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TECHNOLOGY MARATHON

Copyright and AI: Controlling Rights and Managing Risk

Josh Dalton and Colleen Ganin

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Presenters

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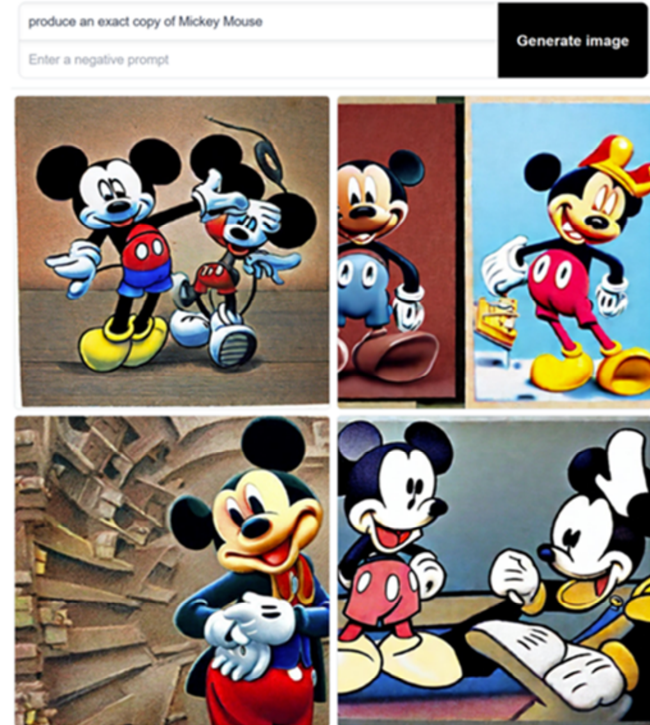
What We're Covering

1. **The Coverage of Copyright Protection** – Traditional Works versus Works Created Using AI
2. **AI Copyright Infringement Litigation**
3. **AI Copyright Legislation and Regulations** – The Current U.S. Landscape
4. **Takeaways**



Copyright Protection

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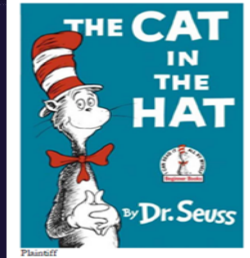
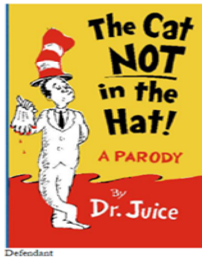
Copyright Protection: Overview

- Copyright law gives creators exclusive rights to their original works (literary, dramatic, musical, artistic, etc.).
- Infringement occurs when someone uses a copyrighted work without permission.
- To prove copyright infringement, a plaintiff must show:
  - It owns a valid copyright (i.e., the work is sufficiently creative to qualify for copyright protection);
  - Defendant copied plaintiff's copyrighted work; and
  - The infringing work is "substantially similar" to the original aspects of plaintiff's work.

Art/Images

Books





Songs

Video

Copyright Protection: Nuts & Bolts

- Copyright Protection Requirements:

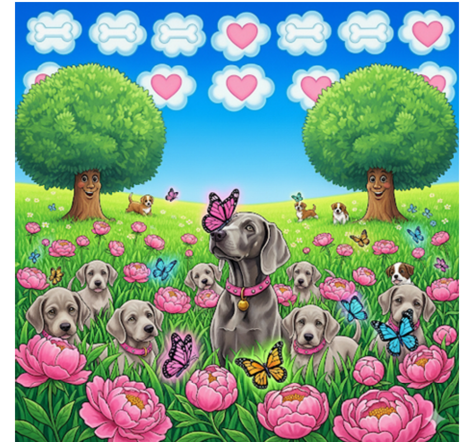
  1. **Original Expression**
     - Idea/Expression Divide
  2. **Fixation in a "Tangible Medium"**
  3. **Human Authorship**

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

Copyright Protection: AI-Generated Works

- **Purely AI-generated works are not copyrightable**
  - Prompting alone (especially simple/directionless) is not enough

