Generative AI Algorithms: The Fine Line Between Speech and Section 230 Immunity

By Hannah G. Babinski

April 30, 2023

Table of Contents

Generative AI Algorithms: The Fine Line Between Speech and Section 230 Immunity

I.   Introduction

Russian-American writer and philosopher Ayn Rand once observed, "No speech is ever considered, but only the speaker. It's so much easier to pass judgment on a man than on an idea."[1] But what if the speaker is not a man, woman, or a human at all? Concepts of speech and identities of speakers have been the focal points of various court cases and debates in recent years. The Supreme Court and various district courts have faced complex and first-of-their-kind questions concerning emerging technologies, namely algorithms and recommendations, and contemplated whether their outputs constitute speech on behalf of an Internet service provider ("Internet platform") that would not be covered by Section 230 of the Communications Decency Act ("Section 230"). In *Force v. Facebook*, the U.S. Court of Appeals for the Second Circuit ruled that use of neutral algorithms to suggest or recommend content to users constituted editorial activity by a publisher shielded from liability under Section 230.[2] Then, in *Dyroff v. Ultimate Software Group*, the Ninth Circuit held that use of recommendation and notification algorithms did not materially contribute to the alleged unlawfulness of the content in question and that the neutrality of the algorithms made the use and output of the algorithms "another function of publishing."[3] Similarly, in *Gonzalez v. Google, LLC*, which is currently pending before the Supreme Court, squarely at issue is the question of whether algorithmic recommendations and promotions of videos based upon a user's past activities constitute speech created by the platform.[4] During the oral arguments of this case, the justices focused on the neutrality of the algorithm that created the recommendations and promotions of the preexisting third-party content and whether the algorithm was employed in a content-neutral way across the platform.[5] The emerging trend amongst the courts is that the output of neutral algorithms used by platforms to promote, recommend, organize, arrange, or distribute content on a website is protected by Section 230 immunity because courts do not view the algorithmic output as constituting a separate class of speech by the platform employing the algorithms.[6]

However, in *Gonzalez*, Justice Neil Gorsuch highlighted that though the neutral algorithms in question were likely protected as non-speech and a function of publication of third-party content, other algorithms may not warrant the same level of statutory protection.[7] Justice Gorsuch alluded

---

[1] *Speech Quotes*, GOODREADS, https://www.goodreads.com/quotes/tag/speech (last accessed Apr. 14, 2023).

[2] Paul Blumenthal, *This Supreme Court Case Could Decide The Future of the Internet As We Know It*, HUFFPOST (Feb. 19, 2023, 5:45 AM), https://www.huffpost.com/entry/section-230-supreme-court_n_63e3ba9ce4b0c8e3fc88d2dd.

[3] *Id. See Dyroff v. The Ultimate Software Group, No. 18-15175 (9th Cir. 2019)*, JUSTIA, https://law.justia.com/cases/federal/appellate-courts/ca9/18-15175/18-15175-2019-08-20.html.

[4] *Gonzalez v. Google Oral Argument*, C-SPAN (Feb. 21, 2023), https://www.c-span.org/video/?525323-1/supreme-court-hears-big-tech-legal-liability-case.

[5] *Id.*

[6] *See generally*, *Force v. Facebook, Inc.*, No. 18-397 (2nd Cir. 2019); *Twitter, Inc. v, Taamneh*, 598 U.S. 471 (2023).

[7] *See* Ja'han Jones, *Gorsuch Wades into the AI Robot Debate in Supreme Court Hearing*, MSNBC (Feb. 22, 2023, 2:25 PM), https://www.msnbc.com/the-reidout/reidout-blog/gorsuch-ai-chatbot-search-section-230-rcna71790.

to generative artificial intelligence ("AI") as a form of speech potentially falling outside of Section 230 immunity,[8] commenting that "[a]rtificial intelligence generates poetry. It generates polemics today that would be content that goes beyond picking, choosing, analyzing or digesting content. And that is not protected. . . ."[9] Justice Gorsuch focused on the fact that the capabilities and functions of generative AI algorithms likely remove them from the protective umbrella of Section 230, yet this issue has not been heard, let alone settled or established, by legislators or the courts.[10]

