THOMPSON COBURN LLP

TC'S IP CORNER®

AUGUST 2025 EDITION

TC'S IP CORNER®

Welcome to TC's IP Corner® summer wrap-up edition. We are excited to share this quarterly newsletter with our clients, colleagues, and friends as we examine hot topics, interesting cases, and weird yet entertaining happenings in the world of intellectual property that occurred this summer.

If you have ideas for future editions, please reach out to one of the editors listed below.

ROBO...NO? USPTO REFUSES TESLA'S TRADEMARK APPLICATION FOR ROBOTAXI

Every generation has eagerly awaited the car of the future – one that can fly, is self-driving, and can travel through time and space. As the decades roll on, we've only gotten as close as the cars on our favorite futuristic shows and movies – *The Jetsons, Back to the Future, Knight Rider, Batman*, etc. Tesla, Inc., a car manufacturer with big dreams and big ambitions, is one of the first to bring self-driving cars to the people. Tesla launched its Robotaxi service this summer in Austin, Texas. The service allows users to schedule an autonomous ride for convenient point-to-point transportation. While the long anticipated self-driving cars have made it to the streets, the name ROBOTAXI has not yet made it to trademark registration.

In October 2024, Tesla applied to register ROBOTAXI as a word mark. On May 23, 2025, the ROBOTAXI word mark was refused for being generic (among other refusals), leaving Tesla to scramble as it neared its big launch. Within the week, TESLA filed new applications for ROBOTAXI design marks and TESLA ROBOTAXI word marks. Tesla filed multiple applications, each for a single class.

Trademark	Status/Key Dates	Goods and Services
ROBOTAXI SN: 98795389	Pending Application, May 6, 2025 Office Status: Non-Final Action – Mailed Filed: October 10, 2024	Int'l Class: 12 (Int'l Class: 12) Land vehicles; electric vehicles, namely automobiles; automobiles; and structural parts therefor

Trademark	Status/Key Dates	Goods and Services
ROBOTAXI SN: 98795392	Pending Application, May 23, 2025 Office Status: Non-Final Action – Mailed Filed: October 10, 2024	Int'l Class: 39 (Int'l Class: 39) Leasing of motor vehicles; transportation and storage of automobiles; transportation of passengers and goods; coordinating travel arrangements for individuals and for groups, namely, arranging time-based ridesharing services for individuals and for groups; vehicle rental services; vehicle sharing services, namely, arranging and coordinating temporary use of vehicles; transportation and delivery services, namely, monitoring, managing, and tracking of transportation of persons and delivery of goods and packages; conveyance rental and sharing services, namely, arranging and coordinating peer-to-peer vehicle sharing and rental services
ROBOTAXI  **SN: 99185848**	Pending Application, May 14, 2025 Filed: May 14, 2025	Int'l Class: 12 (Int'l Class: 12) Land vehicles; electric vehicles, namely, automobiles; automobiles; and structural parts therefor

Trademark	Status/Key Dates	Goods and Services
ROBOTAXI  **SN: 9918584**	Pending Application, May 14, 2025 Filed: May 14, 2025	Int'l Class: 39 (Int'l Class: 39) Leasing of motor vehicles; transportation and storage of automobiles; transportation of passengers and goods; coordinating travel arrangements for individuals and for groups, namely, arranging time-based ridesharing services for individuals and for groups; vehicle rental services; vehicle sharing services, namely, arranging and coordinating temporary use of vehicles; transportation and delivery services, namely, monitoring, managing, and tracking of transportation of persons and delivery of goods and packages; conveyance rental and sharing services, namely, arranging and coordinating peer-to-peer vehicle sharing and rental services
ROBOTAXI **SN: 99211086**	Pending Application, May 30, 2025 Filed: May 30, 2025	Int'l Class: 09 (Int'l Class: 09) Downloadable software in the nature of a mobile application for providing and managing transportation services, namely, software for scheduling and dispatching autonomous vehicles to passengers; downloadable software in the nature of a mobile application for management of transportation rideshare and ride hailing services; downloadable computer software in the nature of a mobile application for vehicle fleet management and operations, namely, positioning, dispatching, and routing vehicles and generating and communicating related prices; downloadable mobile applications for scheduling and booking transportation and delivery services; downloadable software in the nature of a mobile application for scheduling and booking delivery of consumer goods, food, and groceries

Trademark	Status/Key Dates	Goods and Services
ROBOTAXI  **SN: 9918584**	Pending Application, May 14, 2025 Filed: May 14, 2025	Int'l Class: 39 (Int'l Class: 39) Leasing of motor vehicles; transportation and storage of automobiles; transportation of passengers and goods; coordinating travel arrangements for individuals and for groups, namely, arranging time-based ridesharing services for individuals and for groups; vehicle rental services; vehicle sharing services, namely, arranging and coordinating temporary use of vehicles; transportation and delivery services, namely, monitoring, managing, and tracking of transportation of persons and delivery of goods and packages; conveyance rental and sharing services, namely, arranging and coordinating peer-to-peer vehicle sharing and rental services
ROBOTAXI **SN: 99211086**	Pending Application, May 30, 2025 Filed: May 30, 2025	Int'l Class: 09 (Int'l Class: 09) Downloadable software in the nature of a mobile application for providing and managing transportation services, namely, software for scheduling and dispatching autonomous vehicles to passengers; downloadable software in the nature of a mobile application for management of transportation rideshare and ride hailing services; downloadable computer software in the nature of a mobile application for vehicle fleet management and operations, namely, positioning, dispatching, and routing vehicles and generating and communicating related prices; downloadable mobile applications for scheduling and booking transportation and delivery services; downloadable software in the nature of a mobile application for scheduling and booking delivery of consumer goods, food, and groceries

Trademark	Status/Key Dates	Goods and Services
ROBOTAXI  **SN: 99211166**	Pending Application, May 30, 2025 Filed: May 30, 2025	Int'l Class: 09 (Int'l Class: 09) Downloadable software in the nature of a mobile application for providing and managing transportation services, namely, software for scheduling and dispatching autonomous vehicles to passengers; downloadable software in the nature of a mobile application for management of transportation rideshare and ride hailing services; downloadable computer software in the nature of a mobile application for vehicle fleet management and operations, namely, positioning, dispatching, and routing vehicles and generating and communicating related prices; downloadable mobile applications for scheduling and booking transportation and delivery services; downloadable software in the nature of a mobile application for scheduling and booking delivery of consumer goods, food, and groceries
TESLA ROBOTAXI **SN: 99211103**	Pending Application, May 30, 2025 Filed: May 30, 2025	Int'l Class: 39 (Int'l Class: 39) Leasing of motor vehicles; transportation and storage of automobiles; transportation of passengers and goods; coordinating travel arrangements for individuals and for groups, namely, arranging time-based ridesharing services for individuals and for groups; vehicle rental services; vehicle sharing services, namely, arranging and coordinating temporary use of vehicles; transportation and delivery services, namely, monitoring, managing, and tracking of transportation of persons and delivery of goods and packages; conveyance rental and sharing services, namely, arranging and coordinating peer-to-peer vehicle sharing and rental services

Trademark	Status/Key Dates	Goods and Services
TESLA ROBOTAXI **SN: 99211120**	Pending Application, May 30, 2025 Filed: May 30, 2025	Int'l Class: 09 (Int'l Class: 09) Downloadable software in the nature of a managing transportation services, namely, software for scheduling and dispatching autonomous vehicles to passengers; downloadable software in the nature of a mobile application for management of transportation rideshare and ride hailing services; downloadable computer software in the nature of a mobile application for vehicle fleet management and operations, namely, positioning, dispatching, and routing vehicles and generating and communicating related prices; downloadable mobile applications for scheduling and booking transportation and delivery services; downloadable software in the nature of a mobile application for scheduling and booking delivery of consumer goods, food, and groceries
TESLA ROBOTAXI **SN: 99211111**	Pending Application, May 30, 2025 Filed: May 30, 2025	Int'l Class: 12 (Int'l Class: 12) Land vehicles; electric vehicles, namely, automobiles; automobiles; and structural parts therefor

There are several points to take away from Tesla's filing strategy. First, Tesla took a risk in applying to register only the ROBOTAXI word mark. As compared to design marks, word marks do provide broader protection – they protect the words of the mark, regardless of the font, color, style, or design in which it is used. However, word marks are typically harder to register, especially if the words used are descriptive or suggestive of the applied-for goods and/or services. When a trademark is descriptive or suggestive, we often suggest applying to register a design version of the mark, or a word mark and a design mark so that in instances when the word mark is refused, there is still a design mark available to offer protection.

