AI Copyright Contributory Infringement and the Fair Use Defense – Part II

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Since the introduction of various artificial intelligence (AI) tools, there has been a slew of AI intellectual property (IP) infringement cases. For the most part, these infringement claims have been directed at the AI tool developers – namely those who have had a hand in creating AI data sets and related instructions that automatically direct the scraping done by the AI program.

But what about the AI user? Does their use of an AI tool, such as Chat GPT, CoPilot or Stable Diffusion, constitute a form of direct or indirect copyright infringement for content that was impermissibly copied?

And, if liability attaches, is there an available fair use defense?

This two-part article looks at both of those subjects. The first part, published in the February 2024 issue of the *Intellectual Property & Technology Law Journal*, considered the situation of the AI user. This second part examines the fair use defense.

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COPYRIGHT LIABILITY: DOES THE FAIR USE DEFENSE FOR AI SCRAPING EXIST AFTER *WARHOL?*

One thing the recent spate of AI lawsuits have in common is the insistence by defendants that their AI products are legal because their technologies constitute a fair use of the copyrighted content scraped by their AI programs. By way of example, in *J. Doe 1 et al. v. GitHub Inc. et al.*, GitHub and Microsoft described the availability of the fair use defense as a "progress protective doctrine."[1]

Briefly, fair use is an affirmative defense that is available for those defendants who otherwise have committed copyright infringement. To qualify as fair use, an otherwise infringing act must meet a four-part test under 17 U.S.C. § 107. Specifically, the test requires that in order for an otherwise infringing use to qualify as a fair use, it must be ". . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research" and involves a consideration of:

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) The nature of the copyrighted work;

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) The effect of the use upon the potential market for or value of the copyrighted work."[2]

Fair use has been notably applied to technologies somewhat akin of AI – and this has been relied on by AI defendants, as exemplified above in the *Github* litigation. Indeed, there is a linkage between fair use and technology development.

For example, in the Supreme Court case *Google v. Oracle*, Google was accused of copying of Oracle's application programming interface (API) software.[3] Google raised the affirmative defense that such copying was fair use. The Supreme Court agreed. Specifically, the Supreme Court concluded that the first factor, i.e., the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, weighed in favor of Google since the use of Oracle's program, Sun Java API, which incorporated Oracle's code, was transformative. The Court reasoned that Google's use of the Sun Java API creates a new program, and expands the use and usefulness of Android-based smartphones. The "[Google's] new product offers programmers a highly creative and innovative tool for a smartphone environment. To the extent that Google used parts of the Sun Java API to create a new platform that could be readily used by programmers, its use was consistent with that creative "progress" that is the basic constitutional objective of copyright itself."[4] As such, the Court reasoned that Google's usage was transformative and constituted fair use.

Applying the reasoning under the *Google* case, to the extent that the use of an AI product such as GitHub's CoPilot software AI generative tool creates new developments, then a transformative argument would appear to possibly apply.

But the fair use test is highly fact-dependent. Outcomes can easily vary. These variations may ultimately impact how courts view the transformative use prong of the fair use test. To underscore this variability, the Supreme Court came out differently in its March 2023 decision *Andy Warhol Foundation v. Goldsmith*,[5] where the Court held that Andy Warhol's artistic rendering of Lynn Goldsmith's photo of the musician Prince was not transformative under the 17 U.S.C. §107 first factor since it was used for the same commercial purpose and directed to the same audience as Goldsmith's own photos.[6]

More recently, a California district court in *Sedlik v. Von Drachenberg et al.* granted the plaintiff's motion for reconsideration, finding that the *Warhol* decision comprised a significant change in controlling law by giving U.S. district courts new instructions on how to evaluate the first factor under the above-described four-part fair use analysis.[7]

