradigm, then, brings to the fore that which neoclassical analysis 'tends to relegate to the margins': 'the less monetizable public interest in expressive diversity'.[29] Copyright, on Netanel's analysis, is rather about the 'public benefit' of 'self-reliant authorship' and enhancing 'the independent and pluralist character of civil society.' Accordingly, the role of copyright is both to promote 'the democratic character' of public discourse, by 'underwriting an independent expressive sector', as well as 'setting limits on private control of creative expression' (e.g. in allowing 'transformative or educational uses of existing works').[30] In doing so, 'copyright helps to ensure the diversity and autonomy of the voices that make up our social, political, and aesthetic discourse.'[31]

Taking inspiration from Netanel's paradigm, which could, in a programme of future research, provide a way into reconceiving the role of performers' rights today, this article identifies some pathways for blue-skies re-thinking on performers' rights, addressing two legal areas where change is currently being proposed: the reform of economic rights (increase in scope) and moral rights (rights of attribution also for audio-visual performances). In doing so, we draw together insights from the various expertise of all three co-authors: in academic research - legal history and empirical research - but also the lived experience of a performer in the real world today.

Re-thinking Economic Rights

As regards the scope of performers' economic rights, current rules confine legal protection to taking from a 'recording'. This means that the copying of a performance through digital sound-a-like or look-a-like, however perfect and faithful to the original, is not an infringement of performers' rights.[32] As explained in *AI and Performers' Rights in Historical Perspective*, stepping back from the present moment and looking to the past can de-naturalise existing legal rules, and point to the potential for change. Further, while the past should never be approached as

[28] Netanel, 'Copyright and a Democratic Civil Society', 290.

[29] Netanel, 'Copyright and a Democratic Civil Society', 291.

[30] Netanel, 'Copyright and a Democratic Civil Society', 291 and 288.

[31] Netanel, 'Copyright and a Democratic Civil Society', 386.

[32] On the limits of protection by the law of passing off, see Cooper, *AI and Performers' Rights in Historical Perspective*, 451, as well as the forthcoming article by Emma Perot in the *E.I.P.R.*: 'Anticipating AI: A Partial Solution to Image Rights Protection for Performers', forthcoming, 2024.

providing definitive solutions, or binding us in what we decide today, a legal historical perspective can provide a critical sounding board for current debates and be a source of ideas for further exploration.

In the case of the scope of protection for performers' rights, while we lack an in-depth history of performers' rights, the history of copyright can provide us with examples of how we might formulate rules, in line with the democratic paradigm: rules that both better reflect the value of performance as a creative endeavour (and enable performers to obtain remuneration for such uses) while also ensuring balance, to safeguard performing freedom of other human performers. Infringement rules are as much about determining what is protected, as what is not, and looking backwards to various points in time when the scope of copyright was 'neither black nor white' but about determining the 'humble grey' can provide a critical sounding board for ideas today.[33] For example, a key nineteenth century decision on copyright infringement - the ambit of protection offered by engraving copyright - was *West v. Francis* (1822) where Bayley J.held:

> A copy is that which comes so near to the original to give to every person seeing it the idea created by the original.[34]

This dicta was cited with approval by the House of Lords in *Hanfstaengl v. Baines* (1894), a case which is often referred to for its restraint in determining the scope of painting copyright (holding that copyright in a painting was not infringed by a 'living picture' on stage in a theatre, where actors were arranged so as to represent the painting).[35] Indeed, in delivering the Court of Appeal ruling, which was affirmed by the House of Lords, Lindley L.J. expressed that, as copyright 'is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do', 'care must always be taken' to ensure copyright did not become an instrument of 'oppression and extortion.'[36] Looking backwards before looking forwards reminds us, then, that expanding the scope of performers' rights today beyond taking from the recording need not result in over-broad monopoly rights that become instruments of oppression and extortion. Taking inspiration from an earlier point in time, an original performance could be

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[33] T.E. Scrutton *The Law of Copyright*, 1st ed. (London, John Murray, 1883) p.p.1-2, discussed in K. Bowrey, 'On Clarifying the Role of Originality and Fair Use in Nineteenth Century UK Jurisprudence: Appreciating 'the Humble Grey which Emerges as the Result of Long Controversy' in C,W, Ng, L. Bently and G. Agostino (eds) *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Oxford, Portland OR, Hart Publishing, 2010).

[34] (1822) B &Ald. 737, 743; 106 ER 1361, 1363.

