

A look at the

LEGAL AND MORAL CHALLENGES OF AI

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The views and opinions expressed by the speakers have been argued and redefined for centuries. They will be argued and redefined again tomorrow, and the next day, and the next. Art theory is an entire section of the bookstore. The speakers do not and cannot possibly encompass all facets of the discussion. If you want to let us know later what we missed or were wrong about, we are available at the rate of one drink per complaint.

The structure of the discussion

- 1. WHAT IS INTELLECTUAL PROPERTY?**
- 2. WHAT IS ART?**
- 3. WHAT CAN AI DO WITH MY ART?**
- 4. WHAT CAN I DO WITH AI'S ART?**

Where Do You Stand?

69%

worried about
losing their
job to AI

Source: Resume Genius (2023)

64%

would trust a
robot more than
their manager

Source: Oracle (2019)

What is Intellectual Property?

**A creation of human
intellect**

Type

Patents: new and useful products or processes.

Copyrights: original works of authorship, such as books, music, paintings, sculpture, and films.

Trademarks: words or marks used to identify and distinguish the source of goods or services.

Trade secrets: confidential information that gives a business a competitive advantage.



Limitations

- 1. Lack of originality:** creation must be sufficiently different from existing works to be considered original.
- 2. Ideas, concepts, and methods:** IP laws protect expressions of ideas, not the ideas themselves.
- 3. Functional works:** Copyrights apply only to works that are created for aesthetic or literary purposes.
- 4. Common knowledge and trivial:** only works that are the result of creative effort are protected.
- 5. Works created by government employees:** the government is the author, and the public has a right to use.

Rights

- 1. Right to use:** exclusive right to use their creations in any way they see fit.
- 2. Right to exclude:** prevent others from using their creations without their permission.
- 3. Right to transfer:** sell, assign, license, or give their ownership rights to others.
- 4. Right to adapt:** find and create new uses for their creations.
- 5. Right to own:** non-economic rights that protect the integrity of the creation and the reputation of the creator. (i.e. right of attribution, right to prevent the work from being distorted or mutilated, and right to prevent the work from being associated with undesirable commercial endorsements).

Why Protect IP?

1. Encourages Innovation and Creativity
2. Fair Reward for Creators
3. Promotes Economic Growth
4. Protects Consumers from Counterfeits and Deception
5. Preserves Cultural Heritage
6. Maintains Fair Competition
7. Fosters Collaboration and Knowledge Sharing
8. Promotes Global Trade and Investment
9. Encourages Ethical Business Practices
10. Promotes Transparency and Accountability

What is Art?

Communication
(Art is whatever I say it is)

How Does Art Communicate?



