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Trade Marks & Copyright 2025

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Trends and Developments

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Young Conaway Stargatt & Taylor, LLP

Young Conaway Stargatt & Taylor, LLP has enjoyed more than 60 years as one of Delaware's largest, most prestigious and multi-faceted law firms. Over the years the firm has expanded to over 125 attorneys with offices in Wilmington, Delaware, Charlotte, North Carolina, and at Rockefeller Center in New York. Young Conaway offers clients sophisticated national bankruptcy, corporate, commercial and intellectual property practices along with local and regional tax, trusts, employment, business law, commercial real estate, tort, and environmental practices. Thirty-two attorneys were ranked in the 2024 edition of Chambers USA: America's Leading Lawyers for Business.

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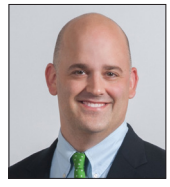

Adam W Poff co-chairs Young Conaway's intellectual property litigation practice. He is an experienced commercial litigator having litigated cases in federal and state courts for almost 20 years. Adam's practice focuses on disputes involving patent infringement, trade mark and trade dress infringement, trade secret misappropriation, licensing agreements, fraud and other complex commercial issues. As lead litigation counsel, Adam has handled cases involving a wide variety of subject matter and technologies, including GPS locator beacons, back-up and restore software, direct I/O device communication software and related hardware, automated music selection software, automated tax preparation software and medical staffing software.

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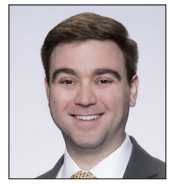

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The Impact of Generative AI on Trade Marks and Copyrights

The rapid evolution of generative artificial intelligence is beginning to affect many industries, and intellectual property is no exception. Generative AI, which refers to AI systems capable of creating new content, has far-reaching implications for how creators and businesses can protect their trade marks and copyrights. As generative AI becomes increasingly prevalent, it also challenges assumptions about authorship and ownership of intellectual property – for example, can an AI model be an "author" for purposes of copyright law? In the short-term, however, legal developments are more likely to be focused on the use by generative AI models of trade marks and copyrighted works owned by others. Moreover, recent decisions by the US Supreme Court addressing "fair use" in both US copyright law and US trade mark law have created an environment ripe for litigation over generative AI models. How will traditional legal frameworks apply to, and adapt in light of, these new technologies?

Understanding generative AI

Generative AI involves machine learning models that can generate content such as text, images, audio, and even videos. These systems are trained on large sets of data, which allows them to learn the styles, patterns, and structures of existing content and produce output based on what they have learned. The produced output is therefore new, unique, and produced without direct human input, even though the data on which the generative AI model was trained was pre-existing content created by humans. For example, if a user asks a generative AI model to produce a poem in the form of a haiku, the model will be able to do so because it has previously "learned" from ingesting thousands of haikus. Common examples include ChatGPT, a large language model that generates text, and DALL E, a text to image model that generates images from text prompts. Both of these examples were developed by OpenAI.

Copyright law: infringement and derivative works

The US Copyright Act is designed to protect the rights of creators in their original works of authorship, granting them exclusive rights to reproduce, distribute, display, and perform their works. A copyrighted work, thus, cannot be used by others without the permission of the work's owner. For generative AI, the question arises whether the use of copyrighted works to "train" the AI model constitutes copyright infringement because the works used for training are copied and used, usually without permission. In other words, does the "learning" process of a generative AI model constitute a violation of copyrights?

Similarly, only copyright owners have the right to make "derivative works" based on their copyrighted works. The output of a generative AI model, which is inherently based on other works that were used to train the model, can be seen as inherently at least somewhat derivative. But is it based closely enough on any one copyrighted work to be deemed a "derivative" of that copyrighted content? The output of generative AI models may closely resemble or reproduce elements of certain copyrighted works ingested by the model during training. On the other hand, the output could also be sufficiently "transformative" that it cannot be said to be derivative of any particular content. In other words, does the output itself of the generative AI model – long after the training process has occurred – constitute a copyright violation if it is too similar to an earlier copyrighted work?

