COPYRIGHT POLICY CONSIDERATIONS FOR BOTSWANA AND SOUTH AFRICA – COMPENSATION FOR STARVING ARTISTS FEEDING GENERATIVE AI

Setso D Mareka*
Associate at Ramalepa Attorneys, Gaborone, Botswana

ABSTRACT

The balancing act which domestic intellectual property policy is now challenged to strike is between fostering growth in technological innovation and incentivising creative labour. Ordinarily, these two considerations should not be mutually exclusive, but generative artificial intelligence (Gen AI) has led to a line being drawn in the sand. On one hand, AI undeniably has the potential to exert a profound societal impact, an outcome which shouldn't be unnecessarily stifled, as onerous barriers to data access would undermine the ideal objectives of copyright policy. On the other hand, creative labourers are still subject to the inherent peculiarities of their industry, which faces further disruption despite their works forming part of Gen AI training data. A few cases worldwide illustrate this standoff, wherein artists contend that automation threatens to disrupt an already precarious creative industry and seek, inter alia, compensation for the use of their works.

In light of these polarised viewpoints, a socio-legal and tech-neutral approach is required to analyse whether a balance could be struck in light of Botswana and South Africa's copyright policies and whether artists could be compensated for this type of use. The legal basis for a claim of compensation will be ascertained first and shall entail determining the manner in which Gen AI infringes upon artists' exclusive rights, and utilise protected works in a manner which would ordinarily warrant remuneration. This analysis shall be informed by a discussion on the polarising interests involved, the normative justifications for said copyright protection, and the corresponding rationales for its limitations.

Before concluding, this article shall evaluate the feasibility of recommendations for fair remuneration frameworks in the context of Botswana and South Africa. It will be suggested that, ideally, CMOs ought to utilise metadata and watermarking measures to trace their members' works across training data sets and ultimately claim compensation on their behalf. However, it is ultimately found that said CMOs in these countries ought to drastically increase their technical ability to monitor online acts of infringement.

1. Introduction

Technological innovation has, in the past, resulted in strain on the application of domestic intellectual property (IP) laws, with it being unclear whether

* LLB (University of Botswana) LLM (University of Kent).

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they remain fit for purpose.[1] Although these concerns are no longer new, the recent technological leaps achieved by artificial intelligence (AI) and generative AI (Gen AI) have reignited this debate and resulted in litigation worldwide. The questions raised include what protection can be granted to Gen AI's outputs, if any, whether the use of protected works as training data constitutes infringement, and whether compensation ought to be afforded as a consequence. These last two enquiries shall form the focal point of this paper as they pertain to Botswana and South Africa, with these two countries being chosen due to the similarities in rights conferred in copyright holders, and the contrast through fair use poised to be implemented in South Africa.

This paper argues that Gen AI has great potential to cause an imbalance between the different interests which copyright policy seeks to cater for, due to its destabilising impact on an already vulnerable labour market. In illustrating this imbalance, our enquiry shall begin by canvassing the different competing interests that rely on or are affected by copyright protection. This shall demonstrate that, ideally, a balance is struck in national legislation between said opposing interests through the imposition of limitations and exceptions, with copyright protection not being absolute. In the context of Gen AI, limitations must be imposed on one's copyright to advance broader societal objectives. Therefore, this paper shall determine whether the novel issues posed by Gen AI, through training data infringement,[2] are justified by existing exceptions in Botswana and South Africa's legislation, and if not, whether that ought to be the case.

Throughout this paper, a socio-legal approach shall be employed to take into account the precarious labour environments in which copyright law forms a part, with acknowledgement being given to the failures on the part of the participants to wield said rights for their benefit. Notwithstanding this, normative underpinnings, including John Locke's labour theory, shall be considered, as it is argued that the diminishing of originality by commercial Gen AI models would disadvantage artists' attempts to gainfully exploit copyright. Due to the concern being primarily commercial, it is further argued that there ought to be instances where unimpeded access to copyright-protected works for purposes of non-commercial research purposes is granted.

Accordingly, a tech-neutral approach shall be employed throughout to avoid reactionary or biased commentary, as it's already been emphasised that copyright law ought not be weaponised to impede Gen AI's potential. This paper takes into account Carys J Craig's description of 'tech-neutrality', being

1 See B Sherman & L Wiseman 'Copyright and the challenge of the new' (2012) 50 *Information Law Series* wherein the authors explore the resultant impact various technological developments have had on the Copyright regime of the EU and UK. See also Ncube 'Online copyright infringement, techno-cultural creations and the copyright-technology nexus' (2018) 9(1–2) *International Journal of Private Law* 19–21 wherein the author considers the influence technology has on copyright law.

2 The non-consensual manner in which copyright-protected works are scraped off the internet and used as training data for machine learning purposes shall be referred to as 'training data infringement' throughout this article.

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that the law ought to address the effects of novel technology solely, with there being no arbitrary differentiation thereto.[3]

The final portion of this article evaluates the recommendations posited by scholarship for a compensation model, and highlights the aspects which ought to be adopted in Botswana and South Africa.

2. Interest Groups Affected by Copyright Policy

Copyright's ability to vest exclusive rights to an author over their work is not without reason, with there being varied justifications, as well as limitations. Michael Spence has described several different justifications, which range from natural law — whereby protection is granted to a creator due to it being the correct thing to do ethically speaking, and economic justifications, which stress incentivisation and that protection should not only benefit the creator, but the public at large.[4] Spence argues that no one philosophy is ironclad, and they are often wielded by different interest groups with opposing interests. Examples of said groups are:

> creators of copyright material such as authors and visual artists, the producers of copyright material such as publishers and printers and institutional users of copyright material such as educational institutions and libraries.[5]

The polarised interest groups are, on one hand, those who primarily create protected works, and on the other, those who primarily rely on such works to use in various forms. It is common cause that the copyright regimes of Botswana and South Africa, as well as the rest of the world, entail a balancing act between society's need to access or use copyright-protected works, and the right holder's interest in having their economic rights remain exclusive.[6] This is further evident by art 27 of the Universal Declaration of Human Rights illustrating that a balance ought to be stuck between people whose right it is to 'enjoy the arts and to share in scientific advancement' and those whose right it is to have 'the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' protected.[7]

This section shall explore the objective of different interest groups affected by copyright law, and consider how their respective interests have been balanced. Generally, the contrary viewpoints are reflected in the legislature itself, which simultaneously vests rights in creators while imposing limitations on said rights for the benefit of other stakeholders. Although theoretically at odds, this section acknowledges that a harmonious balance has been struck in

3 CJ Craig 'The AI-copyright challenge: tech-neutrality, authorship, and the public interest' in R Abbott (ed) *Research Handbook on Intellectual Property and Artificial Intelligence* (2022).

