



**The Journal of Robotics,
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Artificial Incompetence: How Generative AI Creates Latent Intellectual Property Issues

K. Lance Anderson, Benton B. Bodamer, Andrew M. Robie, and Jordan E. Garsson*

In this article, the author examines the extensive legal risks that companies take when using generative artificial intelligence, particularly within operations that create intellectual property or other intangible value represented within a business.

Any groundbreaking new technology can potentially pose significant societal benefits and drawbacks. Recent advances in generative artificial intelligence (GenAI), however, seem to be especially dangerous; experts and pioneers in the AI field, including the “godfather of AI,” have warned that this technology represents a profound risk for humanity and have recently advocated for a six-month pause on the development of new GenAI models.¹ In the context of creating intellectual property assets, and protection of such assets for businesses in nearly any field, an indefinite hiatus on the *use* of these technologies might be a better idea.

GenAI programs are algorithmic models that can “learn” from patterns present in vast amounts of data to produce new text, audio, video, simulations, or software code in response to a human prompt.² The content generated by these models often appears “indistinguishable from human-generated content,” and current GenAI models can produce college-level essays or mind-bending works of art in a matter of seconds.³ Unfortunately, some of the content generated has proven incorrect or severely biased, since a GenAI model is limited by the data it has access to, and any biases in that data will grow exponentially in the model’s output.⁴ Although some of the output from GenAI models is impressive and has the potential to simplify repetitive and difficult tasks, the lack of an established legal framework around GenAI, as well as its inconsistent nature, means that companies that are not careful about using GenAI will likely expose themselves to legal risk,

especially in the context of value accretion or contribution to intellectual property (IP) and corporate transactions, such as mergers and acquisitions (M&A).

Ultimately, GenAI may prove to be a beneficial tool in the hands of businesses, including trained and experienced lawyers who counsel them. However, use of GenAI in a manner that contributes to IP assets or even legal documents on their own, there is currently potential exposure to massive risk and costly litigation.

This article examines the extensive legal risks that companies take when using GenAI, particularly within operations that create IP or other intangible value represented within a business. First, this article provides an overview of current AI-centered IP litigation. Second, the discussion turns to the significant and complex issues that GenAI creates for companies looking to enter M&A transactions or IP acquisitions. Lastly, this article offers solutions in the form of guidance for business leaders, a model AI representation for M&A and IP transactions, and recommendations for initial guidelines around GenAI use.

AI-Generated IP Litigation

Key Questions and Current Cases Related to AI-Generated IP and Related Privacy Issues

The uptick in using GenAI to generate creative corporate work has resulted in several high-profile IP infringement lawsuits against AI developers and guidance from both the U.S. Patent & Trademark Office⁵ and the U.S. Copyright Office (the Offices). At the heart of the guidance and litigation are several legal questions with significant ramifications for the use of GenAI in the workplace: Is AI-generated work eligible for IP protection? Do GenAI models infringe on existing IP? What confidentiality and privacy issues arise with the use of GenAI? These issues are discussed below and illustrated through recent examples of AI-centered IP litigation.

Is AI-Generated Work Eligible for IP Protection?

The closest thing to an established legal framework in the United States for using GenAI to create IP is the published guidance from the Offices regarding protection of work containing AI-generated material.⁶ The long-standing rule promulgated by

the Copyright Office is that “copyright can protect only material that is the product of human creativity” and that the term “author” does not include nonhumans.⁷ Cases involving a book authored by a nonhuman spiritual entity and a photograph taken by a monkey have established that copyright-eligible material must be originated from “a human agent” and that the Copyright Office will not register works “produced by mechanical processes or random selection without any contribution by a human author. . . .”⁸ Therefore, work created by a nonhuman is generally not eligible for copyright protection.