CREATION

Communicating something by physical manipulation



CURATION

Communicating something by selection, defining boundaries



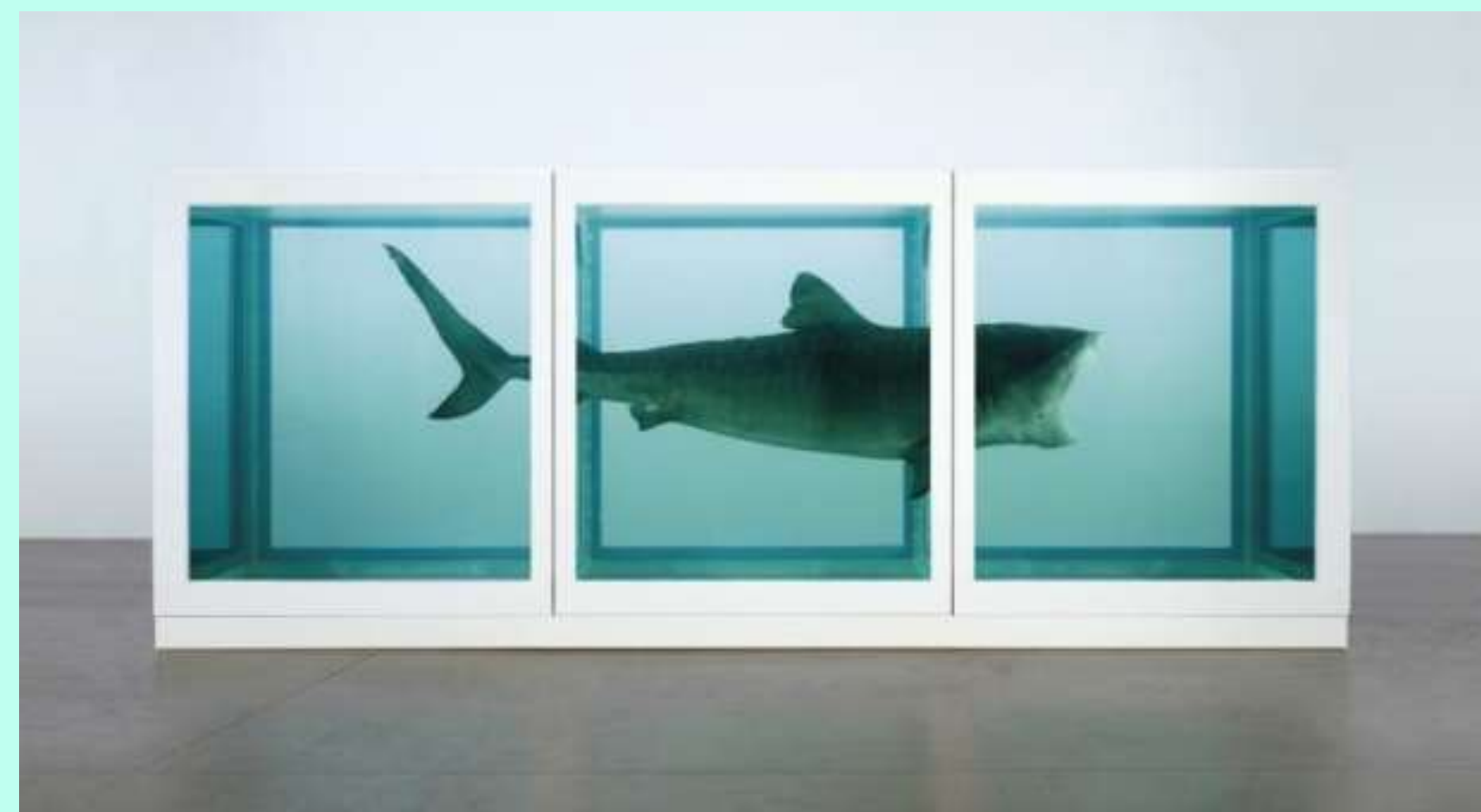
IDEATION

Communicating something by ascribing meaning, story

Who is the artist?

No matter who is involved in executing the project, we recognize the artist as the person who had the original idea.

Creative ownership to date has not dependent on physical execution or the ability to physically execute object creation.



Where are the lines?

Art used in a similar context to similar ends is derivative. What about art used in a different context to different ends?

What is recognizable, the image or the idea? Both? Neither?



A evening photo taken at
Westerstraat, Amsterdam
The weather is clear sky
and 14 degrees. The date is
Kings day 2023 (event) .
Near by there are restaurants ,
bars and grocery store .



What can AI do with my Art?

It depends

Active Cases



- **Chabon v. OpenAI**
NDCA, No. 3:23-cv-04625-PHK, 9/8/2023
- **Tremblay v. OpenAI**
NDCA, No. 3:23-cv-03223, 6/28/2023
- **Doe 1 v. GitHub**
NDCA, No. 4:22-cv-06823-JST, 11/3/2022



- **Huckabee v. Meta**
SDNY, No 1:23-cv-09152-LGS, 10/23/2023
- **Kadrey v. Meta**
NDCA, No. 3:23-cv-03417, 7/7/2023



- **J.L. v. Alphabet**
NDCA, 3:23-cv-03440-LB, 7/11/2023



- **Thomson Reuters v. ROSS Intelligence**
DDE, No. 1:20-cv-00613-SB, 5/6/2022



- **Concord v. Anthropic**
MDTN, No 3:23-cv-01092, 10/18/2023

- **Anderson v. Stability AI**
NDCA, No. 3:23-cv-00201, 1/13/2023
- **Getty Images v. Stability AI**
DDE, 1:23-cv-00135-GBW, 02/03/2023

Precedent – Fair Use

- *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023)*
 - Although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive.
 - Even though [the derivative works] adds new expression to Goldsmith’s photograph, ... in the context of [its commercial] use, the first fair use factor still favors Goldsmith.
 - The same copying may be fair when used for one purpose but not another.
 - The purpose of Campbell’s logo is to advertise soup. Warhol’s ... copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup.