4 M Spence 'Justifying copyright' in D McClean (ed) *Dear Images: Art, Copyright and Culture* (2002) 389.

5 Spence (n4) 402.

6 L Guibault 'Evaluating directive 2001/29/EC in light of the digital public domain' in M Dulong de Rosnay & JC De Martin (eds) *The Digital Public Domain: Foundations for an Open Culture* (2012) 63.

7 Article 27 of the Universal Declaration of Human Rights.

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the past and examines how Gen AI has created an imbalance to the detriment of copyright holders.

Copyright policy warrants consideration, given its significant potential to foster growth in creative industries, which contribute to Botswana and South Africa's economies, and contribute to the attainment of development goals such as the African Union's Africa Agenda 2063 (AA2063). AA2063 sets out the aspirational vision of Africa's future and the development goals for its achievement.[8] One of the seven aspirations applicable herein is for '(i) a prosperous Africa based on inclusive growth and sustainable development'. Inclusive growth is particularly relevant as it underscores the disparity between the creators of copyright-protected works as individuals and the industrial users that profit from said works.

2.1 The copyright industry

Firstly, 'core copyright industries' are defined as those 'which are wholly engaged in the creation, production and manufacture, performance, broadcasting, communication and exhibition, or distribution and sale of works and other protected subject matter'.[9] Based on this definition, copyrighted works, and by extension, the rights which enable their exploitation, are a prerequisite to this industry and its contribution to the larger national economy.[10] This is in contrast with 'cultural industries', which also encompass works of a cultural or heritage-related nature.[11]

The core copyright industries, as they relate strictly to the exploitation of protected subject matter, could be understood as forming part of a larger 'creative industry' which, as defined by Hendrik van der Pol, entails a broader range of activities but is still reliant on the exploitation of copyright.[12] Andres Guadamouz cites examples as film and television productions, that entail copyright, but are more collaborative in nature.[13] Thus, labourers who participate in and rely on the creative industries also include those who support the creation of copyright works, but not necessarily the copyright holders themselves.[14]

Therefore, for purposes of this analysis, the titular and proverbial 'striving artist' concerned is specifically identified as a participant in the copyright

8 African Union 'Agenda 2063: The Africa we want', available at: https://au.int/en/agenda2063/overview (accessed on 28 June 2025).

9 WIPO 'Guide on surveying the economic contribution of the copyright industries' (2015) Revised Edition 51.

10 Ibid.

11 Botswana Institute for Development Policy Analysis *The Economic Contribution of Copyright Industries in Botswana* (2019) 9.

12 R Haines et al 'South African cultural observatory: cultural and creative industry trends' Nelson Mandela University, 5 March 2018.

13 Dr A Guadamuz 'How AI is breaking traditional remuneration models' *Technollama*, available at: https://www.technollama.co.uk/how-ai-is-breaking-traditional-remuneration-models (accessed on 19 July 2025).

14 I proffer as examples, make-up artists, special effect / pyrotechnic engineers and stylists working for a film production.

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industry, a creator of work worthy of protection, and whose work is accessible on the internet, making it susceptible to non-consensual reproduction through text and data mining. Although there persists a lack of transparency regarding training data, artists who place their work on social media platforms such as Instagram, Facebook, and X (formerly Twitter), are directly affected as the data thereon has admittedly been used to train the Gen AI models developed by their proprietors.[15]

2.1.1 *The starving artist's interests*

Creators of copyright-protected works are more likely to advocate for a Lockean labour theory outlook, with labour or originality being one of the requirements of copyright in the first place and vital for their progression in copyright industries.[16]

The merit in a copyright-protected work, be it a visual or musical, is in the eyes of the beholder and is purely subjective, necessitating individuality. This creative labour takes place in a precarious labour market, where work is often sporadic, with exploitative pay, and generally short-term.[17] Creative labour in Southern Africa has a lack of security and unpredictable employment as its defining characteristics.[18] The leading example which informs this conclusion is South Africa, as its copyright industry was found, as of June 2019, to have the highest contribution to employment in Southern Africa,[19] suggesting that similar creative labour concerns set out by Hadisi and Snowball remain true for Botswana as well.[20]

Generally, creators can license and assign these rights, and thus make a profit from their creations.[21] Therefore, the interests of creators are similar at large and dependent on the rights being vested in themselves. This interest would be to preserve the value of their own originality and, by extension, the

15 Meta's text to image Gen AI model, Emu, has been trained on publicly accessible data shared on its platforms, whereas X's Gen AI, Grok, was trained on the data shared on the platform, with said data also having been made accessible to train third-party Gen AI Models. See M Growcoot 'Meta is using your Instagram photos to train its "amazing" AI image generator' *Petapixel* (14 May 2024), available at: https://petapixel.com/2024/05/14/meta-is-using-your-instagram-photos-to-train-its-amazing-ai-image-generator/ (accessed on 11 October 2025), and J Benchetrit 'X is the latest social media site letting 3rd parties use your data to train AI models' *CBC* (19 October 2024), available at: https://www.cbc.ca/news/business/x-third-parties-user-data-1.7356152 (accessed on 11 October 2025).

16 For a general unpacking of John Locke's labour theory as a justification for the acquisition of intellectual property ownership and its normative basis based in ethics, see Mossoff's interpretation of Locke's Two Treatises of Government in A Mossoff 'Saving Locke from Marx: The labor theory of value in intellectual property theory' (2012) 307.

17 R Haines et al (n12) 7, whereby the authors cites various lamentations on the precarious features of creative work.

18 Ibid.

19 Botswana Institute for Development Policy Analysis (n11) 63, which sets out that South Africa ranked 30th in the world in respect of its Copyright Industry's contribution to employment.

20 S Hadisi & J Snowball 'Employment in the cultural and creative industries in South Africa' (2020) 12(2) *African Review of Economics and Finance* 103, where the authors note that employment in cultural sectors is more precarious than 'traditional' non-cultural work.

