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Morgan Lewis

# IP CONSIDERATIONS FOR EVS AND BEYOND

November 15

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# Presenters



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# Open Source Overview

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# Software Copyright Fundamentals

- Copyright law (in the US and elsewhere) protects “original works of authorship” “fixed in a tangible medium,” such as software and documentation. 17 U.S.C. §102(a)
- Under US Copyright law, the author of an original work owns the copyright in the work (unless the work is made “for hire”). 17 U.S.C. §102(a)
  - The single copyright in a joint work is co-owned by the authors
  - The copyrights in separate works in a collective work are owned by their respective authors
- The Copyright is automatically granted to the author – there is no requirement to register a copyright, but registration provides key advantages:
  - Prerequisite to litigation. 17 U.S.C. §411(a)
  - Statutory damages (\$750-30,000 per work infringed, up to \$150,000 if willful). 17 U.S.C. §504
- The use of Copyright Notices is optional, but helpful in litigation or when asserting infringement (or in figuring out who the copyright owner is):
  - E.g., “Copyright 2022, Wile E. Coyote”

# Software Copyright Fundamentals

- The owner of copyright has the exclusive right, among other rights, to do and to authorize others to do the following:
  - To reproduce the work in copies or phonorecords (17 U.S.C. §115);
  - To prepare derivative works based upon the work (17 U.S.C. §§ 103(b), 106(2))
- A violation of any of the exclusive rights of the copyright holder is a copyright infringement, unless fair use (or a similar affirmative defense) applies.
- Copyright term:
  - **Works created since 1978: term is life of the author plus 70 years, unless work is “work for hire,” then term is shorter of 120 years after creation or 95 years after publication** (1998 Copyright Term Extension Act – lobbied for by Disney to prevent early version of Mickey Mouse – published in 1928 – from falling into public domain)
  - Works created before 1978: it’s complicated
  - Works created before 1926: public domain

# Software Licensing – Open Source

- Open Source Software (OSS) is original work of authorship - > subject to Copyright
- OSS can only be used per License Terms imposed by owner of the Copyright
- Check Copyright/License Notice to confirm owner of work and applicable open-source license
- Review License Terms and be sure to comply with them
- ***Violation of license could expose company to breach of contract and Copyright misappropriation claims.***
- ***Could result in injunction, monetary damages, including statutory damages, and contamination of code base with unlicensed third-party code.***



# Open-Source Overview

- Source code freely shared with other programmers subject to an Open-Source License
- It is ubiquitous
  - Per Synopsys, 84 open-source components per commercial application in 2016 to 528 in 2020
- For example:
  - Linux (operating system) (GPL v2)
  - Apache (web server) (Apache License 2.0)
  - MySQL (relational database) (GPL v2)
  - Perl (scripting language) (Artistic License and GPL v2)
  - OpenStack (cloud computing platform) (Apache 2.0)
  - Apache Hadoop (framework for big data) (Apache 2.0)
  - R (statistical computing language) (GPL v2)

# Open-Source Overview

- Rapid Deployment
- Low Cost
- Open
  - Available
  - Modifiable
  - Maintainable
  - Reliable
  - Secure
- Community
  - Pride of Ownership
  - Peer Development
  - Partnership (individual/non-profit/corporate)
  - Outsource Coding
- Continual Improvement
- Open Standard

# Open-Source Overview - EVs

- Software is essential to modern vehicles, especially EVs
- Per Synopsys, 23% of modern vehicle commercial applications are OSS
- Software (including OSS) controls myriad vehicle functions:
  - Suspension, braking, steering, power delivery, battery charging and discharging, user interfaces, media, Internet, autonomous driving, speed and fuel monitoring, accident avoidance, lane positioning, sensors
- Open source automotive initiatives include:
  - Automotive grade Linux (AGL) – collaborative open source project to develop fully open source stack for the connected car
  - Open Automotive Alliance - group developing Android features for automobile
  - GENIVI - industry alliance developing open standard for creating in-car entertainment (ICE) or in-vehicle infotainment (IVI)
- OSS lowers development costs, speeds time to market, and accelerates innovation.
- But OSS risks can be substantial:
  - OSS vulnerabilities can compromise applications and expose user/company confidential information
  - Poor OSS license compliance can trigger litigation and/or compromise rights in embedded or cloud company proprietary code
  - Poor OSS quality can impact vehicle and passenger safety
- Adopt policies and best practices to detect/address security risks and vulnerabilities (NVD) and avoid license conflicts
- Train developers and track OSS use