Goldsmith

Warhol



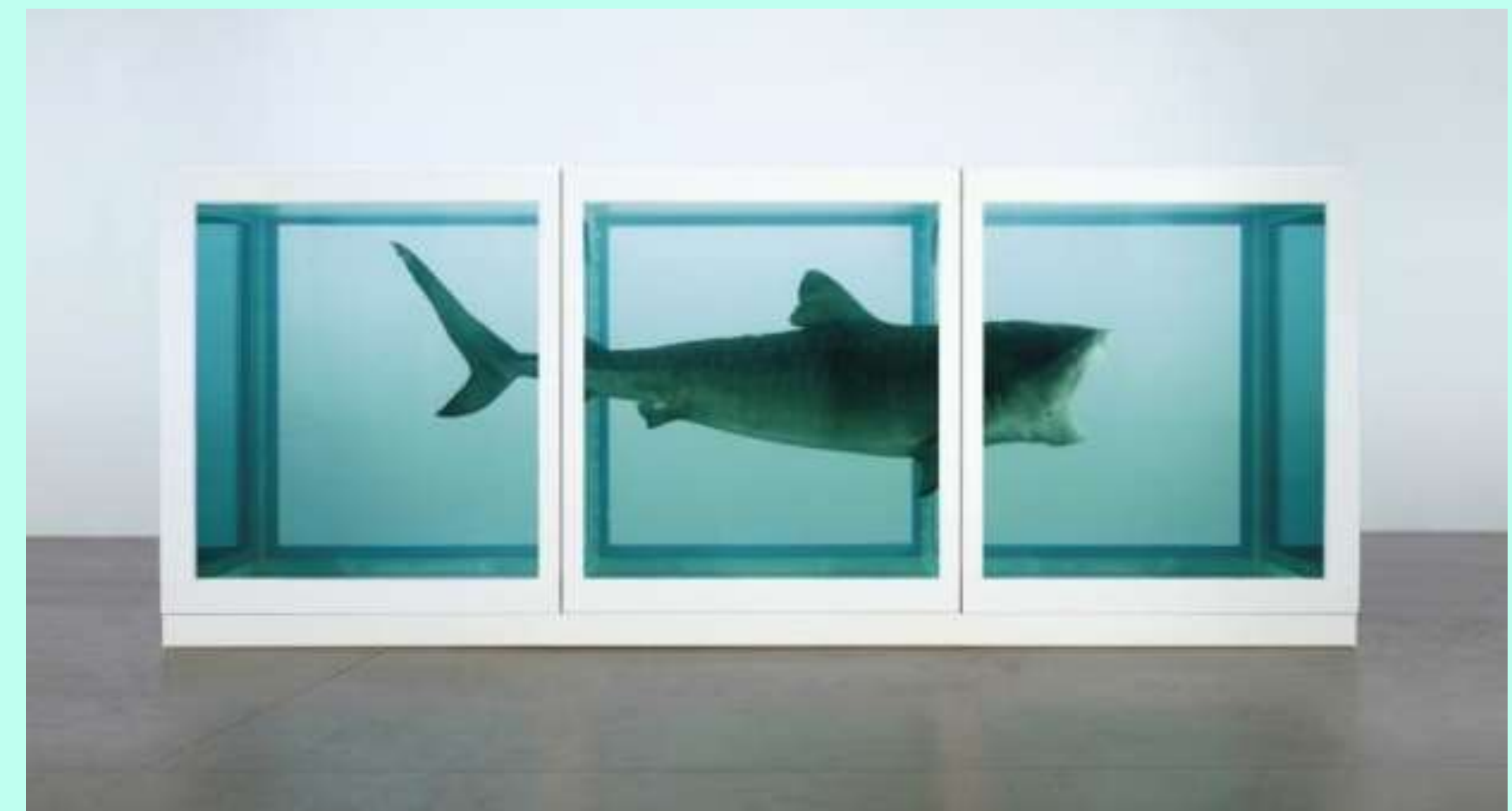
Precedent – Transformative Use

- *Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015)*
 - Google ... scanned the digital copies and established a publicly available search function. An Internet user can use this function to search without charge to determine whether the book contains a specified word or term and also see "snippets" of text containing the searched-for terms.