21 L Bently, B Sherman & D Gangjee *Intellectual Property Law* 6 ed (2020) 323.

copyright vested in their works, and to preserve the industry or marketplace where they would be able to exploit the same for remuneration.

Copyright incentivises the creation of these works by allowing their creators to control their dissemination;[22] however, the practical exploitation of said works usually involves several different stakeholders besides the creators themselves.[23] From the perspective of individual artists, the copyright protection of their works enables them to leverage their presumably one-of-a-kind talent for monetary compensation through commissioned works.[24] However, it ought to be noted that, although copyright does provide its holders the opportunity for remuneration, this is not 'self-executing', as copyright holders still need to harness their entrepreneurial wherewithal to exploit their works gainfully.[25] Thus, Ncube cites the copyright owner's own inability to gainfully exploit their work as resulting in their failure to monetise their creative labour, be it due to their lack of capacity or unfair/exploitative market practices.[26]

This is indeed the case with artists whose primary motivation to create said works is not in pursuit of monetary gain.[27] However, for purposes of this analysis, their inability does not negate their opportunity, right and interest to gainfully participate in the creative labour market. As per art 27(2) of the UDHR, said artists still have a right to the fruits of their labour, which isn't negated by the practical difficulties faced. This paper aligns itself with the findings and recommendations made by Ncube, as it highlights the precarity of the creative industries and the vulnerability of artists participating therein as they struggle to reap the rewards of their artistic labour. It therefore follows that the disruptive potential posed by Gen AI on the creative industry ought to be addressed in a manner that would not further disenfranchise artists or exacerbate existing difficulties in the creative industries.

Since reaching mainstream attention, Gen AI has raised anxiety in the creative industry, with artistic labourers arguing that they stand to be replaced, and their artistic labour being foregone or undermined for what's perceived as the cheaper alternative. Societally, a large class of members of said creative spaces tend to harbour disdain for Gen AI and dismiss it as a legitimate creative tool.[28] This separates Gen AI from now traditional creative tools, which were once also large technological strides that challenged copyright law. In the context of South Africa, the South African Cultural Observatory report does

22 PK Yu 'The copyright divide' (2003) 25 *Cardozo L Rev* 331, 433.

23 Guadamuz (n13) where Guadamuz cites 'publishers, agents, collecting societies, distributors, and licensing bodies' as forming a vital part of the creative industry that assist artists in exploiting their works.

24 P Schlesinger & C Waelde 'Copyright and cultural work: an exploration' (2012) 25(1) *Innovation: The European Journal of Social Science Research* 11–28. Includes examples of participants of the creative industries, especially in the field of music and dance, at 19, 21, and 24.

25 CB Ncube 'The creative industry and South African intellectual property law' (2018) 11 *Law & Development Review* 589, 604.

26 Ncube (n25).

27 A Cuntz 'Copyright and the currency of creativity: beyond income' *WIPO Magazine* (June 2019).

28 However, the potential bias in the reporting on the disruptive potential of Gen AI on the market ought to be noted, as said reports are made by journalists or writers who may not be objective, as they may harbour uncertainty for their own future directly.

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indicate creative industry participant optimism for the use of Gen AI in the creative process, albeit accompanied by calls for its regulation and recognition of its disruptive potential.[29]

Therefore, it is argued that copyright policy ought to manifest in a tech-neutral manner, and artists' adverse reception ought not stifle the legitimate potential on Gen AI as a creative tool. Scholars like Matthew Sag anticipate that one day the labour entailed in creating Gen AI-assisted works may result in copyright protection, taking into account the extensive and intentional prompting an artist may make to reach their desired output.[30] However, this paper does not aspire to answer to what extent said prompts are 'creative choices' or 'labour' for purposes of copyright protection, as this would be traversed on a case-by-case basis, with the varying degrees of Gen AI input taken into account. Suffice it to state that copyright policy in seeking to incentivise the creation of copyright-protected works should aim to preserve the marketplace artists participate in, regardless of the creative tools employed.

2.2 Industrial actors

On the other hand, a theoretically opposed interest group would be the institutional users of copyright material due to their ability to use copyright material stemming from the exceptions and limitations of copyright protection. The purpose of said limitations is well-founded for certain industrial users, including libraries and museums seeking to preserve and archive works.[31] In those cases, the nonconsensual use and access to copyright-protected works would be arguably justifiable as being for a higher purpose other than the artist's rights, and for the benefit of society at large.[32] A manifestation of the socially beneficial purpose of such an exception is through s 16 of the Botswana Copyright and Neighbouring Rights Act, which provides that the exception may only be relied upon by Libraries that have no motivation for profit, directly or indirectly.[33] This is also provided for through s 3 of the South African Copyright Regulations,[34] which sets out that the reproduction and distribution shall not be carried out to derive any commercial advantage.

Therefore, it is arguably well settled that the limitation of one's copyright for these purposes does not result in an overt imbalance in interests. This is further in line with art 13 of the TRIPS Agreement, which sets out the

29 Shelver et al 'Artificial intelligence – rushed revolution or holy algorithmic grail? The initial impact of artificial intelligence on South Africa's creative work and workers – results addendum' DSAC/South African Cultural Observatory.

30 Written Testimony of Matthew Sag – Testimony Before the U.S. Senate Committee on the Judiciary Subcommittee on Intellectual Property Hearing on 'Artificial Intelligence and Intellectual Property – Part II: Copyright and Artificial Intelligence' (12 July 2023) 10–11.

31 United Kingdom Intellectual Property Office 'Exceptions to copyright: libraries, archives and museums' (October 2014) 5.

32 Guibault (n6) 65, where the author notes that the libraries play an important role in the supply of information to the public, and at 63 wherein the author argues that limitation of copyright protection furthers 'society's competing interest in the free flow of ideas, information and commerce'.