# Open Source Litigation, Risks, and Examples

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# Open-Source Risks – Code

- OSS Provenance?
- No support
- No warranty
- Poorly funded → poorly maintained
- No differentiation
  - Common features
  - Hard to customize
- Vulnerabilities are public
- Out of synch with company needs
  - Bug fixes?
  - New features?
  - Roadmap?
  - Need to update every new release with company customizations/patches
- Community
- Taint proprietary code base and vice-versa if intermingled
- Safety and Security (Critical for EV applications)

# Open-Source Risks – Licenses

- Could be viral (e.g., GPL/copyleft licenses)
- Non-negotiable
- As is
- Quirky
  - can include explicit patent licenses
  - can include publicity conditions (i.e., if publicize feature enabled by OSS, need to credit author)
  - can limit use to specific situations (e.g., academic but not commercial uses)
- Gotchas
  - distribution trigger (no copyleft effects unless distributed – and definition of “distribution” varies)
  - code combination (entire work subject to OSS license (GPL), or just derivatives of licensed files (MPL))
- Ambiguous (rarely enforced or subjected to legal interpretation)
- Enforcement
  - “political”
  - public – can be embarrassing even if risk is manageable

# Open Source Litigation

- Three categories of plaintiffs:
  - **Rights holders:** Parties that own or have rights to copyrighted software subject to an open source license
  - **Non-rights holders:** Parties without rights to software but claim to have been injured based on noncompliance with an open source license (*e.g.*, right to repair advocates)
  - **Other third parties:** Anyone claiming to be harmed from the use of open source software in violation of a statutory, regulatory, or other legal requirement
- Key litigation issues:
  - Standing
  - Copyright preemption
  - Covenants vs. Conditions
  - Damages / Injunctive Relief / Specific Performance

# Standing for Rights Holders

- A party may only bring suit for copyright infringement after the Copyright Office “has registered a copyright after examining a properly filed application.”
  - *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).
- The average processing time for all copyright applications is 3.6 months.
  - Online applications with an online deposit are nearly three times faster than using a mail submission.
- The copyright owner may recover damages for infringement occurring before registration, so long as it falls within the statute of limitations.



# Standing for Non-Rights Holders

- Non-rights holders would need to establish third-party beneficiary status under the open source license.
- To be a third-party beneficiary under California law, a non-rights holder must show:
  1. The party “would in fact benefit from the contract,”
  2. “A motivating purpose of the contracting parties was to provide a benefit to the third party,” and
  3. “Permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.”

*Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 829-830 (2019)

# Standing for Non-Rights Holders (cont'd)

- No case has held that a non-rights holder qualifies as a third-party beneficiary under an open source license.
- *Software Freedom Conservancy v. Vizio, Inc.*, 2022 WL 1527518 (C.D. Cal. May 13, 2022):
  - SFC alleges that Vizio breached GPLv2 and LGPLv2.1 by not distributing source code for dozens of programs that are part of its SmartCast software.
  - SFC seeks to obtain the source code for these programs for varied reasons including right to repair, consumer protection, and improved accessibility.
  - After removal, the Court remanded the case to state court without deciding the issue of standing.
  - “Whether SFC can successfully show it is a third-party beneficiary of the GPL Agreements is a question of state law that is not before this Court.”

# Copyright Preemption

- The Copyright Act preempts breach of contract and other state law claims that come within the subject matter of the copyright at issue and are equivalent to any of the exclusive rights under the Copyright Act.
- To survive preemption, a breach of contract claim needs to have an “extra element” that takes the claim outside the realm of copyright.
  - *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1984).
- In general, a claim of copyright infringement requires: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.
  - *Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012).