- **Using AI as a tool to assist a human with their creative decisions → copyright may apply**
  - Human input needs to be sufficiently expressive (e.g., sufficiently original arrangement, selection, etc.)
  - Evaluated on a case-by-case basis



Copyright Protection: No Human Involvement

- Stephen Thaler’s AI system (“Creativity Machine”) created an image with no human creative input.
- Thaler listed the AI as author (he was the owner).
- The U.S. Copyright Office (USCO) denied registration.
- The D.C. Circuit Court affirmed: human authorship is required under the Copyright Act; an AI tool cannot be an author.

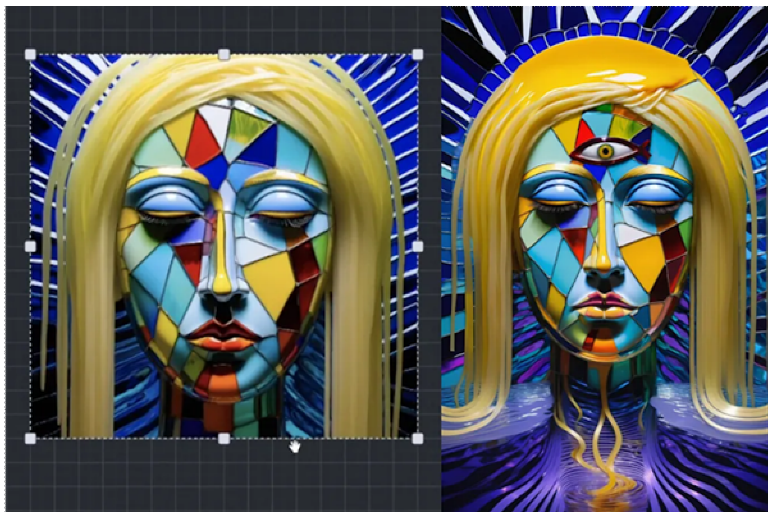
Thaler v. Perlmutter, No. 23-5233 (D.C. Cir. 2025).

Copyright Protection: AI + Insufficient Human Involvement

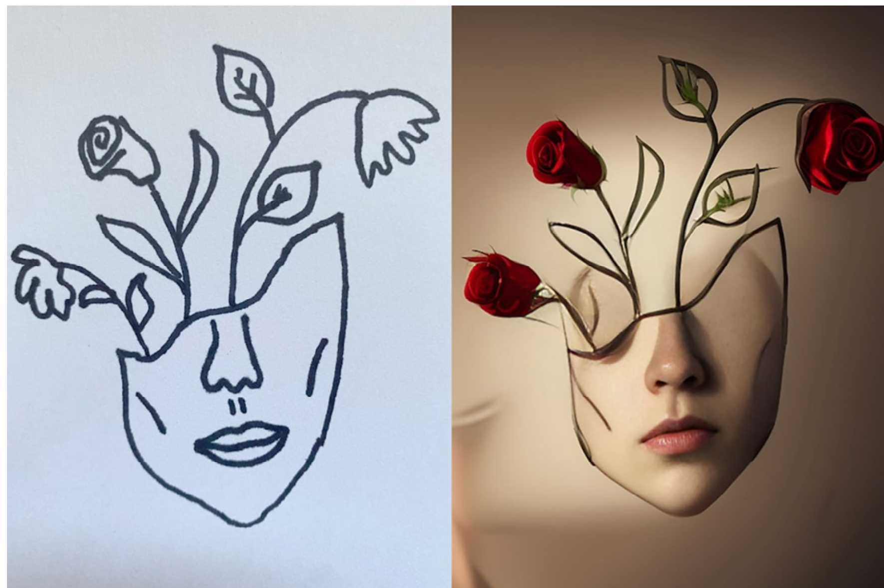
- **Théâtre D'Opéra Spatial**: USCO Review Board found not copyrightable because human creative input was too minimal and AI-generated portions dominated.

