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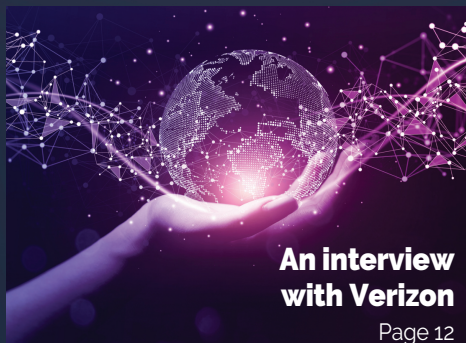
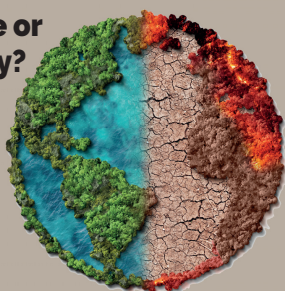
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YEARS ANNIVERSARY

**Generative AI -
apocalypse or
opportunity?**

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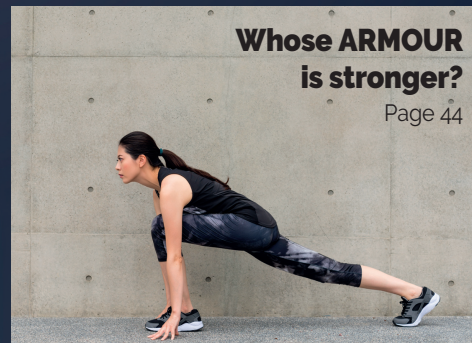


**An interview
with Verizon**

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**Whose ARMOUR
is stronger?**

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Jurisdictional Briefing, US: Penguins, Groggu, and the color orange: the implications of artificial intelligence and its use of copyrighted materials

Michelle Ciotola, Partner at Cantor Colburn LLP, evaluates the ever-evolving debate surrounding AI-created works according to US Copyright Law from both a use and generation perspective.

Confession: I started this article by asking ChatGPT for an introductory paragraph. Using the prompt "An introduction to a legal article about how artificial intelligence ("AI") and ChatGPT use copyrighted material to generate works." Within seconds, ChatGPT provided the following introduction:

Artificial Intelligence (AI) has emerged as a transformative force, revolutionizing various industries, including the creative realm. With advancements in natural language processing, AI-powered systems like ChatGPT have gained remarkable proficiency in generating text, mimicking human-like conversations, and producing creative works. However, this development raises important questions regarding the utilization of copyrighted material by AI systems and the potential implications for copyright law.

Copyright law has traditionally protected original works of authorship, granting exclusive rights to creators while regulating the use and reproduction of their works. However, as AI systems such as ChatGPT learn from vast datasets, they inevitably encounter and incorporate copyrighted material, raising concerns about potential copyright infringement. This article aims to explore the intricate relationship between AI systems, copyright law, and the use of copyrighted material to generate new works.

I like that introduction. But I am a little intimidated by how quickly and comprehensively ChatGPT generated this reply to my prompt. The capabilities of AI are evolving quickly, and the quality of the works generated are frequently astounding. AI has created works of art, written works, and generated musical compositions. AI technology has successfully passed the bar exam and the medical boards. And without question, AI technology has written essays for students. The use of AI raises numerous legal questions, especially in copyright law. But the guidance trickling in is far outpaced by the rapid expansion of AI technology. For example, the US Copyright Office (USCO) recently issued a Statement of Policy on the examination and registration of works containing AI-generated material. It came as no surprise that AI-generated works were not subject to copyright protection since U. Copyright Law requires human authorship. But this leaves open the question of how the USCO will treat works that use but are not solely created by AI. Apart from ownership of AI-created works, what are the legal implications when AI uses copyrighted work to generate these works?