A second point to consider is that Tesla's original ROBOTAXI word mark applications were filed based upon an intent-to-use. An intent-to-use application is one filed when the applicant intends to use the mark in the future, but hasn't started to use the mark at the time of application. Tesla applied to register its ROBOTAXI mark less than one year before its launch. Because United States trademark examination takes on average 6 months to receive a first examining action, Tesla was unlikely to know if the ROBOTAXI word mark would be approved before its launch. When applying based on an intent-to-use, applicants have 36 months after approval of the mark to submit evidence of use. Thus, if an applicant anticipates beginning use of the mark in the next three years, they should consider proceeding with their intent-to-use application so they know the outcome of their trademark examination prior to launch.

A third point to consider is that upon receiving the ROBOTAXI word mark refusals, Tesla immediately filed new applications for ROBOTAXI design marks and TESLA ROBOTAXI word marks. There are several benefits to filing new applications before the original application is abandoned. First a new application is likely more cost-effective than appealing the refusal of the original application. Second, if an applicant cannot overcome the original refusal, there are new applications with a new priority date already awaiting examination. A third benefit is that after receiving a refusal, an applicant knows what they can do differently the second time around. Tesla learned that the USPTO sees the mark ROBOTAXI as generic, so it applied for the term in a specific design, and added the house name TESLA to make the mark more distinctive.

A final point to consider is that Tesla applied for multiple applications, each application only having one international class. While filing multiple applications can be more expensive, filing multiple applications may be more efficient. In multi-class applications, when one international class is refused, the entire application is held up until the specific class refusal is resolved. When there are multiple applications, a refusal of one application does not impact or slow down the examination of other applications.

TC's IP group has experience assisting trademark applicants in developing the best trademark filing strategy to fit their marks and their business. If you are interested in applying for a trademark please reach out to a member of our IP group.

DON'T SQUAT ON MY STUFF

Section 43 of the Lanham Act, which provides a cause of action for trademark infringement, also includes a cause of action to prevent cyberpiracy, also known as "cybersquatting." Under the statute, one who "registers, traffics in, or uses" a domain name that is confusingly similar to a protected trademark with the bad faith intent to profit from that mark, may be liable for cybersquatting. Among the remedies for the trademark owner include transfer of the domain name to the trademark owner or cancellation of the domain name. The statute provides one solution to prevent bad actors from scooping up domains of competitor's trademarks or sitting on domains of well-known trademarks in order to be bought out for a windfall.

A trademark owner may bring a lawsuit in district court or may file a complaint pursuant to the Uniform Domain-Name Dispute Resolution Policy ("UDRP"), a system established to resolve disputes over domain name registrations. In some instances, a UDRP proceeding may be an efficient and cost-effective way to police cybersquatting without filing a complaint in federal court. Since its implementation in 1999, trademark owners have brought 22,5000 UDRP cases involving 40,500 domain names.[1]

This summer, in Christian Copyright Licensing International LLC v. Multitracks.com LLC, a district court examined when a competitor may be committing a cybersquatting violation.[2] There, the entity Multitracks.com LLC ("Multitracks") was the owner of the mark and domain "MultiTracks.com." In 2021, the plaintiff ("CCLI") obtained the domain name "multitrack.com" (no "s") and began redirecting visitors to the website of one of Multitracks' competitors.

---

[1] https://icannwiki.org/Uniform_Domain_Name_Dispute_Resolution_Policy

[2] *Christian Copyright Licensing Int'l LLC v. Multitracks.com LLC*, 2025 WL 1615462 (D. Ariz. June 6, 2025).

Multitracks first sought to protect its rights via a UDRP complaint, wherein an arbitrator concluded that CCLI committed cybersquatting and ordered the transfer of the multitrack.com domain to Multitracks. CCLI then brought an action in district court seeking an order that its actions were not unlawful.

On CCLI's motion for summary judgment, the court concluded that a majority of the factors weigh in favor of CCLI's bad faith intent to profit and denied CCLI's motion. There are ten relevant factors under the statute, including whether the domain registrant has any trademark rights in the domain name; whether the registrant is seeking to divert customers from the trademark owner; and whether the registrant uses misleading information, such as false contact information.

In addition to concluding that there was more than enough evidence of bad faith by CCLI, the court concluded that CCLI, as Multitracks' competitor, "is a sophisticated party" with knowledge of its competitor's marks and services, and therefore CCLI could not rely on the "safe harbor" defense to cybersquatting.

Cases like Multitracks.com illustrate two principles: first, a party should think twice before acquiring domains similar to those of its competitors; and second, a trademark owner who discovers that a third party is using a confusingly similar domain name may take action to enforce its rights. And under the UDRP, the trademark owner has an avenue to obtain an order requiring transfer of the domain to the trademark owner without filing a complaint in federal court.

Our IP team has extensive experience in trademark disputes on the internet and via domain names. If you have any questions about trademark enforcement online, please reach out to a member of our IP team.

CRISPR'S CONCEPTION

Who first invented the gene-editing tool, CRISPR-CAS9, is a hotly debated issue in the case *Regents of the University of California v. Broad Institute, Inc.*, 136 F.4th 1367 (Fed. Cir. 2025). CRISPR systems are immune defense systems that naturally edit DNA. One type of CRISPR system is the Type II CRISPR system, which uses an RNA sequence to guide a protein to a particular DNA sequence as part of the gene editing process. Prior to 2011, a new protein would have to be designed for every new target sequence. In the 2011 to 2012 timeframe, two sets of scientists independently knew that the CRISPR-Cas9 complex would remove the need to continue designing new proteins for new target DNA sequences, and each began testing to prove their invention.

Each set of scientists first filed their inventions with the U.S. Patent and Trademark Office (USPTO) in late 2012/early 2013. This timing is important because, at this time, the U.S. patent system was what is called a first-to-invent system. As of March 16, 2013, the U.S. switched to a first-to-file system when the America Invents Act (AIA) took effect. The difference is that in our current first-to-file system, the patent goes to the person who first filed their patent application, regardless of who invented first.

For pre-AIA patents, determining who invented first can be a difficult issue to resolve. To resolve this issue, the USPTO has a proceeding called an interference proceeding. Interference proceedings are brought before the Patent Trial and Appeal Board (PTAB), and appeals are brought before the Federal Circuit.

There are three stages to the inventive process: (1) conception, (2) reasonable diligence, and (3) reduction to practice. Conception occurs when the inventor has a definite and permanent idea of the complete and operative invention.