# Copyright Preemption (cont'd)

- **Preempted:** Claim for breach of an open source license “allege[d] violations of the exact same exclusive federal rights protected by Section 106 of the Copyright Act, the exclusive right to reproduce, distribute and make derivative copies.”
  - *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 933 (N.D. Cal. 2009)
- **Not Preempted:** “The ‘viral’ component of the GPL is separate and distinct from any copyright obligation. ... An affirmative promise to make its derivative work open source because it incorporated an open source program into its software” provided an “extra element.”
  - *Versata Software, Inc. v. Ameriprise Fin., Inc.*, 2014 WL 950065, at \*4-5 (W.D. Tex. Mar. 11, 2014)
  - *Artifex Software, Inc. v. Hancorn, Inc.*, 2017 WL 1477373, at \*3-4 (N.D. Cal. Apr. 25, 2017)
- **Not Preempted:** “There is an extra element to SFC’s claims because SFC is asserting, as a third-party beneficiary of the GPL Agreements, that it is entitled to receive source code under the terms of those agreements.”
  - *Software Freedom Conservancy v. Vizio, Inc.*, C.D. Cal. Case No. 8:21-cv-01943-JLS-KES (Dkt. 30)

# Conditions vs. Covenants

- If a copyright licensee acts outside the scope of the license, the licensor may sue for copyright infringement.
  - *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939 (9th Cir. 2010)
- Not all breaches of a copyright license give rise a copyright infringement claim.
- “To recover for copyright infringement based on breach of a license agreement, (1) the copying must exceed the scope of the defendant’s license and (2) the copyright owner’s complaint must be grounded in an exclusive right of copyright (e.g., unlawful reproduction or distribution).”
- **Conditions:** “contractual terms that limit a license’s scope, the breach of which constitute copyright infringement.”
- **Covenants:** all other license terms, actionable under contract law.

# Conditions vs. Covenants (cont'd)

## Examples of conditions:

- Right to copy, modify, and distribute open source software “provided that” the user include a notice stating how the software was changed and comply with other restrictions on distribution of its modifications.
  - *Jacobsen v. Katzer*, 535 F.3d 1373, 1380-81 (Fed. Cir. 2008)
- No creation of derivative works without the licensor’s consent.
  - *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 940 (9th Cir. 2010)

## Examples of covenants:

- Open source disclosure obligations under the GPLv2.
  - *Vizio, Inc.*, 2022 WL 1527518 at \*4.
- Prohibitions against bots; no disrupting another player’s gaming experience.
  - *MDY*, cited above.

# Damages

The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties. For example, program creators may generate market share for their programs by providing certain components free of charge. Similarly, a programmer or company may increase its national or international reputation by incubating open source projects. Improvement to a product can come rapidly and free of charge from an expert not even known to the copyright holder.

*Jacobsen v. Katzer*, 535 F.3d 1373, 1380-81 (Fed. Cir. 2008)

# Damages (cont'd)

- A court has awarded statutory damages for infringement of open source copyrights (albeit in the context of default).
- Categories of contract damages could include (at least under California law):
  - Reasonably royalty (including the use of similar, commercial licenses)
  - Unjust enrichment
  - Disgorgement of profits
    - *Artifex Software, Inc. v. Hancor, Inc.*, 2017 WL 4005508, at \*4-5 (N.D. Cal. Sept. 12, 2017)



# Injunctive Relief

- *Jacobsen v. Katzer* is the leading case on injunctive relief in open source litigation.
- In a pre-*eBay* decision, the Federal Circuit reversed the denial of a preliminary injunction, ruling that the open source copyright holder may be able to demonstrate irreparable harm or otherwise have it presumed.
- On remand, the district court held that intervening rulings required the copyright holder to show irreparable harm.
- “The Federal Circuit court’s list of potential harms that a copyright holder may face in the open source field are just that—*potential* harms. There is no showing on the record before this Court that Jacobsen has actually suffered any of these potential harms.” Categories of contract damages could include (at least under California law):
  - 609 F. Supp. 2d 925, 937.

