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The Intersection of Generative AI and Copyright Law

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With the advent of readily accessible artificial intelligence (AI) and the breakthrough of generative AI (GAI) programs such as ChatGPT, Stable Diffusion and Midjourney, GAI is now a staple in all facets of business. GAI programs can generate new texts, images, and content (outputs) based on textual prompts by a user (inputs). Whether prompted to write a corporate slogan, create music, generate works of art and advertisements, or summarize a book – GAI can do it all. However, its increasing popularity means that users of GAI programs face substantial intellectual property risks – particularly when businesses use GAI for marketing and other public-facing purposes.

GAI has taken the world by storm. In 2023 alone, GAI has been used to generate musical works using the voices of famous musicians such as Drake, The Weeknd, Rihanna, Ye (formerly Kanye West), and Jay-Z – to name a few. These AI-generated musical works were short-lived, however, as they were quickly removed from streaming services after record label companies threatened legal action. GAI has also been used to generate new works of art. For example, the winner of the 2023 Sony World Photography Awards used GAI to create their winning work; however, the award was later forfeited when it was found that the artist used GAI to create it. GAI programs also have been used to write substantive and pictographic books – such as the more than 200 e-books on online bookstores that list ChatGPT as an author or co-author. Users galore also produce succinct or lengthy summaries of existing authored works with GAI. This may seem beneficial, however, a recently filed copyright infringement lawsuit, *Silverman et al. v. Open AI Inc*., claims that to produce books and summarize others, the GAI platform must "ingest" copyrighted books to learn what they are about and to account for their writing style – something the program allegedly did to plaintiff's copyrighted work, without her permission.

Scenarios like these raise many questions about how GAI and intellectual property rights intersect. What are the intellectual property risks a company takes when it prompts GAI to generate a unique output? Can a company use GAI to imitate the image and/or likeness of a celebrity for commercial purposes, such as a company advertisement? In this rapidly evolving area of law, it's essential to carefully consider the intellectual property law principles at play before using GAI for your commercial business endeavors.

What's Not Protectable Under Copyright Law

The U.S. Constitution grants Congress the power to "secur[e] for limited Times to Authors . . . the exclusive right to their . . . Writings." Based on this power and in conjunction with the Copyright Act, Congress has afforded copyright protection broadly to "original works of authorship." The U.S. Copyright Office's position is that

copyright protection(s) will only be afforded to a work if it is “created by a human being.” Therefore, the Copyright Office’s current policy is to reject copyright protection for AI-generated works, as they are not products of human creation. Similarly, courts have denied copyright protection to works created by nonhuman authors, such as artistic works photographed by monkeys and works created in nature.

This does not completely foreclose the possibility of copyright protection when using GAI, however, as the Copyright Office acknowledges that it is often used to assist artists in the creative process. In situations where the GAI program assists in the creative process, the user may argue that the programs are merely tools, like cameras, that a human author uses to aid in their creation of a copyrightable work. Under this view and consistent with the 1884 U.S. Supreme Court holding in *Burrow-Giles Lithographic Co. v. Sarony*, a user of a GAI platform may argue that just as a photo taken by a camera is eligible for copyright protection, the AI-generated output that a user arranged, composed, and edited should be eligible for copyright protection as the final product encompasses human-authored aspects. Although it has yet to be done, it is possible that an artist could modify an AI-generated work to a point that it meets the standards required for copyright protection. However, at the end of the day, only human-authored aspects of a work can be copyrighted.

Similarly, the image and likeness of a person is generally not protectable under copyright law. The right of publicity is an intellectual property right that generally protects an individual against unauthorized commercial misappropriation of their name, likeness, or other identifier of their identity, such as a pseudonym, the individual’s voice, their signature, or photograph. Issues involving rights to publicity are governed by the appropriate state’s statutory and/or common law. This is because in the United States, no federal statute or case law recognizes the right to publicity; meaning, the Copyright Act is inapplicable in publicity cases. For example, a recent case, *Young v. Neocortext, Inc.,* involving the “Reface” deep-fake AI app, which allows users to swap their face and voice with their favorite celebrities in photos and videos, was brought under California’s right to publicity law(s) and alleged commercial misappropriation of likeness, not copyright infringement.

State Rights to Publicity Laws

Even if copyright law does not apply, it does not mean a company can start using generative AI to imitate a famous celebrity for its next advertisement. Many states have “right to publicity” laws, which protect the name, image, and/or likeness of a person from unauthorized commercial uses. However, the right of publicity is not limited to just name, image, or likeness – courts have expanded the scope of these protections to cover the commercial use(s) of “sound-alikes” and “look-alikes.” Meaning, if a company is using a look-alike or a sound-alike for a commercial purpose, merely causing a consumer to associate the look-alike or sound-alike with a celebrity, could be enough to subject the company to liability.

In addition, state laws often protect the “likeness” of a person, but the legal definition is not always defined by statute. Stated generally, likeness encompasses the visual image of a person including, among other things, the individual’s appearance, mannerisms, and gestures. And, when the definition is provided within the statute, one should be wary, as states will often have different variations of the definition. This can raise uncertainty as to which identifiers are subject to state publicity law restrictions, because each state has different framework. So, what is permitted conduct in one state may not be permissible in another. For example, some states may choose to protect the celebrity’s voice, but others may choose to protect the celebrity’s signature. In states where the right to publicity is provided by statute, plaintiffs will generally not need to show actual economic loss or damage to

state a claim, whereas in other states, the plaintiff must prove that they sustained actual loss to recover from the alleged infringer. This patchy framework could be challenging to navigate, particularly for those businesses who are actively engaged in commerce across the United States. It is recommended that a business do research on the law of their state and any state in which their advertisement may be viewed before using any AI-generated work that encompasses an individual's likeness.

How to Mitigate Generative AI Intellectual Property Risks

If you plan to use GAI for your public-facing commercial projects, keep in mind the variety of intellectual property legal considerations that come into play.

- If you are creating content with a GAI program that generates an imitation of the image or likeness of a celebrity or other person, consider whether you should first obtain permission and/or a use license from that individual. In some cases, such uses might be permitted in exchange for a royalty or other fee. Otherwise, your business could be at risk of violating state publicity laws.

- It's also important to understand that works produced by GAI are unlikely to be subject to copyright protections. This means that an individual or even the company that owns the GAI program could re-use your AI-generated content for their own commercial purposes without your consent, provided there are no other prevailing intellectual property (e.g., patent and trademark law) or legal limitations.

- Further, most GAI programs are trained using large amounts of publicly available data that the program then copies, stores, and learns from to make its outputs more efficient. In other words, it is entirely possible that the resulting AI-generated work has taken and used elements from works that have copyright protection(s). Without proper precautions, your company's AI-generated work could qualify as a derivative work, and subject your company to an infringement action.

- In the event your business is hiring vendors or service providers to develop projects on behalf of your business, ensure the contract terms address their possible use(s) of GAI to create work product(s). Additionally, check the terms and conditions of the GAI program being used by those vendors or service providers to ensure there are no provisions stating that the outputs the program generates are owned by the company that created the program. It's generally advisable to contract for all work as "work for hire."

This is by no means an exhaustive list of all the considerations for AI-generated works, but as GAI becomes more prevalent in our day-to-day lives, it's essential to consider how it will impact your intellectual property rights and risk exposure. Not only does GAI have the ability to generate unique creative works, but it also has the ability to imitate the image or likeness of others – intentionally or not. Businesses using GAI for commercial purposes must be hypervigilant and stay abreast of the intellectual property legal developments as GAI continues to evolve.

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