

FANTasy Football is an enormous success. You and your friends are in the middle of negotiations with Meta to make it the exclusive FANTasy Football League network, when you receive a threatening letter from the NFL. They claim that you are “stealing” results and statistics from NFL games, unfairly enriching yourself from an activity that the league stages at the cost of millions of dollars. They say they are investigating their legal options and, if current law provides them no recourse, that they will ask Congress to pass a law prohibiting unlicensed fantasy sports leagues. (Later we will discuss the specific legal claims that might actually be made against you under current law.) As this drama is playing out, you discover that other groups of fans have adapted the FANTasy Football idea to baseball and basketball and that those leagues are also hugely popular.

i.) Your mission now is to lay out the ethical, utilitarian or economic arguments that you might make in support of your position that what you are doing should not be something the NFL can control or limit—whether they seek to prohibit you, or merely demand that you pay for a license. Read the Locke excerpt that follows these problems. What might the NFL say in support of its position or its proposed law?

ii.) Should you be able to stop the “copycat” fantasy leagues in baseball and basketball? To demand royalties from them? Why? Are these arguments consistent with those you made in answer to question i.)?

PROBLEM 1-3

JUSTIFYING AND LIMITING – AI

Generative AI systems work by ingesting vast amounts of data and, from the patterns revealed in that data – whether images, millions of pages of text, or MRIs of people with or without cancer – generating “answers” to prompts entered by the user. Those answers could consist of a paper written in response to an essay question, a picture generated from a verbal prompt (“crab fighting hot dog on the moon, Picasso-style”) or a prediction about whether a shadow in an MRI will turn out to be a malignant tumor. The (current) AI programs are pattern-predicting systems, not meaning-comprehending intelligences. The sheer scale of their data-ingestion means that they can generate answers eerily close to what a human student or artist would produce, even though they do not feel the beauty of the pictures they create or the insight in their sentences.

The datasets on which generative AI systems have been trained contain vast amounts of copyrighted material – articles, essays, photos – some of them found on the open web. Copyright inheres automatically on the fixation of a creative work, without the creator taking any affirmative step. It also lasts for a very long period of time; the life of the creator plus 70 years, or 95 years for corporate works for hire. There is no requirement of registration, so much of our culture consists of so-called orphan works—we simply do not know who the copyright holder is. Some work is explicitly put into the public domain (for example, Federally generated texts and images) while other material may be explicitly shared under open licenses, permitting reproduction and reuse (for example, Wikipedia, the Public Library of Science and this casebook are all under Creative Commons licenses). But that is the exception. Thus the material on the

internet is largely composed of copyrighted works—everything from long-forgotten social media postings and pictures to commercially produced content aimed at a profit-making market, such as stock photo sites. It is on this vast, varied body of material that many generative AI systems have been trained. The AI does not produce verbatim or picture-perfect copies of the material it trained on, but given the constraints of subject matter and genre, while many of the outputs will be very different from the original, some will be quite similar.

The developers of AI systems believe that training their models this way is a legally privileged “fair use” under US copyright law. If that is true, their use would require no permission or fee. They claim that without fair use protection, we would never have this new technology in the first place—licensing on that scale would be impossible. They point to cases (which you will read later) finding that it was legal for Google to scan millions of copyrighted books without permission to produce Google Book Search, and for image search programs to index the photos for which people are searching, and even to illustrate them by showing reduced fidelity “thumbnail” images. Again, permission was not required. Those cases stressed that the “use” of the material was “transformative.” Google wasn’t selling the books or images it scanned. It had to scan them to produce this new technology—search—one that had immense social benefits. Right now, you can ignore the copyright law details; the AI cases could go either way. Your goal is to focus on the underlying moral, economic, and policy arguments. The generative AI image and text systems are being sued by *The New York Times*, the owners of the Getty Images photo licensing site, and by groups of artists, photographers and writers whose work was used to train the AI models and who say that the AI output will shortly be competing with their work.

The plaintiffs are saying their intellectual property rights *should* include the right to prevent AI systems from being trained on their material. Your mission is to lay out the ethical, utilitarian or economic arguments for and against that position. You may find the reading that follows useful.

***John Locke, Of Property
Two Treatises on Government***



§ 26. Though the earth and all inferior creatures be common to all men, yet every man has a “property” in his own “person.” This nobody has any right to but himself. The “labour” of his body and the “work” of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

§ 27. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he