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Copyright Ownership in Works Created by AI Applications

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Last month in this publication we wrote about several risk factors related to intellectual property ownership and infringement when licensed products or content are created using Chat AI. Following the drafting of that article, the U.S. District Court for the District of Columbia (the "Court") agreed with the United States Copyright Office that copyright protection is not available for works created entirely by computer such as Chat AI.

Chat AI Defined

In our article last month, we referred to software applications designed to generate content that appears human-created by learning the patterns and structures of language from large pools of data on which the application is "trained," often called large language models or generative AI, as Chat AI. Chat AI applications allow users to enter prompt and then uses those prompts to generate a response using natural language that sounds remarkably conversational, which can cause users to feel as if they are having a conversation or "chat" with the software application. Chat AI applications are designed to produce responses that include content that is contextually relevant to the user's prompt and can produce content that includes articles, artwork, fictional stories, music, and poetry. Chat AI has a remarkable ability to generate content that is responsive and conversational while imitating human-like interaction, which makes it potentially useful for a wide range of business functions.

Copyright in AI Produced Works - Legal Background

Whether copyright protection in the United States accrues to works produced by Chat AI and other AI models has been vigorously debated. The issue had not been settled and has been the subject of much discussion with passionate and colorable arguments made by sides.

Copyright is typically granted to the creator of an original work. In the case of AI-generated content, determining the creator, or whether there is actually a creator, becomes more challenging.

One side of the argument is that since Chat AI models produce content based on extensive training data and algorithms, the AI itself and the entity that developed and trained it is the "creator." This argument suggests that the software itself is the creator because the software created the work autonomously.

The other side of the argument is that the human input was required to select the AI application to be used and then again to craft and refine the prompts that cause the AI application to generate the work. This argument suggests that the prompts and other work done by the human users or curators of the AI application are sufficient to cause them to be the creators of the work.

Copyright law in the United States requires human involvement or intervention in the creative process in order for a work to be considered eligible for copyright protection. In an often-cited case, the Ninth Circuit Court of Appeals held in 2018 that a photographic work created by a monkey pressing the shutter release on a camera was not eligible for copyright protection because it lacked human authorship.[1]

Copyright in AI Produced Works—Recent Decision

Stephen Thaler submitted an application for copyright registration to the U.S. Copyright Office for artwork created using an AI application that he

developed and called the "Creativity Machine." The artwork, an image of railroad tracks meandering through a lush forest that Thaler titled "A Recent Entrance to Paradise," was created entirely by the Creativity Machine.

Thaler asserted that he should own the copyright because he owned the Creativity Machine or, alternatively, the Creativity Machine created it for him under the "work for hire" doctrine. The Copyright Office rejected the registration application and determined that based on copyright law and prior court decisions, a work must have human authorship in order to be eligible for copyright registration.

Thaler administratively appealed the decision and when his administrative options were completed, appealed the registration denial to the Court. The Court, without explanation or written opinion, recently granted the Motion for Summary Judgment by the government to dismiss Thaler's appeal of the administrative denial. Because

Why this Matters?

Licensees of products and content rely on the exclusive right to use, reproduce, publish, or sell the licensed materials. That exclusive right is what creates or adds value to the license and licensing relationship. It significantly diminishes the value of the license and the rights the license conveys if anyone or everyone has the legal right to use, reproduce, publish, or sell the licensed materials.

That exclusivity relies in large part on the copyright and other intellectual property protections (collectively "IP Protections") in the licensed materials that accrues to the owner of the copyrights and allows the owner to restrict who may use, reproduce, publish, or sell those materials and under what terms.

If a work is created by or using an AI application and, as a result, is not entitled to IP Protections, then the work is essentially in the public domain and can be used by anyone for any purpose. In such cases, there is little additional value gained by licensing that work or pay any sort of licensing fee or royalties related to the use, reproduction, publication, or sales of the work.

In our article in last month's journal, we wrote about the importance of understanding whether licensors are using AI applications and in what ways. We included a number of questions that a licensee can pose in order to begin the conversation with their licensors regarding the use of Chat AI in creating licensed products or contents. The Court's ruling in this case, that a work produced by an AI application is not entitled to IP Protections, makes it that much more important to know whether a licensor is using an AI application in the creation of licensed products or content so the licensee can evaluate the financial impact that may have on the value of a license for products or content that are potentially not entitled to IP Protections.

1. Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018)