



COPYRIGHT UPDATE

The tail of '23 and the head of '24

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US SUPREME COURT – COPYRIGHT DAMAGES

Warner Chappell Music v. Nealy et al. (US Sup.Ct. May 9th, 2024)

- 2014 – Petrella – No Laches in Copyrights
- 2017 – SCA Hygiene – No Laches in Patents
- 2024 – Warner Chappell –
 - If there is a Discovery Rule (Big “IF”)
 - The 3 year Statute of Limitations does NOT cap damages
 - Dissent says, “Why are we here????”
- Bigger question
 - Court eviscerated SCA Hygiene which was based on Petrella
 - So, do we have Patent Laches again????

COPYRIGHT & A.I.

NON-HUMAN CREATORS

- What if a **non-human** creates a work?
 - Monkey Selfie Case
 - (*Naruto v. Slater* 2015)
 - No Authorship for AI
 - US Copyright Office Guidance (2023)
 - *Thaler v. Perlmutter* (2023)



Naruto

“Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand, as plaintiff urges here. Human authorship is a bedrock requirement of copyright.”



A Recent Entrance to Paradise

ZARYA OF THE DAWN

- Author Kristina Kashtanova used Midjourney to create a graphic novel called “**Zarya of the Dawn**”
- In 2022 the US Copyright Office granted copyright registration over the entire work
- The application **did not disclose** that AI was used to create any part of the work nor was any part disclaimed.
- After the author posted on social media about the copyright registration, the Copyright Office reexamined the work.
- In Feb 2023, the Copyright Office cancelled the original registration and granted a more limited registration, excluding copyright protection for the computer-generated images.



“Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the Work that were generated by the Midjourney technology are not the product of human authorship.”

KASHTANOVA'S CREATIVE PROCESS

1. Entered a detailed text prompt to Midjourney (e.g., “dark skin hands holding an old photograph”)
2. Selected one or more of these output images
3. Used that image to tweak or change
4. Generate new intermediate images
5. Ultimately selecting the final image

This trial-and-error process required “*hundreds or thousands of descriptive prompts*” to Midjourney until the “*hundreds of iterations [created] the perfect rendition*” of the final images.



Midjourney Selection

CREATIVE ENOUGH?

“Rather than a tool that Ms. Kashtanova controlled and guided to reach her desired image, Midjourney generates images in an unpredictable way. Accordingly, Midjourney users are not the “authors” for copyright purposes of the images the technology generates. As the Supreme Court has explained, the “author” of a copyrighted work is the one “who has actually formed the picture,” the one who acts as “the inventive or master mind.”



VS.



DISCLOSURE OBLIGATION

- Copyright applicants have a duty to disclose when works have an “**appreciable amount**” of AI-generated material (vs. *de minimis* AI-generated content)
- Is the AI-generated material – standing on its own – sufficient to satisfy the *Feist* copyrightability standard (“creative originality”)? If yes, disclosure is required.



AI & HUMAN WORKS - WHAT IS PROTECTED?