# Specific Performance

- In California, the elements of specific performance are well established:
  1. Inadequacy of legal remedy
  2. Underlying contract that is reasonable and supported by adequate consideration
  3. Existence of a mutuality of remedies
  4. Sufficiently definite contract terms for the court to enforce
  5. Substantial similarity of the requested performance to that promised in the contract

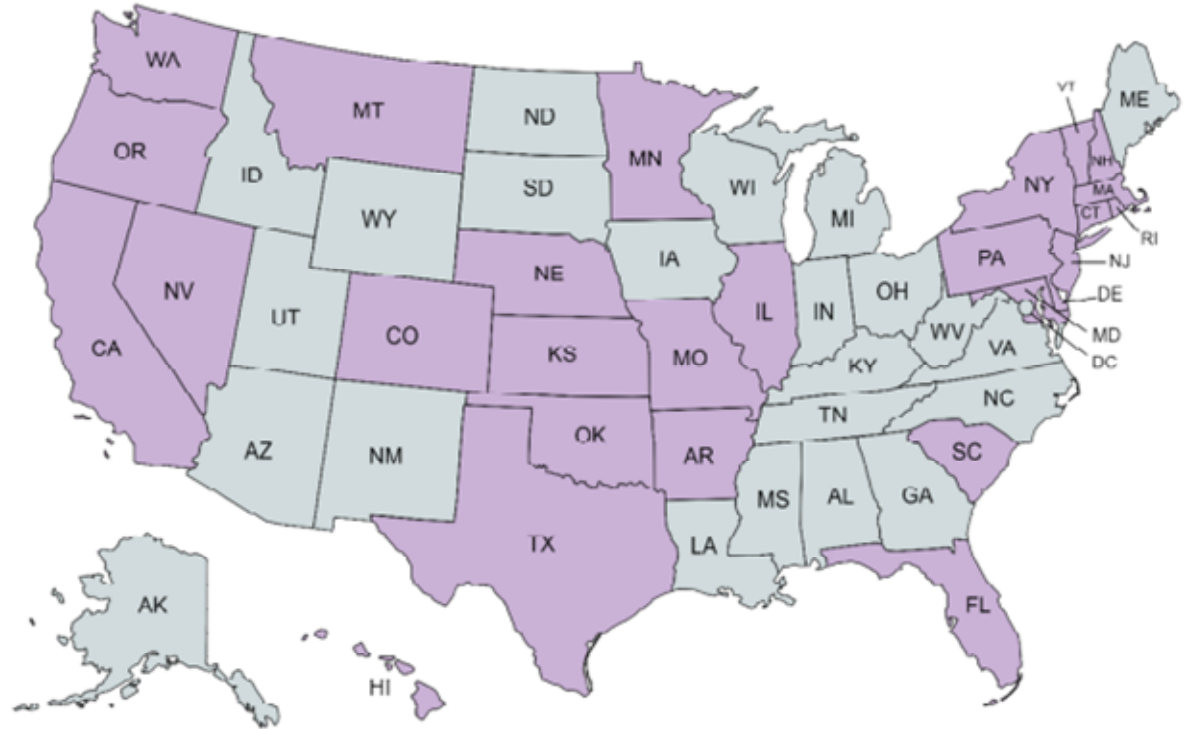
*Tamarind Lithography Workshop, Inc. v. Sanders* (1983) Cal.App.3d 571, 575.

# Right to Repair

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# State Right to Repair Laws

- At least 27 states have introduced right to repair laws in their legislatures.



# California's New Right to Repair Act (SB 244)

- SB 244, recently signed into law and effective July 1, 2014, requires that manufacturers of electronic devices and appliances make available to product owners, service and repair providers, and service dealers:
- For products between \$50 to \$99.99:
  - “**sufficient documentation and functional parts and tools**, inclusive of any updates, on **fair and reasonable terms**, to effect the diagnosis, maintenance, or repair of a product **for at least three years**” after manufacture AND
- For products above \$100, these obligations extend for at least seven years after a product was manufactured.
- Except as necessary to comply with the Act's requirements, a manufacturer is not required “to divulge a trade secret or license any intellectual property . . .”
- The Act “does not require the distribution of a product's source code.”

# DMCA: New Exemptions to Anticircumvention Measures (17 U.S.C. § 1201)

- Section 1201(a)(1)(A) of the DMCA prevents circumvention of technological measures that control access to a copyrighted work.
- DMCA authorizes the Copyright Office to determine exemptions to this restriction on a 3-year basis through rulemaking.
- In October 2021, the Copyright Office published a Final Rule on renewed and new exemptions (<https://public-inspection.federalregister.gov/2021-23311.pdf>).
- The Final Rule included new and expanded exemptions for right to repair advocates in several computer program classes, including: (10) computer unlocking, (11) jailbreaking, (12) repair, and (13) security research.
- The Final Rule also included a new exemption for investigation of open source license violations.