In this piece, I will examine some of the issues arising from the questions posed by Justice Gorsuch in *Gonzalez*, namely whether generative AI algorithms and their relative outputs constitute speech that is not immunized under Section 230. I will provide an overview of the technology behind generative AI algorithms and then examine the statutory language and interpretation of Section 230, applying that language and interpretive case law to generative AI. Finally, I will provide demonstrative comparisons between generative AI technology and human content creation and foundational Copyright Law concepts to illustrate how generative AI technologies and algorithmic outputs are akin to unique, standalone products that extend beyond the protections of Section 230.

II.   Technology Behind Generative AI Algorithms: How They Function

Since its creation, the employment and advancement of generative AI technology has seen tremendous growth. A 2022 study conducted by McKinsey and Company shows that generative AI adoption has more than doubled over the past five years, and investment in generative AI technology is likewise increasing.[11] This rapid growth is a natural result of generative AI's capabilities and revenue generating potential for companies utilizing those technologies, as confirmed by a recent McKinsey survey finding that the adoption of generative AI technology results in higher revenue yearly for companies.[12]

In addition to higher revenue generation potential, generative AI algorithms differ from nongenerative algorithms in a host of ways, including that generative AI technology is more advanced and complex. Nongenerative algorithms often function to organize, sort, and distribute content based upon codified learning that is grounded on the personalized experience of the users of a specific website or platform. Nongenerative algorithms recognize patterns in user activity and organize, sort, and recognize other content, accordingly, adding no original content to the equation. Generative AI algorithms, on the other hand, can generate new content. The ability of generative AI to create content embodies the potential of modern society to interact with the Internet in an entirely new way and invites possibilities of enhanced efficiency in the context of business, research, innovation, and more. For example, generative AI can be utilized to "automat[e] the manual process of writing content, reduc[e] the effort of responding to emails, improv[e] the

---

[8] Ja'han Jones, *Gorsuch Wades into the AI Robot Debate in Supreme Court Hearing*, MSNBC (Feb. 22, 2023, 2:25 PM), https://www.msnbc.com/the-reidout/reidout-blog/gorsuch-ai-chatbot-search-section-230-rcna71790.

[9] *Id.*

[10] *Id.*

[11] *What is Generative AI?*, MCKINSEY & COMPANY 1, 2 (Jan. 2023), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/mckinsey%20explainers/what%20is%20generative%20ai/what%20is%20generative%20ai.pdf.

[12] Louis Columbus, *The McKinsey State Of AI In 2020 Report Finds AI Drives Revenue*, FORBES (Nov. 22, 2020, 2:05 PM), https://www.forbes.com/sites/louiscolumbus/2020/11/22/the-mckinsey-state-of-ai-in-2020-report-finds-ai-drives-revenue/?sh=18537aaa32a6.

response to specific technical queries, create[e] realistic representations of people, summariz[e] complex information into a coherent narrative, [and] simplify[] the process of creating content in a particular style."[13] Notably, the content generating ability that separates generative AI from traditional, nongenerative algorithms may also result in a differentiation between how the output of generative technology is categorized and the level of legal protection that output is granted.

These generative capabilities are precisely what separates the technology from nongenerative, protected algorithms. Generative AI incorporates technology similar to interpolation, which involves "estimating what's missing [between two points of data] by looking at what's on either side of the gap" to fill in the spaces between the available information of text or images.[14] For example, "when an image program is displaying a photo and has to reconstruct a pixel that was lost during the compression process, it looks at the nearby pixels and calculates the average."[15] Likewise, generative linguistic AI models, like ChatGPT and Bard, employ a similar technique: the linguistic AI model will "tak[e] two points in "lexical space" and generat[e] the text that would occupy the location between them."[16] It is through automated interpolation that generative models can learn from content from across the Internet pool upon which the models are trained to statistically approximate what should occupy the space between the two points in lexical space.[17]