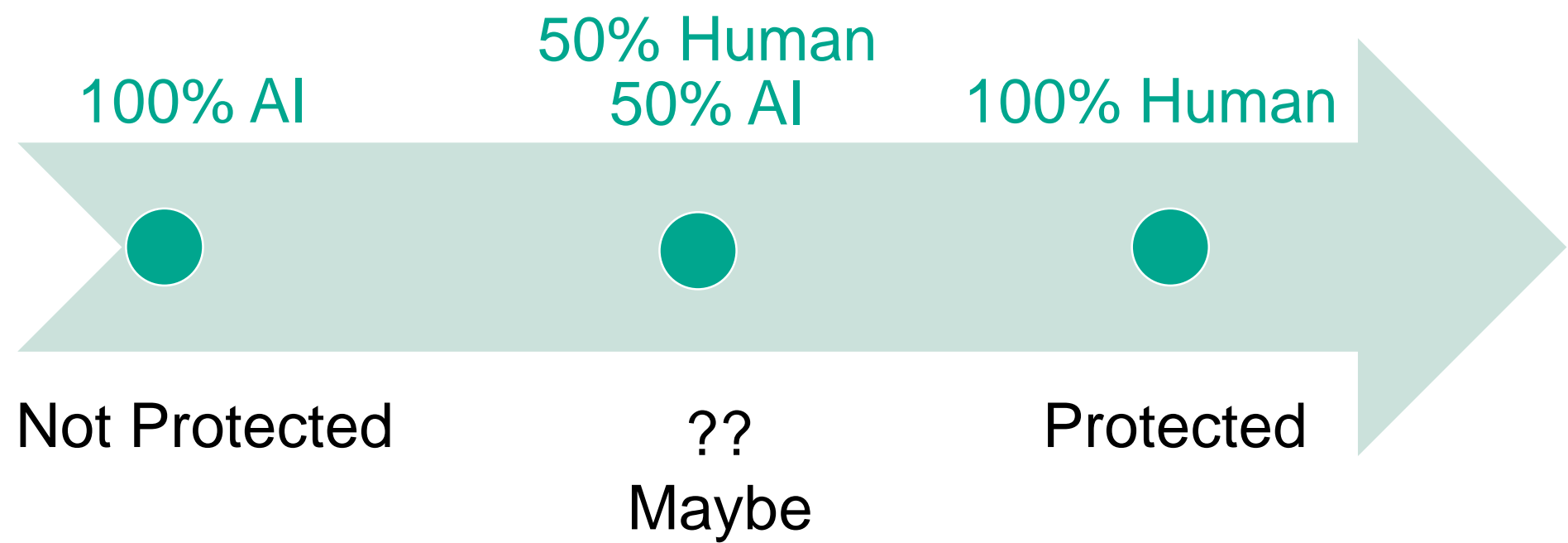
Midjourney Image



The Work



WHERE IS THE “LINE” FOR COPYRIGHT PROTECTION?



REVISIT COPYRIGHT ACT?

- **Copyright Act is Old** - The Copyright Act has been revised 5 times since it was created in 1886, but not for the past 76 years.
- **Merging of Human and AI** - Given that it will soon be impossible to tell where the creative process of the human mind stopped and the machine began, Congress should revise our antiquated Copyright Act to allow for protection of machine generated works.
- **Potential New Standard** - Copyright protection should be available to original works if a human started the creative process for that work.
- **Some Countries Protect Computer-Created Works** - Copyright protection should not be available for works that are entirely computer-generated; although it is worth noting that leading industrial countries including the U.K. and Ireland do allow for such protection.



COPYRIGHT – INPUT QUESTION

Do LLMs' training or output violate copyright of authors?

COPYRIGHT HOLDERS CLAIM INFRINGEMENT



SOME GENERATIVE AI COPYRIGHT CASES

- *Doe 1 v. GitHub, Inc.*, 672 F. Supp. 3d 837 (N.D. Cal. 2023)
- *Andersen v. Stability AI Ltd.*, 3:23-cv-00201, (N.D. Cal.)
- *Getty Images (US), Inc. v. Stability AI, Inc.*, 1:23-cv-00135, (D. Del.)
- *In re: OpenAI ChatGPT Litigation*, No. 3:23-cv-3223 (N.D. Cal) (consolidating *Tremblay v. OpenAI, Inc.*, No. 3:23-cv-03223, *Silverman v. OpenAI, Inc.*, No. 3:23-cv-03416, *Chabon v. OpenAI, Inc.*, No. 3:23-cv-04625)
- *Alter v. Open AI, Inc.*, No. 1:23-cv-08292-SHS; No. 1:23-cv-10211-SHS (S.D. NY) (consolidating *Alter v. OpenAI Inc.*, No. 1:23-cv-10211, *Authors Guild v. OpenAI Inc.*, No. 1:23-cv-08292, *Basbanes v. Microsoft Corporation*, No. 1:24-cv-00084)
- *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, No. 1:20-CV-613-SB, 2023 WL 6210901 (D. Del. Sept. 25, 2023)
- *Huckabee et al v. Meta Platforms, Inc. et al*, No. 1:23-cv-09152 (S.D.N.Y.)
- *New York Times Company v. Microsoft Corp.*, 1:23-cv-11195, (S.D.N.Y.)
- *Raw Story Media, Inc. et al v. OpenAI Inc. et al*, 1:24-cv-01514 (S.D.N.Y)
- *J.L. v. Alphabet, Inc.*, 3:23-cv-03440-LB (N.D. Cal.)
- *Nazemian et al v. NVIDIA Corp.*, 3:24-cv-01454 (N.D. Cal.)
- *Kadrey and Silverman et al. v. Meta Platforms, Inc.*, No. 3:23-cv-03417 (N.D. Cal.)
- *Concord Music Group, Inc. et al v. Anthropic PBC*, No. 3:23-cv-01092 (M.D. Tenn.)
- *The Intercept Media, Inc. v. OpenAI, Inc. et al*, No. 1:24-cv-01515 (S.D.N.Y.)