[35] [1895] AC 20, 27, per Lord Watson, who refers to Bayley J's test as coming 'nearer to a definition of what constitutes copying than anything which is to be found in the books.' For consideration of the ruling in *Hanfstaengl* in recent times see D. Vaver 'Intellectual Property: the State of the Art', (2000) *Law Quarterly Review* 621, 625.

[36] [1894] 3 Ch 109, 128.

protected against any digital sound or look-a-like which comes, to adopt Bayley J's test, so near to the original to give every person seeing it the idea created by the original, leaving the underlying building blocks of performing style free for all to use.

While legal history can help us to see possibilities for legal change and provide us with inspiration for how we might re-think current rules, this article is informed by the viewpoint that good policy on intellectual property should ultimately be evidence-based. Particularly given the mysticism and opacity that surrounds the operation of AI, it is important that policy does not likewise become embroiled in myth. This raises the question of what we can learn from existing empirical studies[37] which examine, through social science methods, how people experience the law in the real world.

Of the existing corpus of empirical studies, the economic component of performer's rights has received most scholarly attention. While none of these academic studies specifically address AI, what can we learn from this existing scholarship? Importantly, the studies are unanimous in finding that the award of a right *in itself* (copyright or otherwise) rarely incentivises authors and performers to produce more works and performances.[38] However, and more precisely, they find that the awards *associated* with the grant of a right certainly are indeed meaningful. The most influential source of extrinsic incentive linked to the grant of a right is, unsurprisingly, remuneration.[39] Evidence on authors' earnings, then, debunks a pervasive 'myth': 'that creative labour is an inexhaustible resource that is constantly replenishing itself through the altruism of our creators" and that 'you don't have to remunerate them properly as their art "will feed them" alone'.[40] What is most striking about these empirical findings is that the monetary award required to incentivise and sustain creative careers is not exorbitant: often, it is concurrent with a minimum wage, or fair and proportionate payment to services rendered. The requirements

[37] Empirical studies were identified via the CREATe, Copyright Evidence Portal (University of Glasgow, 2014), copyrightevidence.org. This online resource aims to catalogue all empirical studies relevant to copyright (and by extension, to performer's rights). At the time of writing, over 900 studies are available on the resource.

[38] Notably: J. J. Liu "Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation" (2015) The Columbia Journal of Law & The Arts, 38(4), pp. 467-548, and R. Towse "Copyright Reversion in the Creative Industries: Economics and Fair Remuneration" (2018) 41 Colum. J.L. & Arts.

[39] The extensive empirical work undertaken in this area is summarised in: A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/, p9.

[40] Amy Thomas presenting to the All party Writers Group Winter Reception at the House of Commons in 2022, presenting the findings of A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/

around this expectation – to receive a fair and proportionate payment - are distinctly human: to keep the lights on, to stay warm, to feed oneself and their loved ones.[41]

Despite this modest goal, the aggregate findings from studies of musicians[42] and voice actors[43] indicate that this is rarely achieved, with highly skewed, winner-take-all markets that crowd out all but the most established, profitable works, and by extension, their authors or performers.[44] A sustainable income as an author or performer is thus an exception rather than a rule. Resultantly, creative markets become the remit of only those who can subsidise their creative income with other sources, e.g., a wealthier spouse, or a second job. Whilst this is partially the nature of cultural markets,[45] the expectation of such a subsidy, and the assumption of structural access embedded in it, results in the inevitable crowding out of (diverse) authors and performers who often cater to underserved audiences.

Facially, the freedom of contract ethos in the UK results in an equal un-opportunity for authors and performers as regards their economic recompense, regardless of their demographic background: as a general rule, the law does not interfere with private, contractual negotiations. The 'freedom of contract' perception can be dangerous because it disguises the structural, systematic factors that dictate who can participate in, and sustain, creative markets. In particular, most authors and performers suffer from disproportionately low bargaining power when in negotiations about the exploitation of their work. Empirical studies suggest that most authors and performers are not aware of, nor do they fully understand, their rights nor how to negotiate them effectively - most do not attempt to negotiate what are perceived as fixed

[41] ibid.