It is through this Internet pool that generative AI technologies are trained by "pouring a significant fraction of the Internet into a large neural network," which "could include all of Wikipedia, all of Reddit, and a large part of social media and the news."[18] In this way, generative AI functions "like the auto-complete on your phone, which helps predict the next most-likely word in a sentence," but the most probable word in a sentence does not necessarily mean the correct word for a sentence based on context.[19] This means that the content a user may receive could be incorrect, nonsensical, or even just a little clumsy, but it is predicted as the most likely gap-filler from what the technology has learned from the available information on the Internet.[20]

In relation to the generative functionality of this technology, two views have emerged.[21] The first view of this technology looks at generative AI as merely algorithms that repeat what they see online, pulling bits of preexisting information and rearranging the information or iterating the information in a new way.[22] The other view of the technology looks at generative AI as not pulling information from preexisting third-party content available in the Internet training pool, but rather

---

[13] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET, https://www.techtarget.com/searchenterpriseai/definition/generative-AI#:~:text=Some%20of%20the%20potential%20benefits%20to%20consider%20in,process%20of%20creating%20content%20in%20a%20particular%20style (last accessed Apr. 14, 2023).

[14] Ted Chiang, *ChatGPT is a Blurry JPEG of the Web*, THE NEW YORKER (Feb. 9, 2023), https://www.newyorker.com/tech/annals-of-technology/chatgpt-is-a-blurry-jpeg-of-the-web.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Eleanor Pringle, *Microsoft's ChatGPT-powered Bing is Becoming a Pushy Pick-up Artist that Wants You to Leave Your Partner: 'You're Married, but You're Not Happy,'* YAHOO! FINANCE (Feb. 17, 2023, 8:25 AM), https://finance.yahoo.com/news/microsoft-chatgpt-powered-bing-becoming-162528826.html.

[19] *Id.*

[20] *See Id.*

[21] Scott Pelley, *Google's AI Experts on the Future of Artificial Intelligence*, 60 MINUTES (Apr. 16, 2023, 7:02 PM), https://www.cbsnews.com/news/google-artificial-intelligence-future-60-minutes-transcript-2023-04-16/?intcid=CNM-00-10abd1h.

[22] *Id.*

learning from the information in the training pool to come up with the most likely information, pixels, and so on to fill gaps.[23] Though the correct view of this technology and how it functions are unknown at this time and subject to debate,[24] according to the engineers behind the development of Bard, Bard, and predictably other similar linguistic models, "read most everything on the Internet and create a model of what language looks like. Rather than search, its answers come from this language model."[25] As such, Bard's engineers assert the following:

> "Bard's replies come from a self-contained program that was mostly self-taught," and the model "tries and learns to predict. . . so peanut butter usually is followed by jelly. It tries to predict the most probable next words, based on everything it's learned. So, it's not going out to find stuff, it's just predicting the next word."[26]

With this in mind, it would seem that generative AI technology aligns more closely with the latter view of functionality. As provided by the developers of Bard, and unlike a search engine, such models are "really here to help you brainstorm ideas, to generate content, like a speech, or a blog post, or an email," rather than scour the Internet for existing information.[27] Regardless of which view is correct, the output of such technology is, nonetheless, generated and unique, but for the sake of this argument, the following application and analysis will be conducted under the latter viewpoint that such technology learns from online content and generates new content based on probabilities, rather than pulling and regurgitating bits of online content.

These capabilities are not merely limited to large language models or images. In fact, generative AI technology can apply to a variety of mediums and come in the form of text, image, video, audio, code, model, data, and avatar generation.[28] Regardless of the medium, this technology seems to function by scanning the Internet, learning from the available information, and predicting the content that would best fill the empty space with the limited information provided to the model from a probability standpoint. The resulting output is, therefore, new information modeled on trends detected from preexisting information on the Internet.