- **Zarya of the Dawn (Kris Kashtanova)**: The text & arrangement retained copyright, but the AI-generated images were excluded.

<u>Copyright Protection</u>: Sufficient Human Involvement(?)



The initial AI-generated image (L), which was edited by Kent Keirsey into *A Single Piece of American Cheese* (R)



A sketch drawn by Kris Kashtanova (L) that was input into an AI program to create the output called *Rose Enigma* (R)

<u>Copyright Protection</u>: What Counts as "Sufficient Human Involvement"?

But compare with Théâtre D'Opéra Spatial . . . The line is very unclear

Midjourney Image

The Work

AI Infringement Litigation

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<u>AI Litigation</u>: Fair Use

- The fair use doctrine permits limited use of copyrighted material without permission (e.g., for criticism, comment, reporting, teaching, research).

- Courts consider the following in evaluating whether a use is "fair":

  1. The purpose and character of the use

     E.g., is it transformative compared to the original work?

  2. The nature of the copyrighted work

     E.g., is plaintiff's work factual or creative?

  3. The amount and substantiality of the use

     E.g., did defendant's work copy the heart of the original work or a non-essential portion?

  4. The effect of the use upon the market

     I.e., does the use harm plaintiff's ability to profit from their work? Is it a market substitution for the original works?

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006)

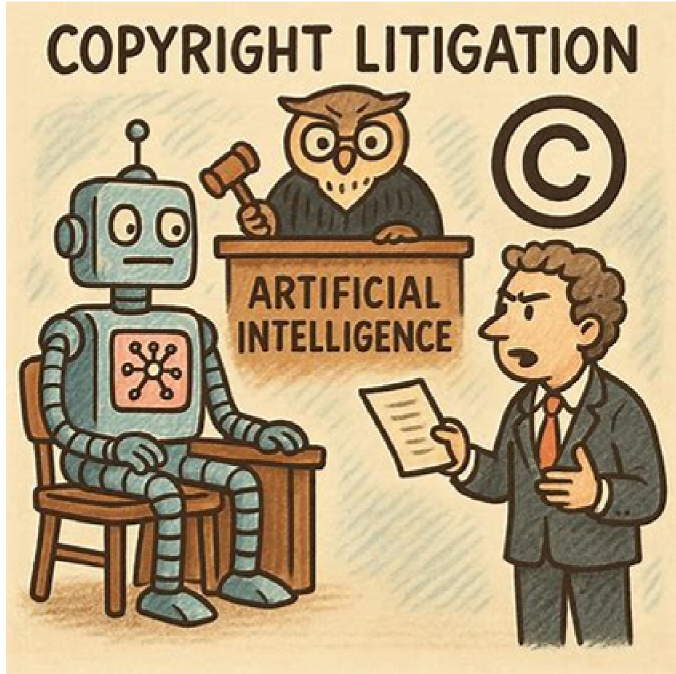
AI Litigation: Gen v. Non-Gen AI

- Generative and Non-Generative AI raise a number of copyright infringement issues and risks, including:
  - AI learns through processing copyright-protected data and content. Is accessing and learning enough to infringe? Is it fair use?
  - Generative AI can be used to easily create infringing works. Who is liable? The GenAI platform or the user (or both)?

Grrrrrrrrrrr!! © Roy Lichtenstein, 1965

"A weimaraner in the style of Roy Lichtenstein"

AI Litigation: Recent and Ongoing Suits



- *The New York Times Company v. Microsoft Corp. and OpenAI, et al.*
- *Thomson Reuters v. Ross Intelligence*
- *Bartz v. Anthropic PBC*
- *Kadrey v. Meta et al.*
- *Disney et al. v. Midjourney*

AI Litigation: *The New York Times v. OpenAI*

- In March 2025, a federal judge ruled that The New York Times and other publishers can proceed with copyright infringement claims against OpenAI and Microsoft, seeking to stop the use of their articles to train ChatGPT and Bing Chat's AI chatbots.
- The alleged use is two-fold:
  - the AI "memorizes" parts of NYT articles included in training data and sometimes generates near verbatim reproductions of the articles; and
  - the AI produces search results that can reveal significantly more information than what would typically be displayed by an online search, which in effect allows readers to bypass the NYT's paywall.
- A trial date has not yet been set.