Following the logic of the *Warhol* case, an AI product that results in a competitive commercial product which is aimed at the same audience as the scraped work may not necessarily be deemed a transformative fair use under the first fair use factor. By way of example, if a user creates a work "in the style" of a well-known artist, to be sold to the same buyer as that artist, it is hard to conceive that this use would qualify as transformative since it appears to have arguably similar facts to *Warhol*. Indeed, plaintiffs in some of the pending AI cases have made just that point. In *Trembley et al.*, the plaintiffs' complaint made it clear "[b]ecause the OpenAI Language Models cannot function without the expressive information extracted from Plaintiff's works (and others) and retained inside them, the OpenAI Language Models are themselves infringing derivative works, made without Plaintiff's permission and in violation of their exclusive rights under the Copyright Act."[8]

Meanwhile, the *Sedlik* case indicated that when a product crosses the line into constituting a derivative work, a transformative defense is unavailable under the fair use test: "the degree of transformation required to make "transformative" [fair] use of an original must go beyond that required to qualify as a derivative."[9]

IS THE AI CHATBOT END USER AN INFRINGER?

Users of ChatGPT, and other programs such as Stability AI, do not directly scrape infringing content themselves. Instead, the entity that trains its AI on copyrighted works copies the content. However, the developer is of course not the person requesting the generation of the emulated text or art. The following example of the Stable Diffusion scraping process is illustrative: Common Crawl, a nonprofit group, scrapes images and their textual pairs

from billions of web pages for free use. "Later, a non-profit such as LAION creates a massive dataset that includes internet indexes and similarity scores between text and images."[10] Stable Diffusion is then capable of training its text-to-art AI generator on these text-image pairs. "Notably, when a text-to-art generator uses the LAION database, the user is not necessarily downloading the images themselves to train their AI. Finally, when the end user goes to Dream Studio and types in the phrase "a mouse in the style of Walt Disney," the AI generates unique images of Mickey Mouse."[11]

So for an end user, where is the direct infringing act? By requesting, for example, that ChatGPT produce a work in the style of a writer or artist, the end user's request is presented in the form of an expression and it is highly unlikely that the request text itself is copying protected expression (moreover, it would not likely pass a *de minimis* expression test for protectability). Moreover, since the end user is not personally scraping the copyrighted content, there does not appear to be an act of direct infringement. From the above Stable Diffusion scraping/training description, the act of direct copying content appears to occur when Common Crawl scraped images in order to build its open repository. On the other hand, it would seem that LAION is neither copying, nor controlling the scraping activity, but is instead pairing images with text descriptors-although it is possible that they are making an intermediate copy. Stable Diffusion may also create an intermediate copy when it trains its AI neural network to answer the user's query. However, is the user contributorily liable for these various acts of infringement? Specifically, where the user is unlikely to know that such copyrighted text/image was used in the first instance, even though he/she asks for an image to be created that is ultimately in the style of a well-known artist, does that suffice to justify contributory liability?

Specifically, there are three forms of secondary copyright infringement liability: contributory infringement, inducement of infringement, and vicarious infringement.

Contributory infringement liability arises when there is proof of direct infringement. For a party to be contributorily liable, that party has to know, had reason to know or was willfully blind to the infringing activity of the direct infringer. Also, the

party had to either cause, further induce or make a material contribution to the direct infringement. The knowledge requirement for contributory liability has been interpreted differently. Some courts have required knowledge of the specific instance of direct infringement while other courts have taken a more flexible view. Also, constructive knowledge is sometimes applied in instances where there appears to be willful blindness.

Looking at prior technology contributory liability cases many of the facts do not square up neatly with AI end usage. For example, the Supreme Court case *Metro Goldwyn Mayer v. Grokster*, involved Grokster's indirect liability for its users' acts of copyright infringement using their product.[12] In *Grokster* there were two theories of indirect copyright liability: contributory or vicarious copyright infringement. However, the end user's direct copyright infringement liability was clear. The end user requested and downloaded the song via one of the defendants' services.