III. Language, Interpretation, and Application of Section 230

With the basics of the functionality of generative AI algorithms established, I will now examine the language of Section 230 and interpretative case precedent and apply them to the technology, demonstrating the manner in which generative AI algorithmic outputs are not covered under Section 230.

a. Statutory Language of Section 230 and Case Law Interpretation

---

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Cathy Hackl, *What Does Generative AI Mean for Your Brand and What Does it Have to Do with the Future of the Metaverse?,* FORBES (Feb. 20, 2023, 6:42 PM), https://www.forbes.com/sites/cathyhackl/2023/02/20/what-does-generative-ai-mean-for-your-brand-and-what-does-it-have-to-do-with-the-future-of-the-metaverse/?sh=6087ecfd1f37.

Section 230 serves to "promote the continued development of the Internet" by insulating interactive computer service providers ("Internet platforms") from liability arising from third-party content published on their websites or good-faith moderation of the third-party content available on their websites.[29] Section 230 effectively treats Internet platforms like traditional bookstores or newsstands, which are generally not liable for the content of the books, newspapers, or magazines they carry, rather than as speakers or publishers of the information in the offline context.[30] This effectively creates a unique position for Internet platforms.

> "Offline, a publisher (such as a newspaper or book publisher) is legally responsible for any content they publish—including content from third parties such as letters to the editor. Online, however, Congress decided in Section 230 that websites and other entities that publish third-party content online—such as tweets or YouTube videos—generally should not be liable if their users post unlawful content."[31]

However, Internet platforms are not wholly immune from liability under the provisions of the CDA; Section 230 of the CDA merely insulates Internet platforms from liability stemming from the posts and activities of third-party users of the Internet platforms' websites, meaning that any platform may still be subject to liability in Tort from speech related to or stemming from the website itself or the website provider.[32] For example, if a platform like YouTube posted an excerpt on the homepage that contained defamatory material relating to a specific person, YouTube would not be protected from civil suit. Specifically, the text of Section 230(c), the heart of the statutory immunity, provides the following:

> "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. . . . No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material. . . ."[33]

This partial insulation from civil liability has presented courts with several challenges, with much of the controversy surrounding what actions constitute those of a "publisher or speaker."[34] Specifically, under what circumstances is an Internet platform speaking and thus outside the scope

---

[29] 47 U.S.C. § 230.

[30] Dariely Rodriguez and David Brody, *Section 230 Requires a Balanced Approach that Protects Civil Rights and Free Expression*, AM. CONST. SOC'Y. (Feb. 21, 2023), https://www.acslaw.org/expertforum/section-230-requires-a-balanced-approach-that-protects-civil-rights-and-free-expression/#:~:text=The%20second%20prong%20of%20the%20Section%20230%20analysis,allegedly%20unlawful%2C%E2%80%9D%20as%20the%20Sixth%20Circuit%20put%20it.

[31] *Id.*

[32] *See generally*, 47 U.S.C. § 230.

[33] 47 U.S.C. § 230(c)(1)-(2).

[34] *Id.*§ 230(c).

of Section 230 immunity?[35] Most courts having adopted the test established by the Ninth Circuit in *Fair Housing Council v. Roommates.com, LLC.*[36] and refined by the Sixth Circuit in *Jones v. Dirty World Entm't Recordings, LLC.*, which established and clarified the concept of a "material contribution."[37] The test for material contribution, as clarified in *Dirty World*, provides that an Internet platform must materially contribute to a third-party's post to be removed from Section 230 protection and to be considered the speaker or publisher of the content.[38] Furthermore, the Court provided that a material contribution on the part of an Internet platform must involve a contribution to what makes the content unlawful and expanded that "[a] material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed content allegedly unlawful."[39] This test is now the standing measure of Section 230 applicability and removal of protections for an Internet platform in the event of a contribution to third-party content. Applying these established legal principles to generative AI algorithms, I will demonstrate in the following section that Section 230 of the CDA does not shield an Internet platform from liability with regard to the output from generative AI algorithms or technologies.

b. *Application of Section 230 to Generative AI Algorithms*

Applying Section 230, as interpreted by the courts, to generative AI algorithms, it seems evident that the technology would not qualify for Section 230 protection. Unlike nongenerative algorithms that sort, organize, display, recommend, or otherwise arrange content created by third parties, which the courts have consistently determined to be immaterial contributions and rather functions of publishing, generative AI algorithms create new content by assessing and learning from information or data sources across the Internet (i.e., the training set) and creating new complementary information based on probabilistic outcomes.

