

Professional Perspective

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Navigating Legal Risks with AI-Generated Content

Contributed by [Megan Baca](#), [Georgina Jones Suzuki](#), and [Sona Sulakian](#), Ropes & Gray

Generative artificial intelligence (AI) has initiated a revolution as well as democratization in the artistic world—anyone can quickly create an image, musical composition, or essay with a few prompts.

Lured by AI's speed and ease of use, businesses are increasingly turning towards AI to fulfill their creative needs. For example, both [Heinz](#) and [Nestle](#) launched advertisements using AI-generated artwork, [James Earl Jones](#) licensed his voice to an AI startup to collect royalties for the voice of Darth Vader, and many music artists use AI to edit album covers.

Businesses have multiple tools to choose from—just with images, platforms include [DALL-E 2](#) (OpenAI), [Jasper Art](#), [Nightcafe](#), [Starry AI](#), [Lensa](#), and [Midjourney](#), to name a few. These tools render images from a text or image input using models trained on images online and uploaded to the site by users. Other similar platforms include ChatGPT for prose, Boomy for music, and Movio for marketing videos.

Before businesses and other entities join in the generative AI fever, lawyers, artists, marketers, and other professionals should consider the legal risks associated with AI-generated content. Use of such platforms and content can pose legal risks by (1) restricting commercial use of content, (2) requiring specific attributions, (3) infringing third party copyrights, trademarks, and rights of publicity and privacy, and (4) undermining users' exclusive use rights in such content.

This article provides professionals with guidelines for evaluating key legal risks associated with AI-generated content. While this article identifies certain major categories of risks, companies should always refer to the specific terms of use of a particular AI platform and seek legal advice as they evaluate their specific risks.

Restrictions on Commercial Use

Many generative AI platforms place certain subject matter restrictions on the use of their platforms, such as prohibiting the creation of images of public figures or offensive content, such as violent, hateful, harassing, illegal, sexual, or deceptive content. However, one of the most significant restrictions applicable to many businesses and other entities concerns commercial usage rights.

In cases where AI platforms use content from open-source or public databases, the terms and conditions of these upstream licensors typically pass through to end users, which may contain restrictions on commercial use. For example, certain Creative Commons licenses only permit non-commercial uses of the licensed work.

To mitigate against this risk, businesses and other entities should always evaluate how AI-generated content will be used—that is, for commercial or non-commercial purposes. If any content will be used for commercial purposes, parties should refer to the AI platform's online terms of use and determine whether any restrictions on commercial use exist. Besides the AI platform's own terms, thoroughly examining any additional third-party terms and conditions, such as the Creative Commons, that may be referenced or linked is critical since these third-party terms could contain limitations on commercial use.

Increasingly, many AI platforms—such as MidJourney—are providing users with the option to pay a fee to receive rights to use content for commercial purposes. For these platforms, users can consider paying a fee to secure such commercial usage rights instead of relying on the free version of the particular platform.

For more tech-savvy users, an alternative solution may involve embedding open-source generative AI code into the user's own proprietary technology. The open-source code is often subject to looser restrictions—for instance, the open-source AI model Stable Diffusion, which is used to create [Lensa](#), applies the Creative ML OpenRAIL-M license, which allows for commercial use.

Attribution Requirements

Another key issue that AI platform users should consider are attribution requirements. Many online terms of use require users to identify and give credit to the specific AI-generator when distributing generative content. In many cases, the AI platform's terms of use specify the manner in which the attribution must be provided, which may include an @ mention, link, or press release.

Attribution requirements may also be embedded in upstream licenses tied to the training dataset. For example, some Creative Commons licenses require users to identify the original creators of artwork in the training dataset, provide a copyright notice, refer to the Creative Commons license, and incorporate the Creative Commons disclaimer of warranties, among other things.

Even if no specific attribution is required, many platforms require users to be transparent about the use of AI; businesses may not represent that an AI-generated piece was created by humans.

Users should fully understand a given platform's attribution requirements by reviewing the platform's terms of use, including any other referenced policies. While many artists may feel that attribution requirements, such as lengthy disclaimers of warranties, impinge on the artistic impression of a given work, they can work with legal counsel to find discrete ways of incorporating required attributions without distracting from the work. Examples of this include the use of concise statements in a corner of a work or the incorporation of Bitly links that take viewers to the necessary legal terms.

Infringement of Third-Party IP Rights

AI-generated content can be considered a new frontier in terms of the infringement of third-party intellectual property (IP) rights.