The Offices have applied this rule, or analogous rules pertaining to other forms of IP protection, to AI-generated content. In September 2022, Kristina Kashtanova submitted a copyright application for a comic book, the text of which was authored by Kashtanova.⁹ The images, however, were created by Midjourney, an AI image generator that creates images in response to human prompts.¹⁰ The Copyright Office ultimately found that the images created by Midjourney were not eligible for copyright, since the visual material produced by Midjourney was unpredictable and, even though Kashtanova put prompts into the model, was not the product of her mental conception or intellectual invention.¹¹ Instead, Kashtanova using prompts in a GenAI model was analogous to “a client who hires an artist to create an image with general directions as to its contents.”¹² The Office noted that AI-generated images might be eligible if they are “edited, modified, or otherwise revised by a human author” and contain a sufficient amount of original authorship.¹³ Simple edits Kashtanova made to the AI-generated images using Photoshop did not meet this requirement.¹⁴ Following the Kashtanova decision, the Copyright Office issued guidance for works containing AI-generated material it advised applicants to specifically claim the portions of their work that are human generated, carefully describe how they have creatively arranged nonhuman content, and exclude nonedited AI-generated content.¹⁵ Essentially, to gain copyright ownership over work created using GenAI, an applicant would need to clearly prove there was significant human input, organization, and editing of the AI-generated product. Similarly, the Patent and Trademark Office has also provided guidance that an applicant must prove significant human input to receive protection for such IP.

Do AI Models Infringe on Existing IP?

Pending lawsuits will establish whether GenAI models infringe on existing copyright or patent rights, but it is likely that infringement claims will be highly fact dependent and that common defenses, such as fair use in copyright law, will not generally apply. Claims of infringement against both AI developers and users will likely be decided on a case-by-case basis and will involve significant and complex litigation. The essence of the copyright infringement claims detailed below is that since GenAI models require data to “learn” from, the use of copyrighted material without permission to train a model constitutes an unpermitted use of that material.

Authors Sarah Silverman, Chris Golden, and Richard Kadrey recently filed class-action lawsuits against OpenAI and Meta, alleging that the companies used the authors’ copyrighted material to train their GenAI systems without consent, credit, or compensation.¹⁶ Both lawsuits contain extensive exhibits demonstrating that each company’s GenAI model can accurately summarize the detailed plots of each author’s book, suggesting that the GenAI models were trained on the copyrighted books themselves rather than reviews or other publicly available writings.¹⁷ The complaint against Meta even states that the company essentially admitted to using books from a “shadow library,” which is a “frankly illegal” website that hosts a large amount of copyrighted material to be used specifically for GenAI training.¹⁸

Similarly, Getty Images sued Stability AI, claiming that Stability AI trained its GenAI model using more than 12 million copyrighted images owned by Getty Images. The complaint contains allegations of copyright infringement, trademark infringement, trademark dilution, and unfair competition, among others.¹⁹ Another similar lawsuit from a group of artists against Stability AI claims that the company trained its GenAI model on billions of copyrighted images without permission.²⁰

Whether training a GenAI model on copyrighted works constitutes infringement depends on whether GenAI training is covered under fair use.²¹ Fair use is determined by four factors: the purpose and character of the use, including whether such use is “transformative,” the nature of the copyrighted work, the amount and substantiality of the work used, and the effect upon the market for or value of the copyrighted work.²² Existing cases are inconclusive as to whether using copyrighted material to train GenAI models is covered under fair use.²³

The fair use question is amorphous and highly fact dependent. Regarding the character and purpose of the use, GenAI model proponents argue that their use of copyrighted material is transformative, while copyright holders argue that the use of their images and text is merely an unauthorized reproduction of their work.²⁴ AI companies rely heavily on the 2015 decision in *Authors Guild v. Google* to argue that their work is transformative.²⁵ In *Authors Guild*, the Second Circuit Court of Appeals held that Google's use of copyrighted books to compile a searchable database of information about each book constituted fair use.²⁶ Google's purpose in using the books was to create a database about the books, which was a fundamentally different and transformative purpose when compared to the original use of the books as entertainment material.²⁷ OpenAI argues that its use is analogous, since creating a GenAI model is a different endeavor than reading a book or looking at an image.²⁸ On the other hand, it is possible that the *Authors Guild* holding is limited to its facts—copyright advocates have argued that “[i]nstead of using copyrighted works to create a new product [an AI model] that could usurp the market for the underlying work, the court found that Google used the books to shed light on information *about* the book[s]...”²⁹ While it is unclear whether the use of copyrighted material to develop GenAI will be deemed “transformative,” there are several other factors to consider in the fair use analysis.