[42] P.C. DiCola "Money from Music: Survey Evidence on Musicians' Revenue and Lessons about Copyright Incentives: (2013) Ariz. L.R. Rev. 55, 301; L. Guiabault, O. Salamanca and S. von Gompel "Remuneration of authors and performers for the use of their works and the fixations of their performances" (2015) A report commissioned by the European Commission; C. Buccafusco and K. Garcia "Pay-to-Playlist: The Commerce of Music Streaming" (2021) U.C. Irvine Law Review, 12(3); Intellectual Property Office "Music creators' earnings in the digital era" (2021), https://www.gov.uk/government/publications/music-creators-earnings-in-the-digital-era; M. Willekens, J. Siongers, L. Pissens and J. Lievens "Behind the Screens: European survey on the remuneration of audiovisual authors" (2019) FERA Report; K. Garcia "Contracts and Copyright: Contemporary Musician Income Streams" in The Oxford Handbook of Music Law and Policy (London: OUP, 2020) and; R. Towse "Dealing with Digital: Economic Organisation of Streamed Music" (2020) CIPPM/Jean Monnet Working Papers, No 1-2020.

[43] M.G.A. Pavis, H. Tulti and J. Pye "Fair Pay/Play in the UK Voice-Over industries and in the US" (2019) https://zenodo.org/records/3340920

[44] A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/

[45] M. Kretschmer, G.M. Klimis and CJ Choi "Increasing Returns and Social Contagion in Cultural Industries" (1999) British Journal of Management, 10, pp. 61-72.

offerings from key gatekeepers.[46] As a result, they are more likely to agree to unfavourable contractual terms with less control over their earnings, particularly with regard to the exploitation of works or performances through new modes of technology (read: AI).[47]

As a result, the distribution of income is not necessarily a natural or inevitable outcome of market structure, but rather is a reality that is sustained by gatekeepers who make commercial and strategic decisions about the distribution of works and corresponding awards to the people who create them.[48] For this reason, even statutory remuneration rights that mandate equitable payments can still be off-set by changes to up-front costings to contracts.[49] Indeed, it would seem that diversity is not monetizable - but especially where gatekeepers to cultural markets hold a disproportionate amount of bargaining power.[50]

These conclusions from existing empirical studies – that key gatekeepers can dictate and distort market conditions for authors and performers - are also borne out by the lived experience of one co-author (Bouvard) of working in the performing arts sector. Even before AI came along, performers have had ongoing issues with securing the value of their work and sustaining a career in the platform economy. While their performances have never been so successfully exploited as in this day and age, as can be evidenced by the rise of the streaming services, or the booming profits of the games industry globally,[51] performers themselves – despite providing the labour that underlies this wealth - have seen their rights and earnings dwindling over time. Indeed, the recently settled SAG-AFTRA entertainment union strike in the United States was triggered by concerns that included both the impact of AI and rapidly diminishing ongoing payments from key gatekeepers, such as publication companies or content aggregators.[52] As the longest and largest withdrawal of creative labour in the union's history, this strike represents a high

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[46] A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/, p9

[47] R. Towse "Dealing with Digital: Economic Organisation of Streamed Music" (2020) CIPPM/Jean Monnet Working Papers, No 1-2020 and P.C. DiCola and D. Touve "Licensing in the Shadow of Copyright" (2014) 17 Stanford Technology Law Review 397

[48] Indicative data from independent authors suggests a more diverse market where traditional gatekeepers are removed, see: A. Thomas. H. de Suarez and M. Battisti "Indie Authors' Earnings 2023" (2023) CREATe Working paper 2023/4

[49] R. Towse "Copyright and economic incentives: an application to performers' rights in the music industry" (1999) Kyklos, 52(3), 369-390.

[50] Netanel, 'Copyright and a Democratic Civil Society', 291.

[51] "Video game industry – Statistics & Facts" https://www.statista.com/topics/868/video-games/ accessed January 2024.

[52] "Tentative Agreement Reached" https://www.sagaftrastrike.org/ accessed January 2024.

watermark for resistance to precarious and worsening working conditions in the creative industries.

Commensurate with the empirical studies detailed above, these working conditions are fundamentally dictated by contract and the transaction of rights between performer and gatekeeper therein. While, from an historical perspective, legal protection for performers has increased during the course of the second half of the twentieth century, contracts have become less favourable, specifically as regards the pattern of performers' remuneration.[53] Since the 1950s, in the audiovisual industry, actors were compensated by a system of ongoing payments which ensured a certain percentage payment each time the project was aired or used (e.g. films showing in different cities or territories or TV series or radio dramas airing at different times or on different stations), thus providing the performer with an ongoing stream of revenue for the continued exploitation of their performance.[54] An on-going revenue stream is critical to sustaining a career in an industry where work-flow is notoriously erratic and performers can go long periods between booking jobs.

