COMPUTER AND TECHNOLOGY SECTION

Circuits

e-Journal of the Computer & Technology Section
of the State Bar of Texas
September 2023

Table of Contents

Stay tuned for our FREE CLE each quarter!

Table of Contents

Letter from the Chair

By Reginald A. Hirsch

First, I want to thank you for your membership, and I would appreciate your thoughts and comments regarding our Section. Please feel free to email me at reghir@hirschfamilylaw.com with any comments or questions regarding the Computer and Technology Section of the State Bar of Texas.

As the new Chair of the Council of the Computer and Technology Section of the State Bar of Texas, I want to tell you about some exciting things we have for you this year.

This month's issue of *Circuits* is the first of our annual quarterly issues that will appear and is available to our members. Sally Pretorius is our esteemed editor assisted by Katie Stahl. The Council strives to provide you with articles regarding current issues, technology and tips that you can utilize in your daily practice.

We strive in our Continuing Legal Education (CLE) courses and CLE publications to bring you the most current information regarding technology and the law. This month we are proud to have Mr. John Browning to present one of our four free CLE courses entitled "Let's Chat about ChatGPT" on September 29th,2023 from noon to 1:00 p.m. John is a former Chair of this Section and currently Chair of the State Bar of Texas AI Taskforce, where he is joined currently by two (2) additional members of our Section. Please register for this exciting presentation at https://tinyurl.com/5n8pbsvn.

This year, in terms of exciting technology, has seen the emergence of artificial intelligence (AI). I am sure you have seen numerous articles on ChatGPT and other AI Apps that are based on different forms of Large Language Model (LLM). The Council, in recognition of the quick adoption of AI has and will take an active role in presenting articles and presentations over the course of the year regarding AI and the Law. Please stay connected as we write, publish, and present various issues regarding the usage of AI and its current and future impact on the practice of law. This year because of the enormous interest in AI and related technology we are currently creating a Speaker's Bureau for the State Bar of Texas to provide a list of speakers well versed in technology and the law. Thanks to our Secretary Mitch Zoll who has undertaken this task of putting together the Speaker's Bureau. If you have a group, a local bar association, and other State Bar Sections or organizations that would like one of our speakers to do a presentation for you, please let us know.

On December 1,2023 we will present our annual "Justice for All" CLE live in Austin, Texas at the State Bar Building. We have speakers and presenters who will take you from A to Z regarding technology and the law. We know that technology can be challenging to lawyers, and we will lead off our CLE presentation with our very popular "Boot Camp for Lawyers" topic to take you through what and how you can use technology and programs to enhance your legal practice. In addition to other "hot" topics regarding technology and the law, we have a superb panel of State and Federal Judges presenting on the Challenges of AI in the Courts. For non-members, we charge $150.00 and for our members we charge $125.00. Because we are committed to providing CLE programing to the legal aid lawyers in our community, we do not charge for their attendance. With your Section membership, you can get free access to our "Texas Bar Legal" app, which is available to Apple and Android mobile phone users as well as Web access. Thanks to Mark Unger for updating the "Texas Bar Legal" app for our Section all through the years. And yes, the "Texas Bar Legal" app has been updated on the current Texas statutes passed by this year's Texas Legislature. For more information regarding the "Texas Bar Legal" app, please go to Get Our App! - Computer & Technology Section (sbot.org). This is a terrific benefit to your Section membership with no additional cost to you. am pleased to announce and congratulate our four newest council members, who will serve a three year term starting this year:

Sean Hamada
Kellye Hughes
Katie Stahl
Sanjeev Kumar

I am especially proud to have a GREAT Executive Committee composed of:

Pierre Grosdidier – Immediate Past Chair
William Smith, Chair-Elect
Lavonne Burke, Treasurer
Mitch Zoll, Secretary

I want to personally thank my Executive Committee members for their service as well as our Council members and ex -officio members for their continued contributions to our Section.

A special recognition is due our Judicial Representatives, State District Judge- the Honorable Roy Ferguson, State Appellate Judge – the Honorable Emily Miskel and Federal Judge – the

Honorable Xavier Rodriguez, who continue to provide our Council with counsel, wisdom and perspective.

For more information regarding the foregoing Council members, Officers and Judicial Representatives please see: Section Leadership – Computer & Technology Section (sbot.org).

Finally, thanks to each and every one of you for this special honor of serving you as this year's Section Chair.

Reginald A. Hirsch
Section Chair, 2023–24
Computer & Technology Section
State Bar of Texas

COMPUTER AND TECHNOLOGY SECTION

Texas Supreme Court Sets Parameters Governing Discovery of Cellphone Data

By Pierre Grosdidier

Plaintiffs logically seek discovery of the contents of accident partakers' cellphones given these devices' fabled propensity to distract their owners. In *re Kuraray America, Inc.*, the Texas Supreme Court held that a party seeking production of cell phone data "must allege or provide some evidence" that cellphone use contributed to the incident for which discovery is sought.[1] Even then, a court may only order production of cellphone data for the time window during which cellphone use "could have contributed to the incident." At this initial stage, therefore, temporally broad cellphone content discovery is impermissible. Only if this initial production establishes a nexus between cellphone use and the incident may the court consider whether a broader temporal discovery request is justified.[2]

Kuraray suffered an accidental ethylene vapor release at its chemical plant in Pasadena, Texas. The ethylene ignited and the resulting fire caused multiple injuries that spawned numerous lawsuits. Plaintiffs asserted negligence claims against Kuraray but did not claim that cellphone use or abuse by Kuraray employees contributed to the accident.[3] Nonetheless, deposition testimony from a supervisor indicated that Kuraray experienced occasional (but otherwise unspecified) cellphone use issues in the plant's control room.