Additional issues arise in debates around the amount of the work used—while training a GenAI model uses the whole copyright-protected work, the output generated in response to a user prompt generally uses only a small portion of the work.³⁰ It is likely that this factor weighs against fair use since the text of the Copyright Act specifically states the factor is based on the “amount and substantiality of the portion *used*” rather than the portion that is reproduced through a process or shown to a user.³¹

The impact on the market for the work will also be fact dependent in relation to the claimant's copyright and the infringer's use of the work. While many GenAI platforms started as open-source, free-to-use resources, they now offer subscriptions and likely have significant plans for commercial use, further harming the market for existing copyright holders.³² Perhaps more damning is the fact that many copyright holders already offer licenses for developers who want to use their work to train GenAI models.³³ The Second Circuit has held that, when an existing market for licensing copyrighted materials exists, unauthorized use of those materials

impacts the license market for the copyright holder's work and weighs against a finding of fair use.³⁴

Ultimately, whether using copyrighted material to train a GenAI model will constitute fair use depends on a number of fact-dependent variables specific to each instance. While initial cases have focused on the use of copyrighted materials by AI developers to train their systems, it is likely that we will see cases against individuals and companies who use GenAI if the AI-generated output mirrors or imitates the style of a copyrighted work.

How Does AI-Generated Work Impact Confidentiality and Privacy?

Companies that rely on trade secrets or confidential information must be extremely cautious when using GenAI. When an attorney or company employee puts confidential information into a GenAI program, it is likely that such information will become part of the data set the model uses to "learn" and will be visible to that program's developers.³⁵ For many GenAI models, any information entered by users may be reviewed by people who work on and train the GenAI model.³⁶ ChatGPT, for example, tells users not to share sensitive information when working with the program.³⁷

GenAI developers are working to quell confidentiality and privacy concerns; OpenAI recently introduced a setting that allows users to opt out of sharing their data to improve ChatGPT.³⁸ The setting also deletes all user conversations after 30 days.³⁹ However, these changes to ChatGPT's policy, which came six months after its release to the public,⁴⁰ will likely end up being too little, too late. First, the update does little to assuage concerns about confidential information being monitored by OpenAI's employees, meaning it offers no protection against the dissolution of trade secrets and disclosure of other confidential information. It also fails to consider the millions of people affected by OpenAI's privacy policy before the update. Regulators and risk management perspectives have taken note of the privacy and confidentiality issues posed by major GenAI creators; the Federal Trade Commission has opened an expansive investigation into OpenAI's use of personal data and capacity to generate false statements about individuals.⁴¹ However, since GenAI developers move exponentially faster than agencies and legislators, confidentiality and privacy concerns will likely grow before regulation or laws offer a solution.

Application to Businesses

The application of these issues to businesses, particularly those that work with proprietary information and various IP assets, is diverse and numerous, and may present incredibly difficult challenges. This section examines the problems with using GenAI to create work product through the lens of a software company whose engineers use Copilot, a GenAI tool that allows them to input natural language and receive AI-generated software code.⁴² Copilot also gives software developers auto-complete style suggestions as they code.⁴³ Importantly, the program was trained using open-source, publicly available code and in some cases generates an exact match to the open-source training code.⁴⁴ While GenAI products like Copilot claim to be life changing for companies that develop software and other IP, GenAI use will introduce potentially disruptive consequences that might outweigh its positive effects.

Companies Using AI to Create Work Product May Not Own Their IP

As discussed above in respect to whether AI-generated work is eligible for IP protection, the Offices have repeatedly stated that IP protection requires a human author or inventor, or at the very least “significant human input.” A person using GenAI does not usually satisfy the requirement, since input prompts “function more like instructions to a commissioned artist.”⁴⁵ Creators are not completely forbidden from using GenAI—but when GenAI determines “the expressive elements of its output,” work is not eligible for copyright.⁴⁶ Unfortunately, proving that AI-generated material has enough human input to render it eligible for IP protection will likely be much easier said than done.

Consider a company that uses a combination of employees and independent contractors to create software code using a GenAI tool like Copilot. If the employees incorporate code authored by GenAI without painstakingly noting which parts of the code were written by GenAI and which were written by humans, it is currently difficult to tell which parts of the code are eligible for copyright protection. Furthermore, if critical parts of the code were authored by GenAI, those elements will not be eligible for copyright without proof that a human did a significant amount of editing, rearranging, and supplementing to the AI-generated product. Under the Office’s guidance, an applicant in this situation would need to claim

and describe the human-authored content while describing which parts of the work are AI-generated, explaining exactly how they edited the work in a way that “constitutes an original work of human authorship.”⁴⁷ They would also need to disclaim any nonedited AI-generated portions.⁴⁸ This is a confusing, tedious, and laborious task for any company, especially one with a significant number of employees and independent contractors creating IP, like source materials, in the course of ordinary business.

