

Tracking The Slow Movement Of AI Copyright Cases

By **Mark Davies and Anna Naydonov** (November 7, 2024)

There is a considerable gap between assumptions in the technology community and assumptions in the legal community concerning how long the legal questions around artificial intelligence and copyright law will take to reach resolution.

The principal litigated question asks whether copyright law permits or forbids the process by which AI systems are using copyright works to generate additional works.[1] AI technologists expect that the U.S. Supreme Court will resolve these questions in a few years.[2] Lawyers expect it to take much longer.[3] History teaches the answer.

Most of you reading this will have a general sense that there are many ongoing copyright suits in the AI space. Title 17 of the U.S. Code, Section 107 permits "fair use of a copyrighted work." An AI system may use a large language model that reviews massive amounts of copyrighted works, and from that review, generate works in response to user prompts.

The most prominent AI system using LLM is ChatGPT, which launched in November 2022. As of Nov. 7, there are over 30 cases litigating the question of whether AI generated works are a fair use of copyrighted works.[4]

Copyright cases relating to AI are not moving quickly.

The first case, Thomson Reuters v. ROSS Intelligence, was filed in 2020 in the U.S. District Court for the District of Delaware.[5] In ROSS, Thomson Reuters sued ROSS Intelligence, an AI legal research entity, alleging that ROSS copied Thomson Reuters' legal research platform through bot accounts. ROSS Intelligence argued that it made fair use of Thomson Reuters' program.

Three years in, the ROSS court has not issued its fair-use ruling. Oral argument for summary judgment motions is now set for December.

The second case is Thaler v. Perlmutter, in the U.S. District Court for the District of Columbia. Stephen Thaler applied to the U.S. Copyright Office in 2018 to register a claim of copyright in a graphic artwork titled "A Recent Entrance to Paradise." He listed the "Creativity Machine" as the author of the work, noting that the work was "autonomously created by machine."

Three-and-half years after the application, the U.S. Copyright Office Review Board rejected Thaler's claim and refused to register the work. Thaler then filed a challenge under the Administrative Procedure Act, the court granted summary judgment for the U.S. Patent and Trademark Office, and oral arguments were held at the U.S. Court of Appeals for the D.C. Circuit in September.

Although neither of these cases raise the question of fair use of works generated by AI, the



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litigation is still more than three years old and we do not have final answers.

Turning to the copyright litigation on fair use for training LLM models, *Authors Guild v. OpenAI Inc.*, was filed in 2023 in the U.S. District Court for the Southern District of New York.[6] Several more cases were filed in June and August 2024.[7]

These cases present many distinct legal questions.

There are disputes that involve copyrighted articles, like *Tremblay v. OpenAI Inc.*, *Silverman v. OpenAI Inc.*, and *Chabon v. OpenAI Inc.*, all pending in the U.S. District Court for the Northern District of California. Some involve copyrighted images, like *Getty Images v. Stability AI* in the District of Delaware, or copyrighted music, such as *Concord Music Group Inc. v. Anthropic PBC* in the U.S. District Court for the Middle District of Tennessee.

Other disputes involve coding, like *Doe v. GitHub Inc.* in the Northern District of California, and personal data, like *Concord Music Group v. Anthropic*.

Additionally, a number of the disputes involve only training of the LLM, like *Nazemian and Dubus v. NVIDIA Corp.*, while some also involve generated works, like *Kadrey v. Meta Platforms*, both in the Northern District of California.

There is no reason to think any of these cases will move faster than *Ross* or *Thaler*. For example, nearly a year in, *Authors Guild* is still in the middle of discovery.[8]

This litigation in resolving the copyright law questions is a feature — not a bug — of our common law system. The generative copyright suits involve seven different district courts and multiple state courts and international tribunals.[9] And in each case, the disappointed party will likely appeal the ruling to the relevant court of appeals.

The typical length of time for an appeal is, roughly speaking, a year, though often longer depending on the circuit and the stakes.[10] The generative copyright cases already involve at least four different appellate courts. And there will be efforts to gain Supreme Court review. All this judicial effort is, yet again, confirmation of the Justice Oliver Wendell Holmes Jr. teaching that "[t]he life of the law has not been logic: it has been experience." And experience takes time.[11]

Experience can also help provide some guidance on the time the legal system needs to answer the questions involving AI and copyright.

The Supreme Court has the discretion to review a case before there is much circuit disagreement, and the court has done so in the copyright context.

A prominent recent example of this is *Google LLC v. Oracle America Inc.*, involving Google's unlicensed copying of Java code. The lawsuit was filed by Oracle in 2010 in the Northern District of California. There were two trials, two appeals and two efforts to take the case to the Supreme Court. The second effort was successful, even with no circuit court disagreement. The Supreme Court's opinion, ending the litigation, was issued in 2021. Eleven years from start to finish.[12]

Eleven years sounds like a long time. But in many ways, the Oracle case was set up to move faster than the generative copyright litigation. The technology was fairly routine, i.e., application programming interface, the copying easy to explain, i.e., expression, and the matter involved one district court — the Northern District of California, and one court of

appeals — the U.S. Court of Appeals for the Federal Circuit.

And perhaps most important, there were only two parties — Oracle and Google.

Indeed, although every big technological change leads to litigation, whether it is online videos,[13] music,[14] books,[15] or TV shows,[16] each of these earlier disputes were also largely resolved with one-on-one litigation.

To find the most analogous matter, we need to leave copyright litigation, and turn to a related intellectual property area: patent law.