In discovery, Plaintiffs sought all information collected by Kuraray from employee phones after the accident. Kuraray instead offered to produce relevant text messages and photographs from the phones of employees that had a connection with the accident. Plaintiffs moved to compel production, arguing that board operators' cellphone use and abuse, and the ensuing distraction, were a potential cause of the release and, therefore, relevant to their claims and discoverable. They also asserted the relevance of evidence of the employees' activities gathered from their phones before and during the accident. The trial court eventually ordered production of cellphone data for three control room board operators starting four months prior to the release, and for two supervisors starting six weeks prior to the release. On

---

1 656 S.W.3d 137, 142 (Tex. 2022) (per curiam) (orig. proceeding).

2 *Id.*

3 *Id.* at 139–40.

reconsideration, before it moved for mandamus, Kuraray maintained that the lack of nexus between the accident and the cellphone data made the latter irrelevant, and their production beyond the scope of permissible discovery.[4] The Texas Supreme Court agreed.

Citing cases from the Tyler and Austin Courts of Appeals that addressed the scope of cellphone data production, the Texas Supreme Court held that the relevant initial inquiry in this case is: whether cellphone use distracted the employees and contributed to the release. Absent this nexus, employees' cellphone use outside the incident's timeframe, and Kuraray enforcement, or failure to enforce, its control room cellphone policies, are "neither relevant nor discoverable."[5] Moreover, the Court added, the trial court should have inquired about this nexus on an individual basis. The two supervisors and one of the board operators showed no cellphone activity that could reasonably have contributed to the release. Ordering earlier cellphone records in their case was, therefore, an abuse of discretion. The other two operators showed some, albeit minimal cellphone activity during the timeframe before the release. Plaintiffs bore the burden, and the trial court was required to consider, whether this use "could support a finding that cell-phone use contributed to the release." Accordingly, the Supreme Court vacated the trial court's order to compel discovery."[6]

---

4 *Id*. at 140-41.

5 *Id*. at 142-44 (citing *In re UV Logistics, LLC*, No. 12-20-00196-CV, 2021 WL 306205, at *1 (Tex. App.—Tyler Jan. 29, 2021, orig. proceeding); *In re Padilla*, No. 03-18-00477-CV, 2018 WL 4087733, at *2 (Tex. App.—Austin Aug. 28, 2018, orig. proceeding)).

6 *Id*. at 144-45.

About the Author

Pierre Grosdidier is a litigation attorney in Houston. He is board certified in construction law by the Texas Board of Legal Specialization. Pierre's practice also includes data privacy and unauthorized computer access issues and litigation. Prior to practicing law, Pierre worked in the process control industry. He holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas, an AAA Panelist, a registered P.E. in Texas (inactive), a member of the Texas Bar Foundation, a Fellow of the American Bar Foundation, and the State Bar of Texas Computer & Technology Section Chair for 2022–23. He was elected Medium Section Representative to the State Bar of Texas for the 2023–26 term.

Autonomously Created AI Works Have No Copyright Claim

By Sean T. Hamada

Over the past year, there have been incredible developments in the field of Artificial Intelligence (AI). New AI systems are capable of writing books and poems, creating songs that mimic the voices of specific musicians, and have even created award winning art and photorealistic images. Despite the recent accolades that AI generated art has received, attempts to copyright works created by AI without human involvement have met with less success.

In a recent memorandum opinion issued in *Thaler v. Perlmutter*, No. 22-1564 (D.D.C. Aug. 18, 2023), U.S. District Judge Beryl Howell affirmed the U.S. Copyright Office's denial of a registration of a work solely generated by plaintiff Stephen Thaler's "Creativity Machine." The court ruled that copyright protection is limited to works created by humans and cannot be extended to works generated autonomously by artificial intelligence systems.

The court's ruling is based on the premise that human creativity is the core element of copyrightability, citing to previous cases such as *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884), that have recognized the need for human involvement in the creative process for copyright protection. In *Sarcony*, the Supreme Court held that photographs were copyrightable because they represented the original intellectual conceptions of the photographer, despite being generated by a mechanical device. Judge Howell also cited other cases where copyright protection was denied for works created without human involvement, such as works claimed to be the words of celestial beings or works generated by AI systems.[1] In so doing, the court affirmed the understanding that copyright law is designed to protect the creative contributions of human authors. Therefore, the court concluded that the Copyright Office acted properly in denying copyright registration for a work created without human involvement.

- Do text prompts and revisions count as human involvement in AI generated works? Not when the "traditional elements of authorship" are determined and executed by the AI technology rather than a human, and the work contains an amount of AI-generated material that is more than *de minimis*.

[1] *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 958-59 (9th Cir. 1997)

In *Thaler*, the court noted that Thaler attempted to "transform the issue presented here, by asserting new facts that he "provided instructions and directed his AI to create the Work," that "the AI is entirely controlled by [him]," and that "the AI only operates at [his] direction," — implying that he played a controlling role in generating the work."[2] However, the court noted that judicial review of a final agency action under the Administrative Procedure Act (APA) is limited to the administrative record. Since Thaler had informed the Copyright Office that the work was created autonomously by his Creativity Machine and that his claim to copyright was based solely on ownership of the machine, and since Thaler never attempted to correct this information, the administrative record clearly showed the absence of any human involvement in the creation of the work. Therefore, based on the facts presented in the administrative record, the court concluded that a work generated autonomously by a computer system is not eligible for copyright.