Despite being the prevalent mode of revenue sharing for performers since the 1950s, there is an increasing trend to forgoing the system of ongoing payments for ongoing exploitation of the performance in favour of one-off payments or "buy-out" contracts.[55] Such contracts are typically offered at the conclusion of the project in exchange for the assignment of all of the performers' economic rights, as well as a waiver of moral rights (to which we return in the next section). The cumulative effect of such a transaction is to alienate the performer from their work, both economically and creatively. By way of example, some companies have become notorious for their sweeping terms, requiring performers to sign away their rights to their work, rather astonishingly, on all planets on all technologies in all eras to come, such as the following taken from a recent voiceover contract of an established audiovisual company:

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[53] See Cooper, 'AI and Performers' Rights in Historical Perspective', 448. For instance, assignable 'performers' property rights' were not introduced until 1996: UK Copyright and Related Rights Regulations 1996 (SI 1996/2967 reg. 21(1), implementing EU Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61. This observation in turn opens up questions for detailed historical study: to uncover with greater specificity and in a greater range of circumstances, how the introduction of new legal rights can be translated into improved remuneration through contracts.

[54] SAG AFTRA (date unknown) History of Residuals, https://www.sagaftra.org/membership-benefits/residuals/history-residuals

[55] A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/, p67 – 68.

> "[The Narrator] hereby irrevocably and unconditionally waives the benefits of any provision of law known as 'moral rights'... or any similar laws of any jurisdiction.
>
> The Narrator hereby assigns to the Company absolutely the entire copyright (including without limitation any rental and lending rights and the right to communicate to the public) throughout the universe by all means and in all media whether now known or hereafter developed for the full period of copyright and all renewals, revivals, reversions and extensions thereof (and thereafter, in so far as the Narrator is able, in perpetuity) and, to the extent relevant, by way of present assignment of future copyright."[56]

As contracts evidently become more weighted toward gatekeepers and clauses become onerous and all-encompassing, performers are thus presented with a stark dilemma: agree to any and all terms presented by the employer, no matter what these entail, in order to book the job, and risk losing all control over what happens to the work; or refuse to agree and not only risk not being paid, but not being able to obtain a booking from that company or possibly others ever again.

Underlying these findings is a glaring and worsening power imbalance that is exacerbated when AI is added to the equation. In this sense, AI is not necessarily a novel disruptor to the performers' market, but an accelerant to worsening pre-existing conditions. It is one thing to lose potential income for a performance through changes in contracts, that eliminate a previous practice of ongoing payments. However, it is another issue entirely when contracts a performer may have signed years ago - on a 'take-it or leave it' basis - now, in ways that could never have been predicted, give free rein for that same performance to be sold on as training data for AI without need for permission or compensation, and developed into a synthesised replication of their own voice, thus potentially leading to the original performer losing not just work, but their entire career, as well as loss of control over their reputation. The now famous case of Beverly Standing, the voice artist who took legal steps against TikTok for taking her voice from a completely unrelated job and, through AI, creating a digital sound-a-like of her own voice, such that they 'could get me to say anything', is the exception rather than the rule.[57]

Drawing these insights together, academic empirical studies both disprove that creative labour is 'an endlessly replenishable resource not tied to economic reward',[58] while also highlighting

[56] Taken from UK television production company contract signed between voiceover performer and company in June 2020.
[57] "Actor sues TikTok for using her voice in viral tool" https://www.bbc.co.uk/news/technology-57063087 accessed January 2024.
[58] A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, p.8.

market-place inequalities in how authors' and performers' economic rights are contractually exploited in the real-world. These inequalities have a detrimental impact on author/performer earnings and suggest that economic rights are failing to support diversity of participation in creative markets. As one co-author commented in presenting a recent study of authors' earnings:

> There are substantial inequalities between those who are being adequately rewarded for their writing, and those who are not. This begs the question whether we are stifling our creative culture by disincentivising a broad and diverse group of writers from participating in this market.[59]

These observations should be placed within the context of an 'arguably global trend towards the de-valuing of creative labour, itself contributing to 'untenable market conditions'.[60] The lived experience of one co-author, is that, in the case of performers, AI has accelerated both inequalities in participation and the devaluing of performing labour in what has long been an 'employer's' market; the power imbalance favouring 'employer' over performer, is such that the law provides no meaningful counter-weight to social relations. AI and its impact on performers, then, is a new context for academics to explore these themes and their relation to legal policy.