 - Google's making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information about Plaintiffs' books.
 - Google's profit motivation does not in these circumstances justify denial of fair use. Google's program does not, at this time and on the record before us, expose Plaintiffs to an unreasonable risk of loss of copyright value through incursions of hackers.

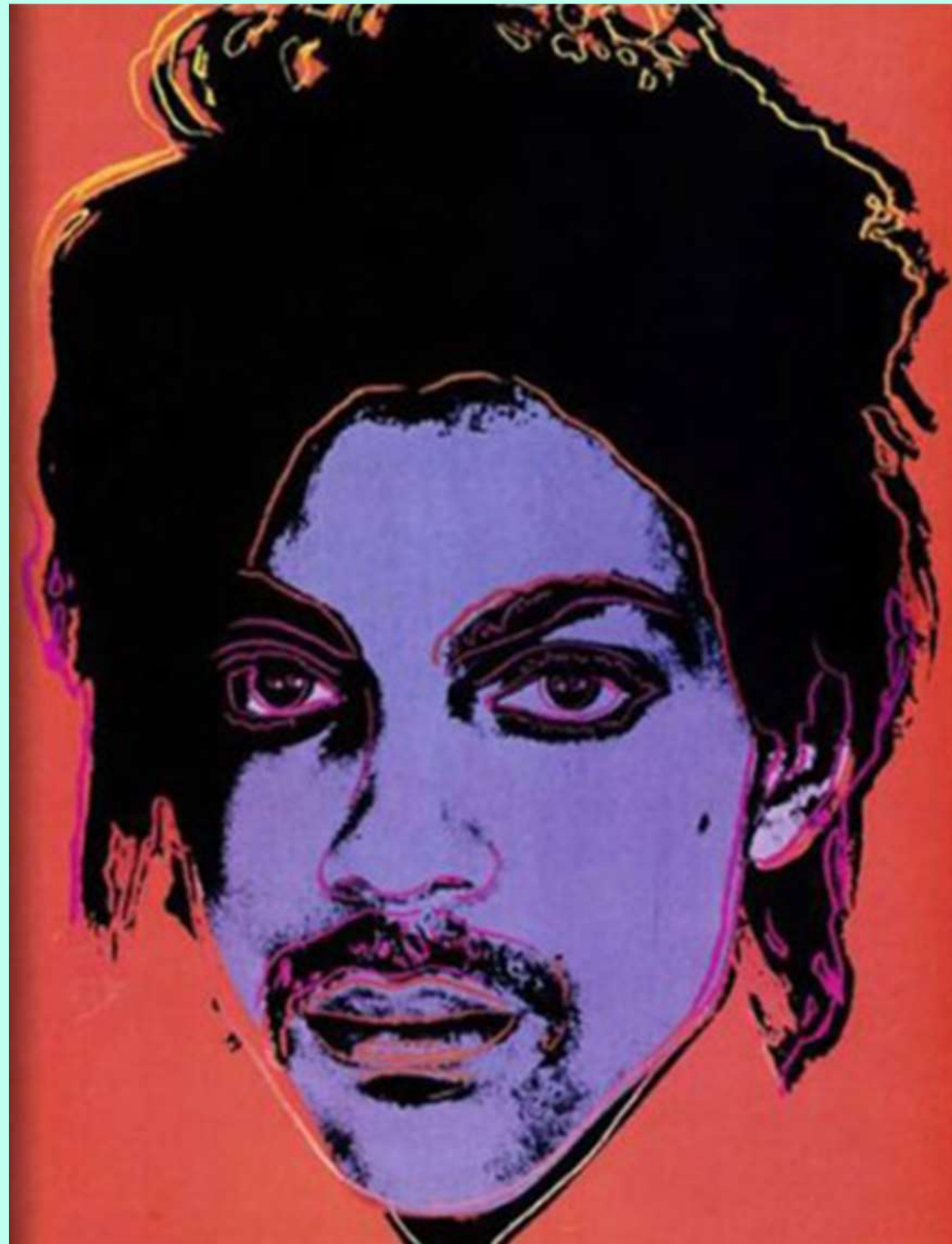


Humans learn from copyrighted works - why can't AI?