Similarly, assume an independent contractor or employee has a contract that assigns all of the IP they create to a company. If that independent contractor or employee writes software code using GenAI, the developer likely has no copyright to that code and, therefore, cannot automatically assign it to the company without explicitly claiming the human-authored portions and disclaiming the AI-generated parts. For content created using Copilot, which autocompletes lines of software code while engineers work, it will be challenging to determine which lines of code are eligible for copyright and which are not. While human-written code is copyright eligible, anything autogenerated through predictive means will not meet the human authorship requirement promulgated by the Copyright Office.⁴⁹

Without careful guidance and explicit company policies regulating the use of GenAI models in the workplace, companies that create IP stand to lose a significant amount of their value as proprietary products are created using GenAI and consequently fall outside of established limits of protectable work. Implementing guardrails to ensure the ability to claim copyright in a product will be essential for companies that hope to grow and eventually sell their IP, or their IP-oriented business, to others.

Companies Might Unwittingly Make Their IP Open Source

Another dangerous risk for companies with significant IP assets is the possibility of inadvertently making that IP open source through the use of AI. In some cases, the use of AI may result in copyright becoming copyleft.⁵⁰ Copyleft is a specific type of restrictive open-source software license requiring any derivative works to be open source.⁵¹ For example, using software code under the GNU General Public License (GPL), an open-source copyleft license would require a developer to share the code for any work created using that open-source code.⁵² GenAI code generators

like Copilot have been primarily trained on open-source publicly available software code. Copilot's developers have acknowledged that some blocks of code generated may exactly replicate the training code.⁵³

Therefore, if a software company's proprietary code contains AI-generated open-source copyleft code, such as the code used to train Copilot, the company's entire code may become "tainted," and they may be obligated to extend the open-source license to the entirety of the proprietary product.⁵⁴ Federal courts have recognized that if software under an open-source copyleft license is used to create a new work, a company may be required to make such derivative work open source.⁵⁵

Using open-source code in even one line of software may put proprietary products at risk of becoming open source, particularly if a restrictive license, like certain GPL versions govern such open-source software. Companies must be aware of this danger and establish clear and strict AI policies to protect their IP, or even to identify to collaborators, acquirers, or stakeholders what their IP actually is.

Companies Might Unwittingly Infringe on IP by Using AI

The cases discussed in the subsection "Do AI Models Infringe on Existing IP?" focus on copyright infringement claims against GenAI developers as a result of their use of copyrighted material to train the GenAI models. However, it is possible that if an artist, engineer, or writer sees an element of their work in an AI-generated product claimed by a business, that original creator may attempt to pursue a copyright infringement claim against the business.

It is impossible to say that all GenAI use would either qualify or not qualify as fair use, and it is currently unclear whether developers or users would be liable for copyright infringement if courts hold that GenAI models do infringe on existing copyright. As a result, these issues will likely be decided on a case-by-case basis, which likely means drawn-out and costly litigation.

Businesses that use GenAI should ensure that products built using GenAI do not infringe on existing copyright. They can attempt this in several ways—first, companies can try to strictly regulate the phrasing of inputs used in GenAI models to ensure that prompts do not result in the GenAI model emulating or copying a distinct piece of protected work. Businesses could also implement a

process for checking and approving AI-generated work to ensure it does not infringe on protected work, such as searching for written material in a traditional search engine or reverse image searching to compare the AI-generated work to existing material.

Companies Might Violate Confidentiality and Trade Secret Protocol by Using AI

As discussed above in respect to how AI-generated work may impact confidentiality and privacy, the developers can see anything entered into a GenAI model.⁵⁶ In many cases, it is likely that the information entered will be used as training data to improve the model, which means that confidential information might appear in outputs for third-party users as well.⁵⁷

As a result, GenAI may be especially detrimental in trade secrets. Information must be valuable because of its secrecy to qualify as a trade secret, and a company must take reasonable steps to keep that information confidential.⁵⁸ “Reasonable steps” often include nondisclosure agreements, security infrastructure, and controlling accessibility of essential documents.⁵⁹ Suppose a software company, for example, does not have an explicit and strict policy around how its employees and independent contractors use GenAI in their IP-related work. In that case, it is unlikely a court would find that the company took reasonable measures to keep their information a secret.