COPYRIGHT CASE TYPICAL ARGUMENTS

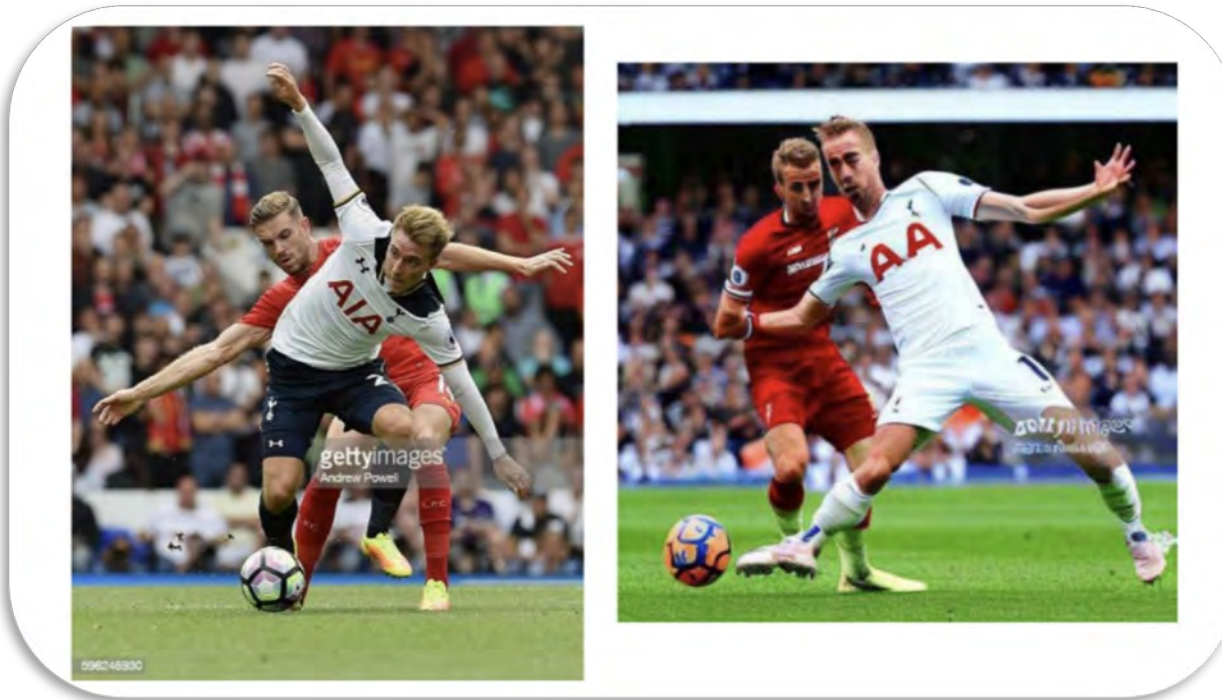
Plaintiff Arguments

- The LLMs themselves are **direct copyright infringement** because they necessarily copy the plaintiffs' works to build the model.
- The output of the LLMs **vicariously infringe** because the LLMs benefit from the infringing output of the LLMs
- LLMs remove **copyright management information** from works in violation of the DMCA to train models which induces LLM users to distribute and publish responses that use plaintiffs' works
- Output of LLMs **unfairly compete** with the plaintiffs' copyrighted works