Art is never truly unprecedented or unimitated. Styles and imagery evolve but all artists are exposed to existing art, copyrighted or not, before they produce their own, and are unquestionably influenced by all they encounter.



All art is derivative of some other art.



What can I do with AI's Art?

Anything you want (but so can anyone else)

GenAI content is not copyrightable

- **Thaler v. Perlmutter**

DDC, No. 1:22-cv-01564-BAH, 08/18/2023

- Stephen Thayer invented a computer that can make art of its own accord.
- Denial of copyright upheld because “human authorship is an essential part of a valid copyright claim”.
- Without copyright protection, Thaler cannot prevent anyone from using or profiting from the image generated.



A Recent Entrance to Paradise

Manipulation of GenAI Content is Copyrightable

- **Zarya of the Dawn**

Registration # VAu001480196, 02/21/2023

- Kristina Kashtanova had copyright for Zarya of the Dawn revoked after she revealed on social media that the images were created with Midjourney.
- Photoshopping of the images was too minor in the scope of the image to demonstrate human creativity.
- Arrangement of the images and text on the page was human creativity worthy of copyright protection.

Detail before Photoshop



Detail after Photoshop

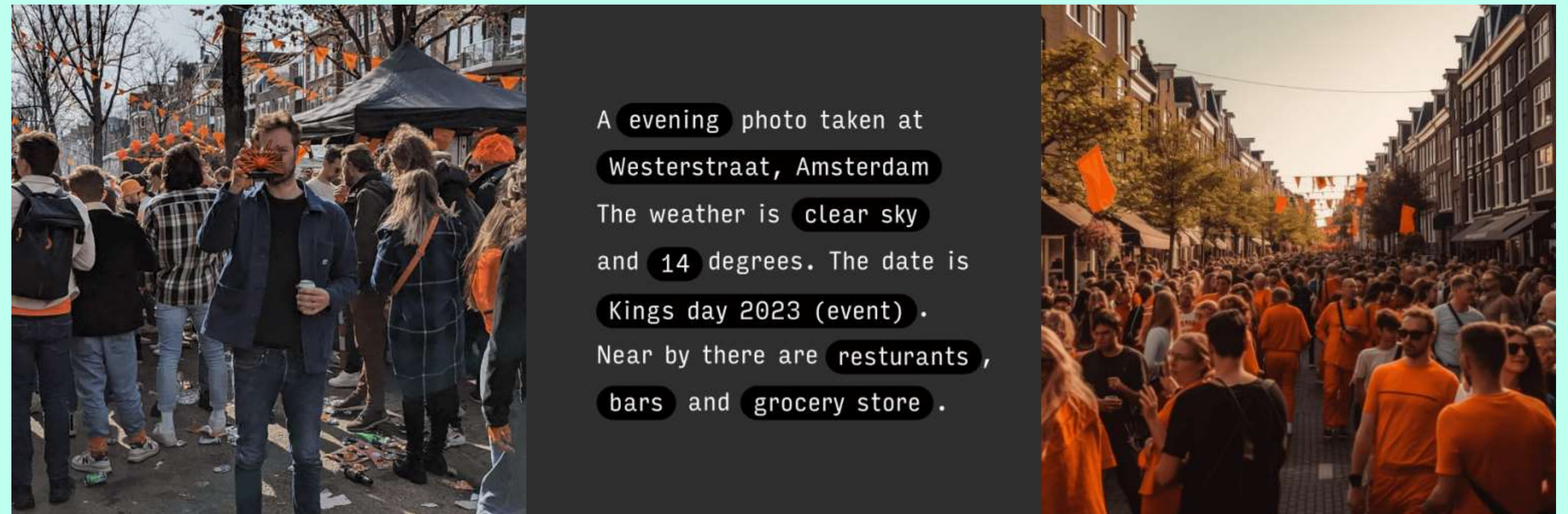


Paragraphica

A camera that generates AI 'photographs'.