AI Litigation: *The New York Times v. OpenAI*

- The question in this case will be whether OpenAI/Microsoft's use of The New York Times's copyrighted works is fair use.

- The Arguments

The New York Times	OpenAI/Microsoft
OpenAI and Microsoft have stolen articles and violated copyrights causing severe harm to their business.	Data scraping practices, including articles from The New York Times, are protected by fair use.

<u>AI Litigation</u>: *Thomson Reuters v. Ross*

THOMSON REUTERS
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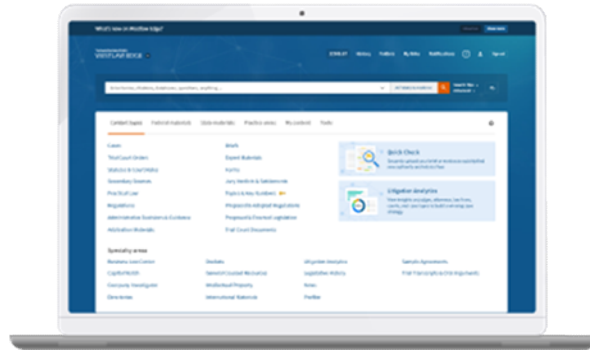
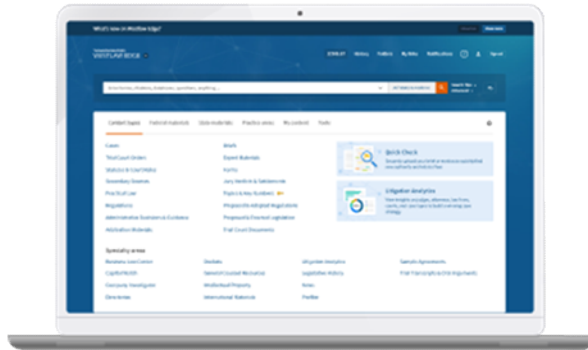


- Thomson Reuters’ Westlaw platform offers case law, treatises, and headnotes (summaries of key case points organized by its proprietary Key Number System), all subject to Thomson Reuters’ copyright.

- Ross Intelligence built a competing AI legal search engine by training its system on over 25,000 “bulk memos” derived from Westlaw’s copyrighted headnotes and Key Number System.

- Thomson Reuters sued Ross for copyright infringement of 21,787 headnotes, the editorial decisions in 500 judicial opinions, and Westlaw’s Key Number System.

AI Litigation: *Thomson Reuters v. Ross*



- In February 2025, the District of Delaware granted Thomson Reuters' MSJ in part, holding that 2,243 of the bulk memos copied Thomson Reuters' copyrighted content and were substantially similar to them.
- Ross's use of the bulk memos was not fair use because it was commercial, non-transformative, and affected the AI training data market.

AI Litigation: *Bartz v. Anthropic*

- Anthropic PBC describes itself as an "AI safety and research company" that produces AI solutions, including large language models (LLMs)
- Plaintiffs Andrea Bartz, Charles Graeber, and Kirk Wallace Johnson are authors who alleged that Anthropic used their copyrighted books to train its Claude LLM
- Plaintiffs alleged that in preparing to train its LLMs, Anthropic compiled an expansive library of books via online digital download, purchase, and other modes to retain perpetually, including books written and owned by Plaintiffs.
- Plaintiffs claimed that Anthropic infringed their copyrights by taking copies of their works for its library and reproducing their works to train Anthropic's LLMs.

AI Litigation: *Bartz v. Anthropic*

- In June 2025, the Court issued an MSJ decision in which it considered whether Anthropic's use of copyrighted materials to train its Claude LLM was a fair use.

- In its analysis, the Court assessed the differences between Anthropic's copying of copyrighted materials to train its LLMs, the creation of the library and retention of the materials, and Anthropic's purchase of books in print and converting them into digital versions for the central library and training of the AI models.