Real-world examples have already occurred in GenAI’s expedient rise to prominence. Samsung, a gigantic electronics company, banned its employees from using ChatGPT after discovering that workers entered confidential code into the GenAI model.⁶⁰ Other massive companies like Apple, Walmart, and Amazon have cautioned all employees against sharing confidential data with ChatGPT or banned the use of GenAI altogether.⁶¹ Unfortunately for these companies, a recent survey of people who use ChatGPT at work found that nearly 70 percent have not told supervisors about their AI use.⁶²

Consequently, a software company with a strict policy against using GenAI in the development of work products might only know about 30 percent of their employees’ GenAI use. The remaining 70 percent of employees who use GenAI under the radar are not likely to take into account the significance of the company’s confidential information, which may lead to that information being

leaked to GenAI developers and ultimately to the public. While this might result in consequences for employees when GenAI use is discovered, those consequences will happen after the damage to the company's private information has already occurred. The confidentiality and privacy risks associated with GenAI use in the workplace are potentially disastrous, and businesses must begin thinking about how to protect confidential information if they suspect employees are using GenAI, particularly to work with critical IP.

M&A: Issues and Solutions

While the IP issues created by GenAI are significant standing alone, they become more complex and more pressing in the context of business transactions, particularly M&A transactions. There are a range of pre- and post-closing problems that may arise for companies with significant GenAI use.

A looming possibility for a seller looking to enter an M&A or IP transaction is that it will discover that GenAI use has made it impossible to assign its IP or proprietary product, thereby lowering or even negating the company's value. A number of typical contractual provisions will need to change with respect to potential pre- and post-closing issues, especially with regard to licensing and assigning IP assets, including software.

One of the reasons GenAI is so dangerous is that the law surrounding it is only just beginning to form. Pending cases, such as the *Silverman* and *Getty Images* lawsuits cited above, will begin to determine the limits of copyright infringement and fair use as they apply to the development of GenAI systems. While the possibilities for issues posed by GenAI are nearly endless, three significant issues initially present themselves as seller companies begin to implement GenAI into their workflow. First, buyers who unknowingly acquire AI-generated assets may open themselves up to future litigation and infringement claims from content creators. Furthermore, a buyer might discover that an AI-generated piece of IP, such as software code, is "tainted" by GenAI authorship or open-source code that requires the proprietary product to be open sourced as well. Lastly, if AI-generated IP is exchanged as part of a transaction without full disclosure and adequate representations and warranties from

the seller, buyers might experience future losses outside the reach of contractually allocated liability or indemnification.

These issues are the tip of the iceberg for companies in M&A or IP transactions if a seller has used GenAI to create or bolster its IP. A number of contractual provisions would need to be updated to explicitly include protection for buyers and sellers in transactions involving AI-generated assets. Examples of these include definitions of terms such as “software,” “company intellectual property,” “purchased assets,” and “source code.” Similar to now-standard open-source software representations, sections involving compliance with laws will also need to reflect a company’s compliance with all IP laws and regulations with regard to GenAI use.

Critically, companies that are selling assets will need to specifically identify AI-derived assets in contrast with true IP assets. Since AI-generated work is not eligible for copyright, most AI-generated work will not be assignable IP for the purposes of M&A transactions. Sellers must be explicit about what they have used GenAI to produce so buyers can adequately value the proposed transaction and prepare for future issues relating to purchased assets.

Recommendations

With all of the issues described above, how should businesses proceed? To start, companies must be extremely careful with how they use GenAI, particularly in the context of employees and independent contractors that are creating content or IP. For businesses looking to enter into an M&A transaction or IP acquisition, becoming aware of a seller’s GenAI use in relation to IP is paramount, and parties should begin using a version of the model representation provided below to protect themselves from future litigation. Disclosure of AI-generated content is critical in preventing cross-pollination of nonprotectable GenAI content versus actual IP.

In considering acquisition of innovation-based assets, consider including language in seller representations:

Use of Generative Artificial Intelligence. Seller represents that it has disclosed all Purchased Assets of the business created, edited, or revised by or with the assistance of a Generative AI Tool, and all Purchased Assets that could be considered derived from material developed by a Generative AI Tool (“AI

Material”). To the extent that any Purchased Asset contains AI Material, Seller has further clearly and accurately identified which portions of such Intellectual Property Asset is human-authored and which is AI Material.

It is also worth noting that GenAI has the potential to develop extremely quickly, and regulators and lawmakers in the United States may choose to implement federal guardrails around GenAI as it becomes more entwined in the business sector. The European Union recently adopted a draft law that is designed to guide the development of GenAI and its use in the continent.⁶³ In draft form, the law establishes GenAI “regulatory sandboxes” where companies can innovate safely and requires AI developers in high-risk organizations like banks and hospitals to use unbiased data.⁶⁴ It will be interesting to see what the law looks like in its final form and whether regulators in the United States will follow suit. Regardless, currently operating companies in the United States or Europe that hope to claim IP rights should consider the following recommendations.