Taking inspiration from Netanel's democratic paradigm, what should the next steps be if we are to reconfigure performers' economic rights, such as to support a diverse and independent civil society? In our view, there are urgent research questions that need to be addressed now: we need independent empirical evidence to document or disprove these claims of worsening conditions, to track how these relate to diversity in the performing arts, and specifically, to elucidate how legislative change to increase the scope of performers' rights – to also cover reproduction through digital sound-alike and look-alike – would then impact on performer remuneration and diversity.[61] Specifically, independent research should address whether increasing the scope of performers' rights would, in fact, empower performers (or their representative body through collective bargaining) to better secure fair remuneration in contractual negotiations.[62] As noted at the outset of this article, empowerment to the performer

[59] A. Thomas in University of Glasgow Press Release (2022) "Future of UK's Writing Profession Is Under Threat", https://www.gla.ac.uk/schools/law/news-and-events/headline_900300_en.html
[60] A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, p.7.
[61] As we explain in footnote, there is also a historical dimension to the question: in what circumstances the introduction of new rights can meaningfully translate into better remuneration for performers.
[62] Suggestions for progressive changes in policy for sustainable cultural markets are detailed in A. Thomas, M. Battisti and M. Kretschmer (2023) "Authors' Earnings in the UK: Policy Brief", https://pec.ac.uk/policy-briefings/authors-earnings-in-the-uk

does not need to be conceived of as oppositional to AI, but rather is reciprocal: incentivising human-created performances creates a sustainable future where corpuses of new material can processed on fair and transparent terms.

Re-thinking Moral Rights

Turning to re-thinking moral rights, again, while legal history may not provide definitive answers, it can provide us with inspiration. Particularly, legal experience in past times reminds us of the importance of attribution to facilitating the mobility of creative labour: attribution can facilitate author/performer discoverability, thereby enabling authors/performers to obtain new work elsewhere and operate as a counter-balance to structural changes that might render an author's/performer's contribution invisible. As explored in *AI and Performers' Rights in Historical Perspective*, that was the case in the late nineteenth century,[63] when photography was organised on an industrial model; attribution of photographer employees on their photographs would ensure that photographers could seek employment elsewhere, rather than having their contribution effaced by norms of industrial authorship (where only the employer was attributed). As we move towards a world saturated by AI-generated content, a lack of meaningful attribution rights might efface the contribution of human performers with a negative impact on their discoverability and future employment. Accordingly, a legal historical approach opens the way for re-thinking the function of attribution rights in an AI world as a source of performer empowerment.

What do empirical studies suggest about how performers' moral rights operate in the real-world today? Specifically, do moral rights today, in practice, facilitate performer discoverability?

Compared to the scrutiny paid to economic rights for performers, moral rights have been relatively understudied by empirical researchers. Yet paradoxically, and perhaps as a result of the low economic returns that the majority performers can evidence in return for their rights, moral rights are perceived by some performers as the more valuable of the set.[64] The protection offered to one's personal convictions is attractive, with the possibility of the integrity right safeguarding against the harms of new technological harms, such as deepfakes[65] and revenge

[63] See Cooper, 'AI and Performers' Rights in Historical Perspective', 450.

[64] See L. McDonagh, Performing Copyright (Bloomsbury Publishing, 2021) , p. 159: 'it is not only the artist who benefits from the moral right of integrity; it is the public as well'.

[65] MM. Pavis "Rebalancing our regulatory response to Deepfakes with performers rights" (2021) Convergence 27(4).

porn.[66] The integrity right has also been explored as a means to enforce more inclusive representation in cultural goods themselves as protection against, e.g., 'whitewashing'.[67] By extension (though yet unstudied), the right to integrity could be extrapolated to the harms of synthesisation by generative AI for performer soundalikes or lookalikes, especially for derogatory purposes where the performer's personal convictions are misrepresented.[68] And indeed, as the above historical comparison also supports, there may also be an economic benefit to meaningful moral rights if attribution can improve a performer's discoverability.[69]

