

Copyright And Generative AI Developments To Watch In 2024

By **Joshua Weigensberg and Felicity Kohn** (January 10, 2024)

The new year may bring clarity to critical copyright issues raised by the recent surge of development in generative AI platforms.

In particular, pending AI-related litigations, many of which were filed in the past year, will test the viability of several theories of liability against generative AI platforms and are likely to provide guidance on the potential defense of fair use.

At the same time, executive and legislative action are likely to shape copyright policy in 2024, if not copyright law directly.

The U.S. Copyright Office, which has been active in this space, is expected to weigh in with further guidance after its AI study. In 2024, we also expect to see the office's policy on registration of works created using generative AI undergo refinement and possibly be the subject of further litigation.

Litigation To Test Theories of Liability for Generative AI

Key questions about AI liability for copyright infringement are at the center of a growing number of lawsuits against major generative AI platforms, including:

- OpenAI Inc. — maker of large language model, or LLM, ChatGPT — and Microsoft Corp.;[1]
- Meta Platforms Inc. — maker of LLM Meta;[2]
- Stability AI Inc. — maker of image generation program Stable Diffusion;[3]
- Alphabet Inc. and Google LLC — makers of LLM Bard;[4] and
- Anthropic — maker of LLM Claude.[5]

Plaintiffs in each lawsuit claim that the defendants' generative AI platforms wrongfully copied protected works to train the models and programs.

Many also assert additional claims, including that the AI models themselves or their outputs constitute unauthorized derivative works, and that the defendants are liable for contributory and vicarious infringement, removal or alteration of copyright management information under the Digital Millennium Copyright Act, and unfair competition.

In some of these cases, there has already been one full round of pre-answer motion practice.

One noteworthy aspect of these motions is that in many, the defendants generally did not take on the core claim that the AI training process was infringing, instead moving to dismiss



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other claims and theories, such as motions filed in the U.S. District Court for the Northern District of California in:

- Andersen v. Stability AI;[6]
- The consolidated Kadrey v. Meta Platforms and Chabon v. Meta Platforms cases — together referred to as Kadrey, in the Northern District of California.[7]
- Tremblay v. OpenAI; and
- Silverman v. OpenAI[8]

Claims based on unlicensed copying in training are moving forward in those cases, although the defendants may of course contest such claims factually or through legal defenses such as fair use.

This year, we are likely to learn whether these plaintiffs' copyright claims, other than infringement based on training, will survive a motion to dismiss. It seems unlikely that plaintiffs ultimately will be unable to maintain any output-based infringement theory, but so far defendants have had early success in dismissing such theories.

As has been widely reported, in Andersen and Kadrey, the courts largely granted the motions to dismiss the other claims and theories, with leave to amend.[9] The plaintiffs in the two cases took different approaches in response.

In Andersen, the plaintiffs filed an amended complaint that, among other things, dropped an initially pled vicarious infringement claim but added claims for inducement of copyright infringement, and cut an initially pled right-of-publicity claim in favor of a Lanham Act false endorsement claim.[10]

If there is another round of pre-answer motion practice, we may see a decision on the viability of plaintiffs' new claims as early as mid-April, when a hearing is scheduled.[11]

In Kadrey, the plaintiffs' amended complaint, filed in accordance with the court's order consolidating the actions with Chabon,[12] asserts a single cause of action for direct copyright infringement based on Meta's alleged unauthorized copying of the plaintiffs' works, making derivative works therefrom, publicly displaying the plaintiffs' copyrighted works, and distributing copies of those works.

Motion practice in other recently filed cases will reveal whether courts will decide differently on the viability of the nontraining based infringement theories.

Pending motions to dismiss in two author class action cases against OpenAI in the Northern District of California, Tremblay and Silverman, may soon be determined, as oral argument on those motions was held in early December.[13]

We may also see motions to dismiss in other jurisdictions early in the year, as responses become due, such as, Huckabee v. Meta Platforms; Authors Guild v. OpenAI, and The New York Times Company v. Microsoft Corp., all in the U.S. District Court for the Southern District of New York.[14]

We may also see further consolidation as the courts manage these separately initiated

infringement litigations that are being filed against a handful of defendants in the tech space.

Some of the pending litigations have already been consolidated — the Kadrey motion to dismiss applied also to the Chabon action,[15] following which the cases were consolidated.[16] After the court's pending ruling on the motions to dismiss in Tremblay and Silverman, those cases will be combined with Chabon v. OpenAI, with the three to be captioned "In re: OpenAI ChatGPT Litigation." [17]

More may be consolidated in the coming months. During a recent status conference in the Southern District of New York class action Authors Guild v. OpenAI, OpenAI reportedly indicated that it planned to seek dismissal under the first-filed rule or transfer to the Northern District of California, where other proposed class actions against OpenAI on similar grounds are pending.[18]

Courts Likely to Address Fair Use and AI This Year

We may also see determinations on the issue of whether reproducing copyrighted material for the purposes of training AI models may in some instances constitute fair use.