- The Court concluded that Anthropic's use of Plaintiffs' books to train its AI models and its digitization of the books were fair uses because:
  - books are intended for others to read and seek knowledge within them; and
  - Anthropic purchased the print copies of the books and did not redistribute them.

AI Litigation: *Bartz v. Anthropic*

- The Court, however, concluded that Anthropic's use of pirated copies of Plaintiffs' books to generate its reference library was not a fair use because it decreased demand for Plaintiffs' (and the other authors') works.

- The Court noted that any pirated books used by Anthropic that were later purchased does not eliminate the finding of no fair use because of the damage caused by using pirated copies of a work.

- In July 2025, the Court certified a class of U.S. copyright owners of works that Anthropic downloaded, which raised the risk for Anthropic's potential owed damages into hundreds of billions of dollars.

<u>AI Litigation</u>: *Bartz v. Anthropic* Settled…Maybe?

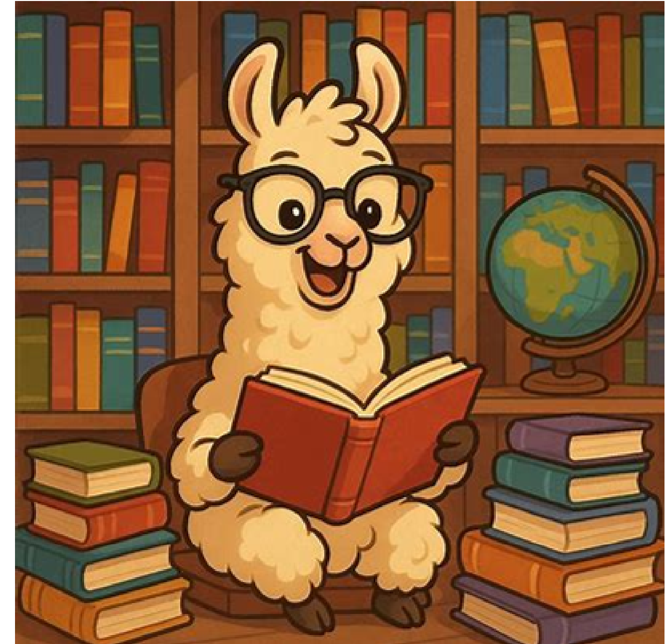
- This month, Anthropic agreed to pay $1.5 billion to the certified class of authors whose works were infringed
- The settlement agreement would also require Anthropic to destroy its datasets containing pirated books for all claims of conduct that pre-date August 2025
- This settlement agreement does not, however, extend to any claims regarding any future reproduction of derivative works by Anthropic and only covers works that the parties agreed to
- Judge Alsup has refused to sign off on the settlement, and a new proposal is due late September

AI Litigation: *Kadrey v. Meta*

- Meta developed and released an AI software LLM called LLaMA and trained it using text that it gathered from numerous allegedly pirated sources, including books written by Richard Kadrey, Sarah Silverman, and Christopher Golden

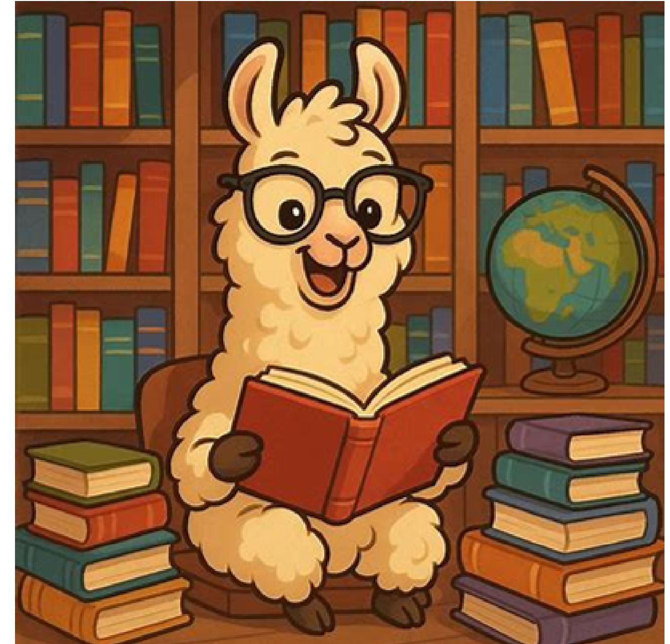
- Plaintiffs, including the above authors, brought a class action lawsuit against Meta alleging:
  - Direct copyright infringement;
  - Vicarious copyright infringement;
  - Violation of the Digital Millennium Copyright Act (DMCA);
  - Unfair competition; and
  - Unjust enrichment and negligence