33 Section 16 of the Copyright and Neighbouring Rights Act 8 of 2000.

34 Section 2 of the Copyright Regulations 1978.

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'three-step test' as a measuring stick for copyright limitations and exceptions which ought not unreasonably prejudice the interests of rightsholders.[35] These 'traditional' limitations met these provisions insofar as they related to clearly defined uses which were narrow in scope,[36] and did not negatively affect the lawful transactions relating to the works,[37] nor had the potential to cause an unreasonable loss of income to the copyright owner.[38]

2.2.1 *Technological actors*

Since Michael Spence's work, a new class of institutional copyright users has developed in the form of technological industry players a la 'Silicon Valley', who make use of copyright-protected works for commercial purposes. For example, the case of *Authors Guild v Google Inc.* clearly illustrates the clash in ideology over protection between creators and technological users of copyright-protected works.[39]

In that case, Google collaborated with several libraries across America to digitise millions of books for their use in the 'Google Books' project, a search engine which allowed users to find and peruse through limited sections of books based on their search terms. In addition to its search and index capabilities, Google Books would provide a brief description about the book, and at times, provide links to purchase the books online, or state which libraries said the book could be found.[40]

When confronted with whether this use of copyright-protected books amounted to an infringement on the authors' rights, or whether it was justified through fair use, the Court considered, inter alia, whether that search and snippet view functions amounted to a transformative use in the sense that it superseded the objects of the original creation and had a further purpose.[41]

In coming to its conclusion, the Court held that the purpose of Google's reproduction of the books was to make significant information about the books available to the public in a manner which did not negatively impact the market itself or compete with authors.[42] This case is cited as it illustrates the application of an exception, in that case fair use, in a manner which still maintained a fair balance of interests involved, as the creation of Google Books could be seen as ultimately being for the benefit of the Authors themselves due to the search and snippet functions exposing their works to potential purchasers.

Relative legal harmony has been disturbed by the latest profound copyright conundrum posed by the use of copyright materials in training data for Gen AI,

35 Article 13 of the Trade-Related Aspects of Intellectual Property Rights.
36 E Rosati 'No step-free copyright exceptions: The role of the three step in defining permitted uses of protected content (including TDM for AI – training purposes)' *Stockholm Faculty of Law Research Paper Series* 5.
37 Ibid.
38 Rosati (n36) 6.
39 *Authors Guild v Google, Inc.* No. 13-4829 (2d Cir. 2015).
40 *Authors Guild v Google Inc* (n39) [209].
41 *Authors Guild v Google Inc* (n39) [214]
42 *Authors Guild v Google Inc* (n39) [219].

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which raised questions regarding standards of creativity and originality required for copyright protection,[43] and to what extent should the use of copyright materials in the diffusion and generative adversarial networks processes be enabled by exceptions such as fair use, or fair dealing. Needless to say, the intersection between Gen AI and copyright law is rife with legal uncertainty; however, for purposes of this paper, said uncertainty could be alleviated by specificity, as it is primarily concerned with the instances where compensation may be payable.

Unlike the traditional industrial actors described above, the interests of Gen AI developers are arguably more theoretically opposed to those of the copyright holders, as machine learning requires large amounts of training data, which often includes copyright-protected works, to create Gen AI models that can create new works, rivalling their training data. In Gen AI developers' defence, models having large and diverse training data is a prerequisite for their utility, enabling them to generate more detailed or accurate outputs.[44] Meta (Inc) posited an illustration of the importance of high-quality training data, arguing that 'an LLM with better (quality training data) will be able to process and respond to longer prompts, incorporate more information into outputs, and remember things from earlier in an exchange, resulting in smoother "conversations"'.[45] Therefore, due to this argument in favour of unimpeded access being cited by Gen AI developers across related lawsuits, including the unfeasibility of entering into individual licensing agreements with copyright holders, Gen AI developers' interest could be described as requiring access to diverse and quality training data to enable the creation of competitive Gen AI models.

In light of this, Bertin Martens argues for less copyright protection for Gen AI training data due to Gen AI's potential positive impact on the larger economy, as it increases human productivity across a wide range of industries.[46] This portrayal of Gen AI developers' interest is premised on Martens' view of copyright as an economic policy tool to 'promote investment in innovative content',[47] and not necessarily for the incentivisation of the creation of works and the creativity entailed therein.

Notwithstanding this, the disruptive potential of Gen AI outputs on the market where their input competes ought to be further highlighted. The starting point would be to acknowledge the observations of Guadamuz, in relation to

43 See the United States Copyright Office's Letter addressed to the creator of the graphic novel *Zarya of the Dawn* whereby it confirms the partial granting of copyright protection to the text used in the graphic novel, but rejected to confer copyright protection for the visuals which were created with a generative model called 'Midjourney', citing the fact that they were not products of human authorship, available at: https://www.copyright.gov/docs/zarya-of-the-dawn.pdf (accessed on 20 July 2025).

44 This is as argued by Meta (Inc) in *Richard Kadrey et al v Meta Platforms (Inc),* 23-cv-03417-VC, page 9.

45 Meta (n44) 9.

46 B Martens 'Economic arguments in favour of reducing copyright protection for generative AI inputs and outputs' Bruegel Working Paper No. 09/2024, 3.

47 Martens (n46) 16.

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the threatened departure from traditional remuneration practices and models which Gen AI poses.[48] Two issues posed include the large quantity of works required to form part of training data, and the circumvention of licensing negotiations, which would ideally occur before the reproduction of the works, forcing licensing to occur after the fact, if ever.[49] Further, Gen AI's ability to effortlessly create works of high quality that could rival those of the average artist could result in the 'over-saturation of marketplaces, negatively affecting the values of all creative works' as cited by Smith,[50] and undermines the cultivated skill laboured for by the marketplace's participants.

These sentiments have been echoed by Michael Smith and Bhamati Viswanathan, amongst others, during a July 2025 Senate Committee Hearing on Artificial Intelligence and Violation of Copyrighted Works.[51] It was argued that having non-consensual and uncompensated pirating of copyright-protected works for purposes of training data would unjustifiably undermine the licensing markets already available and further harm the marketplace for said works.[52] Regarding its potential to harm the marketplace, a similar finding was made in *Kadrey v Meta Platforms (Inc)*,[53] whereby Gen AI's potential to flood the market with endless outputs was emphasised, and such harm suggests that it ought not be deemed fair use.[54] This is the imbalance in interest complained of by artists, which ought to be addressed by copyright policy. This paper suggests that this could be achieved by well-defined instances where compensation would be payable.

