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Vibe Coding Adds More Cracks to Software's Thin Copyright Shield

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AI-composed source code threatens to eviscerate software's already flimsy copyright protection, raising questions about whether the law should recognize a new form of IP to accommodate rapidly changing technology.

Known as vibe coding, the practice has become so widespread that companies like OpenAI and Anthropic promote the extent to which their programs are made with their artificial intelligence.

The problem: Courts have held an author must be human to enjoy protections under copyright law, echoing the US Copyright Office's stance.

"Not enough people in the tech sector fully understand what is going on," and we need to decide how we want to protect software going forward, said Santa Clara University IP law professor Ed Lee.

That could mean a type of intellectual property distinct from copyright that's designed to offer limited protection to vibe-coded software, he said.

“What’s nice about sui generis is you get to start from a blank slate” that allows lessons from other IP regimes to form a customized solution, Lee said of carving out unique intellectual property rights.

Software’s functional purpose has made it an awkward fit in copyright law for 50 years because copyright can’t protect utility, just expression. Vibe coding only further complicates the matter.

Companies now must weigh the speed and labor savings that AI provides against the likely dearth of copyright protection.

The “jury is out” on whether human efforts to direct AI to generate code can result in “some kind of authorship” and copyright protection, said Susan O. Goldsmith of McCarter & English LLP. “So far the answer seems to be no.”

“At some point this is going to be litigated heavily,” Goldsmith said. “Companies need to know who is vibe coding, what’s being vibe coded, and that the thin protection you got before may be gone completely.”

Imperfect Alternative

The issues came to light in March when Anthropic PBC inadvertently posted 500,000 lines of internal code for its Claude large language model to developer platform GitHub. The company then sent Digital Millennium Copyright Act takedown notices in an effort to contain the leak.

Lee, who wrote about the leak and how Anthropic’s promotion of its AI usage undercuts its copyright assertions, said similar boasts have since diminished.

Trade secrets law offers an alternative to patent and copyright, as it lacks a similar bar for novelty, functionality, or creativity. Any information that retains economic value because it’s kept generally unknown can qualify.

That will largely be enough "as long as you've taken reasonable measures to keep source code secret," said Avery Williams of McKool Smith.

But trade secrets law has its caveats.

Entering prompts into and pulling code out of public-facing AI likely nukes the possibility of the input or resulting code being a trade secret, attorneys say. Companies only should allow such information to be known by in-house AI—enterprise versions of LLMs residing entirely on their servers.

Even if no one else knows a particular AI-created code—or any other secret obscured in an AI platform—attorneys say the fact that the information was put there undercuts any claim of reasonable efforts to keep it private, a core trade secrets requisite.

"There are going to be judges out there that say, 'Are you kidding? This is your secret, ChatGPT stores this on its servers, you can't tell ChatGPT not to expose this,'" Williams said.

Trade secrets by their nature also can't be publicly available. An expert in a case could say he or she prompted a chatbot and got it to produce nearly identical code as the allegedly secret software, said Paul Keller of Brownstein Hyatt Farber Schreck.

Mistakes like Anthropic's also highlight the limits of trade secrets law, Williams said.

"Inadvertent or reckless disclosure wouldn't have meant the end of their protection because they still have copyright. That goes away if AI wrote the software," he said.

Vibe coding also incurs difficult-to-track infringement risk, said Airina L. Rodrigues, also of Brownstein.

Output could include identifiable chunks of code from open-source and copyleft code—code that's free, but only under certain conditions

"Coders know not to use it," Rodrigues said. "But that's the risk with AI: what was it trained on? Presumably, a lot of open source."

Yet vibe coding might help on another front: discouraging theft in the first place, she said.

"If labor and time to develop software becomes so much faster, what's the incentive to steal?" Rodrigues said. "Is the value of competitors stealing it worthwhile if they can do the same thing?"

Human Intervention

Still, the notion of a free-for-all doesn't sit well with all copyright attorneys.

"I just think its a shame. There ought to be some way to protect it via copyright," said Marsha Gentner of Dykema Gossett. Programmers make various choices when creating and incorporated AI-produced code, she noted.

"It's more akin to the photography situation where, even though the camera does the actual work, the photograph gets the copyright protection," Gentner said.

Along the same lines, human modifications of AI-made code and decisions on how to incorporate it as a building block into a broader picture could generate copyright protection, as with any selection-and-arrangement of otherwise non-protectable components, Williams said.

"My expectation is it's not like doing code by AI is some sort of scarlet letter from whence nothing done by it is ever eligible for copyright protection," he said.

Lee said the years since the Copyright Act of 1976 codified protection for software have shown the value of some form of IP protection for the technology, considering the resources companies invested into developing it.

“I think we have to consider in that debate whether sui generis is the alternative as opposed to ‘let the chips fall where they may,’” he said. As for now, “the law is unsettled.