On September 5, 2023, the U.S. Copyright Office Review Board (Board), citing to *Thaler*, recently rejected a similar argument promulgated by Jason M. Allen who attempted to register an award winning two-dimensional artwork titled "Théâtre D'opéra Spatial" using a text-to-picture artificial intelligence service called Midjourney. In his requests for reconsideration, Allen argued, among other things, that "his 'creative input' into Midjourney, which included "enter[ing] a series of prompts, adjust[ing] the scene, select[ing] portions to focus on, and dictat[ing] the tone of the image," is "on par with that expressed by other types of artists and capable of Copyright protection."

While the Board acknowledged that the process of prompting can involve creativity, it did not mean that providing text prompts to Midjourney "actually form[s]" the generated images because Midjourney does not understand grammar, sentence structure, or words like humans. "[W]hen an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the 'traditional elements of authorship' are determined and executed by the technology—not the human user."[3] Thus, Allen's actions as described did not make him the author of the Midjourney Image because his sole contribution to the Midjourney Image was inputting the text prompt that produced it, and the work contained more than a de minimis amount of content generated by AI. Specifically, the Board concluded that "the Midjourney Image, which remains in substantial form in the final Work, is not the product of human authorship."

---

[2] Pl.'s Mem. At 36-37.

[3] Citing to the AI Registration Guidance, 88 Fed. Reg. at 16,192

- What if there is enough human involvement? Are there other copyright issues for AI generated works? Possibly, if the AI system is trained from image-text datasets based upon copyrighted images.

Many generative AI models utilize source material and training sets in order to learn how to create a work or respond to a prompt. In a recent lawsuit filed by Getty Images, Inc. entitled *Getty Images (US) v. Stability AI, Inc.*, No. 1:23-cv-00135 (D. Del. Filed Feb. 3, 2023), Getty images has alleged, among other things, that Stability AI, Inc. created and maintains a model to generate digital content using AI called Stable Diffusion, and that the dataset used to train Stability Diffusion is based upon millions of Getty Images' copyrighted images and associated text. Getty Images further alleges that in training the Stable Diffusion model, Stability AI has benefitted from Getty Images' image-text pairs that are not only accurate, but detailed. While Stability AI has made Stable Diffusion open source, Getty Images alleges that Stability AI is also directly monetizing the tool through a commercial platform it calls DreamStudio and, upon information and belief, alleges that since August 2022, millions of people already have used DreamStudio and collectively created hundreds of millions of images without paying Getty Images or other content owners from which it reproduced copyrighted content without permission to train its highly lucrative model.

Hence, even if the underlying work upon which an AI work is created originates from human authorship, the AI generated work may nevertheless infringe a copyright. This may certainly be the case if the use of a copyrighted work shares substantially the same purpose as the original work, and the use is of a commercial nature. See, e.g., *Andy Warhol Found. For the Visual Arts, Inc. v Goldsmith et al.*, No. 21-869 (U.S. May 18, 2023) (holding that petitioner Andy Warhol Foundation did not make fair use of respondent Goldsmith's copyrighted photograph). While this case did not involve the use of AI to transform an original copyrighted work, it is certainly conceivable that a similar copyright violation claim involving an AI "transformative" work may arise in the near future. *Andy Warhol Found. For the Visual Arts, Inc. v Goldsmith et al* took four years from trial court to a decision by the U.S. Supreme Court. Since the *Thaler* case is likely to be appealed, and Allen's counsel has stated the intention to appeal the Board's decision, these and the *Getty Images* case should continue to be monitored as they may eventually be heard by the U.S. Supreme Court.

About the Author

Sean Hamada is a founding principal and co-founder of Hamada Smith, PLLC and practices in the Firm's litigation section. Sean has more than 30 years of experience representing companies and individuals in Texas and California on a variety of commercial and business litigation matters, employment disputes related to restrictive covenants and trade secrets, business transactions, arbitrations, and trials.

Google Searches are Not Beyond the Reach of Fourth Amendment Reverse Keyword Search Warrants

By Pierre Grosdidier

In *Commonwealth v. Kurtz*, the Superior Court of Pennsylvania recently upheld the constitutionality of a Google reverse keyword search warrant.[1] Authorities use "reverse warrants" to force Internet search engine companies to provide information on users who have searched specific words. These warrants arguably cast the broadest possible digital dragnets for suspects on a worldwide scale.

In *Kurtz*, Pennsylvania authorities identified a suspect with a reverse warrant based on the name and home address of a rape victim for the week prior to the crime. The victim lived in a secluded home and her husband had left for his night shift that evening at a correctional facility where, authorities later discovered, her assailant also worked. Authorities obtained the I.P. address of a person who had performed two matching searches hours before the crime. The rest was what is now routine sleuthing. The suspect was physically identified via the registry of Internet addresses and his Internet service provider. Then, DNA collected from one of his discarded cigarette butts matched that of semen collected from the victim. After his arrest, Kurtz reportedly admitted to having raped the victim, along with having committed four other home invasions during one of which he raped another victim.[2] Kurtz moved to suppress the evidence gathered from the reverse search during his consolidated trial related to the five matters, but the court denied the motion.

On appeal, Kurtz argued, *inter alia*, that the reverse warrant lacked probable cause and that he enjoyed a reasonable expectation of privacy in the terms he submitted to Google's search engine. The Superior Court rejected both arguments and affirmed the trial court's denial.[3]

The Superior Court easily dispatched Kurtz's second argument with the third-party doctrine, which holds that a person abandons any legitimate privacy interest in property or information that the person shares with another. Under these conditions, the person assumes the risk that

---

1 No. 811 MDA 2021, 2023 WL 3138750, --- A.3d --- (Pa. Super. Ct. Apr. 28, 2023).

2 *Kurtz*, 2023 WL 3138750, at **1-2.