In *Concord Music Group, Inc. v. Anthropic PBC*, the U.S. District Court for the Middle District of Tennessee, alleging infringement of song lyrics by Anthropic's LLM Claude,[19] music publishers have made a motion for a preliminary injunction that takes on the fair use defense in its opening brief.[20]

That motion, and a motion to dismiss by Anthropic for lack of personal jurisdiction, are scheduled to be fully briefed by mid-February.[21]

If the Anthropic court reaches the merits of the preliminary injunction motion, we may get a court's analysis of the fair use defense in early 2024. Such a decision may be limited in its applicability, however, given that discovery will not have been completed.

In a separate case, *Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc.*, brought in the U.S. District Court for the District of Delaware in May 2020, was one of the first AI-related infringement cases to be filed.

The court recently denied summary judgment in part on the grounds that, among other things, a determination on fair use, including whether it is in the public benefit to allow AI to be trained with copyrighted material, would have to be decided by a jury.[22]

The fair use issues ROSS Intelligence presents are informative even though the AI platform at issue is not generative. The trial is scheduled to start in August.

Congress Likely To Continue Its Focus on Legislation Related to Generative AI

The mounting stakes and speed of generative AI model development will underscore legislative efforts to address challenges in the coming year. Whether judicial or legislative action will have more influence on the application of copyright law to generative AI remains an open question. The following developments from 2023 give some hints as to what is to come.

AI Insight Forums

In the fall of 2023, Sen. Charles Schumer, D-N.Y., organized a series of nine multistakeholder "AI Insight Forums" intended to build consensus on potential AI legislation, including one on "Copyright and IP." In the Nov. 29, 2023 forum, Sen. Schumer previewed some legislative priorities in the area of copyright.

He indicated that such priorities would include "to promote transparency in AI systems," "protect the rights of creators," and "enforce strong intellectual property standards for AI internationally." He also noted that generative AI has created a "copyright issue on two fronts: the input, or using copyrighted works to train these systems, and the output, or generating work that is in a gray area in terms of legal usage and ownership." [23]

The NO FAKES Act

The NO FAKES Act, [24] first introduced in the Senate in October 2023, will be closely watched in creative industries in 2024. The act would protect individuals' voices and visual likenesses from unauthorized recreations using generative AI, prohibit the creation of unauthorized digital replicas, and make platforms liable for knowingly hosting such replicas without authorization.

By federalizing and significantly expanding preexisting right of publicity principles, the act (if passed) would likely have far-reaching effects on the protection of creative visual and audio output, including for licensing regimes.

Executive and Agency Action Likely to Continue, Particularly From the Copyright Office

Based on statements by the Biden administration and recent activity by the Copyright Office, we anticipate further developments in 2024 from both sources on a number of generative AI and copyright issues.

The Biden Administration's Executive Order on AI

President Joe Biden's October 2023 executive order on safe, secure and trustworthy artificial intelligence calls for the director of the U.S. Patent and Trademark Office to issue "recommendations to the President on potential executive actions relating to copyright and AI," including "the scope of protection for works produced using AI and the treatment of copyrighted works in AI training." [25]

These recommendations are due within 270 days of the president's Oct. 30, 2023, order, or 180 days after the office publishes a forthcoming study on copyright issues raised by AI, whichever is later.

The executive order also calls on the U.S. secretary of commerce to develop guidance for content authentication and watermarking to label AI-generated content. [26]

These tools will be employed by federal agencies to ensure the authenticity of government communications, but they may also be employed in the private sector. This may have implications for copyright registration, as currently the Copyright Office relies on applicants to disclose whether AI was used in the creation of their works.

The Copyright Office's Study on Copyright Issues Raised by Generative AI

2023 was a busy year for the U.S. Copyright Office when it came to generative AI. The office's initiatives included its August 2023 notice of inquiry and request for comments that asked the public to weigh in on over 60 separate questions relating to copyright and generative AI.[27]

Those questions covered topics ranging from the protectability of materials generated with AI, to infringement and fair use, to possible transparency and disclosure requirements.

The response to the office's notice of inquiry was overwhelming, with over 10,000 comments received in total, according to the online comment docket. These comments came from a wide range of sources that included many trade associations, copyright owners, technology firms, and individuals across a wide range of industries. Unsurprisingly, the viewpoints expressed were similarly varied.

It remains to be seen what the office will do with the wealth of information it has gathered. The office has stated that it will "use this information to analyze the current state of the law, identify unresolved issues, and evaluate potential areas for congressional action." [28]

President Biden's executive order on AI indicates that the office may issue a formal policy report based on the comments it has received. The office could also use those comments to inform recommendations and reports to Congress.

Further Copyright Office Actions Related to Registration

The Copyright Office may also use the information it has been gathering from the public to inform its decisions and ongoing policymaking related to registration of works containing materials generated through AI. In early 2023, the Copyright Office issued its statement of policy that emphasized the human authorship requirement and required that content generated using AI be explicitly excluded from applications — unless de minimis.[29]

In August 2023, the U.S. District Court for the District of Columbia held in the *Thaler v. Perlmutter* decision that a work that the applicant claimed was "autonomously generated by an AI" could not be registered, because "United States copyright law protects only works of human creation." [30]

A number of recent applications involving generative AI, but claiming that human creators played a larger role compared to what the applicant claimed in *Thaler*, have tested the boundaries of the office's policy.