# New Open Source Exemption: 37 C.F.R. § 201.40(b)(20)

(20) Computer programs, solely for the purpose of investigating a potential infringement of free and open source computer programs where:

- (i) The circumvention is undertaken on a lawfully acquired device or machine other than a video game console, on which the computer program operates;
- (ii) The circumvention is performed by, or at the direction of, a party that has a good-faith, reasonable belief in the need for the investigation and has standing to bring a breach of license or copyright infringement claim;
- (iii) Such circumvention does not constitute a violation of applicable law; and
- (iv) The copy of the computer program, or the device or machine on which it operates, is not used or maintained in a manner that facilitates copyright infringement.

# Executive Order on Promoting Competition in the American Economy

- President Biden issued a July 9, 2021 Executive Order “affirm[ing] that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony ....”
- Among other markets, the Executive Order identified “repair markets.”
- Under Section 5(h)(ii), the Executive Order directed the FTC to consider exercising its rule making authority for “unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment.”



# **AI and the Automotive Industry**

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# Automotive: AI Use Cases

Both traditional and generative AI

- Vehicle navigation, driver assistance, safety
- Automotive design, manufacturing, construction
- Vehicle durability, predictive maintenance, fuel efficiency



*"Self driving car" from Adobe Firefly*

# AI Training & Usage: Data Sets in Automotive



*"City Driving Computer Code" from Adobe Firefly*

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- Sourcing Data for AI Training and Usage
  - Data
  - Images, Content, Code
- Examples
  - Self driving city imagery, videos
  - EV predictive usage, charging, locations

# Generative AI: Use Cases for Automotive

- Generating new content through AI
- Examples:
  - Product design and ideation
  - Manufacturing settings, directives
  - Driver interfaces, displays and controls
  - Navigation, generating 3D images and maps of environment
  - Marketing ideation, content



# **AI: IP Exposure & Considerations**

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# IP Exposure and Considerations

Infringement Allegations  
in use of Data Sets and in Training

Infringement Allegations  
Against Generated Output

Ownership and Enforcement  
of the Generated Output

# AI Litigation – Copyright Claims

Generally, there are three types of copyright infringement allegations in these litigations:

**Direct Infringement** (unauthorized copying or creation of derivative works)

- unauthorized storage/reproduction for training; output generated being substantially similar; the system itself if every output relied upon training from unauthorized copies

**Contributory Infringement** (aiding or facilitating a third-party infringement)

- providing the means to create infringing works; building AI models on web-scraped materials; by removing/modifying CMI (copyright management information)

**Vicarious Infringement** (financially benefiting from—and the ability to monitor or control—the infringement of others)

- by allowing users to create works “in the style of” specific named artists and act as “imposters” artists (selling infringing works); “every output from the [AI model] constitutes an act of vicarious copyright infringement.”

# AI Litigation – Images

## *Getty Images v. Stability AI*

- Getty alleges defendants copied 12 million images to train its AI model without permission or compensation.
  - Getty licenses copyrighted content to train other AI models.
  - Getty also claims output generated contains modified Getty Images' trademarks and watermarks, as shown below:



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## *Andersen v. Stability AI, Midjourney, DeviantArt*

- A second lawsuit filed by a class of visual artists similarly allege that their artwork was used without permission to train AI algorithms, as well as generate new images without attribution.
  - Plaintiffs argue defendant's system "**embeds and stores compressed copies** of the training images and **relies on those compressed copies to generate its output.**"
  - Defendants compare AI's use to "**a student visiting a library** to learn the relationships between intellectual concepts, **or visiting an art gallery** to learn how to match colors or best depict perspective



# AI Litigation – Text/Language

- Class action lawsuits led by:
  1. Author Paul Tremblay;
  2. Author and Comedian Sarah Silverman;
  3. Author and Screenwriter Michael Chabon;
  4. The Author's Guild;
  5. Author Richard Kadrey
- **All of these lawsuits challenge both the training (i.e., input) and the output generated, as well as CMI removal allegations.**
- A defendant's response: "[n]umerous courts have applied the fair use doctrine to strike that balance, recognizing that the use of copyrighted materials by innovators in transformative ways does not violate copyright. ... Under the resulting judicial precedent, it is not an infringement to create 'wholesale cop[ies] of [a work] as a preliminary step' to develop a new, non-infringing product, even if the new product competes with the original."