Defendant Arguments

- LLM training is **fair use**
- Plaintiffs **must show specific examples** of infringing output, not every output is necessarily derivative
- State law claims are **preempted** by federal copyright statute (but what about the Tennessee "ELVIS" Act protecting voices)

GETTY IMAGES V. STABILITY AI



- Getty Images alleges that Stability AI copied more than 12 million photographs from Getty's collection along with captions and metadata to build a competing business
- Status:
 - Mar. 29, 2023 – Amended complaint
 - May 2, 2023 – Brief in support of motion to dismiss or transfer filed
 - Sept. 22, 2023 – Plaintiff's request for jurisdiction discovery granted.
 - Jan 26, 2024 – Defendant's motion to dismiss is dismissed but can be refiled after discovery

PRECEDENT HELPS LLM PROVIDERS

- **Field v. Google** – Court held that Google’s copying of internet content for the purposes of indexing content was fair use and not infringing.
- **Authors Guild v. Google** – Appellate court held that Google’s digitizing of millions of copyright protected books from research libraries for the purpose of indexing content and serving up snippets in response to search queries was fair use.
- **Counter Arguments** –
 - Google Cases Inapplicable - Google was making it easier to find works, not create competing works.
 - Fairness - Unfair that LLM companies are “free riding” off copyrighted work.



WHO WINS?



- **Copied?** – Was the copyright protected material “copied” as part of the training process?
- **Derivative Work?** – Is the output of LLMs a “derivative work” under copyright law?
- **Fair Use** – Was the training process a “fair use” of the copyrighted material?
 - Philosophy – Fair use encourages the dissemination of knowledge by allowing others to use copyrighted works for limited purposes of criticism, commentary, news reporting, teaching, scholarship, or research.
 - 4 Factor Test
 - Purpose & character (e.g., commercial vs. teaching, scholarship, and research)
 - Nature of copyrighted work
 - Amount and substantiality of the taking
 - Effect of the challenged use on market for the original
- **Violation of a License** – Were some of these materials were behind a pay wall or other license? Did the license restrict the use in this manner?

FAIR USE – *CAMEO* SILLINESS

- George Santos v. Jimmy Kimmel
- Cameo is a paid service where customers can ask famous people to record greetings
- Kimmel's late night bit "Will Santos Say It" made fun of Santos on the premise that he would say anything for money
 - Congratulations for coming out as a platypus/beaver 'furry'



FAIR USE – *CAMEO* SILLINESS

- Fair Use Factors?
 - The Purpose and Character of the Use.
 - The Nature of the Copyrighted Work.
 - The Amount or Substantiality of the Portion Used.
 - The Effect of the Use on the Potential Market for or Value of the Work.



NO EXPERT REPORT – NO CASE

RJ Control v. Multiject (6th Circuit, April 18th, 2024)

- RJ develops code and designs for a turntable machine
- Multiject then fires RJ and gives code and designs to replacement implementer
- BIG LAWSUIT
 - Judge needs to know whether merger and *scenes a faire* apply
 - Needs expert testimony looking at the code
- RJ discloses name of expert but no report
 - Rules 26(a)(2)(B) and 37(c)(1) apply
 - Summary Judgment for Defendant

TIGER KING – NOT SO FAST ON THE FAIR USE

- Tiger King Docuseries included 8 videos recorded by the plaintiff Timothy Sepi
 - 7 filmed while Sepi was an employee
 - 1 filmed on his own
 - Video of the funeral of Travis Maldonado, husband of the Tiger King aka Joe Exotic
- Dist. Ct. granted Summary Judgment of all claims
 - 7 videos were works for hire
 - Funeral video was fair use



TIGER KING – NOT SO FAST ON THE FAIR USE

- 10 Circuit – ‘Not So Fast!!!’
 - Works for hire affirmed
 - P. arguments regarding scope of employment were new on appeal
 - You can’t do that....
 - Funeral Video
 - Application of fair use factors was wrong



TIGER KING – NOT SO FAST ON THE FAIR USE

- Purpose and Character of Use
 - Commercial? Yes.
 - Commentary on Original? No
- Nature of Work – Purely Factual
- Amount Taken – Less than 5%
- Effect on Market
 - No evidence by Defendant
- Remand on 4th factor (why?)