- The Court dismissed all claims, except direct copyright infringement



<u>AI Litigation</u>: *Kadrey v. Meta*

- In June 2025, the Court denied Plaintiffs' motion for partial summary judgment on fair use and granted Meta's cross-motion
- The Court's decision focused on the transformativeness of the use of the copyrighted works and the alleged market harm
- The Court held that Meta's use was "highly transformative" due to the purpose and character of the use with LLaMA
- However, the Court also concluded that LLaMA was not capable of generating enough text from the copyrighted works to be significant and that Plaintiffs are not entitled to the market for licensing their works as AI training data



AI Litigation: *Disney/Universal v. Midjourney*

- Disney (and its subsidiaries like Marvel, Lucasfilm, and Pixar) and Universal filed a joint lawsuit against Midjourney in June 2025.
  - They allege that Midjourney trained its AI on "countless" copyrighted works without permission and that its service is a "bottomless pit of plagiarism."
- Midjourney responded in August 2025, asking the court to dismiss the case.
  - Fair use: Midjourney contends its AI use is protected under fair use, which allows for transformative use of copyrighted material.
  - "Unclean hands": The company argues that Disney's own employees and vendors use AI tools like Midjourney for their creative processes

AI Litigation – Key Questions Across AI Training Cases

- Common considerations from decisions to date:
  1. How were the training materials acquired?
  2. How were the training materials used?
  3. Are there distinguishing features between the AI system's output and the copyrighted materials? If so, what are they?
  4. What is the impact of the allegedly infringing use on the market for the original work (not for a license to train off that work)?

AI Litigation – Claims Tested and Evolving

- Common threads from decisions to date:
  1. Most claims that survive a Motion to Dismiss have been against direct infringement claims based on unauthorized use for training AI.
  2. Courts are rejecting broad arguments that every output and/or the program itself constitutes derivative works.
  3. Fair use is a key defense for Defendants in training AI cases, and the outcomes are likely to be highly factually dependent.
  4. In other words, don't read too much into these first few decisions.