If You Want to Own Your Work Product, Do Not Use GenAI to Generate It

The prospect of devoting valuable company resources like time, productivity, and capital to developing a proprietary product that has legal protection, only to discover that GenAI use rendered the creation nonprotectable and less valuable is a terrible scenario for any business. Under long-standing rules requiring a human author for copyright-protectable work, many companies may soon find themselves in this scenario. Businesses should begin by consistently and firmly communicating with staff the expectations around GenAI use, especially if employees are creating IP.

If GenAI use by employees is unavoidable, such expectations should require employees and independent contractors to explicitly state which parts of the product are generated by GenAI and which are generated by a human. This would make it easier to claim some parts of the IP in an application with the Offices, or in representations and disclosures to third parties. Ideally, however, businesses should avoid using GenAI for development of crucial IP moving forward; this will not only make it easier to claim IP protection,

but will also make them a more viable and valuable candidate for IP or M&A transactions with peers and potential acquirers.

Companies Should Not Rely on AI for Creative Works

While it may be tempting, businesses should not rely solely on GenAI for creative work. The fact that AI-generated work is unreliable does not mean that all use of GenAI should be completely off limits. GenAI is developing into a powerful tool that will require human input and organization. If businesses do not input confidential information into a GenAI model and do not use the model to create IP, the use of GenAI may be extremely helpful and will likely allow professionals to focus on the most rewarding and important parts of their job. However, to the extent GenAI is utilized in the context of contributing to the IP assets of the business, great care should be taken to determine adequate levels of human intervention (significant human input) to the copyrightable work, or substantial [human] contribution to the applicable invention. Unfortunately, these thresholds are likely to move as court precedence, additional guidance, and worldwide policies rapidly evolve, rendering this assessment an imperfect effort requiring constant attention.

Conclusion

The IP issues created by using GenAI in corporate and creative work are numerous and multiplying with each new GenAI model released. In the context of M&A or IP transactions, these issues compound and have the potential to create significant litigation. Companies that use GenAI to create IP ranging from software code to graphic novels will cause problems in the transactional process, as business likely cannot technically copyright or assign AI-generated IP.

Businesses should protect themselves by severely limiting their use of GenAI to create, edit, or refine their IP. The model representation included in the Recommendations is a starting point for thinking about IP in a contract to buy or sell a company that may have directly or indirectly used GenAI, should begin requiring human verification and disclosure of work that was completed using GenAI to avoid harmful mistakes and breaches of confidentiality.

Notes

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1. Rebecca Klar & Ines Kagubare, “Experts Sound Alarm on AI,” Hill (Mar. 29, 2023), <https://thehill.com/newsletters/technology/3924774-experts-sound-alarm-on-ai/>; Sara Brown, “Why Neural Net Pioneer Geoffrey Hinton Is Sounding the Alarm on AI,” MIT (May 23, 2023), <https://mitsloan.mit.edu/ideas-made-to-matter/why-neural-net-pioneer-geoffrey-hinton-sounding-alarm-ai>.

2. “What Is Generative AI?,” <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai>.

3. *Id.*

4. *Id.*

5. The U.S. Patent & Trademark Office has adopted a framework consistent with that of the Copyright Office, underscoring a unified approach to IP protection. Consequently, while this discussion predominantly focuses on copyright cases and determinations, the implications are likewise present in patent contexts.

6. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 37 C.F.R. § 202, at 16191-92 (2023), <https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf> (providing guidance from the Copyright Office); Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. 10043, 10043 (Feb. 12, 2024), <https://www.federalregister.gov/documents/2024/02/13/2024-02623/inventorship-guidance-for-ai-assisted-inventions> (providing guidance from the Patent & Trademark Office, noting “[p]atent protection may be sought for inventions to which a natural person has made a significant contribution”).

7. 37 C.F.R. § 202, at 16191-92.

8. *Id.*; U.S. Copyright Office, Compendium of U.S. Copyright Office Practices sec. 503.03(a) (2d ed. 1984), <https://www.copyright.gov/history/comp/compendium-two.pdf>.