3. A Case for Compensation

As stated above, the issue highlighted herein is that copyright-protected works are, by and large, infringed and used as training data to train generative models. Due to the large amounts of data demanded to train generative models, there exists an inherent copyright infringement where protected works are 'scraped' and indiscriminately reproduced from the internet without copyright holders' consent.

Therefore, an analysis of the copyright legal framework of the two countries shall be employed throughout to determine whether compensation would be

48 Guadamuz (n13).

49 This is a departure from general licensing practises, as exemplified by 'sampling' practices and musical works, being the act of using and editing parts of musical works to create new ones altogether.

50 LR Smith 'The cost of compensation: a novel licensing platform for digital content poses unique compromise for artists and generative AI developers' (2024) *Review of Intellectual Property Law* 16.

51 See the recording of the Senate Committee Hearing, 'Senate Committee holds hearing on AI and violation of copyrighted works', available at: https://www.senate.gov/isvp/?auto_play=false&comm=judiciary&filename=judiciary071625&poster=https://www.judiciary.senate.gov/assets/images/video-poster.png&stt=0 (accessed on 21 July 2025).

52 Testimony of Maxwell V. Pritt, Hearing Before the Committee on the Judiciary Subcommittee on Crime and Counterterrorism United States Senate, July 16 2025, at page 5.

53 *Richard Kadrey et al v Meta Platforms (Inc),* 23-cv-03417-VC.

54 *Richard Kadrey et al v Meta Platforms (Inc)* (n53) 3.

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payable upon the use of said protected works as training data, or whether said use could be enabled through an exception. Following an analysis of where compensation may be payable, the different compensation models posited by academia shall be analysed to inform the recommendation adopted.

3.1 Instances where compensation is payable

I have found that the use of copyright-protected work as training data may result in the infringement of artists' rights and thus calls for compensation. Both countries are parties to the Berne Convention, which suggests that the rights conferred by their copyright legislation are largely similar. For this article's analysis, the most relevant is the exclusive right to reproduction, provided for by s 7 and s 6 of the Copyright and Neighbouring Rights Act and the Copyright Act, respectively.

The jurisprudence between both countries would find that the manner in which protected works are copied through text and data mining would amount to reproduction, as exemplified in *Haupt T/A Soft Copy v Brewers Marketing Intelligence (Pty) Ltd*,[55] wherein it was found that the copying of a substantial part of code amounted to reproduction for purposes of infringement.[56] Although the works concerned in this article are on a digital medium, the copying entailed in text and data mining would amount to reproduction under both countries' legislation. In Botswana, this is indicated through the definition of the reproduction right, which emphasises that it entails the making of copies in any material form, including electronically.[57] South Africa's definition does not emphasise the inclusion of electronic reproduction, but the open-ended 'in any manner or form' would encompass reproduction in a digital environment. This point is further buttressed by emphasis having been made by art 1(4) of the WIPO Copyright Treaty, providing that the reproduction right set out by the Berne Convention fully applies to works in their digital forms and mediums.

Both Acts provide for remedies available for rights holders in light of such infringement, including, inter alia, an award of damages. In Botswana, the Act suggests that the quantum of damages would be premised on the profit enjoyed by the infringing party as a result of said infringement.[58] On the other hand, South Africa provides that damages may be quantified based on the reasonable royalty payable to the rights holder if said work was licensed.[59]

Botswana's Court of Appeal was tasked with determining the propriety of the quantum of damages awarded by the court a quo in the case of *Bank of Baroda (Botswana) Limited v Lucian Coman*.[60] In its judgment, it reiterated the fact that the overarching theme in assessing damages for copyright infringement is to 'put the Respondent in the same position he would have been if the wrong

55 *Haupt T/A Soft Copy v Brewers Marketing Intelligence (Pty) Ltd & others* 2006 (4) SA 458 (SCA).
56 *Haupt t/a Soft Copy* (n55) 476.
57 Section 2 of the Copyright And Neighbouring Rights Act.
58 Section 30(1)(c) of the Copyright And Neighbouring Rights Act.
59 Section 24(1a) of the Copyright Act.
60 *Bank of Baroda (Botswana) Limited v Lucian Coman* CACGB-084-23 (Unreported).

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or the infringement had not been committed', and that the factors taken into consideration include loss of sales and profit suffered by the rights holder. Therefore, legislation and common law both presuppose that compensation in the form of damages would be payable as a result of infringement.

However, this claim for compensation may be nullified if the reproduction entailed in text and data mining is justified by an exception such as fair dealing in the case of Botswana,[61] and fair use once adopted in South Africa,[62] if ever. On the other hand, issues of compensation may not arise in instances where consent or compensation have been settled prior, or where those seeking to train generative models already own the copyright in the training data itself. As such, this section shall begin by analysing these different instances to clarify where compensation may be payable to an artist whose protected work forms part of training data.

3.1.1 *Enabling exceptions*

From the outset, a distinction ought to be made between the consensual or non-infringing sourcing of training data, as opposed to the large-scale scraping of training data, which was the theme of this paper thus far. This paper argues that artists may claim compensation depending on whether the manner their copyright-protected works formed part of the training data is enabled by an exception, whether the generative model is to be used for commercial or non-commercial / research purposes.

Unlike s 29 of the UK's Copyright Designs and Patents Act, which enables, through fair dealing, the use of a copyright-protected work for purposes of research and non-commercial purposes,[63] Botswana's Copyright and Neighbouring Rights Act does not recognise such. Instead, the closest examples which could have fit that mould are too restrictive and specific in their application. For example, non-consensual reproduction is authorised for purposes of teaching, and not for scientific research purposes,[64] and further mention of research purposes in this vein is set out in the context of libraries and archives, in that they may only provide a copy to someone they're satisfied would use it for their private study.[65] At best, the Act provides an exception for the reproduction of works as they relate to neighbouring rights for scientific research.[66] This doesn't assist our analysis as neighbouring rights, as described

61 Although not termed as 'fair dealing' in the Copyright and Neighbouring Rights Act, the copyright exceptions as summarized in s 12, and expounded upon in turn from ss 13 to 21, fall more squarely as being fair dealing due to the exceptional instances being clearly specified by statute.

62 Section 12A of the Copyright Amendment Bill seeks to introduce, in addition to already specified exceptions, fair use, with s 12A(b) setting out the same factors for determining whether said use is fair as s 107 of the USA's Copyright Act.

