

*In the Supreme Court of the
United States*

**ULI AND URI BROS. STUDIOS,
INC.,
*Petitioner,***

v.

**SAMURAI SYSTEMS, INC.,
*Respondent.***

ORDER

The petition for writ of certiorari is granted and limited to the following questions:

- 1. Is training a generative artificial intelligence model using a copyright protected feature length film protected as fair use under the Copyright Act?**
- 2. Does the output of a generative artificial intelligence model infringe upon a copyright owner's exclusive right under the Copyright Act to create derivative works of a feature length film?**

October Term, 2023
United States Court of Appeals, Fourteenth
Circuit.

Uli and Uri Bros. Studios, Inc., Appellant,
v.
SamurAI Systems, Inc., Appellee

No. 90212-2023

Argued and Submitted: May 30, 2023
Decided: June 29, 2023

Appeal from the United States District Court
for the Central District of Isengard; J. PLATT,
District Judge, Presiding.

Before: M. ZUCKERBERG, Chief Judge, S.
SILVERMAN, and S. ALTMAN, Circuit
Judges.

Opinion by Chief Judge ZUCKERBERG;
Dissent by Judge ALTMAN.

ZUCKERBERG, Chief Judge:

In this appeal, we consider two issues arising from SamurAI Systems, Inc.'s operating of the POLL-E generative artificial intelligence model. The first is whether the District Court erred in finding that training a generative artificial intelligence model using a copyright protected feature length film constituted copyright infringement under the Copyright Act. The second is whether a generative artificial intelligence model's output infringes upon a copyright owner's exclusive right to create derivative works of a feature length film under the Copyright Act.

Uli and Uri Bros. Studios, Inc. brought suit against SamurAI Systems, Inc. for direct and vicarious copyright infringement. The parties do not dispute the facts before this Court.

We review the District Court's ultimate conclusion regarding copyright infringement de novo.

I. **Factual Background**

Appellant SamurAI Systems, Inc. ("SAIS") is a Delaware corporation with its principal place of business in Los Angeles, CA. SAIS creates and sells artificial intelligence (commonly abbreviated as "AI") software products from its headquarters in Los Angeles. The products sold by SAIS are known as large language models ("LLM"), AI software designed to receive natural language inputs and generate information or data based on the content of those inputs. These LLMs are not created in the same way as traditional software, where one or more individuals write code containing instructions which are executed by the program to process data according to those instructions. Instead, these LLMs are trained using massive amounts of data from various sources that are fed into and ingested by the software. The data provided to and used by the software is often called a "training dataset." An LLM will copy each piece of data in the data set in order to interpret and extract information from it. LLMs will then progressively adjust their output based on instruction and guidance from the software's developers to more closely approximate the information contained in the data they have copied from the training dataset. In doing so, LLMs are capable of emitting data that reflects specific characteristics of its training datasets based on metrics that are established by its programmers. An LLM may be fed data in the form of text, images, and videos in order to extrapolate and learn from information contained within the dataset. Such extrapolation could then allow an LLM

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to create videos that visually resemble specific features of the videos in its training dataset.

Among the LLMs developed by SAIS is the product in dispute, POLL-E, a deep learning model capable of interpreting natural language descriptions called "prompts" that are provided by users as inputs to the software and generating images and videos based on those descriptions. When given an existing image or video, POLL-E is able to produce variations of the source material as individual outputs based on the original and make changes to or expand upon those outputs.

The original version of the POLL-E model was revealed by SAIS in a blog post on its website in January of 2021. SAIS has not released the source code for POLL-E, nor has it publicly disclosed or spoken about the contents of its training datasets. POLL-E is accessible through a page on SAIS's website which contains a chat box for submitting a prompt, a link to upload images or videos to be edited by POLL-E, and a gallery of recently generated content created through submissions and prompts by other users. Users may generate a certain number of images or videos through POLL-E for free each month and may purchase the ability to generate more directly from SAIS in the form of credits which are used when generating content through POLL-E. SAIS prevents POLL-E from generating certain types of content, such as videos featuring politicians. When a user submits a prompt involving a politician, POLL-E generates no output and the website instead displays a message to the user saying, "POLL-E is unable to process the request *SQUAWK*."