# AI Litigation – Software

## *Doe v. GitHub (CoPilot)*

- Copilot, an AI-based program can “assist software coders by providing or filling in blocks of code using AI” in real time. Codex, an AI-based program “converts natural language into code and is integrated into Copilot.”
- According to OpenAI, Copilot was trained on “tens of millions of public repositories” including code on GitHub.
- Class-action filed by open-source software code writers alleging that use of open-source software **violates attribution requirements** under the open-source licenses, violated GitHub’s own terms of service and privacy policies; DMCA § 1202 (CMI removal); California’s Consumer Privacy Act; and California’s unfair competition laws.

# AI Litigation – Fair Use?

In litigation where copyright infringement is asserted, the core defense has been fair use.

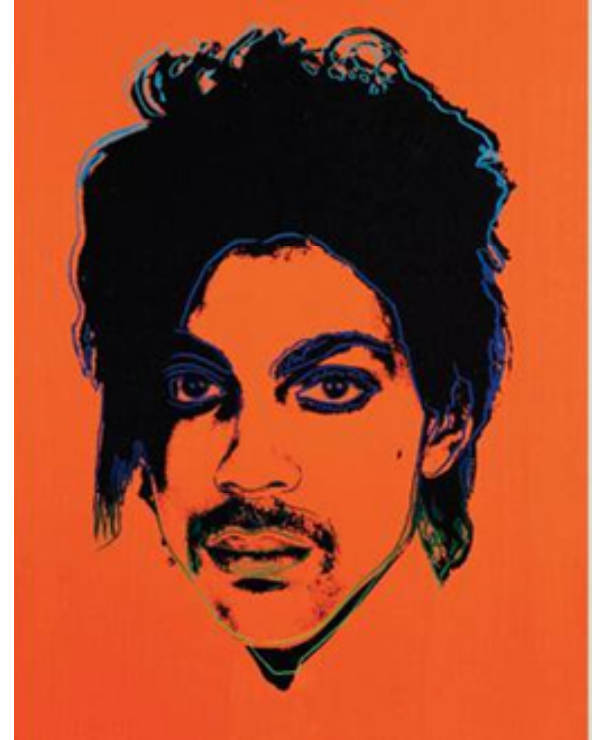
The Copyright Act identifies four factors to evaluate:

- 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;**
  - *Whether these types of uses are transformative*
- 2. the nature of the copyrighted work;**
  - *Works used are creative, protected but typically published*
- 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;**
  - *Whether the entirety of the work is used*
- 4. the effect of the use upon the potential market for or value of the copyrighted work.**
  - *Whether there is an existing licensing market that will be impacted by this use*

17 U.S.C. § 107.

# Fair Use: Recent Supreme Court Cases

- *Google v. Oracle* (2021) (Java Code)
  - Nature of the work and “low” protectability of code
- *Andy Warhol Foundation v. Goldsmith* (2023) (Prince Photo)
  - Purpose and character of the use, substitution and replacement of the market



# Fair Use: Other Relevant Cases

## *A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009)*

- **Fair Use:** Commercial plagiarism-screening service converted student papers into digital code for use in a database to compare the similarity of typewritten characters used in other student works. The Fourth Circuit held that such use was a “highly transformative” fair use because its use of the “works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism”

## *Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014)*

- **Fair Use:** “Without foreclosing a future claim based on circumstances not now predictable, . . . we conclude that . . . fair use allows . . . Libraries to digitize copyrighted works for the purpose of permitting full-text searches.”

## *Google Books, 804 F.3d 202 (2d Cir. 2015)*

- **Fair Use:** “Complete unchanged copying . . . justified as fair use when the copying was reasonably appropriate to achieve the copier’s transformative purpose and was done in such a manner that it did not offer a competing substitute for the original.” Here, the purpose was “to provide a search function,” which the court viewed as “a transformative use, which augments public knowledge by making available information about [] books without providing the public with a substantial substitute for [] the original works or derivatives of them”

## *Fox News Network, LLC v. TvEyez, Inc., 883 F.3d 169 (2d Cir.)*

- **Not Fair Use:** Company recorded TV programming to create searchable database, which allowed customer to watch up to 10 minutes of the selected programs. Even though use was “somewhat transformative” in making access more efficient – it was not fair use because it did not alter the content itself or the purpose for which it was used – and content owners were entitled to license such use.

