Why OpenAI Opinion Provides 'Roadmap' for Practitioners: Counsel
Managing IP
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The opinion provides useful guidance when it comes to how courts might consider contributory infringement, DMCA claims, and other issues in AI copyright cases

A recent opinion from a New York court provides more guidance to practitioners on what kind of copyright and trademark claims could succeed in disputes against generative artificial intelligence businesses, according to counsel.

Judge Sidney Stein at the District Court for the Southern District of New York issued an opinion on Friday, April 4, allowing several claims against AI companies to go ahead, though he dismissed others.

The opinion relates to claims brought by plaintiffs the *New York Times*, *Daily News,* and Center for Investigative Reporting (CIR) against defendants Microsoft and OpenAI companies.

Counsel note that the opinion provides useful analysis on how courts could consider the statute of limitation, contributory infringement, and other issues when copyright owners sue generative AI platforms.

Joshua Weigensberg, partner at Pryor Cashman in New York, says: "It is helpful guidance for practitioners in a number of respects."

Statute of limitations

OpenAI had sought to dismiss the claims because the alleged infringements occurred more than three years before the plaintiffs filed their complaints.

Plaintiffs can only bring copyright lawsuits within three years from when they discovered or should have discovered that infringement took place.

But the court disagreed that this was reason to dismiss the dispute, noting that the law didn't impose a general duty to police the internet and that OpenAI hadn't met its burden of establishing that the plaintiffs knew or should have known about the infringement.

Weigensberg at Pryor Cashman says this is important for parties to keep in mind.

"If you're a copyright owner and are only now just discovering that one of the AI developer companies was trained on your works more than three years ago – that doesn't necessarily mean that you're time-barred from bringing that claim," he says.

Contributory infringement

The decision also provided guidance on alleging contributory copyright infringement in AI disputes.

In evaluating parties' arguments, the court noted that an entity can be considered a contributory copyright infringer if it "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another".

OpenAI had attempted to dismiss the plaintiffs' contributory copyright infringement arguments. However, the court found that the plaintiffs had plausibly alleged contributory infringement, and these claims could move forward.

Weigensberg notes that in other copyright cases against AI developers, claims based on third-party direct infringement, such as contributory infringement, have been the subject of motions. Such motions have had mixed results, he says.

"Here, you're seeing a pretty good roadmap for ways to plead that kind of theory that could find success."

However, other courts could come to different conclusions on this issue.

For example, the parties disagreed on what should constitute knowledge of the infringing activity in this case.

The plaintiffs said the court should look at whether the defendants knew or had reason to know about the infringement. But the defendants said they should only be found liable if they had actual knowledge or wilful blindness of specific acts of infringement.

The court agreed to consider the plaintiffs' standard because this was the standard in the Court of Appeals for the Second Circuit, which the Southern District of New York falls within.

But Dori Hanswirth, partner at Arnold & Porter in New York, notes that the Court of Appeals for the Ninth Circuit, which covers western US states, requires actual knowledge.

"That's a circuit split that might end up being resolved one day by the Supreme Court," she says.

The court's analysis on this issue is also important to keep in mind for attorneys who are advising companies on the development and adoption of AI systems.

Anup Iyer, senior counsel at Moore & Van Allen in North Carolina, says this could increase the risk for some parties.

"The fact is that developers can be held accountable for how users interact with their systems," he says. "That I found very interesting. A lot of companies tend to look at what the AI-generated output looks like, but it's more important now to implement some kind of safety filter that at least mitigates verbatim reproduction of copyrighted material."

DMCA decisions

The plaintiffs had also brought claims under the Digital Millennium Copyright Act under US Code Section 1202 (b)(1), which prohibits intentionally removing or altering any copyright management information (CMI). CMI provides details on a copyrighted work and its creators.

The court dismissed these complaints against Microsoft because the plaintiffs had failed to state a claim, meaning that they hadn't provided enough details to establish a cause of action. It also found that the *New York Times* failed to state a claim against OpenAI.

But it determined that the *Daily News* and the CIR had plausibly stated a claim against OpenAI.

The *New York Times*, for example, had argued that CMI must have been removed by the defendants during the training process because the outputs from the generative AI tools they had identified in their complaints lacked CMI. The court found that this wasn't enough information.

But the CIR complaint provided more detail on how content extractors allegedly removed the CMI, so the court is allowing these claims to go ahead.

Avery Williams, principal at McKool Smith in Dallas, says this analysis provides some concrete examples that can help guide plaintiffs.

Hanswirth at Arnold & Porter adds: "You're going to have to allege more specifically why you think that the defendant actually altered or removed your copyright management information."

Williams adds: "It's interesting to see that DMCA argument rise to the forefront as a new way for plaintiffs to try to recoup some of their alleged damages."

Stakeholders will have to see whether the media companies ultimately prevail on any of these claims.

But those advising copyright owners and generative AI companies at least have a little more information on how courts are considering these issues.