63 Section 29 of the Copyright Designs and Patents Act 1988.

64 Section 15 of the Copyright and Neighbouring Rights Act.

65 Section 16(a)(i) of the Copyright and Neighbouring Rights Act.

66 Section 28(c) of the Copyright and Neighbouring Rights Act. See also Professor D Seng 'Study on copyright limitations and exceptions for educational activities', Standing Committee on Copyright and Related Rights, WIPO, November 2016 at 175 for a review and overview of the exceptions of applicable to copyright protection in Botswana in terms of the Copyright and Neighbouring Rights Act (2000).

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by the Act, entail those that don't qualify as copyright-protected works or concern the rights of those that only assist in the creation of the works.[67] By this description, these rights primarily concern those copyright holders who form part of the wider creative industries, and not our titular starving artist.

As such, Botswana's copyright legislation does not include exceptions which would enable the reproduction of copyright materials for their use as Gen AI training data, even if it were to be for research purposes. On the other hand, s 12(1) of South Africa's Copyright Act provides for fair dealing in respect of literary, musical works, and explicitly labels it as such.[68] Its application has been considered in *Moneyweb (Pty) Limited v Media 24 Limited*,[69] identified by Nwauche as being the only case in South Africa which dealt with fair dealing,[70] and the Court therein generally posited that no hard and fast rule could be used in its determination.

Instead, it was a question of fact, degree and impression,[71] and required the Court to first enquire whether the use amounts to one of the purposes set out in the Act. On that point, it ought to be noted that the Act also falls short of the UK's fair dealing provision as it only provides for two types of works, leaving out artistic or audio-visual works, even though the use of works for purposes of research is provided for.[72] The non-inclusion of artistic works is a serious omission in our digital age, as artistic works contribute significantly to generative models and enable the creation of popular generative models such as Stable Diffusion.

The Act is, at time of writing, in the process of being amended, and South Africa's possible inclusion of fair use in its copyright legislation would mark a significant departure from the stringent application of fair dealing in Botswana. As such, this paper turns now to ponder whether fair use could enable the non-consensual use of copyright-protected works as training data, with cognisance being had of the limited applicability of American commentary due to the vastly different copyright industry conditions.

The case of *Bartz v Antrophic* was concerned with the manner in which the Defendant, a software firm, trained its flagship product, a large language model (LLM) named Claude.[73] In this case, Antrophic had sourced its training data first by essentially pirating millions of copyright-protected books, and then also legally purchased them. The question the Court was faced with was whether the use of these works amounted to fair use. The important distinction in the Court's finding was based on the manner in which the data was sourced, as the use of the literary works which were purchased did not entail any infringement on the author's rights, and thus its transformative use was accepted, whilst the

67 Section 23 of the Copyright and Neighbouring Rights Act.
68 Section 12(1) of the Copyright Act (2000).
69 *Moneyweb (Pty) Ltd v Media 24 Ltd & another* 2016 (4) SA 591 (GJ).
70 Prof E Nwauche 'Fair use versus fair dealing: implications for the cultural and creative Industries (CCI) in South Africa' South African Cultural Observatory (December 2019) 11.
71 *Moneyweb (Pty) Ltd v Media 24 Ltd & another* 2016 (4) SA 591 (GJ) 114.
72 Section 12(1) of the Copyright Act (2000).
73 A Bartz, C Graeber & K Wallace *Johnson v Anthropic* PBC C 24-05417 WHA.

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use of pirated material, and the infringement entailed in pirating, could not be alleviated by fair use. For purposes of our analysis, it could therefore be inferred that, in the former case, compensation to the authors in question was factored in through the purchase of the novels. This distinction is important as most generative models have, by and large, had their training data sourced non-consensually.

However, the current position of copyright legislation in the two countries would mean that reproduction of works for their use as training data, even for non-commercial scientific research purposes, would amount to infringement and call for compensation. This paper's position is that the ideal balance between protecting exclusive rights vested and reasonable access for the benefit of society would not be achieved by disallowing access across the board. First, this paper aligns itself with the argument set out by Thongmeensuk, wherein she posits that allowing TDM and leveraging Gen AI for non-commercial and research-oriented purposes would ultimately be for society's benefit, as it would stimulate scientific progress.[74] Further, as argued by Professor Rosati, an exception to enable said use for specifically scientific research purposes would be in line with the three-step set out by the TRIPS agreement.

On the South African front, the potential for the use of copyright-protected works to be enabled would change depending on whether fair use is adopted or not, as this would be a much more flexible enquiry. If faced with a similar issue as *Bartz v Anthropic*, it is submitted that South Africa's unique market conditions would result in a similar conclusion, which emphasises that compensation ought not be circumvented or foregone.

3.1.2 *Copyright ownership considerations*

There are examples of generative models with training data which do not infringe on one's copyright. This could include public domain works, being those which are not protected by copyright or such copyright protection has since expired.[75] In the case of Botswana and South Africa, this would be 50 years after the death of the author.[76] Theoretically, due to no copyright subsisting in the works in question, no copyright infringement would occur in their being scraped from the internet and forming part of training data, and this would not prejudice the rights of the artists, as this use would have occurred

74 S Thongmeensuk 'Rethinking copyright exceptions in the era of generative AI: Balancing innovation and intellectual property protection' (2024) 27(2) The Journal of World Intellectual Property 278–295.

75 S Dusollier 'Scoping study on copyright and related rights and the public domain' Committee on Development and Intellectual Property, Seventh Session, Geneva, 2 to 6 May 2011 at 5, wherein the author describes this definition as the 'traditional notion' of the public domain.

76 Section 10 of the Botswana Copyright and Neighbouring Rights Act, and s 3(2) of the South Africa Copyright Act.

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after an extensive period after they or their estates would be able to gainfully exploit their work.[77]

Practically, however, Séverine Dusollier does note that there may be instances where access to certain public domain works is not free, and anecdotally cites that one cannot expect to easily have access to the works of Miguel de Cervantes for free in bookshops.[78] The distinction which must be made is that any amounts payable in the facilitation of access to these works, as described by Dusollier, may amount to facilitation fees that do not amount to licensing fees which would be payable to the copyright holders in the course of the exploitation of the work. As such, even if there may be practical barriers in accessing said works physically, no claim for copyright infringement could arise if they are unilaterally scraped off the internet.