Between 2001 and 2003, Uli and Uri Bros. Studios, Inc. ("UUB") released a trilogy of feature-length films directed by Jack Peterson titled "King of the Gourds" ("KOTG"). The KOTG film trilogy follows several small

humanoid characters, including Dorfo and Samdum, as they are accompanied by a group of allies on a quest across Midgourd to destroy the One Gourd and prevent it from falling into the hands of the films' antagonist, Soursop. Throughout the films, the characters travel Midgourd's varied terrain and fight against Soursop's armies. All scenes were filmed by Jack Peterson in locations throughout New Zealand. The KOTG films make notable use of a highly contrasting aesthetics, sometimes relying on the use of muted colors and dim lighting and at other times using bright lighting and vibrant colors, to describe the locations of Midgourd. The films are widely considered among the greatest and most influential film series ever made, as well as one of the highest-grossing films series of all time with nearly \$3 billion in worldwide receipts. The films were released on DVDs and Blu-Ray Discs following their theatrical releases and can now be purchased and streamed to consumer devices through a number of platforms. The films have also spawned myriad consumer products, including replicas of props and costumes used within the films and digital collectibles in the form of non-fungible tokens, or NFTs, and related digital goods and experiences related to blockchain technologies.

Beginning in 2021, shortly following POLL-E's release, videos and images created by POLL-E users began circulating on social media websites. The content of these videos and images vary greatly, ranging from oil paintings of robots in the style of Henri Matisse to photorealistic images and three-dimensional renderings based on user prompts. Some of these videos appear to show scenes from popular films where certain details have been altered. One such video depicts what appears to be a scene from Casablanca where Humphrey Bogart's character says, "We'll always have Paris," except Bogart has been replaced with a face and voice closely similar,

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but not identical, to Borat Sagdiyev, Sacha Baron Cohen's comedic character.

Among the videos created by users of POLL-E were several containing variations of scenes from the KOTG films, which achieved significant recognition and distribution on the internet. These videos would show, for instance, depictions of landscapes that appear extremely similar to those present in the KOTG films with characters from other franchises added to them. The landscapes and scenery in these videos were never depicted exactly within the films and instead appeared to be AI-generated renditions of the scene rather than exact duplicates.

One such video appeared to show a landscape similar to the one depicted in a scene from one of the KOTG films where the character Gangdalf the Beige whistles for his horse, Karfax. The scenery in this video was also of a grassy field, though different in several ways from the scene in the KOTG film, and Gangdalf's character was replaced by Mickey Mouse while Karfax was replaced with a saddled narwhal (the "Mickey Video"). The Mickey Video is distinct from any specific sequence in the films in that the details of the landscape, Mickey's movements, and Karfax's substitute were all different from the original scene in the KOTG films. However, the Mickey Video uses similar color grading, camera angles, and lighting to the original scene in the KOTG film. In general, the Mickey Video appears to have been generated by POLL-E to resemble the originally recorded footage of the film by imitating the film's style through the viewer's perspective, lighting, and color grading. Even though the depiction of the landscape in the Mickey Video closely resembles a scene in the KOTG films by using a very similar aesthetic, it is important to note that the depiction is not, in fact, a digitally superimposed image taken directly from the films but rather an artificially generated depiction of a similar scene.

II. Procedural Background

On March 3, 2022, UUB filed an action against SAIS alleging UUB's exclusive rights under the Copyright Act in the KOTG films were violated first when SAIS copied the films into POLL-E's training dataset and again when users used POLL-E to create derivative works of the KOTG films as part of POLL-E's output. SAIS filed a motion for summary judgment arguing that its use of the KOTG films as part of POLL-E's training dataset is protected as fair use under the Copyright Act and that POLL-E's output does not utilize any copyrightable elements of the KOTG films and therefore is not a derivative work.

The District Court denied SAIS's motion for summary judgment on both issues. On the issue of direct copyright infringement from copying the films into the training dataset, the court found that SAIS's use of the KOTG films in the training dataset was not protectible as fair use because SAIS's use was not sufficiently transformative and threatened to usurp UUB's role in the market for licensing the KOTG films to similar technology companies. With respect to POLL-E's output, the District Court held that the question of whether the outputs constituted infringing derivative works of the KOTG films ought to be resolved by a jury and denied summary judgment on that issue.