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Trade mark law: infringement and dilution

The US Lanham Act, which codifies federal trade mark law, aims to protect businesses and their customers by regulating the use of distinctive marks, ie, brand names, logos, and other identifiers that indicate the business behind the good or service and may distinguish such a product from others. As with copyrighted works, however, a generative AI model may have been trained on data that includes numerous trade marks belonging to well-known businesses. AI models that are trained on existing datasets including trade marks then create new logos, names, or symbols that may create output that is confusingly similar to existing trade marks. Generative AI's ability to generate large numbers of designs in a short amount of time increases the risk of accidental or intentional infringement. For example, if a generative AI model is used to create a logo for a business, its output could be too similar to the existing logo for another business because the existing logo was included in the dataset used to train the AI model. The new mark constitutes trade mark infringement if it is "confusingly similar" to the existing mark, such that a consumer of the goods or services in question would be likely to be confused as to their source.

Likewise, the output of generative AI could potentially cause trade mark "dilution". A famous trade mark can be diluted where a similar mark is used by another in a way that weakens its distinctiveness in the eyes of consumers. This is particularly the case when the reputation of the owner of the famous trade mark may be tarnished by association with inferior goods or services. The potential for generative AI models to produce false or undesirable results has been well-documented, and a generative AI model could easily produce an offensive or deceptive output, while associating that output with a well-known, real trade mark. For example, an AI-generated news story that was false, appearing with the name and byline of a real newspaper, could cause harm to the newspaper's reputation for accurate reporting, thereby diluting the value of its name.

The Supreme Court on copyright fair use

The doctrine of "fair use" is a defence to both copyright infringement and trade mark infringement, although it is slightly different in each context. It allows the use of a copyrighted work or a trade mark, without the owner's permission, under certain circumstances. Recently, however, the US Supreme Court issued decisions narrowing such use under both copyright law and trade mark law.

In May 2023, the Supreme Court decided The Andy Warhol Foundation v Goldsmith. The Court agreed with photographer Lynn Goldsmith that a design by Andy Warhol – "Orange Prince" based on a photograph of musician Prince – was not a fair use of the original photograph when the Warhol Foundation licensed the design for use as a magazine cover. The 7–2 majority found that the Warhol design shared the same commercial purpose as the original photograph by Goldsmith, so it was not a fair use of the copyrighted photograph. Fair use of a copyrighted work requires an analysis of:

- the purpose and character of use, sometimes referred to as the extent to which the use is "transformative";
- the nature of the copyrighted work;
- the amount and substantiality of the portion taken; and
- the effect of the use upon the potential market.

The Warhol Court focused on the final prong by emphasising the commercial purpose of the use,

finding that "Orange Prince" competed with the original photograph in the market for images for use in print publications. The Court's decision was limited to the particular commercial licensing to a magazine, not the creation of "Orange Prince" in the first place. Warhol thus made clear that transformativeness alone does not make a use of copyrighted material fair use. The Court wrote that "[o]therwise, 'transformative use' would swallow the copyright owner's exclusive right to prepare derivative works." In the context of generative AI, therefore, the mere fact that copyrighted works are transformed into a new work that is different to some degree does not necessarily mean the model's input of copyrighted works was fair use.

The Supreme Court on trade mark parody

The following month, the Supreme Court decided Jack Daniel's Properties Inc. v VIP Products LLC. The Court held that a dog toy company's creation of toys mimicking the famous design of Jack Daniels' whiskey bottles was unprotected trade mark infringement. The Court overturned a Ninth Circuit ruling that the dog toy was protected by the First Amendment, finding instead that it "falls within the heartland of trademark law". US trade mark law has long allowed that in certain circumstances a use of another's trade mark is allowable if it is a "parody" or otherwise protected free speech under the First Amendment to the United States Constitution. In this case, VIP Products sold a dog toy that appeared to be a classic parody – a toy shaped like a whiskey bottle, labelled "Bad Spaniels" and replacing other elements of Jack Daniel's trade mark liquor bottle such as switching "Old No. 7 Tennessee Whiskey" with "The Old No. 2 On Your Tennessee Carpet".