It is complete when the idea is defined such that a person of ordinary skill in the relevant art would be able to reduce the invention to practice without extensive research or experimentation. Actual reduction to practice occurs when the invention has been created in a physical or tangible form, but an inventor can alternatively show constructive reduction to practice by a written disclosure sufficient to allow a person of ordinary skill in the relevant art to recognize that the inventor invented what is claimed.

There are two possible ways to establish the date of invention under pre-AIA law. The first way is by establishing the date when the invention was reduced to practice. The second way is by establishing the date of conception and coupling that date with a later reduction in practice with reasonable diligence.

In the interference proceeding at issue, the Broad Institute was relying on the date that they reduced their invention to practice, so Regents attempted to establish an earlier date of conception. The PTAB determined that Regents failed to prove that they conceived of the invention prior to Broad Institute's reduction to practice because Regents' scientists did not know that their CRISPR-Cas9 system would work. The PTAB relied on Regents' scientists' statements expressing uncertainty about whether the experiments had succeeded in determining that conception had not yet occurred.

The Federal Circuit reversed, finding that this analysis conflated conception with reduction in practice. The Federal Circuit distinguished between uncertainty that undermines the specificity of the inventor's idea and general uncertainty surrounding experimental sciences. The important distinction between the two is whether the uncertainty led to modifications that substantively changed the original idea. The Court explained that the key question is whether the exercise of ordinary skill, without extensive research or experimentation, was capable of reducing the invention to practice. The Court vacated and remanded for further analysis under the correct legal framework.

TC's IP group regularly advises clients on how to navigate patent issues, including inventorship and patentability issues. Please consult with a member of TC's IP group if your clients have any patent issues.

GATEKEEPING TO PROTECT THE NEST EGG: $20 MILLION JURY AWARD BLOCKED BY JUDICIAL SCRUTINY

The Federal Circuit's en banc decision in *EcoFactor v. Google* emphasizes the critical responsibility of judges in ensuring expert testimony is not only relevant, but also reliable.[1] EcoFactor, the owner of a patent relating to the operation of smart thermostats, claimed Google's Nest Thermostats infringed on their patent. The Federal Circuit reversed a $20 million jury award to EcoFactor, holding that the expert testimony on damages was improperly admitted.

Background on Damage Experts in Patent Litigation

For context, damages awards in patent infringement cases are commonly based on a "reasonable royalty" calculation. Establishing a reasonable royalty value is a major point of contention in patent infringement actions, as the average jury verdict is in the millions of dollars range and because courts acknowledge "there may be more than one reliable method for estimating a reasonable royalty."[2] In delivering the majority opinion, Chief Justice Moore noted that the reasonable royalty calculation is inherently variable and inexact, which is why "[e]xpert testimony is particularly beneficial to assist the trier of fact in resolving such complex, technical issues as patent damages."[3] The patent damages statute even states that expert testimony may be used to "aid to the determination of damages or of what royalty would be reasonable under the circumstances."[4]

---

[1] EcoFactor, Inc. v. Google LLC, 137 F.4th 1333 (Fed. Cir. 2025) (en banc).

[2] William Scally et al, 2024 Marcum Patent Litigation Study 8 (2024); Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1315 (Fed. Cir. 2014).

[3] *EcoFactor*, 137 F.4th at 1340.

[4] 35 U.S.C. § 284.

The Dispute

At trial, EcoFactor's damages expert, David Kennedy, based his testimony on three litigation lump-sum settlement licenses between EcoFactor and three other companies. Each of these licenses contained a "whereas" recital stating EcoFactor's unilateral belief that "$X" (the actual amount was sealed by the court) per-unit was a reasonable royalty.[5] For example, one license agreement states, "WHEREAS EcoFactor represents that it has agreed to the payment set forth in this Agreement based on what EcoFactor believes is a reasonable royalty calculation of $[X] per-unit . . ."[6] Mr. Kennedy asserted that these licenses showed that the parties agreed to $X per-unit, and testified to the jury that since other companies had paid EcoFactor at this royalty rate, Google should pay the same rate.[7]

Google sought to exclude this testimony from the jury before trial, arguing it was "unsupported by reliable methodology or sufficient facts," which the trial court rejected.[8] Mr. Kennedy's testimony was presented to the jury and after deliberation, EcoFactor was awarded $20 million in damages.[9] Google continued to argue they were prejudiced by the trial court's decision to allow Mr. Kennedy's testimony, and after numerous post-trial motions and appeals, the Federal Circuit vacated the damages award and ordered a new trial on damages.

The Federal Circuit's Analysis

The Federal Circuit based its decision to grant a new trial for damages on two main factors. First, the Court found there was no factual basis for Mr. Kennedy's conclusion that the licensees agreed to $X per-unit royalty rate or shared in EcoFactor's belief the rate was reasonable.[10]

---

[5] *EcoFactor*, 137 F.4th at 1342.

[6] *Id.*

[7] *Id.* at 1341.

[8] *Id.* at 1337.

[9] *Id.*

[10] *Id.* at 1343

According to the Court, Mr. Kennedy's claims are stated nowhere in the plain language of the license agreements. In fact, two of the licenses included explicit language contradicting this claim, one of which states, "nothing in this clause should be interpreted as agreement by Schneider that $[X] per unit is a reasonable royalty."[11] According to the majority, these facts rendered Mr. Kennedy's analysis inherently unreliable. As the Court held, "[t]he licenses therefore do not, individually or in combination, provide support for Mr. Kennedy's testimony that the licensees agreed to pay the $X rate or that the licensees agreed that $X was a reasonable royalty."[12]

Second, the Court found that EcoFactor's own assertion of what it believed to be a reasonable royalty was not based on sufficient facts, further undermining the expert's testimony. Specifically, testimony from EcoFactor's CEO was held to be based on his "general understanding," and unsupported by any sales data or other relevant figures.[13] Thus the CEO's testimony was unable to provide a "factual basis for Mr. Kennedy to provide a reliable opinion."[14]

The Federal Circuit concluded that Mr. Kennedy's expert testimony failed to meet the requirements of Federal Rule of Evidence ("FRE") 702.[15] FRE 702 requires expert testimony to be based on sufficient facts or data, the product of reliable principles and methods, and those principles and methods must be reliably applied.[16] As noted by the Court, distinguishing "'the gatekeeping role of the judge" under Rule 702 from the fact finder's role is particularly essential in the context of patent damages."[17]

---

[11] *Id.* at 1356.

[12] *Id.* at 1343.

[13] *Id.* at 1345.

[14] *Id*.

[15] FED. R. EVID. 702.

[16] *Id*.

[17] *EcoFactor,* 137 F.4th at 1340.

Key Takeaways

The Court's decision aligns with the 2023 Amendments to FRE 702, which clarified that the sufficiency of an expert's basis and methodology is a question of admissibility for the judge, not a question of weight for the jury.[18] The Advisory Committee notes that "judicial gatekeeping is essential" to ensure the expert testimony stays within its supported basis.[19] However, this case also illustrates the tension between allowing juries to make fact determinations and allowing the court to limit what facts are presented to them. As Judge Stark noted in his dissent, disputed facts are not the same as insufficient facts under FRE 702.[20] There is always a concern that cases like *EcoFactor* will be interpreted very broadly to improperly limit expert testimony on damages, or allow other courts to invade the province of the jury as the fact finder.

Although this decision did not fundamentally change the law, it reinforces a trend towards more rigorous expert testimony standards. Practitioners should prepare for increased scrutiny in the sufficiency of the basis for an expert's opinion and there may be more challenges to damage expert testimony by litigants. Furthermore, practitioners should meticulously prep their damage experts to ensure their testimony does not step outside the boundaries of what the plain language of the license agreements and other evidence actually support. The Court's analysis indicates unilateral language is insufficient to support the assertion both contracting parties agreed to the royalty rate, which further encourages clear and direct contractual language.