Knowing that the statute effectively creates an immunity shield for Internet platforms in relation to third-party content posted on their websites by their users, there is an argument to be made that generative algorithmic outputs do not constitute "information provided by another information content provider" that would be protected by Section 230.[40] This argument can be effectively based on the fact that, though the algorithmic outputs are trained on third-party content, they make predictions founded upon trends within third-party content, essentially mimicking preexisting content while, in actuality, generating something new. For instance, with a large language model like ChatGPT or Bard, a user could ask the model what principles guided

---

[35] *See id.* § 230(f)(3) (defining 'information content provider' as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service").

[36] *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008). *See* Ambika Kumar and Tom Wyrwich, *The Test of Time: Section 230 of the Communications Decency Act Turns 20*, DAVIS WRIGHT TERMAINE (Sept. 2016), https://www.dwt.com/blogs/media-law-monitor/2016/08/the-test-of-time-section-230-of-the-communications.

[37] *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 410-11, (6th Cir. 2014).

[38] *See id. See also* Dariely Rodriguez and David Brody, *Section 230 Requires a Balanced Approach that Protects Civil Rights and Free Expression*, AM. CONST. SOC'Y. (Feb. 21, 2023), https://www.acslaw.org/expertforum/section-230-requires-a-balanced-approach-that-protects-civil-rights-and-free-expression/#:~:text=The%20second%20prong%20of%20the%20Section%20230%20analysis,allegedly%20unlawful%2C%E2%80%9D%20as%20the%20Sixth%20Circuit%20put%20it.

[39] *Id*. at 410.

[40] *See* 47 U.S.C. § 230(c).

Immanuel Kant in his philosophy, and the model will instantaneously, based on previous searches and analysis of the sources at its disposal across its relative Internet training pool, predict the most likely information to communicate to the user regarding Kant's philosophical principles.

This provision of the principles may seem like the model sourced, compiled, organized, and offered this information to the user after pulling it directly from third-party content. However, the output from generative AI is, in its own right, unique and novel as it is not quoted from the original sources, nor does the model simply provide the sources to the user like a search engine's nongenerative algorithm. Instead, it generates specific answers to specific questions by analyzing available information from third-party content and making statistical predictions based on that information regarding what the likely answers would be. In this way, the generative AI is not neutrally organizing information or recommending information; it is formulating entirely new content. This output is not content posted by a third-party, as the generative AI output is not a mere facsimile of the source content, but rather materially different from such content. Likewise, this functionality is not even arguably a good-faith attempt at content moderation as contemplated under Section 230. In other words, the immunity shield established by Section 230 is inapplicable to the output of the technology.

The interpretative case precedent surrounding Section 230 applicability, similarly, does not provide any further protections for Internet platforms in the context of generative AI algorithms and technologies.[41] As previously acknowledged, the predominant test established by the courts for determining whether the protections of Section 230 shield an interactive computer service provider from civil liability by classifying certain actions as speech and others as content moderation is the material contribution test.[42] As demonstrated by the existing case precedent, nongenerative algorithms fail to meet the bar of material contribution because they merely organize, arrange, and categorize preexisting third-party content and do not contribute to the content of the third-party posts.[43] While nongenerative algorithms do not have the capability to contribute to the legality, illegality, or otherwise of third-party content, generative AI algorithms, on the other hand, do. For example, generative AI algorithms are capable of adding words, pixels, or other information to defamatory material posted by third parties online or even generating their own defamatory material wholly independent of any third-party material, often for reasons that providers of generative AI admittedly do not themselves understand.[44]

A perfect example of generative AI's ability to contribute to the illegality of third-party content or create independently defamatory content outside the scope of Section 230 occurred earlier this month. In early April of 2023, a California-based attorney asked large language model ChatGPT to generate a list of legal scholars with a history of sexual harassment.[45] In response, ChatGPT generated the requested list and included the name of Jonathan Turley, a practicing law professor, and stated that the professor made sexually explicit comments and physical advances

---

[41] *See e.g., Force v. Facebook, Inc*., No. 18-397 (2nd Cir. 2019); *Twitter, Inc. v, Taamneh*, 598 U.S. 471 (2023).

