

THE RECORDER

Prometheus Re-Bound?

The Future of Copyright in the Time of AI

By Greg Derin

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We have a complicated relationship with folklore and mythology. Reflecting on ancient tales can inform our understanding of the contemporary world and our relationship with nature and other human beings. We are not all adept at hard sciences, data analysis, and the evolution of the human genome. Humanism and sources which help us relate to one another puts our grasp of evolving technological resources within a broader context and understanding.

In some versions of ancient mythology, the Greek god Prometheus created humanity out of clay and served as its champion. He defied other gods of Olympus by stealing fire and giving it to humans in different forms, which we might understand as knowledge and technology. As punishment, Zeus had him bound to a rock and sent an eagle to devour his liver. Every night the liver would grow back, and in an endless cycle, the eagle would reappear and repeat the torment. Prometheus endures today as a symbol of striving for knowledge, as well as the risks associated with overreaching, with tragic consequences.

We live in an exciting and terrifying technological period, which includes the rise of artificial intelligence. Since the printing press replaced scribes in the publication of manuscripts, means have been progressing for the production and processing of information. There is now more computing power in my cellular device than



Greg Derin, a mediator and arbitrator at Signature Resolution

existed in the enormous room filled with hardware which processed the keypunch cards that I spent hours generating to analyze data in my college courses.

For those of us involved in the litigation or settlement of intellectual property matters, AI raises fundamental challenges. At the heart of all intellectual property law is an elemental balance between the encouragement and the protection of creativity. Those who create novel expression deemed protectible by the law, are rewarded with copyrights, trademarks or patents. At the same time, such protection is limited to avoid stifling the creativity of others. Time limits are imposed

on the protection of rights, original creators or their successors are given windows within which they may terminate grants, territorial limits exist, certain rights must be fixed in requisite form and based on specified relationships, and the list goes on.

The explosion of AI platforms has spawned a plethora of lawsuits alleging that published works have been misappropriated or unfairly used, that input or output from the platforms infringe on underlying works or constitute tortious conduct. These lawsuits have raised challenges using traditional concepts of direct and vicarious copyright infringement, violation of other statutory copyright protections, unfair competition, negligence and unjust enrichment. Defenses and academic analysis have focused on elements of each of the alleged claims as well as principles of “fair use.”

Courts, as well as the U.S. Copyright and Patent and Trademark Offices have been grappling with these issues from the perspective of established law. Does unauthorized use to train platforms infringe on an original authors’ work? Is the output “substantially similar” to protectible elements of the original work? Is the use “fair” and deserving of protection? Are these the right questions? Or do we need a new Promethean view of how to accomplish the fundamental purposes of intellectual property law in the time of AI? How should courts, administrators and legislators protect creators without stifling creativity and the advancement of technology?

This article inquires whether the right approach lies beyond seeking answers in traditional intellectual property principles. A brief review of recent considerations will illustrate the point. In *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), the Ninth Circuit held that copyright ownership could only vest in humans. Thus, a seven-year-old macaque, which took a selfie, lacked standing to qualify as the author of the photograph under the Copyright Act. Fast forward to last year, and the decision of the U.S. Copyright Office to deny full copyright protection to Kris Kashtanova’s “Zarya of the Dawn.” The office concluded that human-authored text, combined in a compilation with

images which were generated by an AI platform, did constitute copyrightable work, but the individual images generated by the platform alone were not protectible.

The Copyright Office has issued guidelines to assist applicants in articulating which portions of their submissions were created by a platform and which by a human and is nearing completion of a study regarding generative AI which may provide importance guidance for courts. See also, *Thaler v. Perlmutter*, 2023, (D.D.C.) (appeal pending) (upholding the finding of the Copyright Office that a human was not the author of the work). On Feb. 12, 2024, the USPTO issued guidance regarding the “significant contribution” which must be made by a human before a patent may issue in connection with an AI-assisted invention.

In *Author’s Guild v. Google*, 804 F.3d 202 (2d Cir. 2015), the Second Circuit considered the digitization of tens of millions of books for public use. The focus of the court was on the four fair use factors identified in 17 U.S.C. Section 107. Finding the creation of digital copies and of a search function to be highly transformative (factor 1), without a significant market substitute (factor 4), the court deemed Google’s conduct to be a “fair use,” despite its profit motivation.

The Supreme Court weighed in to the fair use debate with *Google v. Oracle America*, 141 S. Ct. 1183 (2021), for the first time since 1994. The court found Google’s limited copying to be transformative as it only copied what it needed to allow its programmers to work in its new computing environment, thus furthering the creative process and achieving the objective of copyright. There was a major emphasis on the public benefit factor of fair use (factor 4), with less focus on the commercial use issues (factor 1) as both litigants were engaged in commercial ventures.

The long-awaited Supreme Court decision in *Andy Warhol Foundation for the Visual Arts v. Lynn Goldsmith*, 143 S.Ct. 1258 (2023), established no bright line standards for evaluating fair use. Only the first fair use factor (with a focus on the parties’ joint commercial uses) was addressed. The court observed that courts

should not become embroiled in determining the transformative nature of secondary works. The majority of the court declared that if the purpose and use of the secondary work is substantially the same as the original (e.g., commercial), it is not a fair use. Thus, one might infer that it is use, not content which will matter going forward. However, the court did not overturn its fair use case, which requires a balancing of all four factors, even as it denigrated all but the commercial nature of the use. See, *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

Thomson Reuters v. Ross Intelligence, 2023, (D. Del.) involves judicial opinions published, excerpted, summarized and presented by the legal publisher Thomson Reuters through its West head note system. Ross Intelligence created a similar system to teach its AI platform, arguing that it was simply analyzing judicial opinions. The court has declined to “overread” *Warhol* and for now has sidestepped the material issues, deeming them dependent upon findings of fact and reserving them for disposition by the jury at an upcoming trial in spring 2024. It has thereby avoided ruling upon the question of whether the actions of Ross Intelligence constitute a fair use or are “transformative.” In *Warhol*, both elements pointed in the same direction. In *Google v. Oracle*, the Supreme Court “placed much more weight on transformation than commercialism.”