The office has rejected a number of these applications, such as one involving an original photograph that, using an AI program, was then rendered in the style of Vincent van Gogh's "The Starry Night." [31]

Such applicants may file cases against the Copyright Office in 2024 that lead to further jurisprudence on this critical issue. Whether or not those rejected applications make their way to the federal courts, the office may, on its own, provide further additional guidance on registering works containing materials generated through AI, including potentially through a circular or revisions to the Compendium of U.S. Copyright Office Practices.

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[1] See Tremblay v. OpenAI Inc., 3:23-cv-03223 (N.D. Cal.) (Tremblay) (filed June 28, 2023); Silverman v. OpenAI Inc., 3:23-cv-03416 (N.D. Cal.) (Silverman) (filed July 7, 2023); Chabon v. OpenAI Inc., 3:23-cv-04625 (N.D. Cal.) (filed Sept. 8, 2023); Authors Guild v. OpenAI Inc., 1:23-cv-08292 (S.D.N.Y.) (filed Sept. 19, 2023); Sancton v. OpenAI Inc., 1:23-cv-10211 (S.D.N.Y.) (filed Nov. 21, 2023); The New York Times Company v. Microsoft Corp., 1:23-cv-11195 (S.D.N.Y.) (filed Dec. 27, 2023).

[2] See Kadrey v. Meta Platforms Inc., 3:23-cv-03417 (N.D. Cal.) (Kadrey) (filed July 7, 2023); Chabon v. Meta Platforms Inc., 3:23-cv-04663 (N.D. Cal.) (Chabon) (filed Sept. 12, 2023); Huckabee v. Meta Platforms Inc., 1:23-cv-09152 (S.D.N.Y.) (Huckabee) (filed Oct. 17, 2023).

[3] See Andersen v. Stability AI Ltd., 3:23-cv-00201 (N.D. Cal.) (Andersen) (filed Jan. 13, 2023); Getty Images (US) Inc. v. Stability AI Inc., 1:23-cv-00135 (D. Del.) (filed Feb. 3, 2023).

[4] See L. v. Alphabet Inc., 3:23-cv-03440 (N.D. Cal.) (filed July 11, 2023).

[5] See Concord Music Group Inc. v. Anthropic PBC, 3:23-cv-01092 (M.D. Tenn.) (Anthropic) (filed Oct. 18, 2023).

[6] See Andersen, Dkt. Nos. 51, 117.

[7] See Kadrey, Dkt. No. 23, 56; Chabon, Dkt. Nos. 10, 24.

[8] Tremblay, Dkt. No. 33; Silverman, Dkt. No. 32.

[9] Andersen, Dkt. No. 117 (granting motion to dismiss in full, except for direct copyright infringement claim against Stability AI); Kadrey, Dkt. No. 56.

[10] Andersen, Dkt. No. 129.

[11] Id., Dkt. No. 121.

[12] Kadrey, Dkt. Nos. 56 (order granting motion to dismiss), 62 (order consolidating Kadrey and Chabon actions), 64 (consolidated amended complaint).

[13] Tremblay, Dkt. No. 85; Silverman, Dkt. No. 63.

[14] Huckabee, Dkt. No. 36 (setting Jan. 26, 2024 deadline for response to Complaint); Authors Guild, Dkt. No. 36 (setting Jan. 12, 2024 deadline for response to Complaint).

[15] Chabon, Dkt. No. 18.

[16] Kadrey, Dkt. No. 62.

[17] See Tremblay, Dkt. No. 74. The court further ordered that in any cases subsequently filed in, removed to, or transferred to the Northern District of California involving the same or substantially similar issues of law and fact, the parties must file a stipulation and administrative motion to consolidate the actions. Id.

[18] See Jane Wester, "Bestselling Authors' Lawsuit Against OpenAI Adds Microsoft as Defendant," *New York Law Journal*, Dec. 5, 2023.

[19] See Anthropic.

[20] Id., Dkt. No. 41.

[21] Id., Dkt. No. 57.

[22] 20-cv-00613-SB (D. Del.), Dkt. Nos. 547-48. Judge Stephanos Bibas was sitting by designation.

[23] Sen. Schumer Opening Statement, Seventh AI Insight Forum (Nov. 29, 2023), <https://www.schumer.senate.gov/imo/media/doc/Schumer%20Opening1.pdf>.

[24] https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf.

[25] Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Oct. 30., 2023, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

[26] Id.

[27] 88 Fed. Reg. 59,942 (Aug. 30, 2023).

[28] <https://www.copyright.gov/policy/artificial-intelligence/>.

[29] 88 Fed. Reg. 16,190 (Mar. 16, 2023).

[30] *Thaler v. Perlmutter*, 1:22-CV-01564 (D.D.C.), Dkt. No. 24.

[31] Second Request for Reconsideration for Refusal to Register SURYAST (SR # 1-11016599571; Correspondence ID: 1-5PR2XKJ), Dec. 11, 2013.