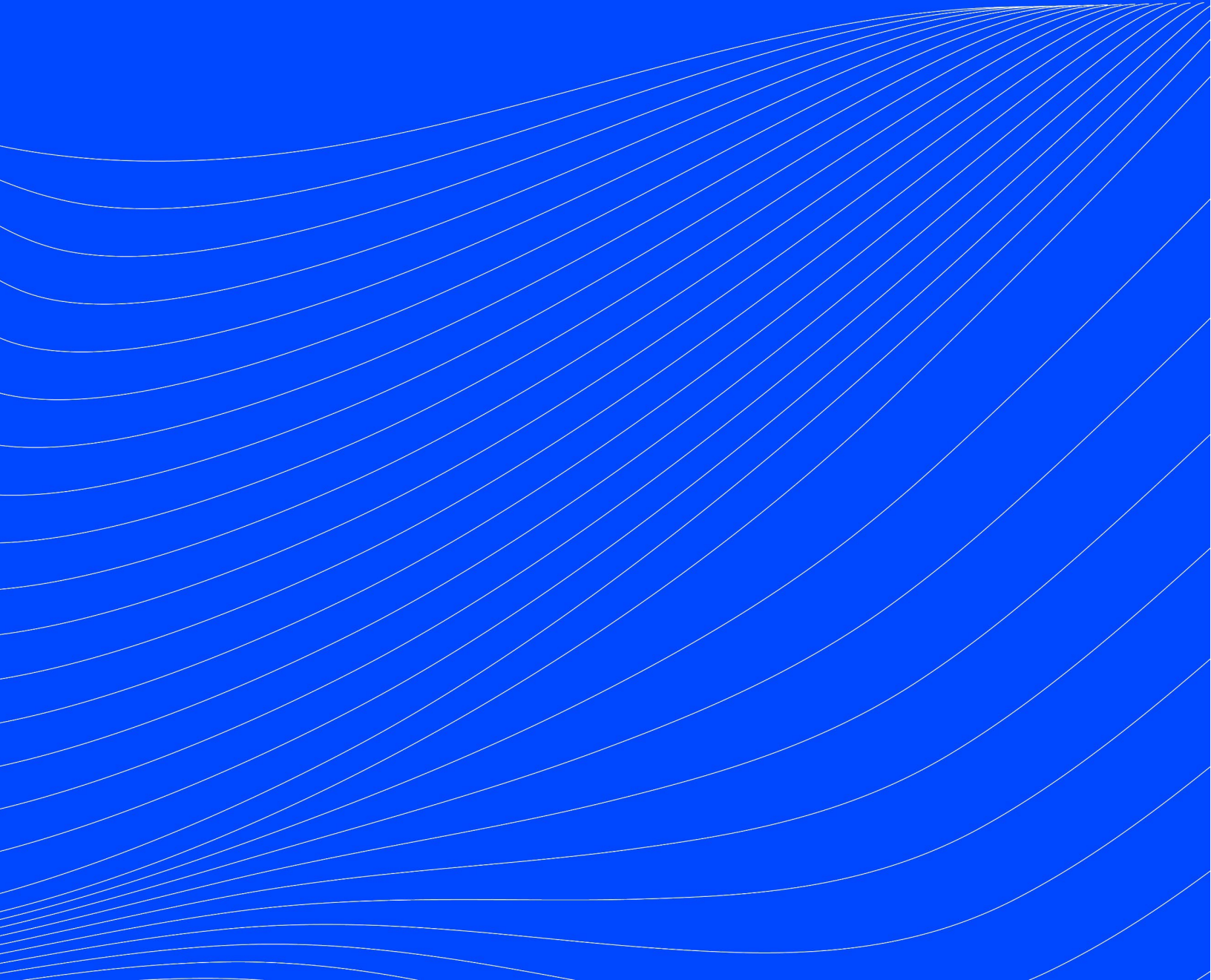# HUSCH BLACKWELL

A Legal Primer on Artificial Intelligence and Intellectual Property

A Legal Primer on Artificial Intelligence and Intellectual Property[1]