3 *Id.* at **3-4.

the third party will share the disclosure with the authorities. Here, Kurtz abandoned any expectation of privacy in his Google search terms the moment he pressed the "Enter" key. Invoking *Carpenter v. United States*, Kurtz also argued that Google searches were now an indispensable feature of contemporary society, like cell phones, thus requiring a warrant, like cell-site location information.[4] But the Court rejected the analogy: cellphones pinged their towers in the background with no user action, whereas Kurtz affirmatively searched Internet with Google's engine. Also, the disclosure of Kurtz's search terms for a week did not reveal the details of his private life, as would cell-site location information.[5]

Kurtz fared no better with his arguably more interesting probable cause argument, which claimed that the reverse warrant's supporting affidavit was merely speculative and offered no basis to believe that the perpetrator would use Google to plan his crime. The Court reiterated that a judge's role when approving a warrant is "'to make a practical, common[-]sense assessment of whether, given all the circumstances set forth in the affidavit, a fair probability exists that contraband or evidence of a crime will be found in a particular place.'"[6] The Court accepted the affiant's reasoning that the secluded, barely noticeable nature of the victim's residence suggested that her assailant might have had known about her and researched her name and address on Internet. The fact that fantasy drives many sexual predators, and that the assailant committed his crime when her husband worked on the night shift suggested that he had stalked her and investigated her husband's work schedule. Given the pervasive use of Internet searches, the affiant reasonably concluded that the assailant would turn to Google to plan his crime. The affidavit, therefore, advanced sufficient facts to "show a 'fair probability'" that a reverse warrant would reveal evidence related to the assailant's identity.[7]

---

4 *Id*. at **3, 6 (citing *Carpenter v. United States*, --- U.S. ---, 138 S. Ct. 2206 (2018)).

5 *Id*. at *6.

6 *Id*. (citing *Commonwealth v. Harlan*, 208 A.3d 497, 505 (Pa. Super. Ct. 2019)).

7 *Id*. at **6-7.

About the Author

Pierre Grosdidier is a litigation attorney in Houston. He is board certified in construction law by the Texas Board of Legal Specialization. Pierre's practice also includes data privacy and unauthorized computer access issues and litigation. Prior to practicing law, Pierre worked in the process control industry. He holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas, an AAA Panelist, a registered P.E. in Texas (inactive), a member of the Texas Bar Foundation, a Fellow of the American Bar Foundation, and the State Bar of Texas Computer & Technology Section Chair for 2022–23. He was elected Medium Section Representative to the State Bar of Texas for the 2023–26 term.

The State Bar of Texas' Taskforce for Responsible AI in the Law – An Update

By Hon. John G. Browning

Artificial Intelligence (AI has captured the public's consciousness. The concept of "AI actors" reading lines generated by AI tools has been at the heart of the Hollywood actors' and writers' strikes, the U.S. government has summoned leading tech visionaries like Elon Musk and Bill Gates to the Hill to discuss AI regulation, and AI's use in "predictive policing" by law enforcement has been hotly debated. Yet, no one seems to be more aware of AI's potential—and its ethical risks—than lawyers. A recent LexisNexis survey found that 39% of lawyers, 46% of law students, and 45% of consumers agree that Generative AI tools will significantly transform the practice of law.

A number of bar associations and other organizations have decided to meet the challenge of AI head-on. MIT convened a taskforce "to examine and report upon principles and guidelines for applying due diligence and legal assurances applicable to Generative AI for law and legal processes." Not to be outdone, Harvard Law School and its Berkman Center for Internet and Society announced the launch of its Initiative on Artificial Intelligence and the Law. The California State Bar's Committee on Professional Responsibility and Conduct plans to craft guidance for lawyers on the use of AI, and in July, the New York State Bar Association announced the formation of its own taskforce. The ABA weighed in in late August, announcing the start of its own Task Force on the Law and Artificial Intelligence.

But amidst the rush to stake a claim in the regulation of AI, one state stood out. After becoming President of the State Bar of Texas in late June, Cindy Tisdale made one of her first official acts assembling a working group of attorneys to examine the ethical pitfalls and practical uses of AI. "We need to get ahead of this," she realized as she found that AI was foremost on the minds of lawyers she was meeting with around the state. During the summer, mainstream media was awash with reports of the two New York lawyers whose use of ChatGPT to research and write a brief went horribly awry. In *Mata v. Avianca*, the lawyers cited fake cases with fake citations that ChatGPT had generated in a "hallucination," leading U.S. District Court Judge Kevin Castel to sanction the lawyers $5,000. Similar episodes have happened elsewhere, including in Texas, prompting judges nationwide to start issuing standing orders addressing the use of generative AI in their courts.

President Tisdale knew that Texas lawyers would need guidance on AI. Immediately after taking office, she decided to assemble her working group of lawyers, starting with its Chair, the Hon. John G. Browning. Browning, a former appellate justice and past chair of the Computer & Technology Section, who'd written numerous articles on AI, quickly accepted. The pair then began assembling a "dream team" of lawyers, judges, technology providers, and legal academics. The working group had its first meeting within a month of the Annual Meeting, and it was clear that it faced a daunting task that necessitated more hands on deck. The "working group" has since expanded to a full-fledged taskforce from all around the state and even outside Texas. It includes, besides Browning, three past chairs of the Computer & Technology Section, representatives from the state and federal judiciary, AI technology providers, and lawyers from law firms big and small from all over the state. On September 7, the State Bar Board's Executive Committee approved transforming the working group into an actual taskforce, illustrating what President Tisdale describes as a "commitment to staying on the forefront of technological advancements and their implications for the legal profession."

