Bloomberg Law

**Disney's Output Focus Puts Fresh Spin on AI Copyright Litigation**

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Disney, Warner Bros., and other entertainment giants put a new twist on the copyright war against generative AI by focusing lawsuits on audiovisual outputs rather than training data, altering both the obstacles and pathways to victory.

The studios' assaults on AI content companies MidJourney Inc. and Minimax allege copyright infringement through mass production of image and video by users. This targets a different activity than most previous copyright suits against AI developers, which have focused on the use of protected works to train large language models.

The three lawsuits—one filed in June and two this month—do allege the companies scraped and reproduced protected works without permission during training. But they place more emphasis on claims that the AI tools create infringing outputs.

While the cases aren't the first to claim infringement by outputs, they stand out. In The New York Times Co's case against OpenAI Inc. and Microsoft Corp., the newspaper managed to "coax" infringing material from ChatGPT, but "it really didn't seem like that was the goal," IP attorney Avery Williams of McKool Smith said.

In the studios' new cases, the tools' mimicking copyrighted material "appears to be a feature rather than a bug," he said.

Attacking AI-generated outputs invokes different questions and presents distinct litigation challenges than zeroing in on model training. This approach may undercut arguments that have led judges in text-based cases to rule that training AI to produce content that doesn't resemble training materials can be transformative fair use. But it raises other fair use questions and could invoke a statutory safe harbor shielding platforms from liability for users' infringement.

Developers of AI image-generation tools' "giant bet is the training is not an infringement, is transformative fair use, and the output we can make all these arguments for why each could be fair use," said IP attorney Yelena Ambartsumian of Ambart Law.

Studios' focus on outputs also could theoretically make windfall awards difficult. In other suits, attention to training data has led to scrutiny on developers' acquisition of copyrighted works from illegal sources. In one, potential trial liability exceeding $1 trillion led Anthropic PBC to a $1.5 billion settlement with authors whose works it downloaded from online pirate libraries.

But outputs vary from the original works, so analysis of similarity and context-dependent fair use factors will differ, likely forcing plaintiffs to litigate each alleged infringement separately. Even seemingly infringing outputs may not represent the finished product, IP attorney Randall K. McCarthy of Hall Estill said, as users can modify an AI generation to produce their desired result.

"It's never been the law that you're guilty of infringement before you're done painting," said McCarthy. "Just because there's output from a machine, that doesn't mean that's what the user is going to use the work for."

VCRs or Grokster

Disney Enterprises Inc., Universal Studios, and other film companies sued MidJourney in June, citing the platform's ability to produce convincing copies of characters and settings from franchises including Star Wars and Marvel. MidJourney's August answer said it doesn't regurgitate training materials, but uses patterns and techniques learned from training materials like any artist.

The tool caters to user prompts by creating works from scratch, the company said, and it can't actively police its tens of millions of users—including the plaintiffs—instead relying on notices from copyright owners.

About a month later, Warner Bros., DC Comics, and others filed their own suit against MidJourney, and on Sept. 16 plaintiffs from the June lawsuit also sued Chinese startup MiniMax. Law firm Jenner and Block LLP filed all three cases.

The MiniMax dispute is notable because it accused the company of marketing its Hailuo AI's ability to copy famous characters under the tag-line, "a Hollywood studio in your pocket."

That marketing could put it on the wrong side of a pair of US Supreme Court decisions addressing tools used to infringe copyrights. In 1984, it cleared Sony Corp. of liability for its VCR, which was "capable of commercially significant noninfringing uses." But in 2005, the high court found Grokster Ltd. liable to 28 entertainment companies because it actively promoted its file-sharing service's ability to rip off entire movies.

"You can make Spiderman and Supergirl on other platforms," Williams said, referring to an image cited in the MiniMax suit. "But other platforms aren't tweeting out advertisements about being able to do it."

The Digital Millenium Copyright Act typically shields platforms from liability for user-posted content, and MidJourney said the studios could've submitted DMCA takedown notices. But there wasn't consensus among attorneys over whether the safe harbor should apply to companies like MidJourney, whose users prompt—but don't so directly dictate—the content.

“YouTube didn’t create the work. MidJourney created the work. MidJourney is selling subscriptions to the infringing machine. They are selling you access to the capability to create all these infringing works,” IP and entertainment attorney Robert Rosenberg of Moses & Singer LLP said. “If they hadn’t hoovered all of this intellectual property in the first place, they may be able to show a mouse” that doesn’t infringe, “but the output is Mickey Mouse.”

London-based entertainment attorney Kelsey Farish bristled at putting responsibility on consumers who don’t know copyright law or how a tool was trained. Giving consumers “the technological ability to do something naughty” and then leaving legal compliance up to them is a “weak argument,” she said.

Even then,"it’s just not the case that every single instance of copying something is unlawful,” she said.

Plaintiffs argued that MidJourney could implement technical controls—such as using filtering technology that blocks prohibited “adult content” and “gore” to also enforce copyrights. Ambartsumian said that would move the company closer to Sony’s legal VCR and further from Grokster’s infringing file-sharing approach. But she said the company obviously doesn’t want to implement such controls because users like using recognizable characters.

“Figuring out whether an output is infringement is not so simple,” she said. “That’s why it’s a complicated question.”