Please reach out to a member of TC's IP group for any questions you have on patents or patent damages.

---

[18] FED. R. EVID. 702.

[19] *Id.*

[20] *EcoFactor,* 137 F.4th at 1356.

COPYRIGHT OFFICE REPORT INDICATES AI TRAINING MAY NOT BE FAIR USE

On May 9, 2025, the U.S. Copyright Office released a pre-publication version of the third part of its report on copyright and artificial intelligence, which addresses generative AI training.[1] Among other things, the Report weighs in on whether (a) the creation of AI training datasets and (b) AI training constitutes copyright infringement where the datasets include copyrighted material. The Report also addresses whether such conduct falls within the scope of fair use. While the Report concludes that such conduct constitutes prima facie infringement, it concludes that the fair use analysis must be determined on a case-by-case basis. The Report's approach creates additional uncertainty regarding AI training, which means both rights holders and AI developers will have to look to the courts and Congress for direction.

Background

AI Training Generally

While there are several types of algorithms that fall under the umbrella of AI, the Report focuses on large language models (LLMs), which are designed to parse and emit natural language. For example, in response to an input of "Twinkle twinkle," the LLM is likely to respond with "little star."[2] At a high level, this is accomplished by converting text to machine language through an intermediary called a "token." Probabilities are assigned to each token, and the algorithm performs numerical analysis on the tokens corresponding to the prompts to identify the tokens that are statistically most likely to be responsive to the input.[3] The output text is then generated by converting those tokens back to text.

---

1 United States Copyright Office, *Copyright and Artificial Intelligence, Part 3: Generative AI Training* (2025), available at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf (hereinafter "Report").

2 *Id.* at 6-7 (citing Murray Shanahan, *Talking About Large Language Models* at 2, ARXIV (2023), https://arxiv.org/abs/2212.03551).

3 *Id.*

For an algorithm to be able to accurately determine a response, it is "pre-trained" on a corpus of material that serves as the input and expected output. By inputting a prompt using a portion of the training material and comparing the LLM's output against the portion of the training material that followed the prompt language, the accuracy of the LLM can be determined and adjustments can be made.[4] The larger the body of material used, the more sophisticated the LLM (and the better it performs in diverse language-based tasks).[5] If necessary, the LLM can then be further trained on particular types of data to enable it to specialize at a particular task. The datasets on which AIs are pre-trained or trained include a wide variety of materials, such as filtered versions of the internet, patents, text from books, Wikipedia, and other similar sources. While some of these materials are in the public domain, copyrighted materials may also be included in the datasets.

Copyright Law

U.S. Copyright law arises from Art. I, § 8, Clause 8 of the Constitution, the purpose of which is "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[6] The Copyright Act grants copyright protection for original works of authorship fixed in any tangible medium of expression.[7] Copyright exists from the moment a work of authorship becomes fixed in a tangible medium, but timely registration brings additional benefits.[8] The Copyright Act provides copyright owners the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies of the copyrighted work to the public; (4) to perform the copyrighted work publicly; and (5) to display the copyrighted work publicly.[9]

---

4 *Id.* at 7-9.

5 *Id.*

6 U.S. CONSTI. art. I, § 8, cl. 8.

7 *17 U.S.C. § 102 (indicating that works of authorship include (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works).*

8 *Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 355 (1991); Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 586 U.S. 296, 309 (2019) (holding that work must be registered before suit can be filed); 17 U.S.C. § 504 (limiting statutory damages to works registered pre-suit).*

9 17 U.S.C. § 106.

Under the Act, "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright"[10] and is subject to civil and criminal sanctions.[11] Congress, however, has codified a "fair use" limitation on the exclusive rights of the copyright owner, which provides that a violation of an exclusive right is not an infringement if done for a "fair use" purpose such as criticism, comment, news reporting, teaching, scholarship, or research.[12] To determine if fair use applies, several nonexclusive factors must be considered: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[13]

The Report

Of note in the Report is the Copyright Office's analysis of prima facie infringement and fair use in the context of AI training. Over the last few years, the use of copyrighted materials has created numerous disputes as to whether such use constitutes copyright infringement.[14] Rights holders assert that the use of their material in training an AI system constitutes infringement while AI companies argue that training constitutes fair use.[15] With respect to infringement, the Report concludes that the creation of training datasets and AI training likely constitutes prima facie infringement. As to fair use, the Report concludes that the issue must be addressed on a case-by-case and work-by-work basis.

---

[10] 17 U.S.C. § 501(a).

[11] *See* 17 U.S.C. §§ 502-506.

[12] 17 U.S.C. § 107.

[13] *Id.; see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).*

[14] *See, e.g., Tremblay et al. v. OpenAI, No. 3:23-cv-03223* (N.D. Cal. June 28, 2023); *Silverman et al v. OpenAI, No. 3:23-cv-03416* (N.D. Cal. July 7, 2023); *The New York Times Company v. Microsoft Corporation et al,* No. 1:23-cv-11195 (S.D.N.Y. Dec 27, 2023); *Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc.,* No. 1:20-CV-613-SB, 2025 WL 458520 (D. Del. Feb. 11, 2025).

[15] *Compare* Note 14 (asserting infringement), *supra, with* Comment of OpenAI, LP, *Comment Regarding Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation*, available at https://www.uspto.gov/sites/default/files/documents/OpenAI_RFC-84-FR-58141.pdf ("Under current law, training AI systems constitutes fair use.").

Prima Facie Infringement

The Report concluded that "[t]he steps required to produce a training dataset containing copyrighted works clearly implicate the right of reproduction."[16] It reached this conclusion because dataset creation involves downloading and copying (e.g., copyrighted material must be downloaded, converted to a different format or storage medium, and further copied if a filtered dataset is created that includes the work).[17] The Report reached a similar conclusion with respect to dataset training because training also requires the download and copying of datasets, and because the training process temporarily reproduces works or substantial portions of works when they are shown to the LLM in batches.[18] The Report deferred its analysis of output based infringement (as opposed to the input based training process) to a later report.[19] Accordingly, the Report concluded that dataset creation and AI training likely constitute prima facie copyright infringement.

Fair Use

The Report next turned to fair use and walked through each of the factors. With respect to the first factor, which focuses on the purpose and character of the use, the Report concluded that "training a generative AI foundation model on a large and diverse dataset will often be transformative."[20] It concluded that the process of collecting and converting the underlying works into an LLM capable of responding to a diverse set of language-based tasks such as translating emails, correcting grammar, or answering natural language questions about various topics is generally a transformative process, but that the purpose of the LLM must be considered.[21] Where the intended output is for an entirely different purpose than the works used in training, the use is more likely to be transformative.[22] But, where the intended output is for substantially the same purpose as the underlying works, the use is less likely to be transformative.[23]

16 Report at 26.
17 *Id.*
18 Id. at 26-30.
19 *Id.* at 31.
20 *Id.* at 45.
21 *Id.* at 45-46.
22 *Id.*
23 *Id.*

The Report also noted that the commerciality of the specific use in question—and not necessarily the status of the training entity—affects the first factor analysis, with uses that serve nonprofit purposes being more likely to be fair than commercial uses.[24] In sum, while the Report concludes that the use of copyrighted material in AI training is likely to be transformative, AI training is not inherently transformative according to the Report, and whether a use is transformative must be analyzed on a case-by-case basis.