9. Letter from Robert Kasunic, Associate Register of Copyrights, U.S. Copyright Office, to Van Lindberg, Taylor English Duma LLP at 2 (Feb. 21, 2023), <https://copyright.gov/docs/zarya-of-the-dawn.pdf>.

10. *Id.* at 5-8.

11. *Id.* at 9.

12. *Id.* at 10.

13. *Id.* at 11.

14. *Id.* at 10-12.

15. *See* 37 C.F.R. § 202 at 16193.

16. Complaint at 4-8, Silverman et al. v. OpenAI, Inc., No. 23-CV-03416 (N.D. Cal. July 7, 2023), <https://lmlitigation.com/pdf/03416/silverman-openai-complaint.pdf>; Complaint at 3-6, Silverman et al. v. Meta Platforms, Inc., No. 23-CV-03417 (N.D. Cal. July 7, 2023), <https://lmlitigation.com/pdf/03417/kadrey-meta-complaint.pdf>.

17. Exhibit A, Silverman et al. v. OpenAI, Inc., No. 23-CV-03416 (N.D. Cal. July 7, 2023), <https://lmlitigation.com/pdf/03416/silverman-openai-complaint-exhibits.pdf>; Exhibit A, Silverman et al. v. Meta Platforms, Inc., No. 23-CV-03417 (N.D. Cal. July 7, 2023), <https://lmlitigation.com/pdf/03417/kadrey-meta-complaint.pdf>.

18. Complaint at 4-5, Silverman et al. v. Meta Platforms, Inc., No. 23-CV-03417 (N.D. Cal. July 7, 2023), <https://lmlitigation.com/pdf/03417/kadrey-meta-complaint.pdf>.

19. Complaint at 21-34, Getty Images v. Stability AI, Inc., No. 23-CV-00135-UNA (D. Del. 2023), <https://fingfx.thomsonreuters.com/gfx/legaldocs/byvrlkmwnve/GETTY%20IMAGES%20AI%20LAWSUIT%20complaint.pdf>.

20. Complaint at 1, Andersen et al. v. Stability AI, Ltd., No. 23-CV-00201 (N.D. Cal. 2023), <https://stablediffusionlitigation.com/pdf/00201/1-1-stable-diffusion-complaint.pdf>.

21. James Vincent, “The Scary Truth About AI Copyright Is Nobody Knows What Will Happen Next,” *Verge* (Nov. 15, 2022), <https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data>.

22. U.S. Copyright Fair Use Index, <https://www.copyright.gov/fair-use/>.

23. Cala Coffman, “How Existing Fair Use Cases Might Apply to AI,” Copyright Alliance (Apr. 13, 2023), <https://copyrightalliance.org/how-fair-use-cases-apply-ai/>.

24. Cala Coffman, “Does the Use of Copyrighted Works to Train AI Qualify as a Fair Use?,” Copyright Alliance (Apr. 11, 2023), <https://copyrightalliance.org/copyrighted-works-training-ai-fair-use/>.

25. Comment Regarding Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation, OpenAI, PTO-C-2019-0038, at 5-6, https://www.uspto.gov/sites/default/files/documents/OpenAI_RFC-84-FR-58141.pdf.

26. *Authors Guild v. Google*, 804 F.3d 202, 216-17 (2d Cir. 2015).

27. *Id.*

28. *See* Comment, *supra* note 25, at 5.

29. Coffman, *supra* note 23 (emphasis in original).

30. *Id.*

31. 17 U.S.C. § 107 (1992) (emphasis added).

32. Alex Konrad, “OpenAI Releases First \$20 Subscription Version of ChatGPT AI Tool,” *Forbes* (Feb. 1, 2023), <https://www.forbes.com/sites/alexkonrad/2023/02/01/openai-releases-first-subscription-chatgpt/?sh=>

345f7ab47f5f; Joseph Saveri & Matthew Butterick, “OpenAI,” LLM Litig. (June 2023), <https://llmlitigation.com/#openai>.

33. Coffman, *supra* note 23.

34. American Geophysical Union v. Texaco Inc., 60 F.3d 913, 928-31 (2d Cir. 1994).

35. “Generative Artificial Intelligence and Data Privacy: A Primer,” Cong. Research Serv., at 4-5 (May 23, 2023), <https://crsreports.congress.gov/product/pdf/R/R47569>.