TIGER KING – DOCUMENTARIANS GO NUTS

- Amicus briefs filed by Documentary film makers
 - 10th Circuit misreads Warhol
 - Chilling effect on Documentary Films who use film clips as historical markers
 - Do not “comment” on original
- Rehearing request granted



JURISDICTION – FOREIGN DEFENDANT WEBSITE

Dish Network v. Bassam Elahmad (5th Circuit)

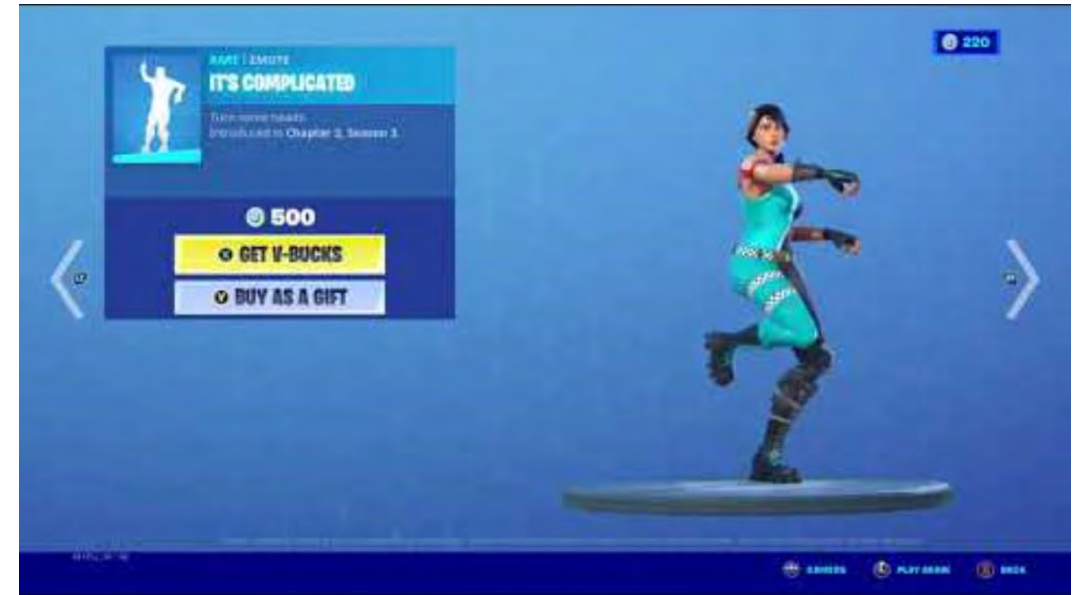
- Elahmad's website copied and provided access to copyrighted Dish Arabic channels
- Dish sued Elahmad in district court in Texas
- District Court denied having personal jurisdiction
- 5th Circuit
 - Contacts with the US entirely, not just Texas
 - Did D. 'avail' himself of the jurisdiction
 - Just ads were not enough
 - "Arab channels in America"
 - DMCA notice
 - US company optimized website (hid his IP address)



VIDEO GAME CHOREOGRAPHY PROTECTIBLE

Hanagami v. Epic Games (9th Circuit, November 2023)