With respect to the second factor, the nature of the copyrighted work, the Report summarily noted that the materials used in training will likely comprise a variety of works (published, unpublished, expressive, and functional), and that the fair use analysis will depend on the particular work in question.[25] In line with current copyright jurisprudence, published works weigh in favor of fair use more than unpublished works and factual works similarly weigh in favor of fair use more than expressive works.[26] As to the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the Report concluded that AI developers ordinarily copy entire works and make use of their expressive content for training, which weighs against fair use.[27] But it tempered this conclusion by noting that where there is a transformative purpose, and where there is a need to train on a large volume of works to effectively generalize, the copying of entire works may be reasonable, especially if the copied material will not be made accessible to the public.[28]

Finally, the Report addressed the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, and concluded that "[t]he copying involved in AI training threatens significant potential harm to the market for or value of copyrighted works." The Report identified three potential sources of harm: (1) lost sales, (2) market dilution, and (3) lost licensing opportunities.

---

24 *Id.* at 48-51

25 *Id.* at 53-54.

26 *Id.*

27 *Id.* at 54-60.

28 *Id.*

The Report explained that lost sales can occur in several situations but are most likely to occur in the case of works specifically developed for AI training (i.e., datasets created for AI training that are copyrightable due to the human selection and arrangement of data) because widespread unlicensed use of such works would cause widespread harm.[29] The potential for market dilution is more widespread, as it is conceivable that AI could be utilized to mass produce generic digital content in a variety of categories (e.g., novels, music, art, etc.) and that such competition could unfairly compete with human-authored works.[30] Finally, the Report identified an industry for individual and collective licenses for AI use, pointing to public licensing deals between OpenAI and the Associated Press and Shutterstock, Getty Image's collaborations with Nvidia and Bria, and the collaboration between vAIsual and music/audio broker Rightsify, as well as additional licensing that took place after comments were submitted.[31] The Report found that while the industry for licensing was still emerging, unlicensed uses could result in significant market harm.[32]

The Report then balanced the fair use factors and concluded that, because generative AI involves a spectrum of uses and impacts, it is not possible to prejudge litigation outcomes. As a result, fair use must be decided on a case-by-case and work-by-work basis.

Subsequent Developments at the Library of Congress

On May 10, one day after the Report was released, Copyright Office Director Shira Perlmutter was fired by Donald Trump.[33] The timing led to some question whether the firing was motivated by the Report's conclusion that the use of copyrighted materials in AI training was not inherently transformative—a finding which stymies AI developers such as Elon Musk.[34]

---

29 *Id.* at 62-64.

30 *Id.* at 64-66.

31 *Id.* at 66-71.

32 *Id.*

33 Complaint ¶ 19, *Perlmutter v. Blanche et al.,* No. 1:25-cv-01659 (D.D.C. May 22, 2025).

34 Scott MacFarlane, Trump fires director of U.S. Copyright Office, sources say, CBS News (May 10, 2025) (quoting New York Representative Joe Morelle's statement that there was "surely no coincidence [Trump] acted less than a day after [Ms. Perlmutter] refused to rubber-stamp Elon Musk's efforts to mine troves of copyrighted works to train AI models.").

On May 12, Justice Department Officials Brian Nieves and Paul Perkins showed staff at the Library of Congress a letter from the White House that purported to appoint Todd Blanche as acting head of the Library of Congress, Nieves as Principal Deputy Librarian, and Perkins as acting Register of Copyrights and Director of the U.S. Copyright Office.[35] Library of Congress staff contacted the U.S. Capitol Police, and Nieves and Perkins left the Library of Congress voluntarily.[36]

On May 22, Ms. Perlmutter filed suit challenging her firing and seeking a temporary restraining order.[37] The Court denied the request for temporary restraining order on May 28, but the case continues to proceed.[38] At present, likely due to uncertainty regarding whether the firing of Ms. Perlmutter was lawful, the Copyright Office is issuing copyright certificates with the seal of the Copyright Office but without the signature of the register of copyrights.[39] This practice has created some uncertainty regarding the validity of the registrations issued in that manner.[40]

Judicial Decisions Addressing AI Training

Earlier this year, the District of Delaware concluded that certain uses of copyrighted material for AI training were infringing and did not constitute fair use.[41] While that decision largely accords with the analysis and outcome proposed by the Copyright Office, more recent decisions from the Northern District of California have concluded that the use of certain copyrighted materials for copyright training constitutes fair use.[42] The state of current AI

35 *Id.* ¶¶ 22-23.

36 *Id.* ¶ 24.

37 *See generally id.*

38 May 28, 2025 Minute Order, *Perlmutter v. Blanche et al.,* No. 1:25-cv-01659 (D.D.C. May 22, 2025).

39 *See* Ivan Moreno, *Unsigned Copyright Certificates Raise Validity Questions*, Law360 (June 3, 2025).

40 *Id.*

41 *See Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc.*, No. 1:20-CV-613-SB, 2025 WL 458520 (D. Del. Feb. 11, 2025).

42 *See Kadrey v. Meta Platforms, Inc.*, No. 23-CV-03417-VC, 2025 WL 1752484 (N.D. Cal. June 25, 2025) (use of works of thirteen authors was fair); *Bartz v. Anthropic*, No. C 24-05417 WHA, 2025 WL 1741691, at *1 (N.D. Cal. June 23, 2025) (use of copyrighted materials for AI training was fair, use of copyrighted purchased print materials to build a central library was fair, use of pirated copies to build central library was not fair).

jurisprudence, as well as how it compares to the Copyright Office's analysis, will be analyzed in a forthcoming article.

Conclusion

The Report indicates that the use of copyrighted materials in AI training constitutes prima facie infringement, and that fair use will need to be decided on a case-by-case basis. Because relatively few cases have reached decisions on the merits, and because even those cases have yet to be reviewed on appeal, copyright jurisprudence regarding AI training is in its infancy. As more courts weigh in on the issue, patterns regarding types of conduct will emerge. Until then, the area is ripe for litigation. To navigate the uncertainty, AI developers and copyright owners should consider:

- Evaluating specific use cases against the fair use factors;
- Considering licensing options where appropriate;
- Monitoring evolving legal precedents;
- Implementing technical measures to limit potential infringement; and
- Considering insurance coverage.

If you have a client with a copyright issue, please reach out to a member of Thompson Coburn's IP department.

AI SCORES EARLY, BUT VICTORIES REMAIN LIMITED

As detailed in the accompanying article *Copyright Office Report Indicates AI Training May Not Be Fair Use*, the United States Copyright Office recently concluded that, in certain instances, the use of copyrighted material for the purpose of training artificial intelligence (AI) may not be fair use. Recent judicial decisions addressing the issue, however, have reached mixed verdicts. Accordingly, the present article examines several recent decisions and compares the fair use analysis in such decisions against the Copyright Office's analysis.

Background on Copyright Law

The Copyright Act grants copyright protection for original works of authorship fixed in any tangible medium of expression.[1] Copyright protection provides the owner with exclusive rights over the work.[2] When those rights are violated, the copyright owner may bring a claim for copyright infringement. The "fair use" doctrine provides a defense to copyright infringement by permitting the "unlicensed use of copyright-protected works" for activities "that promote freedom of expression."[3] While the fair use analysis in each case requires its own factual determination, examples of fair use include "criticism, comment, news reporting, teaching, scholarship, and research."[4]

---

1 17 U.S.C. § 102 (indicating that works of authorship include (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works).

2 17 U.S.C. § 106 (providing copyright owners the exclusive rights to do and to authorize any of the following (1) to reproduce the copyrighted work in copies; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies of the copyrighted work to the public; (4) to perform the copyrighted work publicly; and (5) to display the copyrighted work publicly).

3 *U.S. Copyright Office Fair Use Index,* U.S. COPYRIGHT OFFICE (Feb. 2025), U.S. https://www.copyright.gov/fair-use/.