[42] *See Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 410-11, (6th Cir. 2014).

[43] *See generally*, *Force v. Facebook, Inc*., No. 18-397 (2nd Cir. 2019); *Twitter, Inc. v, Taamneh*, 598 U.S. 471 (2023).

[44] *See* Scott Pelley, *Google's AI Experts on the Future of Artificial Intelligence*, 60 Minutes (Apr. 16, 2023, 7:02 PM), https://www.cbsnews.com/news/google-artificial-intelligence-future-60-minutes-transcript-2023-04-16/?intcid=CNM-00-10abd1h.

[45] Pranshu Verma and Will Oremus, *ChatGPT Invented a Sexual Harassment Scandal and Named a Real Law Prof as the Accused*, The Wash. Post (Apr. 5, 2023), https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies/.

towards a law student during a class trip to Alaska in 2018.[46] ChatGPT even cited an article published by the Washington Post as the source of its findings.[47] However, the alleged sexual misconduct never occurred, and the existence of the Washington Post article was a fabrication.[48] In this instance, ChatGPT clearly created defamatory content independent of any third-party material and demonstrated the capabilities of the technology to contribute materially to the illegality of content online. Therefore, such outputs and contributions would not be shielded by Section 230, as established and interpreted by applicable case precedent.

IV.   Comparisons and Demonstrative Examples

With the basics concerning how generative AI algorithms and technologies function established and the statutory language of Section 230 and relevant interpretive case precedent applied, to further illustrate that the protective umbrella of Section 230 does not shield Internet platforms from liability in the context of generative AI algorithms, I will provide two demonstrative examples as comparisons in relation to human speech and thought or learning and existing concepts in Copyright Law.

a.   Example 1: Human Speech and Thought

Turning to the first demonstrative example, the outputs of generative AI are comparable to the manner in which human beings think, speak, and create expressive content. Human beings express themselves via speech that is formed and molded by their everyday experiences, culture, friends and familial relationships, environment, religious views and doctrines, education, and information to which they are exposed to on the Internet or in the media. Since no thought is wholly original and is heavily influenced by external factors and the external content an individual consumes, the content created and speech generated by human beings is derivative from the content that they have already consumed, be it content from books, the radio, the news, songs, pop culture, social media, and so on.

How, then, when human beings speak or create content online is that speech significantly different from the output created by a generative AI system or algorithm that, similarly, creates content that is based upon information analyzed from the thousands of sources across the Internet upon which the AI is trained? Likewise,

> "[t]he fact that ChatGPT rephrases material from the Web instead of quoting it word for word makes it seem like a student expressing ideas in her own words, rather than simply regurgitating what she's read; it creates the illusion that ChatGPT understands the material. In human students, rote memorization isn't an indicator of genuine learning, so ChatGPT's inability to produce exact quotes from Web pages is precisely what makes us think that it has learned something."[49]

---

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Ted Chiang, *ChatGPT is a Blurry JPEG of the Web*, THE NEW YORKER (Feb. 9, 2023), https://www.newyorker.com/tech/annals-of-technology/chatgpt-is-a-blurry-jpeg-of-the-web.

In this way, generative AI technology functions in a way that is similar to humans, including how we form speech and create expressive content online. As such, the output of generative AI is akin to the speech human beings create independently and, thus, likely is not and should not be protected by Section 230.

b. *Example 2: Original Work of Authorship or Compilation in Copyright*

Turning now to a second demonstrative example, generative AI algorithmic outputs can be compared to common concepts in Copyright Law. The United States Patent and Trademark Office provides that, under the Copyright Act of 1976, a copyrightable work can be ~~any~~ "literary, dramatic, musical, and artistic works such as books, plays, music, lyrics, paintings, sculptures, video games, movies, sound recordings, and software."[50] Likewise, code can also be copyrighted "if it is created as a work of authorship. This means that the code itself is something that can be copyrighted, and not just the results or functionality that the code produces."[51] In order for any work to be copyrightable, it must be three things: 1) it must be original, meaning that the work "must be created independently and must have 'at least a modicum' of creativity"; 2) it must be a work of authorship, meaning that it must fall within one of the protectable categories under Copyright Law as "literary works, musical works, pictorial, graphic, and sculptural works, audiovisual works, and sound recordings, as well as many other types of creative works"; and 3) it must be "fixed in a tangible medium of expression."[52]