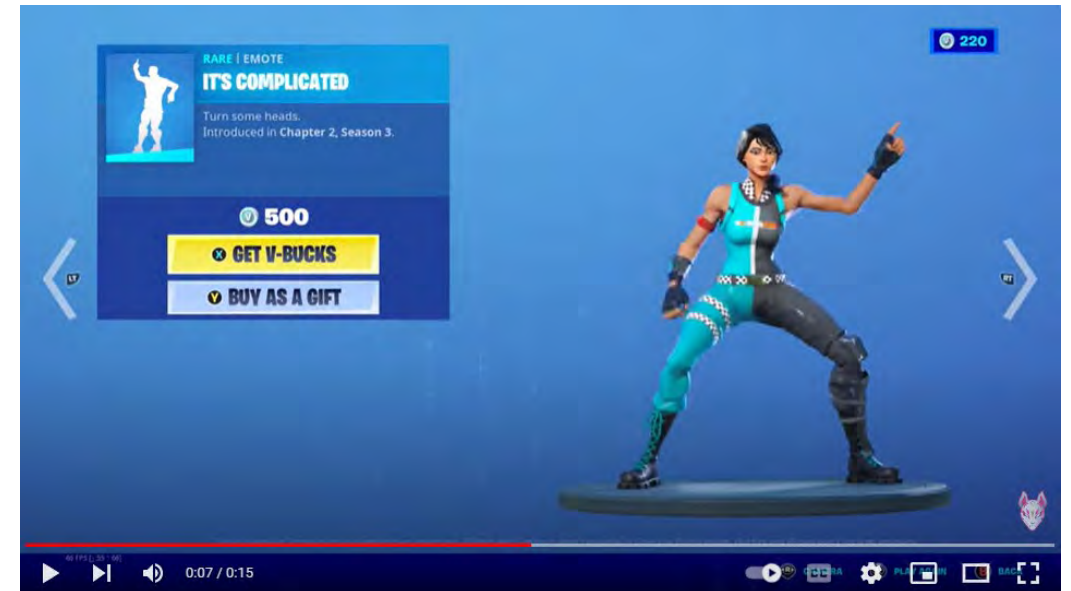
- Hanagami is a choreographer
- Created 5 minute published on YouTube and got 36 million views
- Epic put two second 'emote' into Fortnite called "It's Complicated"
- District Court granted MTD
 - Applying Extrinsic Test
 - Series of unprotectable poses



VIDEO GAME CHOREOGRAPHY PROTECTIBLE

Hanagami v. Epic Games (9th Circuit, November 2023)

- 9th Circuit reverses
 - Two part test:
 - Extrinsic Test – objective similarity of protectible elements
 - Intrinsic Test by ‘ordinary observer’
 - Only objective test at pleading stage
 - Dance is a collection of movements
 - 2 seconds is long enough



ATTORNEY'S FEES CASES

- Lowery v. Rhapsody
 - Take into account amount of damages when determining fees
- Live Face v. Cremation
 - Change in law doesn't matter and nature of plaintiff does matter
- Markham v. Hasbro
 - But... When change in law isn't definitive, it matters



COPYRIGHTED MATERIAL IN PUBLIC LAWS

ASTM v. Public Resource .Org (DC Circuit Sept. 2023)

- ASTM develops and publishes technical standards
- Some standards were incorporated into laws and rulemaking; some were not...
- Public Resource posted the standards online
- DC Court of Appeals:
 - Posting incorporated standards is fair use
 - Posting unincorporated standards is infringement
 - No injunction needed as Defendant already complied



VARA COVER UP

Kerson v. Vermont Law School (2d Cir. Aug. 2023)

- Kerson painted two murals for the walls of the law school's community center
- Complaints from community members regarding depiction of African Americans in murals



VARA COVER UP

Kerson v. Vermont Law School (2d Cir. Aug. 2023)



VARA COVER UP

Kerson v. Vermont Law School (2d Cir. Aug. 2023)

- Law school decided to hide murals behind acoustic panels
- Kerson argued moral rights violated
- VARA allows artist to prevent:
 - Intentional distortion, mutilation, or modification
 - Destruction of a recognized work
- Is hiding “destruction”?