# Ownership of Copyright in Generated Output

- The question of “human authorship” is not new:
  - [T]he constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 US 53, 58 (1884) (rejecting per se rule that “a photograph is the mere mechanical reproduction of the physical features or outlines of some object . . . and involves no originality of thought”).
- What is the requisite amount of human contribution?
  - The Copyright Office “will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.” Compendium § 313.2
  - E.g., long been the case that html created by code generation is not copyrightable, but “hand coded” html may be registered.

# “Human Authorship”

*Naruto v. Slater*, No. 16-15469 (9th Cir. 2018)



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# Can AI Output be Protected by Copyright?



- A copyright registration was granted for a graphic novel, *Zarya of the Dawn*, using Midjourney, the commercial AI art generator.
- Registrations for both collective work and the underlying images individually challenged by Copyright Office, pursuant to CFR 17 § 201.7. Applicant was **unable** to show sufficient human authorship over individual images. Copyright Office stressed the lack of sufficient **human authorship**, as required by U.S. copyright law.
- Policy Statement issued in response: the Office clarified that moving forward, **“the Office will consider whether the AI contributions are the result of ‘mechanical reproduction’ or an author’s ‘own original mental conception, to which [the author] gave visible form.’”** More specifically, **“when an AI technology determines the expressive elements of its output, the generated material is not the product of human authorship.”**



# Can AI Output be Protected by Copyright?

- Stephen Thaler used DABUS, an A.I. system he built, to create *A Recent Entrance to Paradise*.
- Copyright Office refused registration, citing lack of human authorship. Thaler then filed suit in D.C. District Court challenging the denial as arbitrary.
- District Court **upheld** denial of copyright protection.
- *"The 1976 Act's 'authorship' requirement as presumptively being human rests on centuries of settled understanding."*



# Can AI Output be Protected by Copyright?



- On September 6, 2023, the Copyright Office again rejected copyright protection for art created by generative AI submitted by artist Jason M. Allen.
- A Copyright Office examiner requested more information about Midjourney's role in creating the image. According to Mr. Allen, the Work was created by *1) initially generating an image using Midjourney (624 attempts at text prompts), 2) using Adobe Photoshop to "beautify and adjust various cosmetic details/flaws/artifacts, etc." in the Midjourney Image, and 3) upscaling the image using Gigapixel AI.*
- Upon review, and interpreting its own policy statement issued after *Zarya*, the Copyright Office again found that the worked lacked sufficient human authorship.
- "Mr. Allen's actions as described do not make him the author of the Midjourney Image because his sole contribution to the Midjourney Image was inputting the text prompt that produced it."

# Government and Agency Activity

- Executive Order
  - [Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence](#), EO 14110, 88 Fed. Reg. 75191-75226 (Nov. 1, 2023)
  - The order calls for the USPTO to issue guidance on patenting AI inventions; there are evolving guidelines surrounding inventorship and patent eligibility.
    - 120 days to craft guidance for patent examiners and applicants about who should be considered an inventor and AI is used in the development
    - 270 days to produce guidance on “other issues” including updated guidance on patent eligibility.
- USPTO
  - Solicited public comment regarding inventorship surrounding AI and held multiple listening sessions over the last year+
- US Copyright Office
  - Also soliciting public comment and will publish a study regarding copyright issues surrounding AI
  - Initial comments were due Oct. 30 and reply comments are due Nov. 29

# AI Use Policies

## General Use Considerations

- Consider reminding employees of copyright basics
- Consider AI tool attribution/acknowledgement requirements
- Consider enterprise version of AI tools v. publicly available versions
- Be transparent internally on use of AI tools and provide trainings on the AI policy

## Input/Output Considerations

- Consider confidentiality of inputs/prompts/coding in real time
- Beware of possibility that output may infringe. Available filters may reduce that risk
- Check for accuracy of outputs
- Consider protectability of the outputs – human authorship still required
- Make outputs your own with significant, noticeable modifications
- Consider image/likeness rights in output

**NOTE:** This Policy will need to be updated

# Questions

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# Biography



**Douglas J. Crisman**

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Douglas J. Crisman brings the perspective of a software designer and intellectual property (IP) director for a leading computer hardware company to his patent law practice, which includes patent preparation, licensing, and prelitigation opinions, as well as IP transactions, due diligence, and counseling. A co-leader of the IP Open Source Software Working Group, Doug routinely works with standards-setting bodies and consortia on IP issues, and provides advice on strategic IP management and open source legal issues ranging from software development to code review and licensing.