These issues are among those central to lawsuits which have been filed by Sarah Silverman, John Grisham, Getty, Ta-Nehisi Coates, the New York Times, and others against OpenAI, Meta, Stability AI and others. Each of these lawsuits is more expansive than *Thomson Reuters* in that the legal research giant does not own the underlying judicial opinions, it only claims rights in its organizational system. These lawsuits continue, although most have been pared down by skeptical jurists, perhaps with an eye on the larger picture. See, e.g., the Feb. 12, 2024 grant-with-leave to amend of most of the defendants’ motions to dismiss in the Sarah Silverman and Paul Tremblay cases against OpenAI.

Ultimately, if not determined by the courts, triers of fact may be troubled by the platforms

ingesting protected works of another without permission. Such a conclusion could present two challenges. Was the act of “scraping” or reproducing a protected work an actionable infringement of an exclusive right of a copyright holder? What, if any, remedy is appropriate for the ingestion or copying alone? A visceral factual decision by a trier of fact alone will set no legal standards by which to resolve these questions.

Even harder questions arise when considering the “output.” Having made unauthorized use of an author’s work, has something been created which is expressed in a “substantially similar” way? Was it a “fair use”? I can read and analyze the myth of Prometheus and be inspired to conceive a work based upon someone’s articulation of the myth. That does not constitute infringement unless I take an author’s protected expression and reproduce it in a substantially similar way. The ideas are free; the expression is not.

The creation of copyright law was a Promethean undertaking. It has evolved through generational iterations to adapt to mechanical and other changes. Mark Twain famously quipped that “[o]nly one thing is impossible for god: to find any sense in any copyright law on the planet.” What changes by statutory or decisional interpretation are required to maintain or restore the balance between creation and protection? In mediation, parties rarely struggle with these questions. In mediation, we work to help parties resolve a present conflict with which they are confronted. They assess their risks based upon the facts, law and remedies available and decide if a compromise solution is better than the costs and risks of proceeding to adjudication.

As the Copyright Office and USPTO struggle to define balance in the system, will the courts and legislature take a broader view of the original and fundamental intent of the copyright system? As a further complication, intellectual property and privacy rights exist in a global marketplace, requiring harmony among diverse legal systems. The challenges are significant and evolving, but so has the law been since its inception.

As I neared conclusion of this thought exercise, I decided to ask OpenAI’s ChatGPT the following

question: How would Prometheus reform the United States copyright laws to account for the use of artificial intelligence, balancing protection of creativity with encouragement of creativity? Its answer, below, was remarkably prosaic, utilizing conventional tools and analytical models being evaluated by administrators, legislators and courts today. So much for the vision of a Greek god. Nevertheless, its insights are useful into the platform itself and perhaps our future.

“Prometheus, being a mythical figure associated with innovation and enlightenment, might approach the reform of United States copyright laws with the goal of striking a balance between protecting creativity and encouraging further innovation in the realm of artificial intelligence. Here are some potential considerations:

“1. Recognition of AI as Co-Creators: Acknowledge the role of AI in the creative process and consider recognizing AI systems as co-creators in certain circumstances. This recognition may lead to the establishment of new categories of copyright where both human and AI contributors are acknowledged.

“2. Duration of Copyright Protection: Adjust the duration of copyright protection for works generated by AI. Given the rapid pace of technological advancement, a shorter copyright duration for AI-generated works might be considered to ensure that such works contribute to the public domain more quickly.

“3. Fair Use and Transformative Works: Strengthen provisions for fair use and transformative works to allow for the use of copyrighted material by AI systems in a way that fosters creativity, innovation, and the development of new technologies.

“4. Licensing and Access: Promote transparent licensing mechanisms that facilitate the use of AI-generated content while ensuring fair compensation for creators. Encourage the development of accessible and standardized licensing frameworks for AI-generated works.

“5. Ethical Guidelines for AI: Introduce ethical guidelines for the use of AI in the creation of

copyrighted works. This could involve ensuring that AI systems adhere to principles such as non-bias, transparency, and accountability in their creative processes.

“6. Public Domain Contributions: Encourage AI developers and creators to contribute certain AI-generated works to the public domain or make them available through open licenses, fostering a culture of collaboration and shared innovation.

“7. Education and Awareness: Invest in public education and awareness programs to help creators, consumers, and the legal community understand the implications of AI on copyright laws. This can help in navigating the evolving landscape of AI-generated content.

“8. Regular Review and Adaptation: Establish mechanisms for regular review and adaptation of copyright laws to keep pace with advancements in AI and technology. This ensures that the legal framework remains relevant and effective in addressing emerging challenges.

“9. International Collaboration: Promote international collaboration and harmonization of copyright laws to address the global nature of AI and its impact on creativity. This can help in creating consistent standards and facilitating cross-border innovation.

“Prometheus might advocate for a forward-looking and adaptable legal framework that embraces technological progress while safeguarding the rights of creators and the public interest. The key is to foster an environment that encourages creativity and innovation in the AI era while respecting the principles of intellectual property protection.”

Greg Derin is a mediator and arbitrator at Signature Resolution. He has been a professional mediator for more than 20 years. Greg is a distinguished fellow of the International Academy of Mediators and a fellow of the Chartered Institute of Arbitrators. He assisted in teaching the Mediation Workshop at the Harvard Program on Negotiation. Greg can be reached at gderin@signatureresolution.com.