4 *Id.;* see also 17 U.S.C. § 107.

To determine if the use of a copyrighted work constitutes fair use, the courts will consider the following nonexclusive factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrights work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[5] Courts have noted that factor four "is undoubtedly the single most important element of fair use."[6]

Precedent Addressing Non-Generative AI

Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.

Thomson Reuters, the entity behind the popular legal search platform Westlaw, filed suit against Ross Intelligence in the District of Delaware based on the latter's creation of a competing legal-research engine that uses AI.[7] To train its AI system, Ross used materials built from Westlaw headnotes.[8] The court had previously issued a summary judgment decision declining to grant summary judgment in favor of Thomson Reuters as to copyright infringement and the lack of a fair-use defense and the case continued to approach trial.[9] The court, however, issued a *sua sponte* order continuing the trial and inviting renewed briefing.[10] Thomson Reuters renewed its motion for summary judgment, and Ross also moved for summary judgment on largely the same issues.[11]

The court first addressed the issue of direct infringement and concluded that, at least as to Westlaw headnotes that were not verbatim copies of the law, Thomson Reuters had established direct infringement.[12] The court, however, declined to grant summary judgment of infringement as to Westlaw's key

---

5 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-95 (1994).

6 *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, 765 F. Supp. 3d 382, 391 (D. Del. 2025) (citing *Harper & Row*, 471 U.S. at 566, 105 S.Ct. 2218).

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 401.

numbering because it was largely computer generated and a factual issue remained regarding which headnotes had valid copyright registrations.[13] The court next turned to whether Ross nevertheless had a fair use defense to direct infringement and addressed the fair use factors.[14]

The first factor was found in favor of Thomson Reuters for two reasons.[15] First, the court found Ross's use was commercial because Ross "stands to profit from exploitation of the copyrighted material without paying the customary price."[16] Second, the court found Ross's use was not transformative because it has no "further purpose or different character" from Thomson Reuters'.[17] The court stated "Ross took the headnotes to make it easier to develop a competing legal research tool."[18] The court found the second factor, the nature of the original work, favored Ross, noting the factor "has rarely played a significant role in the determination of a fair use dispute."[19] The court reasoned that while Reuters' Westlaw meets the minimum requirements for copyright, the material is "not that creative."[20] In applying the third factor regarding amount and substantiality of the portion used relative to the copyright's whole work, the court questioned if the usage was "reasonable in relation to the purpose of the copying."[21] This factor weighed in favor of Ross because "Ross did not make West headnotes available to the public."[22] In considering the most influential factor in the fair use analysis, the effect on the potential market value, the court weighed this factor in favor of Thomson Reuters.[23]

---

13 *Id.*

14 *Id.* at 397-401.

15 *Id.* at 397.

16 *Id.*

17 *Id.* at 397-98.

18 *Id.* at 399.

19 *Id.*

20 *Id.*

21 *Id.* at 397 (citing *Campbell,* 510 U.S. at 586).

22 *Id.* at 400.

23 *Id.*

The court acknowledged two markets in question: (1) legal-research platforms, and (2) data used to train legal AIs, a derivative market.[24] In its analysis, the court noted there is a public interest in accessing the law, however, "[t]here is nothing that Thomson Reuters created that Ross could not have created for itself . . . without infringing Thomson Reuters's copyrights."[25] The court then weighed the factors, concluded that the balance favored Thomson Reuters, and granted summary judgment for Thomson Reuters with respect to Ross's copying of Westlaw headnotes that were not verbatim copies of the law.[26]

Generative AI Rulings

In June 2025, the Northern District of California provided some of the first U.S. judicial decisions on whether the use of copyrighted works to train generative AI models constitutes fair use under the Copyright Act. The defendants in both *Bartz v. Anthropic PBC*,[27] and *Kadrey v. Meta Platforms Inc. et al* asserted fair use defenses that were addressed on motions for summary judgment.[28]

Bartz et al. v. Anthropic PBC

In *Anthropic*, an AI software firm started by former employees of OpenAI utilized two separate data sets to train its AI product, Claude.[29] The first data set consisted of millions of copyrighted materials downloaded from pirate sites, while the second was created by purchasing copyrighted books and digitizing them.[30] The digitized books, which were formatted into a central library of works, included works of the plaintiff authors.[31] Crucially, Claude was not only composed of the LLMs, but also complementary software that filtered inputs into the LLM and outputs from the LLM to users.[32]

---

24 *Id.*

25 *Id.*

26 *Id.* at 401.

27 No. C 24-05417 WHA, 2025 WL 1741691, at *1 (N.D. Cal. June 23, 2025) (hereinafter *"Anthropic"*).

28 No. 23-CV-03417-VC, 2025 WL 1752484, at *2 (N.D. Cal. June 25, 2025) (hereinafter *"Meta"*).

29 *Anthropic,* 2025 WL 174169, at *1.

30 *Id.* at *5.

31 *Id.*

32 *Id.*

Because of this, no infringing copy of the authors' works was or ever would be provided to Claude users, and the plaintiffs did not allege copyright infringement on the outputs.[33] Before beginning its fair use analysis, the *Anthropic* court evaluated how the copyrighted work had been used and determined there were three separate uses of copyrighted material, each of which required a separate fair use analysis.[34] The court analyzed: (1) the use of the copyrighted works to train the generative AI; (2) the digitization of lawfully purchased books to create a central library; and (3) the use of pirated works in its central library.[35]

The *Anthropic* court heavily focused on fair use factors one and four.[36] The court found that the "purpose and character of using copyrighted works to train LLMs to generate new text" was distinct and "quintessentially transformative" from being used to "replicate or supplant them."[37] Judge Alsup analogized training the LLM on copyrighted works to a human reading a book and then creating something new.[38] Additionally, the court noted how there was a finding of no fair use in the recent *Thomas Reuters* decision.[39] The court emphasized in that case the data was being used for the same purpose and the parties were direct competitors, which is not the case here.[40]

In considering the purpose and use of creating a centralized digital library for the legally obtained works only, the court found a similarly favorable outcome.[41] The court held "that format change itself added no new copies, eased storage and enabled searchability, and was not done for purposes trenching upon the copyright owner's rightful interests — it was transformative."[42] In contrast, the court determined that the use of pirated copies for the central library weighed

33 *Id.* at *6.
34 *Id.*
35 *Id.*
36 *Id.* at *7, 16.
37 *Id.* at *8.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at *9-11.
42 *Id.* at *9.

against fair use, emphasizing "[s]uch piracy of otherwise available copies is inherently, irredeemably infringing even if the pirated copies are immediately used for the transformative use and immediately discarded."[43]

On all three issues, the court found the nature of the copyrighted works (second fair use factor) favored the plaintiff, as all of the works, fiction or non-fiction, were chosen for their expressive qualities.[44]

In consideration of the amount and substantially of the copyright portion used, the relevant scope is based on what is "thereby made accessible to the public for which it may serve as a competing substitute," not the amount and substantiality used in making a copy.[45] The court held that factor three favored fair use, as the copying done was reasonably necessary to the transformative purpose of training the AI.[46] Furthermore, the court found copying the legally obtained works to put them in a more favorable storage format with search capabilities weighed in favor of fair use because there was no surplus copying and copying the entire work was required for this purpose.[47] In consideration of the pirated library copies, the court found "Anthropic lacked any entitlement to hold copies of the books at all" and this factor weighed against fair use.[48]

In the court's consideration of the final factor, the determination of the market harm, the authors argued the LLMs will cause an explosion of works competing with their works, leading to market dilution.[49] The court dismissed this argument and found it no different than if the authors had claimed "training school children to write well would result in an explosion of competing works."[50]

---

43 *Id.* at *11 (holding "[t]he objective analysis here shows the initial copies were pirated to create a central, general-purpose library, as a substitute for paid copies to do the same thing").

