



Using AI and the Potential IP Pitfalls

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ChatON AI Joke

Why did the scarecrow become
a lawyer?

Because he was outstanding in his field,
especially when it came to defending
corn-stitutional rights!



Copyright ChatGPT (or is it?)

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“Artificial Intelligence” What is it?

The Meaning of “AI”

■ What is AI?

- Use of computer algorithms/computer systems to perform certain tasks that historically only humans could perform

■ The Two Models of AI

- Predictive/Discriminative – Used to classify or predict data
- Generative – focuses on understanding patterns/structures in data to produce new content
 - Large Language Models (LLMs) are a type of AI that can mimic human intelligence – a subset of Generative AI

■ Closed System vs. Opened System

- Open – gathers data from different sources, may share the model, data or code
- Closed – formed by finite set of data, obscures one or more things.

AI is Already in Use

- May 2023 Bloomberg Law survey found that ~ 25% of all law firm staff, including lawyers, were using AI.
- Many of the programs and platforms lawyers use everyday have AI incorporated into them- such as Microsoft and Outlook.
- ChatGPT, Bard, and legal products such as Westlaw Precision and Lexis+ AI make AI easily accessible.

AI Use in Law Firms

- Document Review and Analysis
- Legal Research
- Contract Review and Analysis
- Form Letters
- Predictive Analysis
- Client Management
- E-Discovery



Benefits of AI

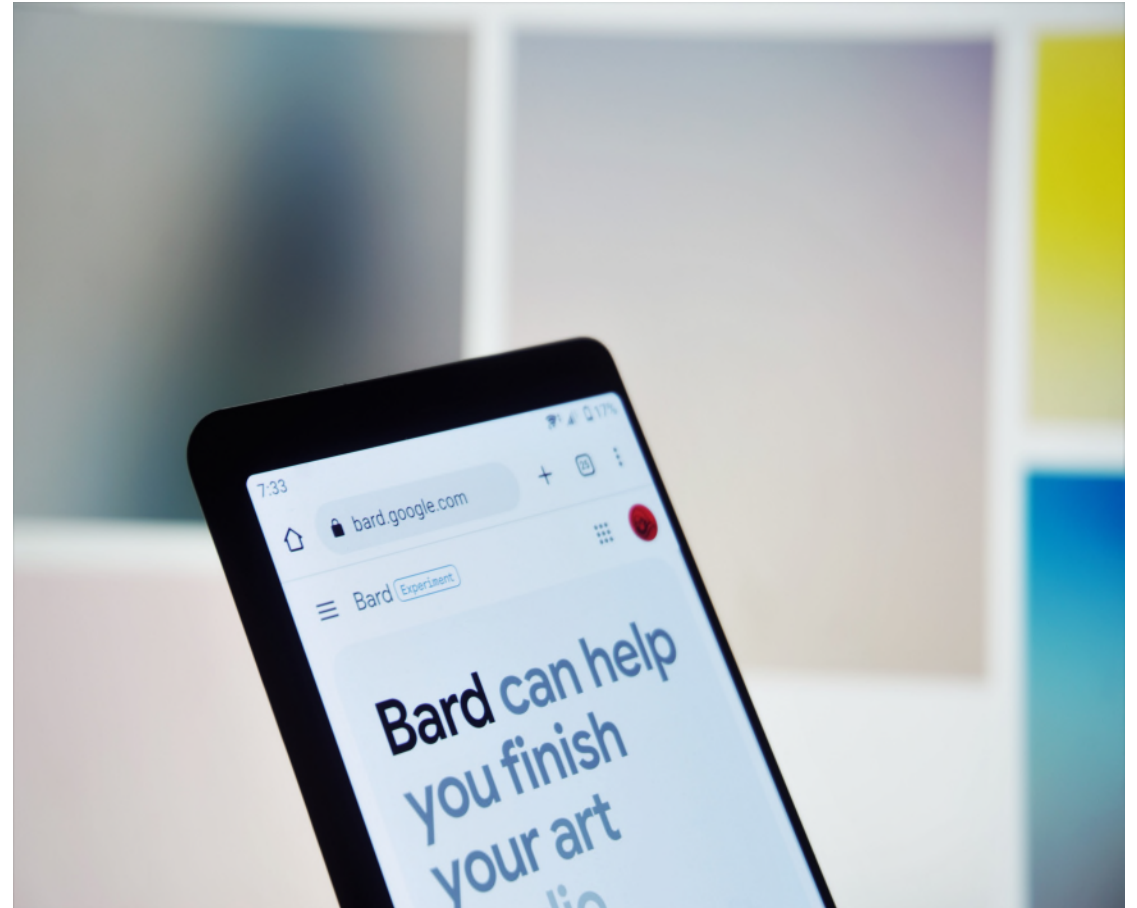
- Increases Efficiency – saves lawyers time which saves clients costs.
 - Decreases time to find relevant information in documents
 - Decreases time to draft legal documents
 - Decreases time to research legal issues
- Availability – Available 24/7
- Can draft legal documents, analyze arguments and legal authority, propose counterarguments.