The paragraphica digital tool uses sourced geolocation information and user input to create an AI image of a particular place, at a particular time.

While the project was intended to raise questions about the validity of AI in image creation, the question of whether the images it produces are art remains unanswered.



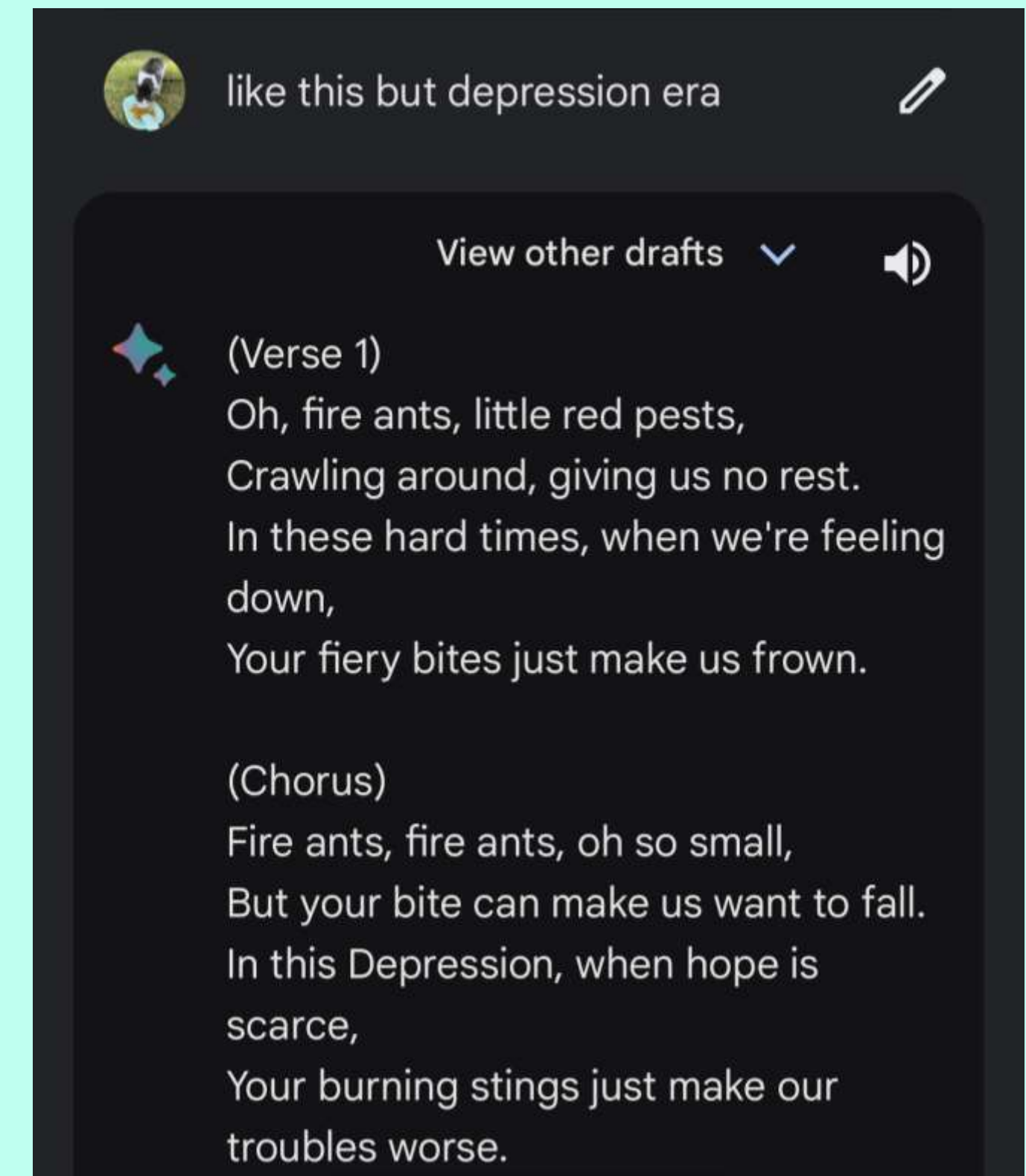
