

The Third Enclosure Movement

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Very Preliminary Abstract

Today, trade secret law is the leading form of intellectual property protection for GenAI. While patent and copyright protection of AI systems is limited due to eligibility requirements, trade secrecy safeguards a wide array of GenAI material—including algorithms, source code, system architecture, and training data. Trade secrecy enables GenAI firms to maintain a competitive advantage, protect commercial assets, and avoid public scrutiny at a low cost because there are no registration requirements and trade secrets remain self-defined and unsubstantiated unless they are enforced through litigation.

However, the rise of trade secrecy within GenAI has produced a paradox of information privatization: trade secret law facilitates the concealment of GenAI material at the same time that it is designed to facilitate the disclosure and production of information. The result, we argue, portends a tragedy of the data commons, a third enclosure movement. Because GenAI firms train algorithms using data sourced from public data commons, many entities are increasingly restricting information access through terms of service, paywalls, and the Robots Exclusion Protocol in an effort to prevent GenAI firms from using their information without permission or compensation. Data access restrictions, which are only expected to grow with time, impact not only GenAI firms, but researchers, scientists, academics, and the public.

The potential decline and privatization of public data commons as a consequence of trade secrecy in GenAI has garnered much attention. However, as GenAI continues to digest publicly accessible information, thickets of licensing agreements will form. Licensing will make it difficult for individuals and entities alike to access and use content, resulting in a societal loss of research, innovation, and technological advancement. We discuss potential avenues to mitigate GenAI anticommons, including the adoption of copyright's "fair use" doctrine for trade secrecy and AI governance focused on implementing data provenance requirements and mandating the disclosure of GenAI information.