# Biography



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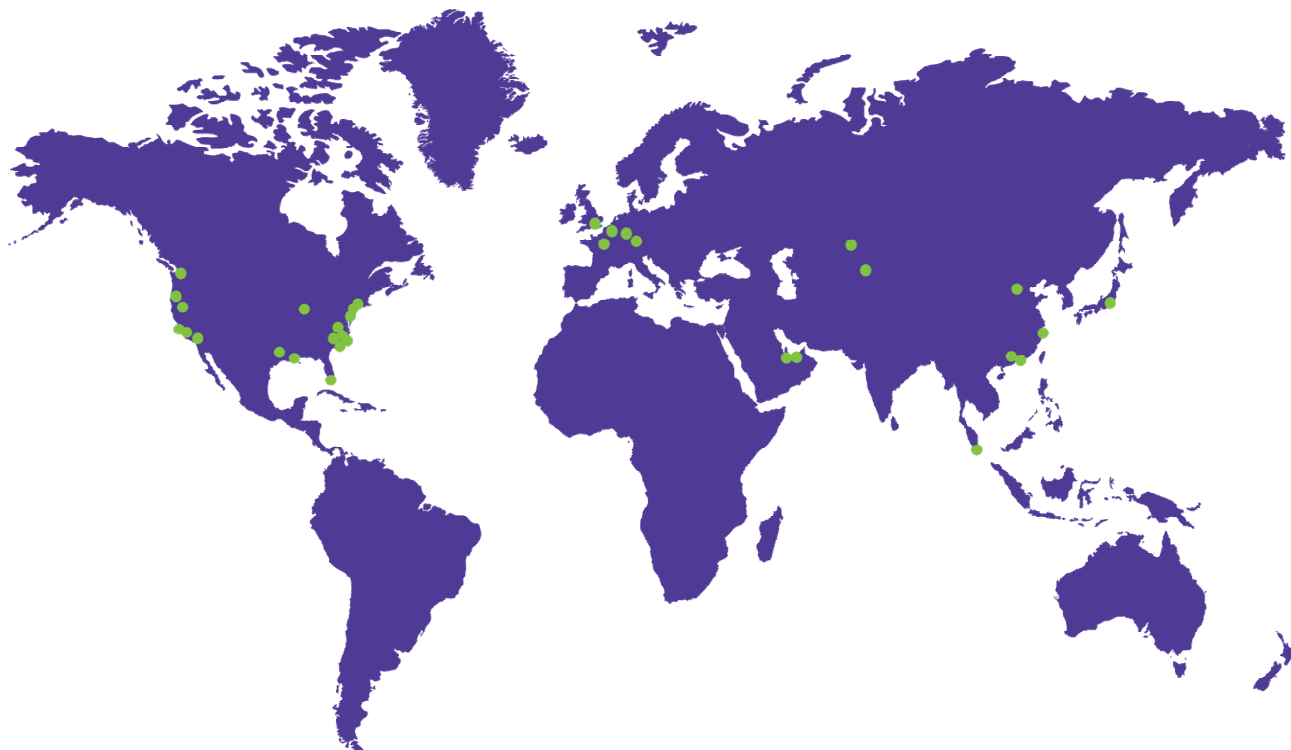
Meaghan Kent is an experienced intellectual property (IP) litigator and counselor. She frequently advises media, consumer product, automotive, and software companies, among others, on IP protection, risks, and claims. She counsels clients on the development and protection of IP portfolios, including copyright registration, licensing, clearance, fair use analysis, and establishing efficient enforcement strategies to monitor and abate online infringement. Meaghan counsels clients on the IP considerations surrounding the use of AI, particularly generative AI, including development and implementations of AI policies and related trainings.

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