So what will the Taskforce for Responsible AI in the Law (TRAIL) do? It is focused on "educating Texas practitioners about the benefits and risks of AI and fostering the ethical interpretation of artificial intelligence within the legal profession in Texas," according to its mission statement. Exploring the uncharted waters of AI in the legal profession with a mixture of caution and optimism, the Taskforce will investigate how practitioners can leverage AI responsibly to enhance delivery of legal services in Texas while upholding the integrity of the profession.

I know what you're thinking: sounds great, but what will you actually *do*? The Taskforce is keenly aware that lawyers in Texas need to know what AI can do, what it can't do, and what the ethical risks are. The first goal is to create some type of reference work or white paper, a resource for Texas lawyers to consult for the many questions they might have. Continuing on that theme of educating lawyers, Taskforce members have been, and will continue to be, engaged in outreach—providing speakers on AI for local bar association meetings, judicial conferences, Inn of Court gatherings, etc. The Taskforce also hopes to create an "AI toolkit" of sorts, which will provide practical guidance to Texas lawyers on AI tools that might be useful for certain legal tasks.

Finally, the Taskforce is charged with making recommendations about AI to the State Bar as well as various related agencies. This may involve recommending that the State Bar's Professional Ethics Committee issue an ethics opinion on the ethical ramifications of using AI, or possibly asking the Bar's MCLE Committee to examine the potential for adding a mandatory

technology component to the annual CLE requirements. The Taskforce may recommend other actions for the State Bar to consider.

President Tisdale had a tremendous response to her call for volunteers for the Taskforce, and unfortunately, the need to keep the group to a manageable level meant having to pass on some who asked to serve. But with AI having such a dramatic impact on all corners of our profession, from legal education to the judiciary, this Taskforce has its work cut out for it.

About the Author

Hon. John G. Browning is a partner in the Plano office of Spencer Fane, and a former Justice on Texas' Fifth District Court of Appeals. He also serves as the Distinguished Jurist in Residence at Faulkner University's Thomas Goode Jones School of Law, and as the Chair of the Institute for Law & Technology at the Center for American and International Law. The author of 5 books and more than 50 law review articles, Justice Browning is a graduate of Rutgers University and the University of Texas School of Law.

DC District Court: AI-Created Works Ineligible for Copyright

By Dennis Crouch

On August 18, 2023, a federal court has dealt a blow to the prospect of granting copyright protections to works created entirely by artificial intelligence systems. In *Thaler v. Perlmutter*, No. 22-1564 (D.D.C. August 18, 2023), Judge Beryl A. Howell ruled that because AI systems lack human authorship, their output is ineligible for copyright.

The case centers around an image generated by an AI system called the Creativity Machine, with the system's owner Stephen Thaler attempting to register the generated image with the U.S. Copyright Office. Dr. Thaler is the same individual who unsuccessfully attempted to protect an invention created by a separate machine that he had titled DABUS.

In this case, Thaler listed the Creativity Machine as the author and designated the work as created autonomously by the AI, with ownership transferring to himself as the owner and creator of the machine. The Copyright Office denied the registration application on the grounds that copyright law requires human authorship. Thaler challenged the rejection in court, but Judge Howell upheld the Copyright Office's decision.

In her ruling, Howell emphasized that human authorship has underpinned copyright law since its Constitutional inception, which enables Congress to grant exclusive rights to "authors." While copyright has adapted over time to cover new technologies like photography and film, Howell wrote, it has never extended so far as to protect works created without any human involvement. The court does not discuss in any detail the work made for hire doctrine that does permit non-human authorship. However, even in that situation a human underlies the creation.

Judge Howell also noted that machine learning systems like the Creativity Machine do not require copyright incentives, since they operate algorithmically rather than responding to legal rights and protections. The opinion concludes unambiguously that "in the absence of any human involvement in the creation of the work, the clear and straightforward answer is the one given by the [Copyright Office]: No."

While this ruling provides clarity for now, the accelerating development of AI systems means the issue is unlikely to disappear. As AI grows more advanced and autonomous in generating creative works, questions around copyright protections will likely resurface. Lawmakers may eventually need to reconsider whether AI-created works should be eligible for copyright,

especially if human direction becomes minimal or nonexistent. With the current copyright regime requiring human authorship, however, true machine-created art remains in the public domain.

While this case dealt with a work claimed to be created entirely autonomously by an AI system, a more common scenario today sees individuals using AI tools in tandem with their own creativity and direction. In these situations where both human and machine contribute, questions arise around how much and what kind of human input is necessary to meet the originality and authorship requirements for copyright protection. If an artist uses a generative AI tool to create a work but provides extensive creative guidance and selection, there would seem to be a strong argument for human authorship. However, as AI grows more advanced and autonomous, that human contribution may become limited to little more than prompting the system. In these cases, courts will need to draw difficult lines around what amounts to human authorship. If AI progress continues apace, the fundamental question of whether true machine-created works should be eligible for copyright will require legislative attention.

About the Author

Dennis Crouch is a law professor at the University of Missouri School of Law.

AIn't Nothin' New: A Brief History of Artificial Intelligence

By Charles L. Mudd, Jr., and Katherine L. Stahl

*Adapted from a presentation given by Charles L. Mudd, Jr. at the Internet Law Leadership Summit on May 11, 2023

By now everyone has probably heard or read a little bit about the new frontier of legal issues related to ChatGPT and artificial intelligence in general. However, artificial intelligence has been around for quite some time. We can, in fact, go back many years and even decades. But first we must understand what artificial intelligence really is. AI represents the programmed simulation of human intelligence in machines. You may also have heard the term natural language processing or "NLP." Natural language processing is the interaction between computers and human language to enable computers to understand, interpret and generate natural language. ChatGPT, in fact, comprises artificial intelligence using natural language processing.