SAIS appealed the District Court's ruling on the motion for summary judgment. Neither party disputes that the KOTG films are protected by the Copyright Act, nor do the parties contest the copyrightability of the scenes depicted within those films. Consequently, we sought to answer whether SAIS infringed UUB's copyright in the KOTG films.

We now reverse the order of the District Court on both issues and remand for further proceedings consistent with this opinion.

III. Discussion

A. Including the KOTG Films in POLL-E's Dataset

We first examine whether direct copyright infringement occurred when SAIS copied the KOTG films into POLL-E's training dataset. The Copyright Act affords owners of original works with six exclusive rights. 17 U.S.C. § 106. Among these is the exclusive right to reproduce a work in copies. *Id.* at § 107(1). The question is whether SAIS's use of the KOTG films in its training dataset violated Respondent's exclusive right to reproduce those films.

Undisputed evidence obtained by UUB through discovery demonstrates that, while the majority of the training datasets for POLL-E contained video footage which was released in the public domain and obtained by SAIS through legal means, the copyrighted KOTG films were also included in POLL-E's training datasets. SAIS contends that, even if SAIS copied the KOTG films when it included them in POLL-E's training dataset, their inclusion in the training datasets is protected as fair use under the Copyright Act.

Whether a use constitutes fair use requires analysis of the context of the use according to four statutory factors. *Id.* at 107; *see also Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183, 1201 (2021). These factors may not be examined in isolation and must be explored and weighed together in light of the purposes of copyright. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S.Ct. 1258, 1287 (2023).

The first fair use factor examines the purpose and character of the use of a copyright owner's original work and whether the copier's use adds to the original work with a further purpose. *Google*, 141 S.Ct. at 1202.

Uses of an original work to create new products and expand the usefulness of the original work have been described as transformative and weigh in favor of fair use. *Id.* at 1203. UUB and SAIS agree that the purpose of the original KOTG films was to provide entertainment to viewers through its creative expression. The District Court found that the first factor weighed against fair use. That court posited that SAIS's use of the KOTG films was not transformative because no changes were made to the films as they were copied into POLL-E's training dataset. Since the KOTG films in SAIS's dataset were entirely unaltered forms of UUB's films, the District Court found there was no alteration of or expansion on the use films and thus no transformation occurred. However, this analysis ignores how SAIS used the films after they were ingested by POLL-E.

The purpose of SAIS's use of the KOTG films is not to provide entertainment to viewers, as POLL-E does not itself make the KOTG films available for direct viewing by its users. Instead, SAIS's purpose is to enable its deep learning model to be trained based on the features within the works comprising its dataset. By using the KOTG films, SAIS has created a new tool that can generate new media based on its training dataset rather than simply providing entertainment to viewers, despite the fact that SAIS monetizes this tool. *Id.* at 1204. And because SAIS seeks to create an entirely new tool separate from the entertainment purpose of UUB's work, we find the use transformative and so the first fair use factor weighs in favor of fair use. *Id.*

The second factor recognizes that some works are close to the core of copyright protection, making fair use more difficult to establish when such works are copied. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

SAIS does not contest that the KOTG films contain creative expression. The District Court found that the creative expression in the KOTG films falls within the core of the Copyright Act's purpose and weighed this factor against a finding of fair use. *See Id.* at 586. We agree with the District Court's analysis and also find this second factor weighs against fair use.

The third factor looks at "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). In holding that this factor also weighed against fair use, the District Court relied on the fact that SAIS included the KOTG films in their entirety without alteration. We agree with the District Court's analysis and also find this fact weighs against a finding of fair use under the third factor.