On November 30, 2022, OpenAI captured the world's attention when it introduced version 3.5 of its ChatGPT service. What began as cocktail hour conversations and funny experiments quickly made its way into boardrooms and budgets. Goldman Sachs reported AI investment was forecast to approach $200 billion globally by 2025, and 47% of top technology officers (e.g. CIO, CTO) reported to CNBC that AI was their number one budget item in 2024. Most of this focus has been on what is known as "Generative AI" (Gen-AI), which can output seemingly new content such as emails to customers, sales pitches, and even artwork and company logos.

It did not take long for the lawsuits to start. Stories about lawsuits filed by well-known and respected companies and individuals like the New York Times and George Carlin soon began appearing next to articles that touted the benefits and cost-saving potential of Gen-AI. Other risks of Gen-AI soon began appearing as well. News sources reported stories where AI "hallucinations" caused mistakes that ranged from humorous[2] to concerning[3].

Companies are left in a conundrum. Faced with customer, employee, and management demand to implement Gen-AI tools to keep up with competitors while simultaneously reading stories of companies being sued for intellectual property infringement[4], those charged with risk mitigation and management must answer several questions:

- What is Artificial Intelligence (AI)?

- How does Gen-AI differ from earlier versions of AI?

- How does Gen-AI get its data/how does Gen-AI learn?

- Is Gen-AI secure?

- What intellectual property risks can my use of Gen-AI present?

- How can I guard against risks that I will be sued for IP infringement or will destroy my company's IP by using Gen-AI?

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[1] "A Legal Primer on Artificial Intelligence and Intellectual Property" was written by Dustin Taylor, a partner with Husch Blackwell's Denver office and a member of the firm's intellectual property practice group.

[2] GPT-3 responded to a question by answering "the Golden Gate Bridge was transported for the second time across Egypt in October of 2016." Before the 2024 Super Bowl, Google and Microsoft's chatbots were caught making up Super Bowl statistics. The two bots disagreed as to which team won.

[3] Attorneys cited several nonexistent cases (complete with manufactured quotes and holdings) in a May 2023 case in the Southern District of New York. Similarly, a well-respected news outlet was forced to issue corrections after it published a Gen-AI authored article that gave inaccurate personal finance advice when it was asked to explain compound interest.

[4] While the authors of this article primarily focus on the intellectual property concerns relating to Gen-AI, the Husch Blackwell artificial intelligence service team can help you address all the risks of Gen-AI. To learn more about areas other than intellectual property, check out what other members of the service team have said about Gen-AI.

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This article answers those and other questions and serves as a starting place to help businesses evaluate potential use of Gen-AI. Future articles will delve deeper into intellectual property issues raised by Gen-AI.

WHAT IS ARTIFICIAL INTELLIGENCE (AI)?

Although a seemingly simple question, there is disagreement and confusion as to how to define AI. Many point to the 1950 work of Alan Turing, who developed the "Turing Test" where a human would try to distinguish between a human and computer text response. (Presumably, any computer answer that tricked the human would qualify as AI.) Others think only technology that matches examples preconceived by science fiction such as Cylons, Jarvis, or Kitt should qualify as AI. According to IBM (whose AI tool "Watson" made history by beating out human contestants to win Jeopardy in 2011), however, AI is simply "a field, which combines computer science and robust datasets, to enable problem-solving."

Defining what is, and is not, AI will become increasingly important. A recent New York City law requires employers using AI to independently audit their systems for bias. Several other states have proposed similar bills. New York City defines AI as:

An umbrella term without precise boundaries, that encompasses a range of technologies and techniques of varying sophistication that are used to, among other tasks, make predictions, inferences, recommendations, rankings, or other decisions with data, and that includes topics such as machine learning, deep learning, supervised learning, unsupervised learning, reinforcement learning, statistical inference, statistical regression, statistical classification, ranking, clustering, and expert systems.