To use ChatGPT, a user inputs a language prompt using English and natural language. ChatGPT then generates natural language answers back to the user. The popularly recognized origins of natural language processing go back seven decades to Alan Turing in 1950 and an article titled "Computing Machinery and Intelligence."[1] Even before Alan Turing published his 1950 paper, a paper by Shannon and Weaver in 1949 titled "The Mathematical Theory of Communication"[2] was published which gives the foundation for communication theory. Essentially, Turing proposed that if a machine could carry on a conversation that was indistinguishable from a human conversation, it could be said to be intelligent.

The first demonstration of artificial intelligence was via a program written by British computer scientist, Christopher Strachey which could play a complete game of "draughts" or checkers at a "reasonable speed." Basically, the program played at an expert level by learning from its mistakes and improving its strategy over time. So then, instead of mere natural language processing, Strachey's draughts program was essentially an early example of machine learning.

---

1 A. M. Turing (1950) Computing Machinery and Intelligence. Mind 49: 433-460. You can find the full article linked here: https://redirect.cs.umbc.edu/courses/471/papers/turing.pdf

2 Shannon, C. E., & Weaver, W. (1949). The Mathematical Theory of Communication. Urbana, IL: The University of Illinois Press, 1-117. You can find the full publication here: https://pure.mpg.de/rest/items/item_2383164/component/file_2383163/content

Notably, the computer that was first able to run Strachey's program was the Manchester Mark 1 which became the prototype for the Ferranti Mark 1 and the Ferranti Mark 1 Star.[3] Mary Lee Woods and Conway Berners-Lee met while working on the programming team for the Ferranti Mark 1 and the Ferranti Mark 1 Star. The two married and had four children together. One of those children was Sir Tim Berners-Lee, the inventor of the World Wide Web.[4] So, you could say that the technological world as we know it can trace its origins to a simple game of checkers.

This brings us to the Dartmouth Summer Research Project on Artificial Intelligence which took place in 1956. The project was essentially a weeks-long brainstorming session among various mathematicians and scientists and is considered the founding event of the field of artificial intelligence. In fact, the proposal for the program, authored by Dartmouth College Professor John McCarthy is largely credited with coining the term "artificial intelligence". The proposal reads:

> The study is to proceed on the basis of the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it. An attempt will be made to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves.[5]

To get closer to McCarthy's goal of artificial intelligence, we look to the first language model, ELIZA which was created by Joseph Weizenbaum at MIT in 1966. The first large language model or "LLM" was created at the University of Toronto in 2010. Today's Generative AI such as ChatGPT are powered by complex LLMs trained on trillions of words and natural language tasks. And that "training" has significantly increased in the short time since ChatGPT was launched for public use in November 2022. In November 2022, the language model GPT-3 utilized 175 billion parameters. Now, it is estimated that the latest language model developed by OpenAI, GPT-4 utilizes 1.7 trillion parameters.[6]

---

3 https://en.wikipedia.org/wiki/Manchester_Mark_1

4 https://en.wikipedia.org/wiki/Mary_Lee_Woods

5 McCarthy, J., Minsky, M., Rochester, N., Shannon, C.E., A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence., http://raysolomonoff.com/dartmouth/boxa/dart564props.pdf August, 1955.

6 https://the-decoder.com/gpt-4-has-a-trillion-parameters

Although artificial intelligence started as a mere conceptualization by mathematicians and scientists several decades ago, has become part of the fabric of everyday technology and is now ubiquitous in our lives. And the speed at which it is developing is breathtaking.

About the Authors

Charles L. Mudd, Jr. Seasoned attorney with substantial background in space law, Internet law, defamation law (libel and slander), data security, and intellectual property (trademark, copyright, trade secrets). Substantive focuses also include export control, ITAR/EAR, IP, AI, AR/MR/VR, video gaming, and privacy. Representing individuals, startups, entrepreneurs, and businesses.

Katherine L. Stahl: I have joined Mudd Law out of Chicago to build their Houston office after working with the amazing firm of Lorance & Thompson for 10 years . Before joining Lorance & Thompson in 2010, I practiced as a solo attorney and dedicated the majority of my practice to assisting and serving small businesses and individuals with their copyright, trademark, intellectual property, and business litigation needs. I adopt the entrepreneurial values of my clients and acts as a champion for them in their efforts to grow and protect their intellectual property and good will.

SEC Cybersecurity Reporting Requirements for Public Companies: Applying Old Standards to New Risks

By Seth D. DuCharme, Margaret B. Beasley and Anissa L. Adas

On July 26, 2023, the Securities and Exchange Commission ("SEC") issued a *final rule* that requires registrants to provide enhanced and standardized disclosures regarding "cybersecurity risk management, strategy, governance and incidents." This rule, the culmination of discussion following the March 9, 2022 *proposed rule*, applies to public companies that are subject to the Securities Exchange Act of 1934 and takes effect September 5, 2023.[1]

Corporate cybersecurity risk has increased dramatically in recent years, the result of the widespread—and still growing—use of digital technologies and AI, the new normal of hybrid work environments, the growth of crypto assets and the rise in illicit profits from ransomware and stolen data. That increased risk, and its associated costs, has prompted investor concerns over access to timely, consistent and understandable information related to cybersecurity.