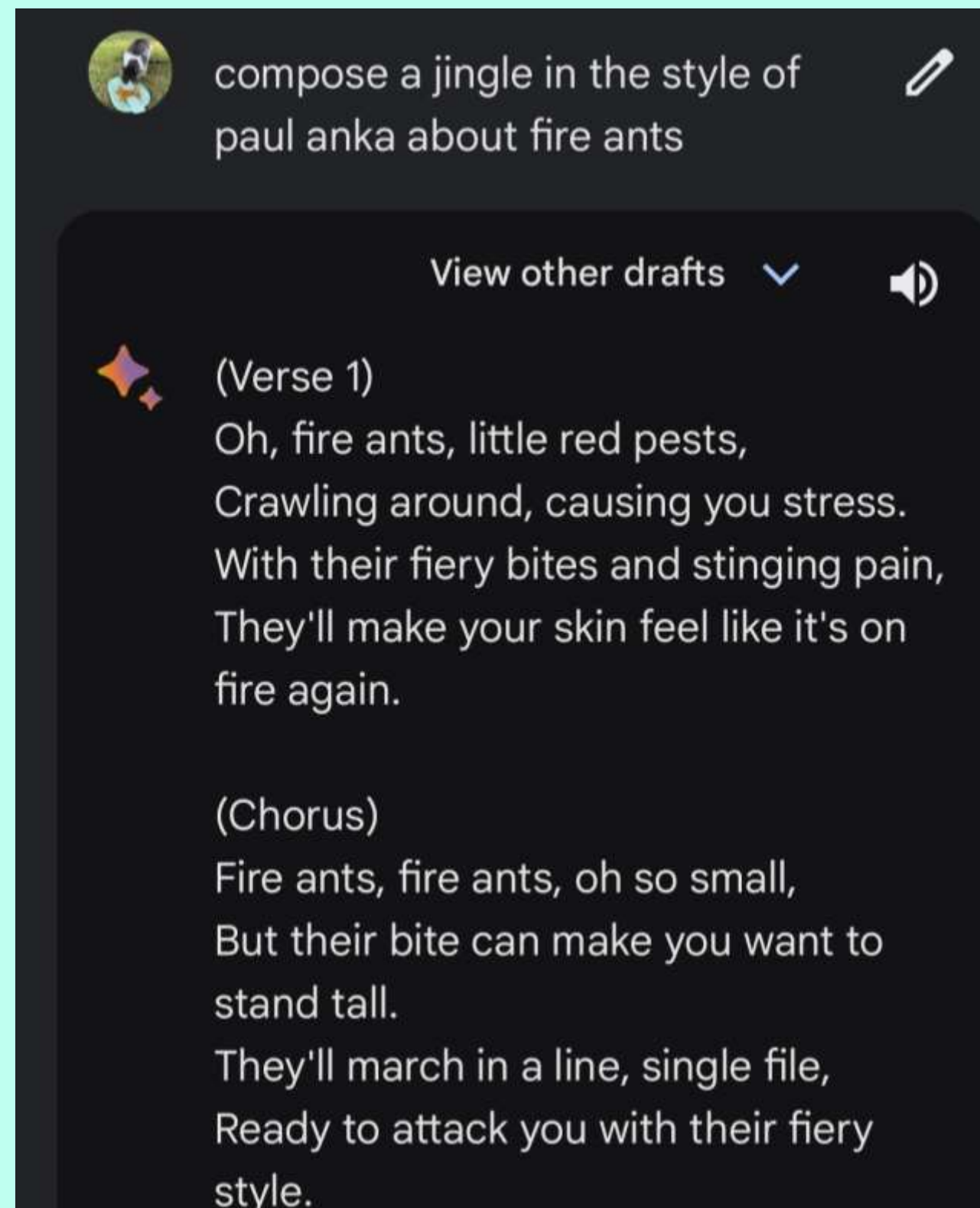
“like this but more ominous”

Are prompts creations of human intellect?

Prompts paired with their generated text outputs, as unified works of creative art, are already circling the internet.

Will these ultimately be found copyrightable?

Should these be recognized as independent works of art?





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