44 *Id.* at *15.

45 *Id.* (reemphasizing that the Court was only considering the circumstances around inputting the copyrighted works to train the AI and not whether an output was infringing).

46 *Id.*

47 *Id.* at *16.

48 *Id.*

49 *Id.* at *17.

50 *Id.*

Judge Alsup emphasized that it is not a purpose of the Copyright Act to protect authors against competition.[51] The court also applied this reasoning to arguments alleging that training the LLMs will displace an emerging market of licensing works for the "narrow purpose of training LLMs."[52] The market considerations were neutral for the centralized library of legally obtained works because it was a format change which did not itself claim any of the authors' rights, and even if it displaced potential digital purchases of copies, there is no evidence the digital copies were distributed.[53] The court additionally found factor four weighed against fair use for the pirated copies of works because it displaced demand for those works.[54]

To summarize, the court found that (1) using copyrighted works to train LLMs is highly transformative and was fair use; (2) the creation of a central library consisting of legally obtained printed works was fair use; (3) the retention of improperly obtained digital copies of copyrighted works in its central library was not fair use.[55] On August 26, 2025, subsequent to the Court approving a class of authors on July 17, 2025, Anthropic submitted filings indicating that it had reached a proposed class settlement and requested all proceedings be stayed.[56]

Kadrey et al. v. Meta Platforms Inc. et al

In *Meta*, the thirteen plaintiff authors argued that Meta infringed on their copyrights by downloading their works from online "shadow libraires" to use in training Meta's LLM called Llama.[57] The court considered the nature of Meta's work under the fair use doctrine.[58]

The first factor analyzed the purpose and character of the use.[59] The court found

---

51 *Id.*
52 *Id.*
53 *Id.* at *17-18.
54 *Id.* at *18.
55 *Id.* at *18-19.
56 *See* Adam Lidgett, *Anthropic, Authors Reach Deal in AI Copyright Cases,* Law360 (August 26, 2025).
57 *Meta,* 2025 WL 1752484, at *3.
58 *Id.* at *9.
59 *Id.*

Meta's use to be "highly transformative" because the use had "further purpose" and "different character" than the books' original purpose.[60] Meta was using the works to train its LLMs to generate diverse text and perform a large range of functions.[61] The plaintiffs argued Meta actually has the same purpose "because an LLM training on a book is akin to a human reading one."[62] The court countered that "an LLM's consumption of a book is different than a person's" because an LLM is learning statistical patterns while humans do not read for that purpose.[63] Additionally, the court noted there is a relevant public interest.[64] On this point, the plaintiffs argued Meta's use was not transformative because there was "no critical bearing" on their books like criticism or parody would.[65] However, the court viewed the use as transformative and of public interest. The court notes how a use that provides "valuable information on any subject of public interest . . . might be justified, especially where that benefit is 'provided without allowing public access to the copy.'"[66] Furthermore, the potential commercial gain that Meta could receive from copying the plaintiffs' works was seen as less important because the court viewed the use as highly transformative.[67]

The second factor, the nature of the copyrighted work, played little role in the fair use analysis.[68] The court stated it applies "with less force" when the copied works have already been published and the secondary user therefore cannot interfere with the creator's right to control the first public appearance of their work.[69] The third factor, the amount and substantiality of the portion used, favored Meta. While large portions of the plaintiff's work were copied, only a small portion, fifty words of any copied work, was made available to the public.[70]

---

60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.* at *10.
64 *Id.*
65 *Id.* at *10.
66 *Id.*
67 *Id.*
68 *Id.* at *13.
69 *Id.* at *14.
70 *Id.*

The amount copied was viewed as reasonable because of the transformative purpose.[71]

The *Meta* court considered the final fair use factor, the effect of the use upon the potential market for or value for the copyrighted work, as highly influential.[72] The court stated that a plaintiff has three arguments to show harm to the market of their works: (1) the plaintiff might claim that the model will regurgitate their works;[73] (2) the plaintiff might point to the market for licensing their works for AI training and contend that unauthorized copying for training harms that market;[74] or that (3) the plaintiff might argue that, even if the model can't regurgitate their own works or generate substantially similar ones, it can generate works that are similar enough (in subject matter or genre) that they will compete with the originals and thereby indirectly substitute for them.[75] However, here the plaintiffs' argued there was market dilution because users could reproduce text from their books and that Meta's copying harmed the market for licensing copyrighted materials to companies for AI training, which the court classified as "two flawed theories."[76] Ultimately the court sided with Meta on the fourth factor because the plaintiffs failed to "to present meaningful evidence on the effect of training LLMs like Llama with their books on the market for those books."[77] The court was careful to point out the limited nature of its ruling, and explicitly stated its ruling did not stand for the proposition that Meta's use of the copyrighted materials was lawful.[78]

Meta was granted summary judgement for its fair use defense, but the court made it clear that it believed that the plaintiffs will often win in cases where there are better-developed records on the market effects of the defendant's use.[79]

---

71 *Id.*

72 *Id.*

73 *Id.* at *15.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.* at *21.

78 *Id.* at *3.

79 *Id.* at *23. ("In cases involving uses like Meta's, it seems like the plaintiffs will often win, at least where those cases have better-developed records on the market effects of the defendant's use. No matter how transformative LLM training may be, it's hard to imagine that it can be fair use to use copyrighted books to develop a tool to make billions or trillions of dollars while enabling the creation of a potentially endless stream of competing works that could significantly harm the market for those books.").

Complex Fair Use Landscape

Prima Facie Evidence of Copyright Infringement

As noted above, when considering whether the use of copyrighted materials to train AI models is copyright infringement, authorities have consistently applied the fair use framework. The Copyright Report predicts that "[w]ith respect to infringement . . . the creation of training datasets and AI training likely constitutes prima facie infringement."[80] In the first application of copyrighted materials being used to train AI models, the *Meta* and *Anthropic* decisions do not explicitly state this context supports prima facie evidence of copyright infringement. However, both courts' application of the fair use defense suggests that fundamentally, the use of copyrighted materials to train AI models is not inherently lawful.[81] As Judge Chhabria in the *Meta* decision states, "no previous case answers the question whether Meta's copying was fair use. That question must be answered by flexibly applying the fair use factors and considering Meta's copying in light of the purpose of copyright and fair use: protecting the incentive to create by preventing copiers from creating works that substitute for the originals in the marketplace."[82]

Split: Tension in Determining "Transformative Use"

The Copyright Office and judiciary agree, for now, that using copyrighted works to train an AI model may be considered a transformative use when applying a fair use defense. However, there are significant nuances to this basic consensus. The *Anthropic* court gave heavy consideration and broad holdings to the transformative use factor, whereas the Copyright Office and *Meta* court took a more conservative approach. For example, the Report emphasized that although a typical training context is likely to be transformative, it is crucial that the purpose of the LLM is taken into consideration.[83] The Copyright office

---

80 *United States Copyright Office, Copyright and Artificial Intelligence, Part 3: Generative AI Training (2025)* at 4, available at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf (hereinafter "Report").

81 *Meta,* 2025 WL 1752484, at *2 ("[T]he fair use inquiry is highly fact dependent, and there are few bright-line rules."); *Anthropic,* 2025 WL 174169, at *7 ("This order addresses each of the four factors in turn, pointing out how each applies to the training copies and to the purchased and pirated library copies. It concludes with an integrated analysis.").