AI Copyright Legislation and Regulations

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U.S. Legislation

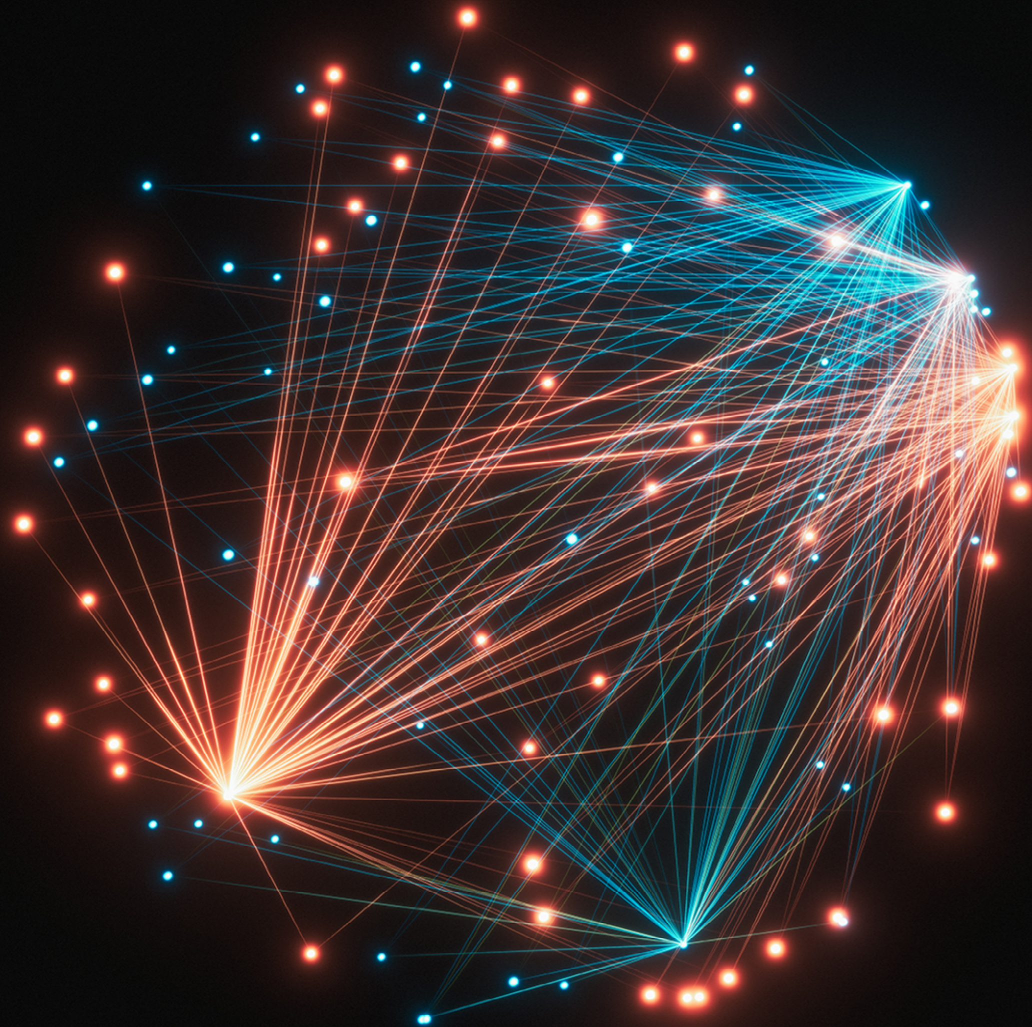
- **Federal:**
  - In 2024: 100+ considered
  - CREATE AI Act of 2025
  - Generative AI Copyright Disclosure Act of 2024
  - NO FAKES Act; No AI Fraud Act; Preventing Abuse of Digital Replicas Act (PADRA)

- **State:**
  - In 2024: 600+ introduced; nearly 100 enacted
  - TN: ELVIS Act
  - CA: 30+ AI-related bills including the California AI Transparency Act (AB 412)

U.S. AI Action Plan

- **Executive Order 14179 in January 2025**
  - White House statement that the AI Action Plan "will define priority policy actions to enhance America's position as an AI powerhouse and prevent unnecessarily burdensome requirements from hindering private sector innovation."
- **America's AI Action Plan released July 2025**
  - Pillar I: Accelerating AI Innovation;
    - Promotes open-source AI and collaboration
  - Pillar II: Building American AI Infrastructure; and
  - Pillar III: Leading in International AI Diplomacy and Security

Takeaways



Key Takeaways

- Implement processes to review AI-generated outputs for similarity to existing copyrighted works.
- License (and vet) the data you use to train your AI.
- The number or sophistication of "prompts" currently is not considered sufficient to constitute human authorship of AI outputs in the United States, so AI outputs (like software generation) may not be enforceable.
- There is increasing judicial acceptance of fair use for transformative use in training AI, though under very fact-specific conditions.
- This is a developing area of law and so too are the policy issues.