Additionally, industrial actors could arguably make use of orphaned works as training data for generative models, these being works whose creators are anonymous, unidentifiable or impossible to locate.[79] This could arguably be a viable alternative which wouldn't be deemed an infringement of one's copyright, but this is only to the extent that the creator of the said orphaned works does not reappear and assert their copyright. As such, this is the least viable solution, as relying on orphan works to form part of your training data may still result in said copyright owners reemerging and seeking compensation.

As such, the best solution which would circumvent infringement and compensation claims would be to leverage one's own wealth of data to create, what Mr Dana Rao of Adobe Inc. terms, 'commercially safe' data sets.[80] In addition to Adobe Firefly, which is trained entirely on Adobe's own stock imagery and public domain content,[81] examples include Getty Images' generative model, which boasts compensation to those who contribute to its training data,[82] and Shutterstock's partnership with software companies such as Reka to license their wealth of data as training data.[83] This would be the most ideal manner in which generative models are trained, as there is no non-consensual sourcing of data in a manner that undermines copyright holders' rights. This argument's shortcomings are that it would only be applicable for

77 See J Boyle *The Public Domain, Enclosing the Commons of the Mind* (2008) 11, wherein the author argues that this limitation on the exclusive rights granted by copyright is beneficial as the 'monopoly' granted is only for the period in which they could incentivise their property right, thus allowing free access after this period in a manner which does not impede their interests.

78 Dusollier (n75) 75.

79 See PB Hirle, E Hudson & A Kenyon *Copyright and Cultural Institutions: Guidelines for U.S. Libraries, Archives & Museums* (2009) 171 .

80 Written testimony of Dana Rao, Executive Vice President, General Counsel and Chief Trust Officer Adobe Inc., U.S. Senate Committee on the Judiciary Subcommittee on Intellectual Property Hearing on 'Artificial Intelligence and Intellectual Property – Part II: Copyright' 4

81 'Firefly Legal FAQs – Enterprise Customers' *Adobe* (10 May 2024), available at: https://www.adobe.com/cc-shared/assets/pdf/enterprise/firefly-legal-faqs-enterprise-customers-2024-06-11.pdf (accessed on 20 July 2025).

82 'Commercially safe AI Image Generation and Modification | Generative AI by Getty Images', available at: https://www.gettyimages.com/ai (accessed on 20 July 2025).

83 'How Reka uses Shutterstock data to create State-of-the-Art multimodal AI models' *Shutterstock* (8 October 2024), available at: https://www.shutterstock.com/blog/reka-shutterstock-multimodal-ai-models-case-study#h-shutterstock-data-upgraded (accessed on 20 July 2025).

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entities that already have a wealth of data, which they have accumulated over years at their disposal, and it may be impractical to expect the same capacity for relatively novel start-ups which seek to enter the market.

Therefore, this article submits that if neither consent nor compensation has been availed prior to copyright-protected works forming part of training data, compensation would be payable subsequent to their use as such. The features of the ideal remuneration model shall now be discussed to illustrate how artists' interests could be vindicated.

3.2 Proposed remuneration model

Having discussed the justifications for compensation arising from the copyright infringement entailed in the sourcing of training data for Gen AI, this paper finally turns to consider the proposed remuneration models proffered by academia. The works considered shall be those of Herremans,[84] Pasquale and Sun,[85] and Smith.[86] This evaluation seeks to consider whether these recommendations could be feasibly implemented in the context of the countries discussed.

The proposals of Smith, Pasquale and Sun all feature an emphasis on copyright holder consent. Smith argues that copyright holders ought to make peace with the disruptive potential that Gen AI has on their labour market,[87] especially in light of the arguably legitimate and 'commercially safe' examples cited above. As such, Smith argues that instead, artists ought to leverage their consent and actively participate in the training of generative models by offering their works in exchange for compensation.[88]

This paper is aligned with the suggested licensing platform, especially as it caters for the interests of Gen AI developers requiring training data, and circumvents the need to enter into individual licensing agreements with each artist involved. Smith cites examples of Gen AI developers who are agreeable to pay royalties to artists who provide their work in this manner.[89] However, said platform falls short by not addressing the previous acts of infringement which caused the initial training to take place. Failing to address this may amount to a waiver of the compensation already due.

Notwithstanding that shortfall, Smith's proposed licensing platform may address Ncube's above-cited critique of artists failing to gainfully exploit their copyright. The proposed platform could potentially be a straightforward source of compensation. In the context of the countries discussed, artists could

84 D Herremans 'Royalties in the age of AI: Paying artists for AI-generated songs' *WIPO Magazine* (6 May 2025).

85 F Pasquale & H Sun 'Consent and compensation: Resolving generative AI's copyright crisis' (2024) 110 *Va. L. Rev. Online* 207, available at: https://virginialawreview.org/articles/consent-and-compensation-resolving-generative-ais-copyright-crisis/.

86 Smith (n50).

87 Smith (n50) 16.

88 Smith (n50) 16, where Smith describes a novel platform to be used for licensing digital content to prospective generative model proprietors.

89 Smith (n50) 23.

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circumvent CMOs and form part of said licensing platform independently. All that would be required would be the platform, Gen AI developers who are willing to pay for training data, and artists who consent to providing their work for that purpose. Emphasis is made that fair remuneration ought to be offered lest the platform ultimately enable the continuation of exploitative market practices.

Another recommendation, which ideally would be onboarded to assist in remuneration efforts, involves the utilisation of technology to track/trace protected works and enable CMOs or rightsholders to determine whether the works have been incorporated as training data without their consent.[90] Pasquale and Sun cite technology which could remove said copyright-protected content from training data[91] or filter outputs to ensure they do not infringe their inputs.[92] However, these would be applied after said infringement has already been detected.

For this purpose, Herremans cites computer science research techniques such as 'Shapley Additive Explanations', which could trace, from a Gen AI's output, the correlative input through a better understanding of the predictions made as a result of a prompt.[93] Herremans quickly concedes that the practical success of these tools in detecting the presence of copyright-protected work in training data is currently unclear, which begs the question of whether rights holders have the technical capacity to detect said infringement. This is further the case with CMOs in Botswana and South Africa, whose operational inefficiencies in collecting and distributing royalties ordinarily are documented.