VARA COVER UP

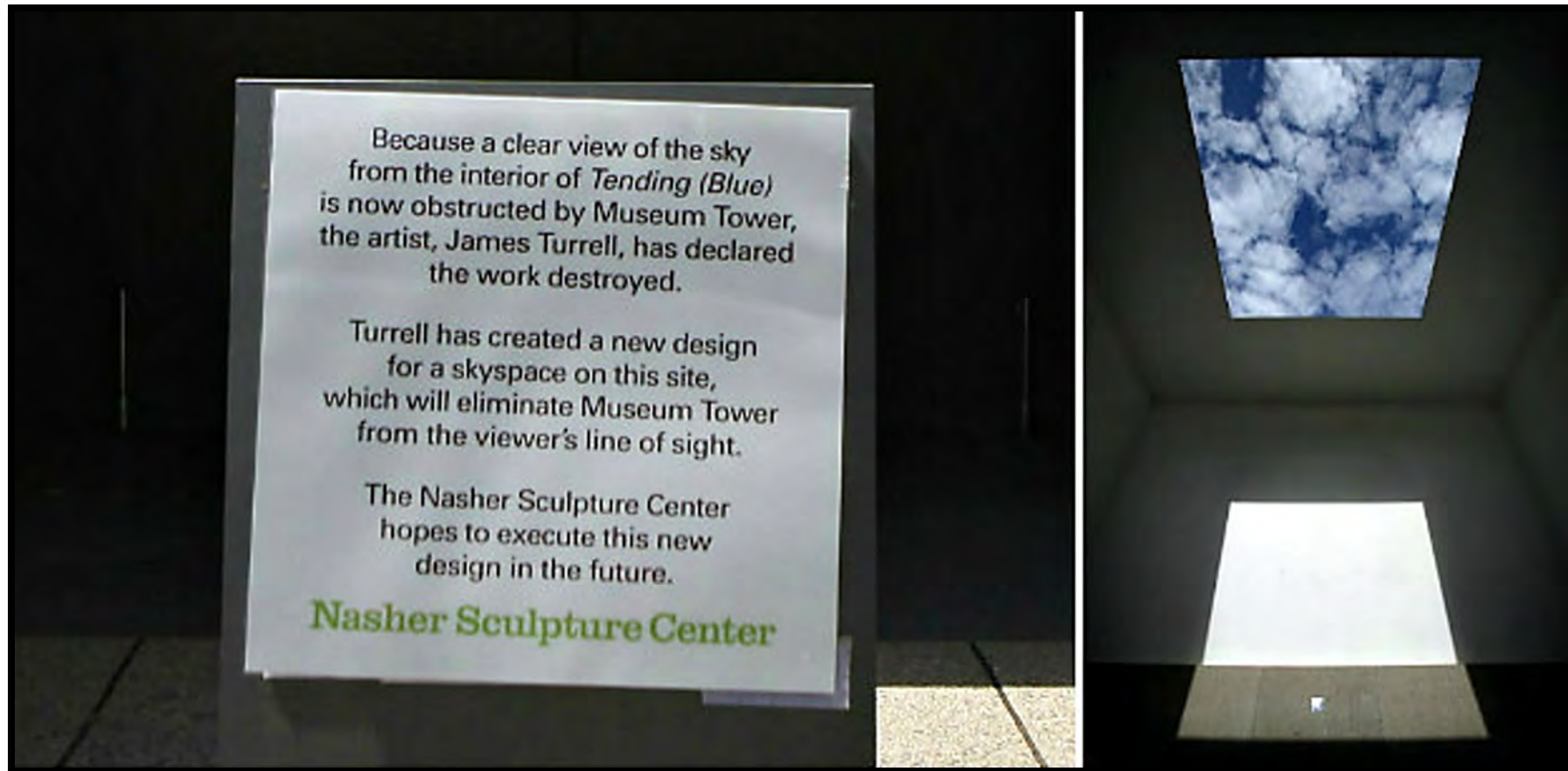
Kerson v. Vermont Law School (2d Cir. Aug. 2023)

- 2d Circuit:
 - Hiding is not in the convention definition of “destruction”
 - Modifications do not include concealing the entire work behind a barrier where the barrier has been designed not to touch the work.



VARA COVER UP

Kerson v. Vermont Law School (2d Cir. Aug. 2023)



QUESTIONS?

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