Navigating the Legal Landscape: Generative AI and Copyright Law

BRYAN MECHELL

Generative artificial intelligence captivated the world in 2023 and is firmly positioned to remain center stage in the coming year. In the United States, the introduction and early-stage use of generative AI have been plagued with legal disputes and speculation. This presents challenges for companies protecting their generative AI innovations as well as for users understanding rights and risks associated with generative AI tools.

In this Q&A, Robins Kaplan attorney Bryan Mechell provides some guidance to understanding the many copyright controversies that have accompanied the introduction of generative AI systems and take-aways for technology companies leveraging and licensing generative AI innovations.

REWRITING THE ODDS

800 553 9910
ROBINSKAPLAN.COM

1 | There have been two primary copyright questions that everyone is asking with regard to AI and intellectual property. The first is: Can something created with AI be protected by copyright law?

In short, yes, content created using a generative AI tool can likely be protected by copyright law—but the scope of how much human input is necessary to qualify the user of an AI system as an "author" of the generated work is still an open question subject to substantial ongoing legal and regulatory discussion. The U.S. District Court for the District of Columbia considered aspects of this question in the August 2023 *Thaler v. Perlmutter* decision. In that case, the court affirmed the U.S. Copyright Office's denial of an application for an AI-generated image that was generated autonomously by an AI system called the "Creativity Machine." Noting that "human authorship is an essential part of a valid copyright claim," the court highlighted Section 102 of the Copyright Act, which provides copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. §102(a). Section 101 of the Act further provides that the work of authorship must be fixed "by or under the authority of the author." This "authorship" requirement, the court noted, was "presumptively human" and centered on "acts of human creativity." The court noted that "Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand."

Notably, however, the *Thaler* decision left the critical and more fact-specific question unanswered of *how much* human input would have been needed to qualify the work for protection. While courts have long recognized that technological tools can be used by authors as part of the creative process, generative AI highlights important questions about how a technological

> While courts have long recognized that technological tools can be used by authors as part of the creative process, generative AI highlights important questions about how a technological tool can be used by a human author and the extent of human decision-making required.

tool can be used by a human author and the extent of human decision-making required. With the right amount of human input and creativity, it stands to reason that works containing outputs from advanced technological tools may qualify for copyright protection. Courts and the U.S. Copyright Office are likely to provide useful guidance as they explore the contours of this issue in the coming year.

2 | **The second question concerns whether generative AI companies such as OpenAI are violating copyright law, as some class actions have been filed recently over infringement and related issues. Who is waging these suits and what are these plaintiffs claiming?**

Proposed class action lawsuits filed last year against GitHub, Stability AI, OpenAI, and Meta—including actions filed by George R.R. Martin, John Grisham, Pulitzer Prize winner Michael Chabon, comedian and author Sarah Silverman, and various other authors against OpenAI and Meta—raise important questions about liability for unauthorized use of copyrighted materials to train generative AI models without consent, credit, or compensation, as well as questions about ownership of generative AI outputs.

These actions include allegations that generative AI companies trained their generative AI tools on protected materials without proper attribution or compensation. For example, the class action complaint filed against GitHub, Microsoft, OpenAI, and related corporate groups in November 2022 alleges that the defendants trained Codex and Copilot (coder-assisting generative AI programs) on public code that was protected by open-source licenses, but the AI does not provide attribution of authorship or copyright when outputting that code. These are alleged Digital Millennium Copyright Act (DMCA) violations.

It is critical that technology companies developing and licensing generative AI innovations closely monitor, catalog, and assess training data used by generative AI tools.

The various class action litigations filed against OpenAI and Meta allege that the generative AI tool uses copyrighted works in its vast *training datasets* that are built by scraping the internet for text data—which necessarily leads the tool to capture, download, and copy copyrighted written works, plays, and articles. The complaints also assert that the *outputs* of the generative AI model—i.e., the text-generated responses to a user input query—constitute copyright infringement.

And to round out the year, *The New York Times* sued OpenAI and Microsoft, alleging millions of the newspaper's articles were used without permission to train AI chatbots that interact with users.

For intellectual property owners protecting their generative AI innovations, as well as end users licensing generative AI tools, these lawsuits underscore the importance of closely monitoring the composition of generative AI training data sets, scope and content of outputs, and license terms regulating the use of these rapidly evolving technologies.

