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PERSPECTIVE

AI & THE LAW

What's ahead when AI and intellectual property converge

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Generative artificial intelligence (AI) tools became ubiquitous this year, being deployed across a wide range of industries and affecting almost every aspect of business. The proliferation of such tools has raised fundamental new questions concerning AI and intellectual property. We review some key developments from 2023 and flag what to watch for in 2024.

Innovation sparks litigation

As interest in AI intensified this year, so too did intellectual property litigation in the space, with cases asserting copyright and patent infringement as well as trade secret misappropriation.

The most active set of cases involved claims of copyright infringement in the data used to train generative AI models so that they could learn patterns, relationships, and structures. Training data sets can be vast and may include materials such as books or photographs. In 2023, authors and artists filed several lawsuits claiming that the process of training the models on their materials infringed their copyrights. While the lead cases in California remain at the pleading stage, *Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.*, is set for an August 2024 trial in Delaware. Thomson Reuters alleges that Ross Intelligence copied Westlaw's headnotes to train its natural language search engine, and litigants



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in California and across the country will be looking closely at the way issues, including the crucial question of fair use, play out in that case.

This year also saw one of the first patent litigations concerning generative AI after years of increased patent filings in the space.

In *FriendlyAI Inc. v. Hugging Face, Inc.*, the plaintiff asserted a patent directed to a machine learning model against the defendant's machine learning and AI technologies. While trial is not scheduled until November 2025, important threshold questions of claim construction and subject

matter eligibility issues may be on tap next year.

Finally, one of the first cases alleging misappropriation of generative AI trade secrets was filed in 2023. In *Gemedy, Inc. v. The Carlyle Group Inc.*, the plaintiff sued a former cybersecurity development

partner. While a motion to dismiss is pending, the case is likely a harbinger of things to come. More trade secret claims are likely to follow, with significant investment and interest, heightened employee mobility, and rapid innovation in the space.

Is AI output intellectual property?

Questions of patent and copyright protection of AI output became pointed in 2023. In *Thaler v. Vidal*, the U.S. Supreme Court declined to review the finding of the U.S. Court of Appeals for the Federal Circuit that “inventors” under the Patent Act are limited to humans. In *Thaler v. Perlmutter*, the D.C. District Court held that a computer-generated image could not be copyrighted because the work lacked human authorship. That followed the Copyright Office’s March 2023 guidance requiring applicants to disclose the inclusion of AI-generated content and to provide an explanation of the author’s contribution to their work.

2024 will see the Thaler copyright decision appealed to the U.S. Court of Appeals for the D.C. Circuit

while other registrations push the envelope on AI-assisted invention and creation. In *Zarya of the Dawn*, for example, the Copyright Office granted a copyright for the text in a comic book written by the author, but not the illustrations created using AI. In *Rose Enigma*, the same individual created an artwork by scanning a pen-and-paper sketch into an AI tool and subsequently refining it by adjusting settings and using text prompts. The Copyright Office will likely continue to be presented with the questions of how much machine involvement is too much.

The feds will weigh in

In October 2023, President Biden issued a comprehensive executive order on AI that directed multiple federal agencies to tackle intellectual property issues through guidance and policy. Specifically, it gave the Patent and Trademark Office 120 days to publish guidance about who is the inventor when an invention is developed using AI and 270 days to publish guidance on other issues such as subject matter eligibility when dealing with AI-related inventions.

In August 2023, the Copyright Office announced a study regarding the copyright issues raised by generative AI. The Copyright Office received over 10,000 comments on (1) the use of copyrighted works to train AI models; (2) the copyrightability of material generated using AI systems; (3) potential liability for infringing works generated using AI systems; and (4) the treatment of generative AI outputs that imitate the identity or style of human artists. 180 days

after this study is complete or 270 days after the AI executive order, whichever comes later, the Copyright Office will issue recommendations to the president on potential executive actions relating to copyright and AI.

Congress has not yet acted on data privacy or other AI legislation. But with EU policymakers announcing agreement on sweeping AI regulations earlier this month, it is worth watching for legislative developments in 2024.

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