Although the "Bad Spaniels" toy may have been seen as a parody protected by the First Amendment, the Supreme Court held that defence does not apply if the parody is itself used as a trade mark: "Consumer confusion about source – trademark law's cardinal sin – is most likely to arise when someone uses another's trademark as a trademark." VIP Products' position had been based on a 1989 Second Circuit decision, Rogers, which allows trade marks to be used without permission if they are part of an "artistically expressive" use and do not "explicitly mislead" consumers. The Supreme Court took no position on whether the Rogers test should continue to be used, but found that parodies that do not feature source indicators, and are instead simply expressive, could still be protected parodies. But in the case of "Bad Spaniels" and similar products, the parody nature of the product does not automatically bar trade mark infringement, and the lower courts must instead engage in a traditional likelihood-of-confusion analysis, including considering whether the product is a parody. The Jack Daniels decision also touched on trade mark dilution by tarnishment, explaining that: "The Ninth Circuit's expansive view of the noncommercial use exclusion – that parody is always exempt, regardless [of] whether it designates source – effectively nullifies Congress's express limit on the fair-use exclusion for parody."

Litigation has begun

A number of cases exploring these issues have already begun to make their way through courts across the United States. There are high-profile examples of owners who have given permission for their intellectual property to be used for training of AI models. For example, in the context of print journalism, OpenAI has entered into licensing deals with Vox Media (New York Magazine and The Verge), News Corp. (Wall Street Journal and New York Post), The Financial Times, and The Atlantic. Many other copyright and trade mark owners, however, have not licensed AI models to use their intellectual property for train-

ing, and several lawsuits brought by these owners have already been filed. Most prominently in print journalism, the New York Times chose to litigate rather than strike a deal.

Prominent cases that have been filed to date include the following:

- Andersen v Stability AI Ltd. (N.D. Cal. 2023):
  - (a) Class action filed by visual artists against generative AI image model.
  - (b) On 12 August 2024, the court granted motions to dismiss claims under the Digital Millenium Copyright Act (DMCA). The court denied motion to dismiss claims under the Copyright Act and Lanham Act, and for unjust enrichment.
  - (c) The parties are currently engaged in discovery.
- Doe v Github, Inc. (N.D. Cal. 2022):
  - (a) Class action filed by anonymous plaintiffs against Microsoft, OpenAI, and GitHub regarding use of copyrighted material to train coding-assistant AI, Copilot.
  - (b) On 24 June 2024, the court granted motions to dismiss claims under the DMCA, but did not dismiss claims related to violations of open-source licences.
- Silverman v Open AI, Inc. (N.D. Cal. 2023):
  - (a) In several consolidated cases, including one brought by comedian Sarah Silverman, authors filed complaints against OpenAI for copyright infringement, DMCA violations, and various torts.
  - (b) The parties currently are engaged in discovery.
- Kadrey v Meta Platforms, Inc. (N.D. Cal. 2023):
  - (a) Some of the same plaintiffs from Silverman also filed cases against Meta regarding Meta's use of their copyrighted works to train its LLaMA model.
  - (b) The parties currently are engaged in discovery.
- Thomson Reuters Enterprise Centre GmbH v ROSS Intelligence Inc. (D. Del. 2021):
  - (a) Thomson Reuters sued ROSS Intelligence, which had trained an AI-powered legal research platform based on legal research memoranda created using summarised points of law from Thomson Reuters' platform.
  - (b) The parties completed discovery and a trial was continued in August 2024, with the court instead scheduling a summary judgment hearing for December 2024.
- The New York Times Co. v Microsoft Corp. et al. (S.D.N.Y., 2023):
  - (a) The New York Times brought suit, alleging that its copyrighted news content was used to train generative AI models including ChatGPT and Microsoft Copilot. The complaint includes allegations that ChatGPT recited certain articles verbatim or very closely, and falsely attributed other output as a New York Times article.
  - (b) The parties currently are engaged in discovery.

As indicated by the cases filed to date, owners of copyrighted content may be the most directly implicated by, and therefore the most concerned about, AI models trained on their intellectual property. But even for businesses that do not think of themselves as media companies specialising in copyrighted content, a business' name, image, logo, or other trade mark may also be at risk of infringement by generative AI models. Businesses and counsel will want to monitor closely these cases and others for clues regarding the application of copyright and trade mark law to generative AI models, particularly with the US Supreme Court's renewed interest on placing boundaries on the fair use of trade marks and copyrighted works.