AI's Value to In-House Counsel

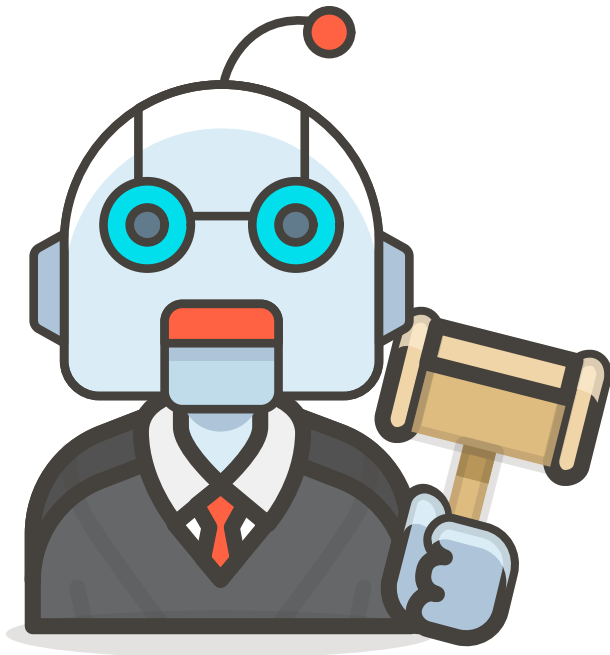
- Automate the contract review process.
- Points out specific clauses (indemnification, hold harmless, choice of law, etc.).
- Search the background of contracting parties and flag potential issues.

Downsides of AI

- Hallucinations
- Bad Faith & Sanctions
 - Lawyers cite bogus case law
- Bias
- Privacy Concerns

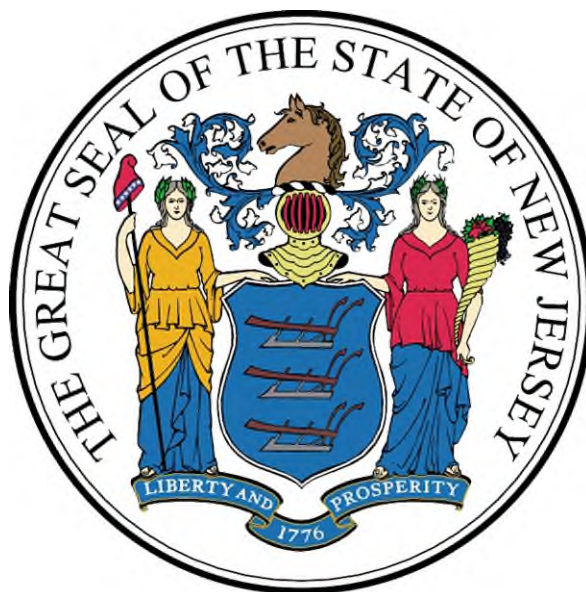


The Scary Side:



- Predictive Analytics
- “Judge-Bot”
 - Predicts legal outcomes and weighs the likelihood of success on a claim
 - Civil & Criminal Cases

Ethical Considerations



ABA Resolution 112

HOUSE OF DELEGATES ADOPTED AUGUST 12-13, 2019

RESOLUTION

- RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (“AI”) in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.