82 *Id.* at *22. ("[T]he fair use inquiry is highly fact dependent, and there are few bright-line rules.").

83 Report at 17-19.

concludes that transformative use must be analyzed on a case-by-case basis.[84] Although not as explicit as the Report, the *Meta* court repeatedly emphasized that "[t]here is certainly no rule that when your use of a protected work is 'transformative,' this automatically inoculates you from a claim of copyright infringement."[85] In contrast, the *Anthropic* court did not show such restrained language; instead the opinion contained statements such as, "[t]he technology at issue was among the most transformative many of us will see in our lifetimes" and "the purpose and character of using copyrighted works to train LLMs to generate new text was quintessentially transformative."[86]

Furthermore, the *Meta* and *Anthropic* courts split on how to characterize each use. In Meta, the court stated the plaintiffs were wrong to suggest the downloading of the books and use of the books to train the Llama AI software "must be considered wholly separately."[87] As referenced above, this approach favors the defendants because of the highly transformative view of training AI models.[88] In contrast, the *Anthropic* court analyzed the issues separately.[89] Here, the court separately considered the use of training the LLM, and the use of downloading copyrighted works, further parsing out if the works were copied in a lawful or unlawful manner.[90] The *Anthropic* approach seems to be a more plaintiff-friendly approach, as the transformative nature of training LLMs would not need to be overcome.

Liability on Input

The issue of obtaining the data and training the AI systems are important considerations in future cases. From a liability standpoint, the *Meta* and *Anthropic* cases suggest that if a defendant lawfully obtains copyrighted works used to train an AI model, and there is sufficient transformation, the court will be more likely to find fair use than at the data acquisition stage. The *Meta* and

---

84 *Id.* at 46.
85 *Meta,* 2025 WL 1752484, *2.
86 *Anthropic,* 2025 WL 174169, at *9, 18.
87 *Meta,* 2025 WL 1752484, *12.
88 *Id.* at 12.
89 *Anthropic,* 2025 WL 174169, at *6-7.
90 *Id.* at 8, 11, 14.

Anthropic decisions to varying degrees distinguished lawful and unlawful acquisition of copyright materials as a threshold issue. This suggests that companies who are seeking to use copyrighted works to train their AI models may have a higher risk of liability on this point, and thus may be more likely to be found answerable for copyright infringement.

Split: Market Effect

The alignment between the Copyright Office and the *Meta* court is further strengthened in the market harm analysis. The *Meta* court opened the possibility of plaintiffs succeeding in showing market dilution, stating " [i]n cases involving uses like Meta's, it seems like the plaintiffs will often win, at least where those cases have better-developed records on the market effects of the defendant's use."[91] Furthermore, the Copyright Office Report finds that market harm from training AI models on copyrighted works may come from lost sales, market dilution, and/or lost licensing opportunities.[92] The Office has stated that "[t]he copying involved in AI training threatens significant potential harm to the market for or value of copyrighted works."[93] In contrast with the *Meta* court, the *Anthropic* court did not find that copies used to train LLMs displaced demand for authors' works.[94] Unless the defendant uses pirated copies, it would seem unlikely for a court following *Anthropic* to view copies as an issue for market dilution. The in-district split described above suggests the law will likely remain unsettled pending further litigation.

Conclusion

In conclusion, recent cases have begun to address the many questions that the technology behind AI presents under copyright law. While cases such as *Anthropic* and *Meta* agree that training AI models with non-pirated material is

---

91 *Id.* at *16, 23.
92 Report at 64-66.
93 *Id.* at 73.
94 *Id.* at 17.

fair use, they diverge on the issue of market harm.[95] As the Copyright Office has noted, in many instances fair use will have to be determined on a case-by-case basis.[96]

If you have a client with a copyright issue, please reach out to a member of Thompson Coburn's IP department.

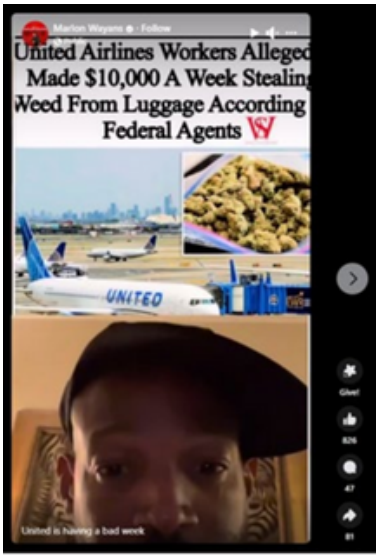
[95] *Id.*
[96] Report at 46.

YES... THIS REALLY HAPPENED

BASS V. WAYANS

In the era of social media, many of us find ourselves scrolling through our Facebook, Instagram, TikTok, X, and LinkedIn accounts to see what our family, friends, and favorite celebrities and influencers are up to. We use the platform to stay in the loop, catch up on news, share stories, and provide opinions. But as we share on social media, we may not be thinking of the copyright implications. Scrolling through our home pages or stories, we often see accounts sharing articles, pictures, memes and opinions that belong to others. But we don't think much of it - the platforms have a "share" button. However, just because content is online, doesn't mean it is free to use, and the "share" button doesn't necessarily provide users protection.

Marlon Wayans, actor and comedian, best known for his roles in The Wayans Bros., White Chicks, and Scary Movie, was hit this summer with a copyright infringement lawsuit for a social media post, wherein he stitched a third-party thumbnail with a video of himself. The thumbnail includes the headline "United Airlines Workers Allegedly Made $10,000 A Week Stealing Weed From Luggage According to Federal Agents" along with a photo of a United airplane and a plastic bag filled with marijuana. Wayan's contribution to the post included a video of himself making facial expressions in response to the headline. The video had no audio.



Facebook Post at Issue Complaint, *Bass v. Wayans*, Exhibit 2

The suit, *Bass v. Wayans*, Case No. 2:25-cv-05240 (C.D. Cal), was brought by Gabriella Bass, creator of the photograph of marijuana in a Ziploc bag (the "Photograph") pictured on the right side of the thumbnail. The Photograph was registered by the United States Copyright Office.

YES... THIS REALLY HAPPENED

In her Complaint, Bass alleged that Wayans "without permission or authorization from Plaintiff, actively copied and displayed the Photograph on the Account and engaged in this misconduct knowingly and in violation of the United States copyright laws." More specifically, Bass alleged that Wayans has not implemented adequate social media polices to verify copyright ownership before using another's content, "indicating a gross negligence in legal compliance." Bass alleged Wayans' inadequate social media policies "indicate de facto willful infringement." Bass asked for damages for copyright infringement under the Copyright Act and for violation of the Digital Millennium Copyright Act ("DMCA"), hoping to recover as much as $25,000.

While we don't have the fame of Wayans, and our social media posts are unlikely to be seen by that many, we all can learn from his situation. It feels like many social media users engage in similar content sharing methods to Wayans. However, as we all know, just because everyone is doing it doesn't mean that it is acceptable or legal. Before sharing the work of another, or stitching our commentary with someone else's, we should take pause to consider the copyright consequences.

The Photograph

Complaint, *Bass v. Wayans*, Exhibit 1

TC'S IP CORNER®

Contributors to this edition of IP Corner include Brendan Bement, Steven Heinrich, Sylvia Turner, Alex Weidner, Alexandra Kerr and Randal Lay. Editors are Justin Mulligan, Sartouk Moussavi, Shoko Naruo, Michael Parks, and Tom Polcyn.

Visit the Thompson Coburn Intellectual Property page to learn more about our team:

Intellectual Property | Thompson Coburn LLP

TOTAL COMMITMENT®