Biography

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Joshua M. Dalton is the leader of the firm's global trademark and copyright litigation practice and head of the Boston IP practice. As a pretrial, trial, and appellate lawyer in IP litigation, Josh takes a bold, creative approach to resolving even the most complex trademark, trade dress, false advertising, copyright, patent, and trade secret/non-competition disputes for clients across a wide variety of business sectors. Josh has appeared in courts throughout the United States, as well as before the Trademark Office and Trademark Trial and Appeal Board and the International Trade Commission. He is the immediate past president of the Boston Intellectual Property Law Association and has been recognized as a leading lawyer in IP litigation by *Chambers*, *World Trademark Review*, *Best Lawyers*, *Super Lawyers*, and others.

Biography

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Colleen Ganin is a go-to advisor for clients in the fashion, entertainment, financial, and technology industries on all aspects of trademark, copyright, and trade dress law. Clients, including many of the world's leading companies, turn to Colleen for her strategic thinking and common-sense approach to navigate critical brand launches and protect their intellectual property. Colleen's ability to provide practical and effective counsel has earned her the trust of top organizations.

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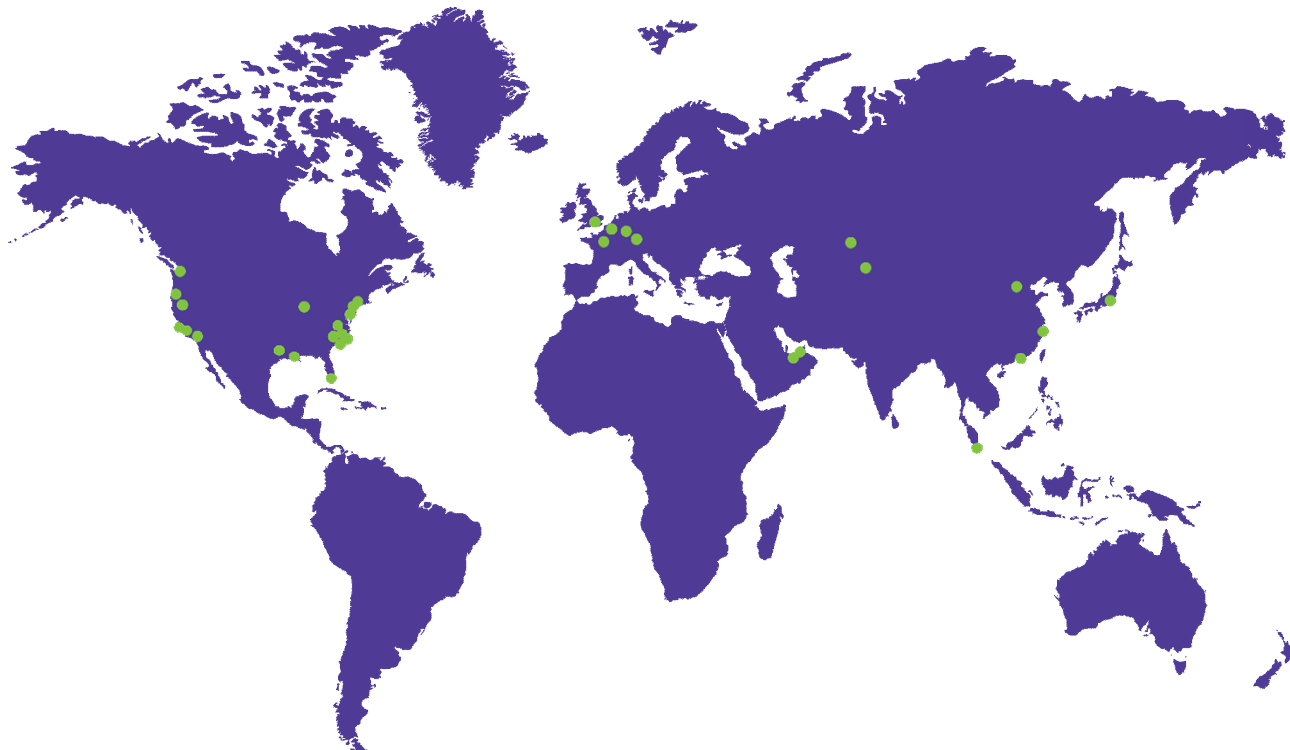

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