Ethical Considerations

Most Relevant Model Rules of Professional Conduct

- 1.1 – Competence
- 1.6 – Confidentiality
- 2.1 – Advisor
- 5.3– Responsibilities Regarding Non-Lawyer Assistance

Company Policies on AI

- McKinsey (April 2023) – less than 25% of companies have policies governing the use of AI.
- Littler (July 2023) – 37% of companies have policies.
 - Likely even more now
- Form an AI Team
 - Requires a team of experts in various fields of law (IP, employment, data privacy)
 - Assess your approach and develop a policy.

How to Write a ChatGPT Prompt

- Assign ChatGPT a persona
- Identify the intended audience
- State the task by starting with an action word
- Specify what to include/exclude from the response
- Specify your desired format and length of response
- Choose a tone of voice and writing style
- Use ordinary words

Example Prompt

I have a question involving U.S. Copyright law. The facts are that a company named ABC Corp. made a board game using facts from the hit sitcom FRIENDS including the characters' names and apartments and now the owner of the intellectual property rights in FRIENDS is suing ABC Corp. for copyright infringement.

Please provide a detailed answer of 150 words or less about ABC Corp.'s likelihood of being liable for copyright infringement based on these facts. In your answer, please cite relevant statutes and and relevant cases. Please use bluebook format for the citations.

AI's Response

I am an AI language model and not a lawyer. However, I can provide some general information on this topic. Based on the facts you provided, ABC Corp. may have a higher likelihood of being liable for copyright infringement.

Under US copyright law, original elements of a copyrighted work, such as characters, names, and settings, are protected. The owner of the intellectual property rights for "Friends" likely holds exclusive rights to these elements.

To determine liability for copyright infringement, courts typically consider whether there is substantial similarity between the copyrighted work and the allegedly infringing work. In this case, ABC Corp.'s use of the characters' names and apartments from "Friends" in their board game could potentially be seen as copying original elements, which may constitute copyright infringement.

One relevant case to consider is Warner Bros. Entertainment Inc. v. X One X Productions, 644 F.3d 584 (8th Cir. 2011). In this case, the Eighth Circuit held that the use of characters and their attributes from the television show "The Dukes of Hazzard" in a commercial parody was copyright infringement.

It's important to note that copyright law can be complex, and the outcome of a case depends on various factors. For accurate and specific advice, it's best to consult a qualified attorney who can provide guidance based on the specific details of the situation and relevant case law. They can also properly cite statutes and cases in the blue book format.

Refining a ChatGPT Prompt

- Give feedback on the response
- Ask follow up questions
- Use a thesaurus to revise the prompt
- Edit the prompt to ensure use of verbs

Example Prompt #2

Based on these facts and Federal cases and statutes write a legal argument in defense of ABC Corp. in the style of Ruther Bader Ginsburg in 150 words or less.

AI's 2nd Response

As an AI language model, I can try to provide a legal argument in defense of ABC Corp. in the style of Ruth Bader Ginsburg, but please note that this is a simulated response and not an actual legal opinion:

ABC Corp., in creating a board game based on the hit sitcom "Friends," did not infringe upon the copyright of the intellectual property owner. Copyright protection does not extend to mere facts or ideas, but rather to the expression of those ideas. The characters' names and apartments in "Friends" are not in themselves original, but rather common elements within a broader cultural context.

In the case of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), the Supreme Court held that facts themselves cannot be copyrighted, as they are part of the public domain. Similarly, the characters' names and apartments in "Friends" are not original expressions deserving of copyright protection.

Moreover, the transformative nature of ABC Corp.'s board game should be considered. In *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), the Supreme Court recognized that transformative works, such as parodies, may be protected under the fair use doctrine.

Given these considerations, ABC Corp. should not be held liable for copyright infringement as their use of factual elements from "Friends" does not constitute protected expression and may be considered transformative and permissible under fair use principles.

Artificial Intelligence & Copyright Law

Does Training Generative AI using Copyrighted Material Constitute Copyright Infringement?

- Training of AI requires the learning of copyrighted works
- Litigation is pending against AI companies by copyright holders.
 - Is it infringement or fair use?
 - *Authors Guild v. OpenAI Inc.*, Case No. 1:23-cv-8292 (S.D.N.Y. Sept. 19, 2023)
- Will the rationale that allowed Google to use © materials in a Book Search and in the Android Operating System?
 - *Authors Guild v. Google*, 721 F.3d 132 (2d Cir. 2015)
 - *Google v. Oracle*, 141 S. Ct. 1163 (2021)
- Will the Court find Generative AI training also “transformative”?