In a *press release*, SEC Chair Gary Gensler explained the importance of the new requirements to investors: "[w]hether a company loses a factory in a fire – or millions of files in a cybersecurity incident – it may be material to investors."[2] Mr. Gensler acknowledged that "[c]urrently, many public companies provide cybersecurity disclosure to investors," but asserted that "companies and investors alike, however, would benefit if this disclosure were made in a more consistent, comparable, and decision-useful way."[3] The new rules seek to accomplish this in three significant ways, relying on the familiar legal concepts of reasonableness and materiality.

---

1 Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Release No. 33-11216, U.S. Securities and Exchange Commission (July 26, 2023). The Form 10-K and Form 20-F disclosures will be due beginning with annual reports for fiscal years ending on or after December 15, 2023. The Form 8-K and Form 6-K disclosures will be due beginning the later of 90 days after the date of publication in the Federal Register or December 18, 2023. Smaller reporting companies will have an additional 180 days before they must begin providing the Form 8-K disclosure.

2 SEC Adopts Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies, U.S. Securities and Exchange Commission, (July 26, 2023).

3 *Id.*

1. Form 8-K Material Cybersecurity Incident Reporting

Registrants must disclose, on the new Item 1.05 of Form 8-K, any material cybersecurity incident. The disclosure must include all material aspects of the incident including its nature, scope, timing, and material impact, or reasonably likely material impact on the registrant. This disclosure must be made within four business days of the determination that an incident is "material."

2. Form 10-K Annual Disclosures

Registrants must describe, in S-K Item 106 on the Form 10-K, (a) any processes for assessing, identifying and managing material risks from cybersecurity threat; (b) the board of directors' oversight of cybersecurity threats and (c) management's role in assessing and managing material threats from cybersecurity threats.

3. Foreign Private Issuers

Foreign private issuers will be required to disclose information on material cybersecurity incidents in accordance with an amended Form 6-K and information regarding cybersecurity risk management, strategy, and governance on Form 20-F.

Definitions

While these requirements seem simple, the devil will be in the definitions. Registrants should pay close attention to how the Commission defines key terms in the new rule to ensure full compliance.

- *Cybersecurity incident*: an unauthorized occurrence, or a series of related unauthorized occurrences, on or conducted through a registrant's information systems that jeopardizes the confidentiality, integrity or availability of a registrant's information systems or any information residing therein.
- *Cybersecurity threat*: any potential unauthorized occurrence on or conducted through a registrant's information systems that may result in adverse effects on the confidentiality, integrity or availability of a registrant's information systems or any information residing therein.
- *Materiality*: Significantly, the SEC did not define "materiality" in the new rules, explaining that "[c]arving out a cybersecurity-specific materiality definition would mark a significant departure from current practice and would not be consistent with the intent

of the final rules."[4] Instead, the SEC offered the following guidance: "consistent with the standard set out in the cases addressing materiality in the securities laws, that information is material **if there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision, or if it would have significantly altered the total mix of information made available.**[5]"

Changes from the Proposed Rule

The Final Rule incorporates several key changes from the proposed rule, providing insight into the Commission's enforcement priorities. These include the following:

- Narrowing the scope of the cyber incident disclosures and adding a limited delay for disclosures that would pose a substantial risk to national security or public safety.
- Omitting the aggregation of immaterial incidents for disclosure in Forms 10-Q and 10-K; however, a series of related unauthorized occurrences may prompt a requirement to provide disclosures on Form 8-K.
- Streamlining the proposed disclosure elements related to risk management, strategy and governance with a focus on processes as opposed to specific policies and procedures.
- Removing the proposed requirement to disclose cybersecurity expertise of the board.
- Adding transition provisions for disclosing material cyber incidents on Form 8-K and for providing annual cybersecurity risk management, strategy and governance disclosures.

---

4 Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Release No. 33-11216, U.S. Securities and Exchange Commission (July 26, 2023) at 80.

5 *Id.*

About the Authors

Seth D. DuCharme draws on his experience serving in senior leadership positions at the Department of Justice to represent companies and individuals in the investigation and defense of a wide variety of federal and state regulatory, civil and criminal matters, including cryptocurrency enforcement, highly sensitive national security incidents, cross border regulation, cyber security and data breach response, Foreign Corrupt Practices Act (FCPA) diligence and litigation, export controls, sanctions compliance and anti-money laundering.

Margaret B. Beasley represents clients across a wide range of industries in every level of federal and state courts, as well as in agency forums. She provides counsel in diverse matters including white collar defense, government investigations, and development and implementation of cybersecurity and data breach response plans and reporting requirements. Additionally, Meg represents clients in complex commercial disputes, environmental claims, and securities litigation. Her experience includes engaging with the Department of Justice, the Securities and Exchange Commission, the Environmental Protection Agency, and the Federal Energy Regulatory Commission.

Anissa L. Adas focuses her practice on complex commercial litigation and appeals, compliance reviews and white collar criminal defense. During law school, she served as a judicial intern for the Honorable Marian Blank Horn of the United States Court of Federal Claims.

Anissa has also handled pro bono matters involving immigration and criminal defense.

Two Dozen Testifying and Reporting Tips for Computer Experts

Craig Ball

Tips for Testifying:

1. Listen to the question and answer only the question asked.
2. Clarify as you need, explain when you must; answer without quibbling where you can.
3. Stay above advocacy: it's not your job to nail anyone—let the evidence do that.
4. Watch your language: Never assume technical jargon is universally understood.
5. Don't speculate: Take the time to supply the right answer (which may be "I don't know").
6. Don't reach beyond your grasp. No one is an expert in everything.
7. Keep your CV on the level and up to date.
8. When questioned from a writing, asking "may I see it please" is generally allowed.
9. On cross-examination, listen carefully to objections by counsel; they may be cues.
10. There are frequently topics the court has directed may not be mentioned; know them!
11. In court, a picture is worth ten thousand words. Use demonstrative evidence!
12. Volumes are spoken non-verbally; do you know what your body language says?