The smartphone patent wars bear the closest resemblance to what is happening now in AI litigation. Just as AI is a broad foundational change, as noted in *Apple Inc. v. International Trade Commission* in the Federal Circuit in 2013, the "[s]martphone has defined modern life," "dramatically alter[ing] how humans across the globe interact and communicate." [17]

Just as AI has prompted suits by multiple plaintiffs, after the launch of the smartphone, Apple, Samsung, Qualcomm, HTC, Ericsson, Sony, Motorola, Microsoft and others were part of large numbers of patent suits. [18]

One smartphone patent dispute, so far, reached the Supreme Court, in *Samsung Electronics Co. v. Apple Inc.* in 2016. [19] And just as the AI disputes present similar but distinct legal issues, the smartphone suits concerned both who invented aspects of the smartphones and who designed aspects of the phones.

For further evidence that the smartphone patent litigation is similar to generative copyright litigation, consider the answer that ChatGPT-4o eventually gave the author to the question posed at the beginning of this article.

At first, ChatGPT answered "several years," in line with the current assumption of the technologists. ChatGPT thought the Oracle Google analogy "strong," but found the smartphone patent wars only a "partial analogy" due to the different "nature" of copyright and patent law. But after the author raised the litigation parallels, ChatGPT acknowledged the "legal, commercial, and technological dynamics that are likely to shape the future of AI and copyright law." ChatGPT came around.

Together, human and machine had "reframed the issue in a broader, more fitting context." "I'm genuinely convinced that the smartphone wars are the best analogy here," said ChatGPT. [20]

How long did it take our litigation system to resolve the patent disputes around the smartphone? It took about 11 years. The iPhone launched in June 2007. Most of the litigation was resolved by 2018. ChatGPT launched in 2022. See you in 2033.

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Mark Davies represented Stephen Thaler in *Thaler v. Vidal*, Oracle in *Google v. Oracle*, and filed an amicus brief on behalf of a design professional in *Apple v. Samsung*.

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[1] Artificial Intelligence: Law & Litigation | LexisNexis Store ("AI Treatise"). See generally Chapter 1, What is "Artificial Intelligence"?

[2] Interview with leading technology funders, personal communication, Sept. 24, 2024.

[3] Dorothy Atkins, Attys Worry OpenAI IP Row Will Drag On Amid AI Policy Push, Law360 (Sept. 26, 2024).

[4] Chat GPT Is Eating the World – the latest news in ChatGPT + AI + DALL-E (last visited Oct. 2, 2024).

[5] See AI Treatise, ch. 5, sec. 5.02(2)(b) (2022).

[6] Authors Guild et al. v. OpenAI Inc. et al., Docket No. 1:23-cv-08292 (S.D.N.Y. Sept. 19, 2023).

[7] Bartz v. Anthropic PBC, Docket No. 3:24-cv-05417 (N.D. Cal. Aug. 19, 2024); The Center for Investigative Reporting, Inc. v. OpenAI Inc., Docket No. 1:24-cv-04872 (S.D.N.Y. June 27, 2024); UMG Recordings, Inc. et al. v. Suno, Inc., Docket No. 1:24-cv-11611 (D. Mass. June 24, 2024); UMG Recordings, Inc. et al. v. Uncharted Labs, Inc et al., Docket No. 1:24-cv-04777 (S.D.N.Y. June 24, 2024).

[8] Id. at ECF 65.

[9] See DAIL – the Database of AI Litigation – Ethical Tech Initiative, George Wash. Univ. (last visited Oct. 02, 2024) (under "Generative AI" listing N.D. Cal, S.D.N.Y., M.D. Tenn., D. Del., C.D. Cal., D.D.C., N.D. Ga., Cal. Super Ct., Ga. Gwinnett County Super. Ct.).

[10] U.S. Courts of Appeals, Table B-4A --Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit. (Average time across all circuits for all civil cases counting from the Filing of Notice of Appeal to Last Opinion or Final Order is 11.5 months) available at https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2017.pdf.

[11] We may well see new issues in AI litigation arise as the technology further develops. As another parallel, blockchain and cryptocurrency boomed in 2013 reaching \$1,000 per coin for the first time. The increased valuation associated with blockchain technology and cryptocurrency triggered the first set of crypto-related litigations in 2014. The number of crypto-related litigations steady increased and peaked in 2018. Yet now that the technology has matured, we are seeing a second peak of litigations relating to different issues. See generally Farshad Ghodoosi, Crypto Litigation: An Empirical Overview, 40 Yale J. Reg. Bulletin 87 (2022).

[12] Mark represented Oracle in the court of appeals. See also AI Treatise, supra note 7, ch. 5, sec. 5.03.

[13] Viacom International, Inc. v. YouTube, Inc., 676 F.3d 19 (2nd Cir. 2012).

[14] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th. Cir. 2001).

[15] Authors Guild v. Google, 804 F.3d 202 (2nd Cir. 2015).

[16] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[17] Apple Inc. v. Int'l Trade Comm'n, 725 F.3d 1356, 1368 (Fed. Cir. 2013). Mark was involved in this case.

[18] Mark took part in several of these matters for one of the global technology companies. See also AI Treatise, *supra* note 7, ch. 8, Patent Litigation. A dramatic visual image of the suits involving nine different entities is worth a look. Dan Levine, Apple, Google settle smartphone patent litigation, Reuters (May 16, 2014). Reproduced in Chapter 8, Section 8.01.

[19] Samsung Elecs. Co. v. Apple Inc., 580 U.S. 53 (2016).

[20] ChatGPT, Supreme Court LLM Fair Use communication, Aug. 28, 2024.