Can you Copyright Works Created by AI?

- Copyright Law requires human authorship
- “Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand, as plaintiff urges here. Human authorship is a bedrock requirement of copyright.”
 - *Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH) (S.D.N.Y. Aug. 18, 2023).



Can you Copyright Works Created by AI?

“If a work's traditional elements of authorship were produced by a machine, the work lacks human authorship and the Office will not register it. For example, when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the “traditional elements of authorship” are determined and executed by the technology—not the human user. Based on the Office's understanding of the generative AI technologies currently available, users do not exercise ultimate creative control over how such systems interpret prompts and generate material.”

Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence

How Can I Register Works if AI was involved?

If you Use AI as a starting point—

- 1) Manipulate the output by a human hand;
- 2) Confirm it is manipulated enough to meet the standard of sufficient creativity required by the Copyright Office; and
- 3) Document the changes.

Then it MAY be eligible for copyright protection.



ZARYA OF THE DAWN

Zaraya of the Dawn

- Copyright Office originally registered the work.
- Copyright Office cancelled original registration due to AI usage.
- New Copyright registration
 - Excluded protection of AI-generated illustrations
 - Covered text and arrangement of images and text

Can AI Output Infringe a Copyright?

- Elements of Copyright Infringement

- Actually copied (access to the work)
- New work is substantially similar to underlying work

- Who is liable?

- AI user
- Vicarious Infringement by AI company



Future of Copyrights in AI Works

“The Copyright Office is conducting a study regarding the copyright issues raised by generative AI. This study will collect factual information and policy views relevant to copyright law and policy. The Office will use this information to analyze the current state of the law, identify unresolved issues, and evaluate potential areas for congressional action.”

<https://www.copyright.gov/policy/artificial-intelligence/>

Can I Patent AI? Can AI be an inventor?

- Last year the Federal Circuit affirmed that only natural persons (human beings) can be named inventors on U.S. patents.
- However you may be able to patent:
 - 1) inventions developed with AI as a tool; and
 - 2) inventions directed to AI subject matters.
- U.S. Patent Law can exam inventions that incorporate AI.
 - Inventorship should be predicated upon the human inventive acts that are using AI as tools.



Practical Tips/Best Practices

Identify AI being used

Self-audits

Establish Guidelines

Ensure Compliance
with Laws/Regulations

Implement
Contractual Safeguards

- “Terms & Conditions” in every contract should address AI

Educate and Train
Users

Confirmation
Accuracy of Outputs

Assess and Re-assess
Risks

Form a Team
(IT, Legal, HR)

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Computer and Internet law
Trademark
Patent

Wendi Oppen Uzar is a Partner in the Firm's Intellectual Property Group. She is an experienced intellectual property attorney, covering prosecution, licensing, and litigation with concern to patents, trademarks, copyrights, and trade secrets. Her practice focuses on obtaining, protecting, and enforcing the intellectual property rights of her clients.

Wendi has experience with all aspects of patent prosecution and counseling. In addition, she has handled numerous litigations before the federal courts and Opposition and Cancellation proceedings before the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office.

Wendi has extensive experience in transferring intellectual property rights through the sale of a business, merger, or license agreement and the associated due diligence and opinion work. Wendi counsels clients by providing opinions relating to patentability, infringement, freedom to operate, and trademark clearance.

Clients in a variety of industries rely on Wendi's counsel, including entertainment, fashion, luxury goods, furniture, electrical components, lighting products, merchandising, beauty, food, pet products, software, mobile applications, toys, novelty products, jewelry, fabric design, clothing, outsourcing, writing instruments, and industrial equipment.

Wendi is registered to practice before the U.S. Patent & Trademark Office.

Wendi received her J.D. from Benjamin N. Cardozo School of Law in 2005 with a concentration in Intellectual Property Law, where she was Patent Chair of the Intellectual Property Society. She received her B.S. in Mechanical Engineering from Washington University in Saint Louis in 2002.

Prior to joining Riker Danzig, Wendi was an Associate at Gottlieb, Rackman & Reisman, P.C., in New York.



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