The fourth factor examines "the effect of the use upon the potential market for or value of the copyrighted work." *Id.* at § 107(4). The revenues generated by the KOTG films since their release demonstrate an active market for their consumption and licensing by third parties. The District Court noted that copying an original work without alteration may produce a market substitute for the original work. *Google*, 141 S.Ct. at 1206. That court also noted that SAIS used the KOTG films for a commercial purpose—namely to train POLL-E and charge consumers to use its capabilities—creating a presumption that the use negatively affects Respondent's licensing market for the films. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–51 (1984). The District Court relied on this presumption and records of UUB's licensing revenues for the KOTG films in finding that SAIS's use of the KOTG films to train POLL-E usurped the potential market for UUB and other copyright holders to license their works to similarly positioned businesses

wishing to develop AI models. Accordingly, the District Court held that the fourth factor also weighed against fair use.

We disagree. This Court does not find the existence of a licensing market for the KOTG films for viewing by consumers to indicate the presence of, or potential for, a similar market to emerge for licensing copyrightable works in developing AI models. SAIS's use of the KOTG films does not create a market substitute for the films because its use does not involve consumptive viewing by individuals. *See Google*, 141 S.Ct. at 1207. Although a market for licensing the KOTG films exists to support viewing by individuals and it is possible that UUB could generate additional revenue by licensing these films to companies developing deep learning models, it cannot be said that the films were created for the purpose of, nor that these markets exist to facilitate, licensing these works to technology companies in order to train AI. Nor is the potential for market harm the sole analytical basis under this factor; the public benefit achieved by copying is also important when examining the circumstances under this factor. *Id.* at 1206. Enforcing UUB's copyright in this instance would risk harm to the public by stifling technological innovation that serves to promote copyright's creative objectives. *Id.* at 1208. The lack of a specific market for uses of the KOTG films such as that presented by SAIS, as well as the potential harm to the public, support the fourth factor weighing in favor of fair use.

Given the facts before this Court, we find that the purpose of SAIS's use and the market effects of SAIS's use predominate over the nature of the work and amount used. Accordingly, we reverse the District Court's ruling and hold that SAIS's use of the KOTG films in training its POLL-E deep learning model constitutes fair use under § 107 of the Copyright Act.

B. Copyright Infringement by POLL-E's Output

The Copyright Act does not explicitly address liability for another's acts of copyright infringement. However, in some situations copyright infringement by another may be attributed to an individual or entity vicariously where that party knowingly facilitates another's infringing activity. *Sony*, 464 U.S. at 442.

UUB's argument against SAIS for copyright infringement based on POLL-E's output is predicated on the fact that SAIS knowingly and actively facilitates copyright infringement by POLL-E users who generate materials which are derivative works of the KOTG films. We must assess whether the outputs generated by POLL-E's users make SAIS vicariously liable for copyright infringement.

One will be found vicariously liable for another's copyright infringement where they enjoy a direct financial benefit from another's infringing activity while maintaining the right and ability to supervise that infringing activity. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005). SAIS charges its users to purchase credits needed to operate POLL-E and generate videos, such as the Mickey Video. UUB argues that SAIS directly benefits financially from its users' infringing activity. UUB also points to the fact that SAIS actively maintains the POLL-E service and has demonstrated its ability to block users from creating certain types of content, such as content featuring politicians, indicating an ability to police this service. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001). So, UUB argues, SAIS has both the right and ability to control infringing activity but has failed to exercise that right and ability.

However, SAIS argues that its users are not infringing Respondent's copyright in the KOTG films because POLL-E's output does

not copy any copyrightable elements of the KOTG films. Specifically, SAIS argues that POLL-E only copies the style of the KOTG films and style is itself is not copyrightable because it is an idea. Conversely, UUB argues that because POLL-E's output is based on expression extracted from the KOTG films, POLL-E's user-generated outputs constitute infringing derivative works that violate Respondent's exclusive right to create such works under the Copyright Act.

Among the exclusive rights offered by the Copyright Act to creators of original works is the right to prepare derivative works. 17 U.S.C. § 106(2). The Act defines a derivative work as one "based upon or more preexisting works...or any other form in which a work may be recast, transformed, or adapted." *Id.* at § 101. The District Court found that, although POLL-E may have been trained on non-protectable elements of the KOTG films—such as the grassy fields, mountainous terrain, and buildings constructed with jagged metal exteriors which comprise the setting of the films and which are not be protectable under the Copyright Act—the manner in which these settings were depicted in the films is copyrightable. The District Court concluded that POLL-E's outputs depicting modified versions of the scenes could be found to be infringing derivative works. Because POLL-E takes from UUB's creative expression and generates outputs that mimic that creative expression as closely to the original as possible, the District Court held that a jury may find those outputs infringe UUB's exclusive right to create derivative works and denied SAIS's motion for summary judgment.