Regarding the Copyright Society of Botswana (COSBOTS) as the Country's sole CMO, although it is tasked with managing all works provided for in the Copyright and Neighbouring Rights Act, in practice, visual and literary works are given less emphasis than musical works.[94] This omission is significant due to said works having been instrumental in the creation of popular Gen AI models such as MidJourney and ChatGPT. To its credit, a concerted effort seems to have been made between 2013 and 2024 whereby the percentage retained as administrative fees reduced from 47% to 30%,[95] which furthers its mandate in maximising royalty distribution to rights holders.[96] However, its technological prowess in tracking amounts due ought to be improved to carry out its mandate in this ever-evolving digital age.[97]

90 Herremans (n84) 3.

91 Pasquale & Sun (n85) 225.

92 Ibid.

93 JVR Laan 'Explainability of artificial intelligence models: Technical foundations and legal principles' (2022) 7(2) *Vietnamese Journal of Legal Sciences* 20.

94 See KN Monyatsi 'Survey on the status of Collective Management Organizations in ARIPO Member States' African Regional Intellectual Property Organization 22, wherein it is noted that the actual rights being managed are musical.

95 See Monyatsi (n94) 35 regarding COSBOTS's administrative fees as per 2013; COSBOTS 'Membership & Distribution Rules, Classes and Benefits' 16, wherein rule 20 sets out that a maximum of 30% may be deducted from the royalites collected for administrative costs.

96 WIPO 'WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit): A bridge between rights holders and users' Working Document (2025) 93.

97 As previously recommended by CIPA (n11) 8.

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On the other hand, CMOs in South Africa faced governance issues, with significant efforts to reform their operations having been carried out through the establishment of the South Africa Copyright Review Commission.[98] The resultant recommendations, which place an emphasis on fair remuneration, have not been implemented as they are primarily contained within the Copyright Amendment Bill 2017,[99] which was referred back to Parliament. Ultimately, this is indicative of CMOs in Botswana and South Africa needing to more efficiently carry out their mandates so as to become better positioned to claim remuneration for the use of protected works in Gen AI.

This paper submits that the technical difficulties faced by the two countries' CMOs in policing training data infringement could be alleviated through more collaboration with foreign CMOs that have better technical ability. Although CMOs operate on a national level,[100] it is submitted that the transnational nature of infringement in this digital age requires a collective effort to adequately address. As such, the two countries' CMOs ought to enter into reciprocal representation contracts with CMOs that successfully police infringement detected digitally in their jurisdictions.[101]

Pasquale and Sun propose a two-pronged legislative solution, which firstly entails copyright owners being entitled to opt-out their works from forming part of training data.[102] The right to opt out would arise upon the copyright owner identifying an output which potentially infringes their right to reproduction or to prepare derivative works, and the Gen AI developer would be obliged to remove said work from the training data, and ensure that said infringement does not occur again. Secondly, Pasquale and Sun propose a levy payable by Gen AI developers, amounting to a percentage of their yearly revenue, to be distributed to said copyright owners.[103] Infighting among artists over their fair share of the levy could be avoided by agreeing upon a sum payable per infringement or per work found to have been training data.

However, it is appreciated that said levy would have to be enforced by the jurisdiction within which said Gen AI developers are based. Due to said levy not having yet been enforced, artists won't be able to stake their claim for compensation until this is done. For Gen AI developers based in the jurisdictions discussed, different levies could be implemented depending on the company's annual turnover, to ensure that a fair balance is struck between compensation and Gen AI developers being able to operate without potentially onerous financial barriers.

In summary, a workable remuneration model will first require CMOs to improve their collection capabilities for infringement which occurs on the

98 Department of Trade and Industry 'Copyright Review Commission Report' 7.

99 See Oriakhogba & Erhagbe 'The Copyright Amendment Bill: A new vista for fair remuneration for South African creators and performers?' (2024) 73(10) *GRUR International*.

100 Bently (n21) 342, where it is noted that CMOs do exist and operate in a global network of collective agencies, where collaboration is commonplace.

101 Ibid, where the functionality of reciprocal representation contracts is briefly discussed.

102 Pasquale & Sun (n85) 223.

103 Pasquale & Sun (n85) 239.

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internet. Whilst they do so, the interests of their members could still be catered for through leveraging their reciprocal relationships with foreign CMOs with greater technical capabilities. Artists could independently attempt to make peace with Gen AI and actively participate in its training in exchange for remuneration.

4. Conclusion

As such, it is again emphasised that copyright policy ought to require that fair compensation be payable to copyright holders whose works form part of training data. Even if similar precarious market conditions prevail, once CMOs improve on their ability to make said collections, training data infringement could amount to a new source of royalties for rights holders. This would amount to the preservation of licensing practices which ought to already be in place, and further the normative objective of copyright through incentivising the activity of authorship.[104]

This paper has found that, as copyright law stands currently in Botswana and South Africa, a claim for compensation may be made by artists whose work has non-consensually formed part of Gen AI training data. This paper has taken the stance that this is further the case due to the disruptive potential which Gen AI has on creative labour, which is already precarious. However, copyright policy should not be implemented for the interests of artists solely, and the legislation in these two countries is not properly capacitated to address the competing interests at play. The current state of the applicable legislation is untenable due to there being no opportunity given for access to said copyright-protected data for legitimate, non-commercial and societally beneficial purposes.

It is submitted that the fair dealing exception in Botswana ought to be made more extensive, to take into account the purpose of the uses in question, with access being allowed for scientific and research purposes. Although said use may not be justified as fair use in South Africa, the case-by-case analyses ought to take into account that non-commercial Gen AI models may not disrupt the market within which the work and the creative labourers operate.

Put frankly, it is argued that Artificial Intelligence has the potential to make profound strides in the advancement of mankind, and that may be achievable without undermining an already vulnerable labour market.

A sobering takeaway for artists and copyright scholars would be to accept that copyright law itself does little to ensure remuneration or compensation for copyright holders. Notwithstanding this, it is finally submitted that, at the very least, the advancement of artificial intelligence ought not be the altar upon which the rights of artists are sacrificed.

104 CJ Craig 'The AI-copyright challenge: Tech-neutrality, authorship, and the public interest' in R Abbott (ed) *Research Handbook on Intellectual Property and Artificial Intelligence* (2022) 167.

https://doi.org/10.47348/SAIPL/v13/i2a1