36. Lance B. Eliot, “Generative AI ChatGPT Can Disturbingly Gobble Up Your Private and Confidential Data, Forewarns AI Ethics and AI Law,” Forbes (Jan. 27, 2023), <https://www.forbes.com/sites/lanceeliot/2023/01/27/generative-ai-chatgpt-can-disturbingly-gobble-up-your-private-and-confidential-data-forewarns-ai-ethics-and-ai-law/?sh=44c2a5c57fdb>.

37. *Id.*

38. Cecily Mauran, “ChatGPT Rolls Out Important Privacy Options,” Mashable (Apr. 25, 2023), <https://mashable.com/article/openai-chatgpt-chat-history-privacy-setting>.

39. *Id.*

40. “New Ways to Manage Your Data in ChatGPT,” OpenAI (Apr. 25, 2023), <https://openai.com/blog/new-ways-to-manage-your-data-in-chatgpt>.

41. Brian Fung, “FTC Is Investigating ChatGPT-Maker OpenAI for Potential Harm to Consumers,” CNN (July 13, 2023), <https://www.cnn.com/2023/07/13/tech/ftc-openai-investigation/index.html>.

42. About GitHub Copilot, <https://docs.github.com/en/copilot/overview-of-github-copilot/about-github-copilot-for-individuals#about-github-copilot>.

43. *Id.*

44. Srikanth Jandhyala, Jinwoo Kim & Arpita Bhattacharyya, “IP Issues with AI Code Generators,” Bloomberg Law (Jan. 2023), <https://www.bloomberglaw.com/external/document/X4H9CFB4000000/copyrights-professional-perspective-ip-issues-with-ai-code-gener>.

45. *See* 37 C.F.R. § 202 at 16192.

46. *Id.*

47. *See* 37 C.F.R. § 202 at 16192-93.

48. *Id.*

49. *See supra* notes 6 and 7 and associated text.

50. This issue is exclusive to restrictive, or “copyleft” licenses. Permissive open-source licenses, on the other hand, do not typically have requirements for how derivative works must be distributed. For additional background on different types of open source licenses, see “Guide to Open Source Licenses,” Synopsys (Oct. 7, 2016), <https://www.synopsys.com/blogs/software-security/open-source-licenses/>.

51. Ben Cotton, “What Is Copyleft?,” Opensource.com (Aug. 12, 2016), <https://opensource.com/resources/what-is-copyleft>.

52. *Artifex Software, Inc. v. Hancorn, Inc.*, No. 16-CV-06982-JSC, 2017 WL 4005508, at *6 (N.D. Cal. 2017).

53. Copilot was trained in part on a restrictive GPL code, and has allegedly failed at removing such code from its outputs. *See* Jandhyala et al., *supra* note 44; *see also* David Ramel, “Open Source Codeium Challenges GitHub Copilot, Strips Out Non-Permissive GPL Code,” *Visual Studio Magazine* (Apr. 24, 2023), <https://visualstudiomagazine.com/articles/2023/04/24/codeium>.

54. *Id.*

55. *See* *Artifex Software, Inc.*, 2017 WL 4005508, at *4.

56. *See* Eliot, *supra* note 36.

57. *Id.*

58. Trade Secrets, World Intellectual Property Organization, <https://www.wipo.int/tradesecrets/en/>.

59. *Id.*

60. Mark Gurman, “Samsung Bans Staff’s AI Use After Spotting ChatGPT Data Leak,” *Bloomberg* (May 1, 2023), <https://www.bloomberg.com/news/articles/2023-05-02/samsung-bans-chatgpt-and-other-generative-ai-use-by-staff-after-leak>.

61. Sam Sabin, “Companies Are Struggling to Keep Corporate Secrets Out of ChatGPT,” *Axios* (Mar. 10, 2023), <https://www.axios.com/2023/03/10/chatgpt-ai-cybersecurity-secrets>; *see also* Aaron Mok, “Amazon, Apple, and 12 Other Major Companies That Have Restricted Employees from Using ChatGPT,” *Insider* (July 11, 2023), <https://www.businessinsider.com/chatgpt-companies-issued-bans-restrictions-openai-ai-amazon-apple-2023-7>.

62. Sarah Jackson, “Nearly 70% of People Using ChatGPT at Work Haven’t Told Their Bosses About It, Survey Finds,” *Business Insider* (Mar 21, 2023), <https://www.businessinsider.com/70-of-people-using-chatgpt-at-work-havent-told-bosses-2023-3>.

63. Urs Gasser, “An EU Landmark for AI Governance,” *380 Science* 1203 (June 23, 2023) <https://www.science.org/doi/10.1126/science.adj1627>.

64. *Id.*