However, the reality is that moral rights can often be meaningless post-conclusion of contract, as the narration contract quoted above illustrates. In contrast to the more expansive protections for moral rights offered elsewhere (particularly continental Europe), the UK has a more limited scope. In the UK, moral rights are not effective unless they are asserted,[70] and can also be waived by contract.[71] Resultantly, moral rights are only effective insofar as a performer is both aware of them and has the bargaining power to retain them. But herein lies a contradiction between legal theory and practice: despite the legislative intent for moral rights to be 'sticky' (non-transferrable) in acknowledgement of a *personal* connection with a performance, the experience of our co-author suggests that the assumption of *transferability* of moral rights is pervasive amongst performers. Whilst the conceptual differences between 'transferability' and 'waivability' of rights is certainly meaningful for lawyers, for the performer the outcome is ultimately the same: regardless of whether moral rights are waived or 'transferred', they are no longer benefitting from them. This is a distortion in meaning caused by the form and context of a contractual offering. If a moral rights 'transfer' is offered on a 'take it or leave it' basis in a boilerplate format with no scope for negotiation, then, regardless of the fact that performers

[66] Y.H. Lee "Delivering (up) a copyright-based remedy for revenge porn" (2019) Journal of Intellectual Property Law and Practice, 14(2), pp. 99-111.

[67] J. Tanaka "Promoting Asian American Representation Through Copyright: Moral Rights in The Last Airbender and Fair Use in Ms. Marvel" (2018) 25 Asian American Law Journal, 88.

[68] Noting, however that the precedent set in *Confetti Records & Others v Warner Music UK Ltd*. [2003] EWHC 1274 suggests that the (copied) underlying work must be 'decipherable' in the new work to assess an integrity claim (at para 153).

[69] C.J. Buccafusco, C.J. Sprigman and Z.C. Burns "What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property" (2012) Boston University Law Review, 93, 1; K. Pappalardo and P. Aufderheide "Romantic Remixers: Hidden Tropes of Romantic Authorship in Creators' Attitudes about Reuse" (2020) Cultural Science Journal, 12(1), pp 1-12 and; L. McDonagh, Performing Copyright (Bloomsbury Publishing, 2021)

[70] CDPA s.77(1) (authors) and CDPA s.205D (performers).

[71] CDPA s.87 (authors) and CDPA s.205J (performers).

wish to retain their moral rights,[72] and regardless of the fact that they cannot technically transfer them, they are nonetheless alienated.

As such, empirical studies find that moral rights are systematically waived in sub-sectors of the creative market: full time authors waive their moral rights in almost half of all their contracts.[73] Qualitative evidence from these authors suggests that, whilst they would wish to retain these rights (and akin to creators' earnings contracts detailed above), the waiver is offered on a 'take it or leave it' basis, often in boilerplate format with no scope for negotiation.

Empirical research accords with the lived experience of the law by one co-author (Bouvard). At present, actors have moral rights of attribution in relation to certain performances only: live performances in public or their live broadcast, and (in certain circumstances) *sound* recordings of performances, but, crucially, *not* recordings of audiovisual performances.[74] The focus of recent campaigns, therefore, has been on removing, what Richard Arnold terms, writing extra-judicially, 'the present discrimination between performers whose performances are recorded in sound recordings' (who do have attribution rights) and 'those whose performances are recorded in films' (who have no such rights) through the implementation of the Beijing Treaty.[75] Yet, these legal distinctions are meaningless in many real-world contexts: even in fields where attribution rights *do* apply (e.g. audio-drama) for the majority of actors - ordinary 'jobbing actors' (who undertake discrete pieces of creative work for different parties) but are not 'stars' or well-known 'names' - attribution rights mean very little in practice. Such actors are often *not* credited in a clear or obvious way (e.g. aggregated with non-specific attributions as having been supplied 'with the talents of' or 'featuring'), and sometimes not at all, even for substantial roles, and this anonymity heightens the industry perception that actors *can* be replaced by machines.[76] In relation to audio work: 'In our industry… there is a sense of "we don't know who you are, so we

[72] A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/, p51

[73] A. Thomas, M. Battisti and M. Kretchmer (2022) UK Authors' Earnings and Contracts, https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/, p51

[74] S.205C(1) CDPA, read in conjunction with the definition of 'performance' in s.180(2) CDPA. Attribution rights apply when *sound* recordings of live performances are either communicated to the public or copies of such a *sound* recording are issued to the public.

[75] Arnold, *Performers' Rights*, p.53, para. 1-121.

