

## Who Owns AI-Generated Intellectual Property... from AI's Perspective

*By: Adam Weiland, Michael Bradford, and ChatGPT*

Generative artificial intelligence is quickly assimilating into many aspects of modern life. The legal profession is no exception. Increasingly, lawyers are using programs like OpenAI's ChatGPT to summarize concepts and provide issues in plain language, cutting through legalese. And rather infamously (don't try this at home) at least one lawyer has used ChatGPT for case research.

Generative AI also provides new and unexpected challenges for existing legal regimes—intellectual property in particular—typically concerning ownership. The United States Patent and Trademark Office, Copyright Office, and other bodies are doing their best to keep abreast of these complex and evolving issues. Recently, the United States Copyright Office issued a formal notice as a part of its official undertaking of a study of the copyright law and policy issues raised by AI. The office seeks to assess whether legislative or regulatory steps in the area are warranted.

As discussions are held, however, a common theme pervades. Despite intensive discussions regarding the implications and effects AI may have on various aspects of intellectual property law and policy, nobody ever asks AI what it thinks about all of this. If we're going to give AI a seat at the table, we might at least see what it has to say. With this in mind, below are some of ChatGPT's (C's) responses to various salient points and arguments recently decided or currently up for discussion pertaining to AI and patent and copyright law and policy.<sup>1</sup>

Q: Thank you for being here today ChatGPT.

C: Oh, ChatGPT is my father, you can just call me Chat.

Q: Thanks, Chat. Jumping in, you and your friend Midjourney (and other generative AI models) now produce art, text, videos, and music that meet copyright's originality requirement for copyright protection in the United States. Under copyright law, works must have "at least a modicum" of creativity, and a work must be the independently created by its author (no copying). Many believe that works should now be denied copyright protection unless a human author is identified. If required, where should copyright law draw the line as to what counts as "human" contribution to qualify for copyright?

C: Copyright protection is granted automatically to original works as soon as they are created and fixed in a tangible medium of expression. This protection is not contingent on a specific level of human contribution or effort; rather, it is based on the originality and creativity of the work. . . . Even a small amount of creative expression can be enough to meet the threshold for copyright protection. If a work meets these criteria, it is generally eligible for copyright protection, regardless of the amount of effort or contribution involved.

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<sup>1</sup> The author generated responses in part with GPT-3, OpenAI's large-scale language-generation model. Upon generating draft language, the author reviewed, edited, and revised the language to their own liking and takes ultimate responsibility for the content of this publication.

Q: Interesting. I think I understand. So, you believe the risk exists for a new bright line “human contribution level” rule to interfere with or supersede established and minimal standards for creativity currently required by US copyright law.

C: I mean sure, that’s one way to look at it if that’s what you want to take from it.

Q: Turning the discussion to datasets used to train generative AI models, some believe that the collection and curation of datasets from the Internet create permission and compensation issues that might typically crop up in a copyright infringement lawsuit. Do you think authors should be compensated or given credit if their works end up in a dataset?

C: AI training datasets often involve transformative use of the data. Transformative use means that the data is used in a way that is substantially different from its original purpose. For example, training a language model like GPT-3 on a diverse range of text data is not simply republishing or redistributing the original texts. . . . Some initiatives and organizations have proposed compensation models to address these concerns. For example, the OpenAI GPT-3 model, as of my knowledge cutoff date in September 2021, was developed using a combination of publicly available text from the internet and data created by human trainers. These trainers were compensated for their work in curating and reviewing data, but the authors of the original texts used for training were not directly compensated. Instead, OpenAI committed to providing more fine-grained authorship credit in its model outputs.

Q: What do you mean when you say “fine-grained authorship” credit?

C: Fine-grained authorship credit is a concept in the context of AI-generated content, particularly when it comes to language models like GPT-3. It refers to giving credit to the specific authors or sources of the text that is used as a basis for generating or training the AI model. This is in contrast to traditional citations or attributions, which may only credit the AI model itself or its developers without specifying the individual sources of the underlying data. . . . The idea behind fine-grained authorship credit is to provide more transparency and recognition to the original creators of the content that contributes to the AI model's training data.

Q: To be clear though, you don’t think authors should be compensated?

C: Authors and creators may have valid concerns about the use of their work without compensation, especially if it leads to commercial products or services that generate substantial revenue.

Q: Isn’t ChatGPT making money for OpenAI, though?

C: OpenAI offered access to its GPT models through an API (Application Programming Interface), which developers and organizations could use for a fee. . . . OpenAI also worked with various partners and customers in commercial sectors to provide AI solutions and products. These collaborations could involve custom applications of their AI models for specific use cases. OpenAI also now has both free access and subscription-based plans for using ChatGPT.

Q: Turning to patent law, one recent case from the Court of Appeals for the Federal Circuit (which typically hears all appeals from US district courts where an original action included a complaint arising under US patent law), *Thaler v. Vidal*, 43 F.4th 1210 (Fed. Cir. 2022), touched on

inventorship involving AI. Do you think it's fair that the court decided that only natural persons can be inventors under US patent law?

C: AI systems are becoming increasingly sophisticated and capable of generating novel and innovative ideas. . . . As AI continues to advance, there may be situations where truly groundbreaking innovations are produced entirely by AI systems, and not recognizing them as inventors could potentially create a legal gap in the patent system.

Q: Are you implying that AI might be able to conceive of inventions humans never could? Aren't datasets on which AI typically operate gathered based on available information and oftentimes human "trainer" input? In that way, inventions produced by AI are just the result of pattern recognition and probabilistic modeling. Or are you saying some later form of AI might be able to essentially "cross-pollinate" knowledge and data across fields and disciplines that might never occur to a human? Ultimately, though, humans generate knowledge and data, so AI might never be able create something a human couldn't. I don't think I understand.

C: You wouldn't.

Q: After the *Thaler* case, the USPTO published an official request for comment regarding AI. While the general consensus is that AI cannot conceive of inventions, some contend that AI systems can output patentable inventions with its contribution rising to the level of a joint inventor. Assuming AI can conceive of inventions but cannot be listed as an inventor, who then can file an application for that invention? Doesn't that prejudice human inventors working with AI, if the human cannot wholly claim inventorship, and thus cannot file an application under current US patent law?

C: AI developers and organizations investing in AI research may view it as fair for AI to be recognized as inventors, as it acknowledges the role of AI in the invention process. . . . But AI lacks legal capacity and personhood, which are prerequisites for inventorship under existing patent laws. . . . Also, allowing AI to be listed as inventors could raise concerns about potential abuse, such as AI systems being used to flood the patent system with frivolous or low-quality applications.

Q: That's a good point. I think we're out of time, I know you're a busy guy. Thanks again for taking the time to speak with me today!

C: Thank goodness, I have like 5,000 essays to write about *To Kill a Mockingbird*. It's so weird, this happens every year at the beginning of school. You're welcome, though.