We disagree with the District Court's conclusion that POLL-E's output borrows from the expression of the KOTG films and instead find that POLL-E's output in fact borrows from ideas contained in the KOTG films, which are not protectable as a matter of law. *Id.* at § 102(b). The Copyright Act only

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affords protection to the expression of ideas as they are embodied in a tangible medium and does not protect the ideas embodied in works. *Id.* Courts have long relied on the idea-expression dichotomy to distinguish between those portions of works that are copyrightable and those that are not. See *Baker v. Selden*, 101 U.S. 99, 103–4 (1879). The expression in the KOTG films comes from the sum of creative choices made in selecting between different ideas when creating the films. This is distinguishable from the features of POLL-E's output, such as the high visual contrast and the use of muted color palettes, which are simply ideas contained within the films. See *id.* So, while the creative selection and assortment of ideas contained in the KOTG films may be copyrightable, the individual ideas, including the choice of lighting and color grading, are not themselves copyrightable. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 341 (1991). Because POLL-E uses only the ideas from the KOTG films in its output, we reverse the District Court's decision and hold that SAIS has not infringed UUB's exclusive right to create derivative works of the KOTG films.

IV. Conclusion

In light of our review of the evidence and the parties' arguments, we hold that SAIS does not infringe upon UUB's copyright in the KOTG films. SAIS's inclusion of the KOTG films in POLL-E's training dataset constitutes fair use under the Copyright Act. We also find that the outputs generated by POLL-E's users do not constitute derivative works of the KOTG films because only ideas and not creative expression are taken from the films and included in POLL-E's output.

The District Court's judgment is REVERSED.

ALTMAN, Circuit Judge, dissenting:

I respectfully dissent from the majority's holding with respect to both SAIS's use of the KOTG films in POLL-E's training dataset and the features of the films included in POLL-E's output.

With respect to SAIS's inclusion of the KOTG films when training POLL-E, I agree with the District Court's assessment of the four fair use factors. The central question when assessing the first fair use factor is whether the new work supersedes the objects of the original work, thereby supplanting it, or whether it instead adds something new with a further purpose. *Campbell*, 510 U.S. at 579. The majority views SAIS's use to train a generative AI model as sufficiently novel in purpose to deem SAIS's use transformative. But this view ignores the other element of the first fair use factor, namely whether the use is commercial or nonprofit. Although the commercial nature of a use is not dispositive when assessing whether behavior is protectible as fair use, it is a relevant consideration and one which ought to weigh heavily against SAIS's use here. *Andy Warhol Found.*, 143 S.Ct. at 1276. And the distinct purpose of a use should be weighed against whether the copying is reasonably necessary to achieve that new purpose. *Id.* SAIS provides no argument supporting the necessity of copying the KOTG films, as opposed to other works which are legally acquired, to train POLL-E. So, the first fair use factor should weigh against a finding of fair use.

Similarly, the majority ignores the potential for new markets to form alongside the creation of generative AI models which allow copyright owners to commercially benefit from their works being used in the development of those models. This is not an instance where UUB's ability to compete in the market for licensing works to train AI models is uncertain because this technology is in its infancy and UUB has not been given an opportunity to test those

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waters. *Cf. Google*, 141 S.Ct. at 1208. Given UUB's revenues from the KOTG films and UUB's ability to expand its monetization of the film franchise to other emerging technologies, the fourth factor should weigh against a finding of fair use.

I also agree with the District Court that the question of whether POLL-E's outputs constitute infringing derivative works should be decided by a jury. POLL-E may undoubtedly be used to generate an infinite number of outputs which may utilize the works on which it was trained in different ways, some of which may constitute copying of the expression and not the ideas contained in the KOTG films. Therefore, it is my opinion that the issue should not be resolved on summary judgment.

I disagree with the majority's reasoning on these issues in several places. For the foregoing reasons, I respectfully dissent.

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