Theoretically, a user could provide instructions in an AI chat scenario that could bring that user closer to direct or contributory infringement, such as identifying exactly the work they wish to copy. In such an instance, even though the user may not directly control the act of copying, there is a higher likelihood that the scraped database will download the copyrighted subject material. But even under this scenario the answer does not seem to be clear-cut.

For example, an end-user ChatGPT query of a somewhat general nature would not likely establish that the user had direct knowledge of the copyrighted material that was scraped for them. The knowledge element however may shift if the query contains terms that would lead a court to conclude that the user would have to be intentionally blind to the fact that a third party's copyrighted content would be scraped for their query. If the user's inquiry to ChatGPT were "write an article that is substantially similar to Hemingway's war reports" it would seem that such user would be willfully blind to the fact that Hemingway's reports were scraped; on the other hand if the instruction were to "write a war article in the style of World War II era journalists," then the knowledge prong of the direct infringement seems less supportable.

With regard to the second contributory liability prong – that the end user had made a material

contribution to the infringing activity – there is no clear cut threshold concerning the level of contributory involvement. Courts nonetheless tend to agree that such involvement must be substantial. Indeed, it would seem that a general inquiry into an otherwise invisible data training process would hardly qualify as a "substantial" contribution to the infringing activity. Again, while it is a truism to state that the circumstances will dictate this issue, as exemplified above – without any understanding of how the neural network is trained, it seems hard to hold a typical user (if there is such a person) contributorily liable data even if the query is more targeted (as exemplified above). Simply put, most end users have no idea where training data comes from or how the AI engine uses that data.

It should be noted that the other forms of secondary liability – inducement and vicarious liability appear to be inapplicable to the ordinary end user scenario.

Inducement involves the distribution of a device where the object involves promoting its use in order to infringe a third party's copyright as well as engaging in some form of intentional conduct that encourages copyright infringement.[13] An end user's inquiry into ChatGPT does not involve such activity.

Vicarious liability occurs when a party supervises or has the right and ability to supervise the infringement and financially benefits from it. For the most part, courts tend to look at whether a defendant had sufficient control to be able to prevent or stop the infringement and failed to exercise it. Again, for the ordinary ChatGPT user, vicarious liability would appear to be inapplicable. Users have no idea how the infringement occurs and certainly have no ability to control or supervise the content scraping process. Although they may financially benefit from the AI engine's results, their ability to control or stop the data training process does not

seem possible. Perhaps as AI engines become more sophisticated such a feature can be built into the models. But for now, holding an ordinary end user vicariously liable for copyright infringement where such control does not exist, seems like a long shot proposition.

CONCLUSION

As AI technology grows in sophistication, there is little doubt that IP issues relating to the technology will grow more complex and there will be more case law decisions to guide us. For now, there are many questions – which will undoubtedly continue to be around as this bold technology continues to impact our legal world and change how we live and work with content.

Notes

1. J. Doe 1 et al. v. GitHub Inc. et al., Def.'s Mot. to Dismiss, at 1.
2. 17 U.S.C. § 107.
3. Google v. Oracle, 593 U.S. __, 141 S. Ct. 1183, 209 L.Ed.2d 311 (2021).
4. Id., at 1203.
5. Andy Warhol Foundation v. Goldsmith, 143 S. Ct. 1258 (2023).
6. Id. at 1287.
7. Sedlik v. Von Drachenberg et al., 2023 WL 6787447 at p. 2 (C.D. Cal. Oct. 10, 2023).
8. Complaint at p. 12, Trembley et al. v. Open AI, Inc. et al., Civ. No. 3:23-cv-03223 (N.D. Cal. 2023).
9. Sedlik, 2023 WL 6787447 at p. 7 (quoting Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1275 (2023).
10. Jason Alhadeff, AI Art "In the Style of" & Contributory Liability, WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS (Jan. 23 2023), https://wjlta.com/2023/01/23/ai-art-in-the-style-of-contributory-liability/.
11. See id.
12. Metro Goldwyn Mayer v. Grokster, 545 U.S. 913 (2005).
13. Grokster, Ltd., 545 U.S. 913.

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