The New York City guidance suggests this definition would include not just Gen-AI, but also: (1) "machine learning algorithms, such as those that recommend viewing options on streaming platforms. . ." and (2) "computer vision technologies, such as those that match identities based on fingerprint or iris scans, that detect objects in images to enable better search and accessibility, that enforce cash-free tolling, or that count pedestrians in a public space."

WHAT IS GENERATIVE AI? HOW DOES IT DIFFER FROM PREVIOUS FORMS OF AI?

Although AI certainly includes more than Gen-AI, it is this latter category that has captured the attention of companies and the general public. Gen-AI is an umbrella term that refers to any AI that has the capability to generate content, such as text, images, code, video, etc. It includes well-known services like text-generative ChatGPT, Microsoft Copilot, and Google's Gemini, as well as image generative services such as Dall E by OpenAI and Craiyon.

At their core, traditional machine learning and Gen-AI are very similar. In implementation and scope, however, they are very different. Whereas "traditional" AI may, for example, be trained on millions of users' video-watching history to suggest what a specific user may like to watch next, Gen-AI is trained on hundreds of millions (or even billions) of wide-ranging media to suggest (or generate) new content. Whereas "traditional" AI may be used to make suggestions (such as what movie to watch next), Gen-AI is being used to create new content, including emails to customers, internal memorandum, or code for a new application to be used by customers.

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HOW DOES GEN-AI GET ITS DATA/HOW DOES GEN-AI LEARN?

Gen-AI must first be "trained" to generate "new" content. Text-based Gen-AI (such as ChatGPT) is trained on written material, while image-based Gen-AI (such as Dall-e) is trained on images. Although earlier models were trained on limited amounts of information, for Gen-AI products to answer the wide range of questions posed to them, developers needed a practically limitless source of training material. Fortunately (for them) they had one— the internet. Gen-AI developers use web crawlers (similar to those used by search engines or archival sources such as the WayBackMachine) to capture as much information as possible and train their Gen-AI using that information.

OpenAI and other Gen-AI companies also offer "custom-tuned" products that companies can train on their own proprietary data. These products come pre-trained up to a specific point in time, after which companies can continue to train the Gen-AI tool using the company's own information.

IS GEN-AI SECURE?

Maybe. Use of open-source or public Gen-AI is not secure. OpenAI and others explain that information submitted to their public-access Gen-AI tools is used to continue training the tool. If a company is not using a public-access Gen-AI tool, however, the data *should* be secure. OpenAI claims the information companies provide to any custom-tuned products will not be disclosed outside the company and will not be used to train models outside of the client company. It is important to carefully read any license or user agreement for any Gen-AI tool to confirm any data your company provides remains confidential.

WHAT INTELLECTUAL PROPERTY RISKS CAN MY USE OF GEN-AI PRESENT?

A lot. Intellectual Property (IP) is generally understood to consist of four components: copyright, trade secret, trademark, and patent. Together, these doctrines protect new and/or proprietary implementations of ideas. Critically, IP does not protect the ideas themselves, but rather the way in which the ideas are implemented or take shape. So while IP won't protect an idea for a pizza shop, it can protect the pizza sauce recipe (trade secret), the pizza store's name (trademark), the store's website (copyright), and the oven in which the pizza is cooked (patent).

IP law will only protect the aspects of IP that are new, created by a human, and unique to the IP owner. If something is well-known and deemed to belong to the public at large, IP law will not protect it. As more companies and individuals begin using Gen-AI, their use creates numerous IP risks: both to IP that already exists and to the ability to claim new IP. In the paragraphs below, we highlight some of these risks. We will cover the risks in more detail in future posts, so be sure to subscribe to learn more.