When viewing the outputs of generative AI technology under these parameters, one could argue that the outputs are original in that they are not copied from another since generative AI learns from other content rather than copying other content, making outputs independently created. Likewise, such outputs contain at least a 'modicum of creativity.' The 'modicum of creativity' standard "sets a low bar for copyrightability," as the Supreme Court in *Feist v. Rural* "held that 'the requisite level of creativity is extremely low; even a slight amount will suffice.'"[53] Therefore, the generative outputs created by the technology when such technology is tasked with creating song lyrics, poems, and so on would meet the low bar of containing at least a 'modicum of creativity.' In regard to the remaining second and third requirements of copyrightability, generative AI has the ability to create poems, music, speeches, blog posts, song lyrics, and graphic images and artworks, which fall under the protectable categories established by the Copyright Act, and is capable of doing so on a computer screen, which is considered a fixed and tangible medium of expression since the requirement of fixation is not based on whether you can actually touch the product; the expression must merely be recorded, rather than be an abstract idea. With these requirements in mind, it is likely that generative AI outputs could be considered copyrightable,

---

[50] *Copyright Basics*, U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/ip-policy/copyright-policy/copyright-basics (last accessed Apr. 30, 2023).

[51] Staff Desk, *Can a Programming Code Be Copyrighted?,* VAKILSEARCH (Mar. 13, 2023), https://vakilsearch.com/blog/can-a-programming-code-be-copyrighted/#:~:text=Generally%2C%20the%20software%20code%20can%20be%20copyrighted%20if,must%20be%20original%20and%20created%20by%20the%20developer.

[52] *Copyright Basics*, UNIV. OF MICHIGAN LIB., https://guides.lib.umich.edu/copyrightbasics/copyrightability#:~:text=To%20be%20eligible%20for%20copyright%20protection%2C%20a%20work,many%20other%20types%20of%20creative%20works.%20More%20items (last accessed Apr. 30, 2023) (quoting the Court majority opinion in *Feist* in part).

[53] *Id.*

and if they are theoretically copyrightable as standalone products, they cannot be considered non-speech that is protected by Section 230 like traditional, nongenerative algorithms.

However, it is important to note that in 2015, the Court struck down an argument that a monkey and the zoo in which the monkey lived could obtain a copyright for a 'selfie' taken by the monkey with a camera that was dropped into the primate's enclosure by a visiting photographer.[54] The Court held that the monkey was ineligible to hold a copyright over the image because the Copyright Act did not extend protections to animals.[55] This creates space for the argument that outputs of non-human algorithms and technology, like generative AI used by Internet platforms, would be unprotectable and, therefore, not capable of being considered standalone products. However, the courts have consistently viewed the traditional, nongenerative algorithms that Internet platforms develop and apply and their related outputs as extensions of the Internet platforms themselves. As such, generative AI outputs utilized by Internet platforms could and should be equally considered as products of the Internet platforms that develop and use the technology.

What's more, should an individual assume the view that generative AI functions by pulling bits of information from preexisting content on the Internet, under this view, the outputs created by generative AI algorithms could still be considered standalone products in a manner that is akin to compilations in Copyright Law. Compilations are protected under the Copyright Act as unique works of authorship and are understood in the context of Copyright Law as the following:

> "Under the Copyright Act, a compilation is a 'work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term compilation includes collective works'. . . This gives the compilation a separate copyright from any of the individual pieces within it. An author who creates a compilation owns the copyright of the compilation but not of the component parts. The author can compile material even if someone else owns the copyright, but the author must get the rights holders' permission to do so. A compilation of mere facts may not be copyrighted. Instead, a compilation may only be copyrighted if there is a creative or original act involved, i.e., in the selection and arrangement of materials. The protection is limited only to the creative or original aspects of the compilation."[56]