Tips for Reporting:

1. Lead with an executive summary of key takeaways.
2. Reports are written by humans for humans.
3. Proofread with care: Spelling and grammatic errors make you appear careless.
4. Use numbered paragraph headings for clarity and improved flow,
5. Do not include phrases you believe to be unfair or inaccurate.
6. "We need you to say this" is no substitute for supporting evidence.
7. Be skeptical. Consider alternate explanations for what you observe.

8. Always double check time values to ensure Universal Time Coordinated (UTC) time and Daylight Savinng Time (DST) offsets are right.

9. Screen shots must be legible. Highlight to underscore significant content.

10. Be prepared to explain anything in your report, even if you deem it irrelevant.

11. Lawyers and courts like citations to published authority.

12. Jargon and technical language should be defined and explained for the reader.

Are you working with a computer forensic expert? Equip them with Craig Ball's new publication, "*Being the Better Expert Witness: A Primer for Forensic Examiners*" available at http://www.craigball.com/Ball_Expert_Witness_2023.pdf.

About the Author

Craig Ball of Austin and New Orleans is a court-appointed special master, veteran Texas trial attorney, law professor and certified computer forensic examiner. More of Craig Ball's publications on computer forensics and electronic discovery are available at craigball.com and ballinyourcourt.com.

How to Join the State Bar of Texas Computer & Technology Section

Joining the State Bar of Texas Computer & Technology Section is easy. You can join online by visiting the State Bar of Texas Website at www.Texasbar.com. Please follow these instructions to join the Computer & Technology Section online.

Step 1
Go to Texasbar.com and click on "My Bar Page"

Step 2
Login using your bar number and password
(this will be the same information you'll use to login to the Section website)

If you see "Computer and Technology", congratulations, you're already a member.

If not, click the "Purchase Sections" button and follow the instructions to add the Computer and Technology Section. **Please note: It may take several days for the State Bar to process your section membership and update our system.**

You can also complete this form and mail or fax it in.

State Bar of Texas Computer & Technology Section Council

Officers:

Reginald Hirsch – Houston – Chair

William Smith – Austin – Chair-Elect

Lavonne Burke ~~Hopkins~~ – Houston – Treasurer

Mitch Zoll – Austin – Secretary

Pierre Grosdidier – Houston – Immediate Past Chair

Circuits Editors:

Sally Pretorius – Dallas

Katie Stahl – Houston

Committee Chairs:

Sally Pretorius – Dallas – Circuits eJournal Co-Chair

~~Sanjeev Kumar – Austin~~Katie Stahl – Houston – Circuits eJournal Co-Chair

~~Michael Curran – Mc Kinney~~

Grecia Martinez – Dallas – CLE Program Coordinator

~~Grecia Martinez – Dallas~~ ~~– Membership Chair~~

~~Chris Krupa Downs – Plano~~ ~~– App committee Co-Chair~~

Mark Unger – San Antonio – App committee Co-Chair

~~Rick Robertson – Dallas~~Mitch Zoll – Austin – Tech ~~in Courts~~Competency Chair

~~Seth Jaffe – Houston~~ ~~– Cybersecurity & Privacy Chair~~

~~William Smith – Austin~~ ~~– Justice for All Co-Chair~~

~~Alex Shahrestani –~~Mitch Zoll – Austin – ~~Justice for All Co-Chair~~Speaker's Bureau

Webmaster:

Ron Chichester – Houston

Appointed Judicial Members:

Judge Xavier Rodriguez – San Antonio

Hon. Roy Ferguson – Alpine

Hon. Emily Miskel – McKinney

Term Expiring 2024:

Justin Freeman – Austin

Zachary Herbert – Dallas

Grecia Martinez – Dallas

Guillermo "Will" Trevino – Brownsville

Term Expiring 2025:

Alan Cooper – Dallas

Mason Fitch – ~~San Francisco~~Houston

A. Dawson Lightfoot – ~~Mckinney~~Dallas

Sally Pretorius – Dallas

Term Expiring 2026:

Sean Hamada – Dallas

Kellye Hughes – ~~Arlington~~Waxahachie

Sanjeev Kumar – Austin

Katie Stahl – Houston

Chairs of the Computer & Technology Section

2023–2024: Reginald A. Hirsch
2022–2023: Pierre Grosdidier
2021–2022: Elizabeth Rogers
2020–2021: Shawn Tuma
2019–2020: John Browning
2018–2019: Sammy Ford IV
2017–2018: Michael Curran
2016–2017: Shannon Warren
2015–2016: Craig Ball
2014–2015: Joseph Jacobson
2013–2014: Antony P. Ng
2012–2013: Thomas Jason Smith
2011–2012: Ralph H. Brock
2010–2011: Grant Matthew Scheiner
2009–2010: Josiah Q. Hamilton
2008–2009: Ronald Lyle Chichester
2007–2008: Mark Ilan Unger
2006–2007: Michael David Peck
2005–2006: Robert A. Ray
2004–2005: James E. Hambleton
2003–2004: Jason Scott Coomer
2002–2003: Curt B. Henderson
2001–2002: Clint Foster Sare
2000–2001: Lisa Lynn Meyerhoff
1999–2000: Patrick D. Mahoney
1998–1999: Tamara L. Kurtz
1997–1998: William L. Lafuze
1996–1997: William Bates Roberts
1995–1996: Al Harrison
1994–1995: Herbert J. Hammond
1993–1994: Robert D. Kimball
1992–1993: Raymond T. Nimmer
1991–1992: Peter S. Vogel
1990–1991: Peter S. Vogel