3 | **What are the defendants claiming gives them the right to use copyrighted content to train their systems?**

OpenAI has moved to dismiss the bulk of the claims in the class action filed by Sarah Silverman and others—the "heart" of which it argues are copyright claims—on the basis that they "misconceive the scope of copyright, failing to take into account the limitations and exceptions (including fair use) that properly leave room for innovations like the large language models now at the forefront of artificial intelligence." Motion to Dismiss, Dkt. 32, *Silverman v. OpenAI, Inc.,* No. 3:23-cv-03417 (N.D. Cal. Aug. 28, 2023) (Dkt. No. 32). The Copyright Act grants a limited monopoly in service of a broader goal to—as

the U.S. Constitution states—"promote the Progress of Science and useful Arts." U.S. CONST. Art. 1, § 8, cl. 8. But this protection has limits, including the "fair use" doctrine, which OpenAI argues should be adapted to account for "rapid technological change" and, in short, to protect the use of large sets of training data for generative AI models. OpenAI argues in its motion to dismiss that current judicial precedent supports the conclusion that it is not an infringement to create "wholesale cop[ies] of [a work] as a preliminary step" to develop a new, non-infringing product, even if the new product competes with the original. **Oracle**, 141 S. Ct. at 1199 (summarizing *Accolade*, 977 F.2d at 1521– 27); *see also Connectix*, 203 F.3d at 603–08.

4 | You mention the potential liability of those training their AI models, but how are technology companies addressing the risk of developing and using generative AI models?

Technology and software license disputes involving intellectual property and contract rights carry significant risk in terms of potential business disruption and damages. While generative AI models that learn from datasets as large as the internet can be exceptionally powerful, those datasets are heavily interspersed with copyrighted and other protected material. The increasing implementation and use of generative AI at software and technology companies could, therefore, lead to increased disputes over the use of copyrighted data to train generative AI models as well as ownership of outputs.

It is likely going to be some time before we get solid guidance from courts, regulations, and potentially Congress on the scope of various IP rights in generative AI tools. In the meantime, it is critical that technology companies developing and licensing generative AI innovations closely monitor, catalog, and

assess training data used by generative AI tools. This includes maintaining a detailed record of the sources, libraries, metadata, and the compositions of each—which provides the basic materials needed to assess risks associated with an AI system trained on protected materials. All aspects of the generative AI ecosystem are important to consider from a risk management perspective, including the training set, the AI algorithm or model itself, the input query, and the output result. One strategy is to develop a cross-functional team tasked with monitoring use and compliance. As part of this assessment, companies should pay close attention to license terms that outline authorized uses and protect IP rights, assess how generative AI outputs are being used (and modify licenses accordingly), and develop a robust review process for monitoring compliance with developing laws and regulations.

5 | What are some strategies for crafting effective license terms in software license agreements to maximize benefits of IP protection for generative AI innovations?

One important take-away for technology companies leveraging generative AI innovations is to take a wholistic approach to licensing that acknowledges how any generative AI tools interact with licensed software. This includes drafting terms that clearly articulate what rights are licensed, authorized uses, restrictions, and warranties—all of which can vary based on the specific piece of the generative AI ecosystem under consideration. For example, license agreements should identify the scope and content of training data used by any generative AI tools, and how (or if) user data is used to train the model. Similarly, license agreements should define ownership and authorized uses of the generative AI outputs, and articulate restrictions on how the overall tool can be used. It is important to remain mindful of internal goals for IP protection in generative AI and implement intentional processes for refining licensing practices as the laws applicable to generative AI evolve.

Bryan Mechell is a trial attorney in the Intellectual Property and Technology Group at Robins Kaplan LLP, where he focuses his practice on litigating complex technology and software license disputes. Drawing on his background in computer science and physics, Bryan counsels emerging and established businesses developing and leveraging cutting edge technologies, and helps them develop methods for protecting innovation, mitigating risk, and enforcing license compliance. Bryan can be reached at BMechell@RobinsKaplan.com.

2024 PARTNERS

We are pleased to announce that Robert Callahan, Jr. and Jessica Gutierrez have been promoted to partner, effective January 1, 2024.

"I am proud to welcome Jessica and Rob as our newest partners. Their dedication, innovation, and unwavering commitment to our firm's success have not only fueled their individual growth but have greatly benefited the firm and its clients," said Ronald Schutz, chair of the Executive Board.

Robert Callahan, Jr. (Boston) focuses his practice on complex commercial litigation, intellectual property litigation, financial markets litigation, and insurance-related litigation. He is experienced in the legal complexities associated with all phases of an enterprise's lifecycle, from creation and governance, through growth, licensing, and patent monetization, to merger, acquisition, and dissolution. Rob has successfully represented clients in a variety of industries, including software and mobile app development, insurance, telecommunications, healthcare, manufacturing and retail, and consumer products and services.

Jessica Gutierrez (Minneapolis) is a trial attorney with broad intellectual property and technology experience. She counsels clients in navigating every stage of the litigation process, from pre-suit evaluation through appeal. Jessica has litigated patent, copyright, and trademark disputes. She has successfully represented clients in federal district court, before the Patent Trial and Appeal Board, and at the Court of Federal Claims. Jessica employs her engineering background to handle an array of complex technological fields. Her experience spans numerous industries, including medical devices, mobile device technology, computer software, energy, consumer product marketing, and more.

ROBERT CALLAHAN, JR.