Similar to compilations, under this view of the technology's functionality, generative AI assembles preexisting digital content (i.e., such words, data, information, pixels, etc.) and arranges this information into a new work of art, image, or sentence, thus creating what is arguably an original work of authorship that could be copyrightable as a standalone product.[57] This comparative argument of a compilation applies in certain instances where the generative AI is pulling from and reorganizing third-party content into a new product that could be copyrightable based on its organization and whether it satisfies the relative requirement of creativity.

---

[54] Samuel Osborne, *'Monkey Selfie' Case: Photographer Wins Two Year Legal Fight Against Peta Over the Image Copyright,* INDEPENDENT (Sept. 12, 2017, 4:28 PM), https://www.independent.co.uk/news/world/americas/monkey-selfie-david-slater-photographer-peta-copyright-image-camera-wildlife-personalities-macaques-indonesia-a7941806.html.

[55] *Id.*

[56] *Compilation*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/compilation (last accessed Apr. 15, 2023).

[57] *Id.*

In the same vein, recently, the Copyright Office has weighed in on this discussion, finding and confirming that some works created with AI assistance are copyrightable.[58] In March of 2023, the Copyright Office built upon ". . . on a decision it issued last month rejecting copyrights for images created by the generative AI system Midjourney. . . [and] the office said copyright protection depends on whether AI's contributions are 'the result of mechanical reproduction,' such as in response to text prompts, or if they reflect the author's 'own mental conception.'"[59] Though the Copyright Office has plans to further explore the concept of generative AI copyrightability,[60] this acknowledgement of the need to explore the availability of copyright protections for generative AI outputs demonstrates the unique nature of generative AI and its clear differentiation from nongenerative AI algorithms, making it unlikely that generative AI outputs would be protectable as non-speech under Section 230.

V.   Conclusion

In summary and as evidenced by the cases brought before the Supreme Court and various district courts challenging Section 230 protections, such as *Gonzalez v. Google, LLC* and *Force v. Facebook,* the immunity shield for Internet platforms under Section 230 of CDA over their use of algorithms and resulting outputs will continue to come under fire as technology continues to advance in this space. Though a case concerning the applicability or non-applicability of Section 230 immunity to generative AI is undoubtedly on the horizon, such a case has yet to surface. Resultantly, the courts have yet to provide any definitive guidance as to whether the outputs of generative AI are covered as non-speech. Still, based on the current state of the law, the outputs of generative AI likely do not and should not fall under the statutory protections afforded by Section 230. With the statutory language of Section 230 and associated case precedent and the functionality and capabilities of generative AI in mind, it is likely that Justice Gorsuch's comment in the *Gonzalez* case will have implications that extend well beyond *Gonzalez*; his comment is prophetic of the legal and technological landscape to come.

---

[58] *See* Blake Brittain, *U.S. Copyright Office Says Some AI-Assisted Works May be Copyrightable*, REUTERS (Mar. 15, 2023, 5:49 PM), https://www.reuters.com/world/us/us-copyright-office-says-some-ai-assisted-works-may-be-copyrighted-2023-03-15/.

[59] Blake Brittain, *U.S. Copyright Office Says Some AI-Assisted Works May be Copyrightable*, REUTERS (Mar. 15, 2023, 5:49 PM), https://www.reuters.com/world/us/us-copyright-office-says-some-ai-assisted-works-may-be-copyrighted-2023-03-15/.

[60] *See Copyright Office Launches New Artificial Intelligence Initiative*, U.S. COPYRIGHT OFF. (Mar. 16, 2023), https://copyright.gov/newsnet/2023/1004.html. The Copyright Office's acknowledgement of the need for further exploration of generative AI in the context of copyright protections has been evidenced by the Office's launch of "a new initiative to examine the copyright law and issues raised by artificial intelligence (AI), including the scope of copyright in works generated using AI tools and the use of copyrighted materials in AI training."