Copyright

Use of Gen-AI presents significant copyright issues. First, while website copy or images can be protected by copyright if they are human-created, they cannot be if Gen-AI creates the content. Thaler v. Perlmutter, No. CV 22-1564 (BAH), 2023 WL 5333236, at *6 (D.D.C. Aug. 18, 2023) (rejecting arguments that the material is copyrightable because the human "provided instructions and directed his AI to create the Work," "the AI is entirely controlled by [the human]," and that "the AI only operates at [the human's] direction"). Second, use of

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Gen-AI can also expose a company or individual to claims of copyright infringement. Indeed, most Gen-AI cases that have been filed to date allege copyright infringement by copyright owners naming the companies who design and program the Gen-AI tools, rather than the end users as the defendants in these lawsuits. Companies that have custom-trained Gen-AI tools may later find themselves named as defendants in copyright cases if they use copyrighted material to train those tools.

Trade secret

Unlike copyright, patent, and trademark law—each of which require the IP-owner to disclose their IP to place the public on notice of the owner's rights—trade secret law requires the IP to be kept, well, "secret." The Defend Trade Secrets Act (the federal trade secret law), defines a "trade secret" to include "all forms and types of . . . business . . . information" so long as "the owner thereof has taken reasonable measures to keep such information secret" and "the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means . . . ." 18 U.S.C. § 1839(3).

If information claimed to be trade secret was originally created in whole or in part by Gen-AI, it is significantly less likely to be considered a "trade secret." Moreover, if trade secret information is publicly disclosed when used to train Gen-AI, the information will likely be deemed to no longer meet the trade secret definition. Extreme care should be taken, therefore, to protect against the accidental disclosure of confidential information when using Gen-AI to avoid destroying trade secrets.

Patent

On February 13, 2024, the United States Patent and Trademark Office (USPTO) issued guidance entitled "Inventorship Guidance for AI-Assisted Inventions." Although the USPTO did not completely foreclose the ability to obtain a patent if the inventor used Gen-AI during the invention process, it did reiterate the restrictions that only a natural person can be deemed an inventor. As a general rule, assume that like copyright, something generated by Gen-AI technology cannot be protected by patent.

Unlike copyright, however, AI IP lawsuits to date have not (yet) alleged patent infringement. This is likely because the number of patents claiming the use of Gen-AI is very small. As a result, there are less rights to allege to have been infringed. Furthermore, patent infringement is limited to when the defendant makes, sells, offers for sale, or imports into the United States a product or uses process that reads on the patented invention. This is more likely to occur by another Gen-AI company, rather than an end-user of Gen-AI services.

Trademark

Trademark law has to date been the least affected by Gen-AI. Unlike patent and copyright law, trademark law does not require the word- or design-mark to have been created by a human to receive protection. In theory, a company could ask Gen-AI to create a new logo or design and then register that design as a trademark for the company (assuming the company has, or intends to, use the mark to offer goods/services in interstate commerce).

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Companies should still be careful, however. Because Gen-AI tools are trained on existing material, there is a significant risk that any logo or design is confusingly similar to an existing trademark. Use of Gen-AI to create marks which are then used to offer goods and services can present risk of trademark litigation.

HOW CAN I GUARD AGAINST RISKS THAT I WILL BE SUED FOR IP INFRINGEMENT OR WILL DESTROY MY COMPANY'S IP BY USING GEN-AI?

Companies and individuals concerned about the risks imposed by Gen-AI can take several steps to reduce those risks. First, adopt an AI policy that sets out clear guidelines on how AI can (and cannot) be used at your company. The policy should focus not only on what tasks can use Gen-AI (the output), but what information can be used to accomplish those tasks (the input). Second, perform an audit to determine to what extent your company is potentially disclosing proprietary information to open-source resources, such as GitHub. Third, keep up to date on changing laws that may affect your IP rights. Consider signing up to our resources to be notified of new posts.

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