JESSICA GUTIERREZ

ROBINS KAPLAN NAMES BRENDAN JOHNSON CHAIR OF NATIONAL BUSINESS LITIGATION GROUP

Brendan Johnson, a longtime Robins Kaplan partner and co-chair of the Government and Internal Investigations Group, has been named chair of the firm's National Business Litigation Group. He replaces Jason Pfeiffer in the role.

"Brendan is an incisive strategist, a fearless advocate, and a widely admired leader," said Ronald Schutz, chair of the firm's Executive Board. "All of those qualities—and more—make him the ideal person to lead our Business Litigation Group forward."

Pfeiffer, Johnson's predecessor, will remain at the firm and focus exclusively on his active litigation practice, including his nationally recognized work in disputes arising from industrial disasters.

JAKE HOLDREITH ADMITTED TO AMERICAN COLLEGE OF TRIAL LAWYERS

Jake Holdreith has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in North America. The induction ceremony took place during the 2023 Annual Meeting of the College in San Diego, California.

Founded in 1950, the College is composed of the best of the trial bar from the United States, Canada, and Puerto Rico. Fellowship in the College is extended by invitation only and only after careful investigation, to those experienced trial lawyers of diverse backgrounds, who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.

STEVE SCHUMEISTER AND CHRIS MESSERLY RECEIVE 2023 MINNESOTA ICON AWARD

Managing partner Steve Schumeister and former partner Chris Messerly received the 2023 Minnesota ICON award by *Finance & Commerce* and *Minnesota Lawyer*. The award recognizes attorneys or business leaders who have exhibited distinctive excellence that puts them at the top of Minnesota's legal and business communities.

ROBINS KAPLAN NAMED ONE OF BTI'S MOST FEARED FIRMS IN LITIGATION

BTI has named the firm to its 2023 list of "Most Feared Law Firms in Litigation." This recognition highlights the firm's strategic, aggressive, and innovative approach to litigation. *BTI* announced the list in its 2024 Litigation Outlook report, which was based on 280 in-depth telephone interviews with top legal decision-makers at large organizations. *BTI*'s research was independent with no law firm or attorney influencing the results, submitting nominations, or providing client names to *BTI*.

FRONT AND CENTER

KELLIE LERNER APPOINTED INTERIM CO-LEAD CLASS COUNSEL IN TWO HIGH-PROFILE ANTITRUST LITIGATIONS

Kellie Lerner has been named interim co-lead counsel for two nationwide classes of end-user plaintiffs in *In re Fragrance End-User Plaintiff Antitrust Litigation* and *In Re Axon Vievu Antitrust Litigation*. The first case alleges that several of the world's largest fragrance manufacturers entered into agreements regarding the prices and supply of fragrances and fragrance ingredients, which artificially raised the prices of household goods, including cosmetics, personal care products, detergents, and cleaning products purchased by consumers across the country. The second case alleges that Axon Enterprise, Inc. artificially increased the price of body cameras and tasers. These alleged actions have cost purchasers—including potentially thousands of police departments and civilians—significant amounts of money.

ROBINS KAPLAN ACHIEVES MAJOR WIN IN BOUNDARY WATERS *PRO BONO* CASE

The firm achieved a significant victory on behalf of its client, Friends of the Boundary Waters, in its campaign to prevent Twin Metals copper-nickel mine from developing a $1.7 billion sulfide mining project on the edge of the Boundary Waters Canoe Area Wilderness.

In September 2023, a federal judge dismissed Twin Metals' lawsuit challenging the U.S. Department of Interior's cancellation of its mineral leases along the edge of the Boundary Waters, its rejection of its mining plan of operations, and denial of its preference right lease applications in other nearby areas that were withdrawn from mineral exploration. The United States District Court for the District of Columbia allowed the Friends of the Boundary Waters Wilderness and several other environmental groups and recreational businesses to intervene as defendants, granting their motion to dismiss Twin Metals' case in its entirety.

"This decision is a victory for Minnesota's ecological crown jewel and an important milestone in ending a grave threat to the Boundary Waters," said partner Stephen Safranski, counsel to the Friends of the Boundary Waters Wilderness.

Robins Kaplan attorneys Richard Allyn, Bryan Mechell, and Eric Barstad also represented the Friends of the Boundary Waters Wilderness in this case.
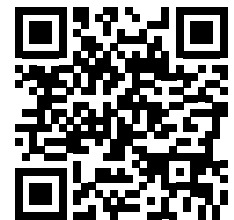
ROBINS KAPLAN LLP

800 LASALLE AVENUE
SUITE 2800
MINNEAPOLIS MN 55402

QUARTERLY

PAYMENT CARD SETTLEMENT FOR U.S. MERCHANTS

We are thrilled to share a monumental development in the business world – the $5.5 billion payment card settlement for U.S. merchants. If your business accepted Visa and/or Mastercard credit or debit cards at any time between January 1, 2004, and January 25, 2019, you are likely part of the class of merchants who are entitled to a share of the settlement.

SUBMITTING YOUR CLAIM IS QUICK AND EASY. GET STARTED HERE.

800 553 9910
ROBINSKAPLAN.COM