[76] Laurence Bouvard, panel contribution to AI/ML Media Advocacy Summit, March 2023, full proceedings are available online: https://www.aimlmediaadvocacy.com. Also in this panel discussion, Bouvard commented more generally on contractual practice as follows: 'we are bought out and often in the contracts we have it says 'you sign over your rights, in perpetuity, in the known universe, for any technology now in the future' and if you don't, you don't get paid and you are not used.'

won't put you in the credits", but if you aren't in the credits, then anyone can do the job, so let's get a robot to do it.'[77]

Further, as regards video games, wider contractual practices indicate that the enforcement of moral rights would be impossible in practice. As a journalist writing for *The Guardian* noted, drawing on interviews with performers:

> I was struck by the lack of transparency and absence of good faith that was shown towards performers and the vital role that they play in a game's success. Some [performers] say they work on games without ever even knowing which game it is, and are bound by NDAs and project code names; sometimes they're taken by surprise when a game is released and their voice features in it.[78]

Accordingly, in the experience of one co-author (Bouvard), with very rare exceptions, the web of contracts underpinning video games keeps the performers as a relatively anonymous group who are not adequately attributed or associated with the game. This perfunctory attribution can create barriers to performers trying to build a reputation and a career both in games and elsewhere in the entertainment industry. Taken together, this real-world testimony supports opening up research into the wholesale reconsideration of moral rights: not just a review of rules of assertion and waiver but widening the ambit of the contractual practices under consideration beyond intellectual property clauses (e.g. also to include the impact of NDAs on moral rights in practice).

Thus, the trajectory for moral rights, is similar to economic rights: useful for authors and performers in theory, but only insofar as they can be meaningfully actualised in reality. This conclusion – that contracts are a significant barrier to actualising a diverse and demographic cultural market - show that 'bad outcomes' for authors and performers are not necessarily synonymous with 'bad deals', but rather may be created by 'bad law'. In the UK, copyright and by extension performers' rights, are deliberately constructed to offshore the responsibility for performers' welfare to the market's willingness to pay for it. As evidenced above, constructing the law in this way does not support a diverse, nor sustainable, creative market. If anything, generative AI, and the consequent risk of labour displacement for performers, may be an accelerant to the inequalities in-built into legislative rules.

Conclusion – Evidencing Performers' Rights

[77] Ibid.
[78] K. MacDonald, 'Pushing Buttons: the voice actors speaking out against NDAs, code names and poor pay', *The Guardian*, 18 October 2022.

In this article we have drawn together a number of strands - legal theory, legal history, empirical and real-world testimony - so as to inform the first steps of a substantial future programme of blue-skies research into re-thinking performers' rights for an AI world. Our review of existing literature reveals that whilst the formation of performers' rights is facially neutral (an equal un-opportunity), the benefits of this system inevitably flow disproportionately to those with the power to exploit it. In respect of both economic and moral rights, this reality becomes actualised during the formation of contract, which is evidently a linchpin for divergence between the law in theory, versus the law in practice. In their present format, any theoretical application of performers' rights when applied in reality – however minimal, feasible, or technical – have a nil effect where the disparities in bargaining power are so significant. This disparity is exacerbated by the lack of consideration for performance as a distinct area of study worthy of separate treatment in itself.

Thus, in terms of research priorities, we support evidencing the *value of human performance*. This is a twofold task. First, to reverse the treatment of the performer as complementary or in servitude to the author as 'primary' creator, we should evidence the value a performer *gives* to their performance by better understanding its nature, and by considering the impact of AI on the diversity of human performers and our civil society now. Secondly, we need to evidence the value subsequently *received* by the performer as an individual, to understand, in AI world, how this can translate into sustainable remuneration such as to enable the participation of a diverse group of performers in our civil society.

Specifically, fusing historical and empirical insights, we need evidence of how performers' rights can be recalibrated, to support diverse, independent and pluralist expression in an AI world. As regards economic rights, using historical analysis as a sounding-board for ideas, we need to evidence the consequences of increasing the scope of performers' rights, including asking whether such legislative change would indeed improve diversity in civil society (in enabling a diverse creative workforce to take advantage of new remuneration opportunities offered by AI). Turning to moral rights, a legal historical mantle, that denaturalises rules of assertion and waiver, opens the way for empirical studies that evidence how best to ensure that human performers can be identified (a precondition to being hired for another job and remaining in work) in an AI saturated world, and how changing rules of assertion and waiver might, in turn, better support diverse, independent and pluralist expression in an AI world.