The AI technology often used in the creation of these works is known as "generative AI". Generative AI is a type of artificial intelligence system that can generate text, images, or other media in response to prompts entered by the user. The chatbot ChatGPT and the image-generator Dall-E, both developed by OpenAI, are examples of generative AI technology. Both ChatGPT and Dall-E use GPT-4 and GPT-3 respectively. GPT or Generative Pre-Trained Transformer is an

autoregressive language model which uses deep learning to create the outputs. Deep learning is a type of machine learning that uses artificial neural networks to mimic the human brain – deep learning algorithms learn from diverse, unstructured, and inter-connected data and is capable of improving performance. This raises copyright issues because the data deep learning learns from will likely include copyrighted materials.

The question becomes whether use of copyright material in AI deep learning may constitute infringement. Given the breadth and scope of data available, it would be impossible to obtain permissions from copyright holders. But the ability to use materials protected by copyright is instrumental to the success of deep learning. Does use of the data in the learning process constitute fair use? The doctrine of fair use permits the use of copyrighted works without permission from the owner of the copyright. It is a limitation to the rights afforded to a copyright owner. The doctrine is codified in the US Copyright Act under 17 U.S.C. §107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (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.*

The application of the fair use doctrine is fact and circumstance specific. Even if the use of copyrighted materials in machine learning is fair use, what happens when the prompts entered into generative AI technology results in an output that does infringe copyright? Is the user of the technology liable for copyright infringement depending on how that work is then used? Is the developer of the technology liable for infringement? Contributory infringement? The answers to these questions will depend on the specific technology at issue, safeguards put in place, and the manner in which the output is ultimately used by user, among other considerations.

Earlier this year for his seventh birthday, my son asked me for a painting of "penguins, Grogu,



Michelle Ciotola



Image generated by Dall-E from prompt "a painting of penguins and Grogu with orange"

and the color orange." These are his absolute favorite things. The character Grogu, also known as "Baby Yoda," was from the television series The Mandalorian, is well-protected intellectual property and subject to copyright protection. Curious about how Dall-E would handle this prompt, I entered the following prompt into Dall-E: "a painting of penguins and Grogu with orange." The image generated contained penguins and orange, but no Grogu. Did AI understand the prompt "Grogu" but also identify it as subject to third-party intellectual property rights? Are there safeguards in place to guard against copyright infringement in certain circumstances?

Recently, TikTok user Ghostwriter977 posted (and subsequently deleted) a video in which they claim they used AI to create - specifically using AI to replace their voice with an AI generated voice to mimic the voices of rapper Drake and singer The Weeknd. Ghostwriter977 claims to have written the lyrics. This raises a new set of issues: if the lyrics were in fact written by Ghostwriter977 can this be a case of copyright infringement where the voices of third parties are used in the creation of the final work? While it is more likely the appropriate claim would be one directed to rights of publicity for use of the mimicked voices of Drake and The Weeknd, this is another example of the potential legal issues raised by use of generative AI.

While US Copyright Law continues to play catch-up to this very rapidly expanding technology, owners should be prepared to monitor and enforce their works, just as users of generative AI technology should carefully consider the technology used, the prompts entered, and the output created.

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Résumé

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Michelle Ciotola counsels clients on protecting and enforcing their trademark, trade dress, copyright, and related IP rights, including unfair competition, Internet, advertising, and promotions law. She counsels clients in developing and exploiting their trademark and copyright portfolios, including clearance, prosecution, and identifying important overseas jurisdiction and filing or coordinating with local counsel overseas. Michelle develops strategies for the enforcement of her clients' IP rights. She also develops strategies for enforcement of her clients' intellectual property rights online, including handling Uniform Domain Name Dispute Resolution Policy proceedings. Michelle is a thought leader on AI and emerging technologies issues related to intellectual property, and has authored several articles related to these complex and evolving issues. Michelle attends and speaks at International Trademark Association (INTA), MARQUES, European Communities Trade Mark Association (ECTA), IPO, and the Asociacion InterAmericana de la Propiedad Intelectual (ASIFI).

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