Infringement, or the unauthorized use of another's protected IP rights, can arise where a user uploads content to the platform, the user does not hold rights to such content, and the platform generates output that substantially copies such content. Alternatively, infringement could arise where the platform otherwise obtains and uses third-party content without adequate permissions. Weaker infringement claims could even arise where an artist simply feels that generated content too closely resembles his or her work, even if the platform did not directly access or copy the original work.

Various IP rights can be implicated as a result. Where pictures, music, written content, or other original works of authorship are involved, copyrights may be at issue. Where brands, slogans, logos, trade dress, or other indicia of origin come up, trademarks could be implicated. And where content involves an image of a real person or his or her name, likeness, biography, or voice, rights of publicity or privacy may be at stake.

The risks of copyright infringement could potentially be significant—payment of monetary damages to third parties; expenditure of money, time, and resources to defend against third party claims; enjoinder or other restrictions on the ability to use the AI-generated output; and reputation damage from the use of infringing content.

Courts may require infringers to compensate for lost sales, lost profits, lost licensing revenue, or other monetary loss caused by the infringing work. Where a copyright is registered and actual damages may be difficult to prove, the owner of such copyright may be able to seek [statutory damages](#) in the range of \$750 to \$30,000 per copyrighted work infringed. Where willful infringement is involved, this number can balloon to \$150,000 per work.

While not unique to the AI world, infringement issues are compounded in the AI context. First, while many AI platforms require users to represent and warrant that any content that they upload to the platform does not infringe third-party IP rights, platforms cannot easily prevent uploading of infringing content. Individual users may care less about rights clearance than, for example, a company in the business of selling content for professional use, such as stock photography agencies.

Second, copyright infringement can be difficult to establish in the AI context. An aggrieved rights owner must show that the alleged infringer copied the infringed work, which can be shown through a combination of access to the infringed work and demonstration that the AI's output is substantially similar to the original. Given that neural networks are almost impossible to reverse engineer, a user of an AI platform may not have visibility into how output is generated or to what extent works are copied. Many companies behind AI platforms hesitate to disclose the details regarding how images are generated, a reluctance that may stem from a lack of resources in responding to customer inquiries, concerns over protection of their proprietary process, or otherwise.

Third, some AI models may be susceptible to copyright infringement risk. The diffusion model, used by many image-generating platforms, theoretically constructs an image from scratch using statistical patterns learned from examples, though recent [research](#) has shown that such models memorize more training images than originally believed.

In contrast to the diffusion model, a platform based on generative adversarial networks (GANs) typically creates images based on a training dataset and then filters for the images most resembling the training data. Depending on how the specific model works, either model could potentially result in IP infringement. Users should conduct diligence, to the extent that information is available, to assess such infringement risk, as well as monitor for updates in the AI space as researchers learn more about how AI algorithms work.

Finally, many AI platforms broadly disclaim liability with respect to infringement. Terms of use typically do not represent or warrant that the generated output will be non-infringing, and all content is provided "as is" and "with all faults." In addition, terms of use often do not indemnify users for use of content that infringes third-party IP rights, and instead require users to indemnify the platform in the event of liability. Most generative AI platforms also cap any liability arising from the use of their services—for example, to a mere \$100.

To address infringement risks, professionals should initially conduct diligence to understand the AI platform's specific technological risk profile, including how the platform generates images and what training data the platform relies on to create new content. Professionals should also assess the probability or magnitude of potential harm—for example, a claimant is more likely to identify infringement and sue on an extensive, nationwide marketing campaign than a short, local marketing campaign.

To avoid potential copyright infringement or right of publicity violation, users should avoid prompts that reference specific people, places, or property (such as characters or brands), including prompts that request content "in the style of" a specific person or artist. While the fair use doctrine provides a potential defense to claims of copyright infringement, it is riskier and more uncertain from a legal and business perspective to rely on a defense, rather than avoid IP infringement altogether.

Professionals can also take additional steps following content creation to modify works—for example, using particular filters, blurring, or other editing tools to ensure that the final content is not substantially similar to the original work. Professionals can also conduct searches to see if any similar content is easily found in public databases, including running an online image search.

Finally, businesses should consult with their attorneys to understand the scope of any representations and warranties, indemnities, liability caps, and other infringement terms in online terms of use. Businesses may wish to inquire about a commercial contract, rather than a free instance of a license, as greater monetary consideration for a license is typically associated with greater legal protections for the licensee. Businesses could also inquire whether there is room for negotiating licensing terms—most platforms offer their services only on a "take it or leave it basis," but some platforms may potentially be willing to entertain negotiation depending on the specific facts and circumstances.

Limited Exclusivity in Created Content

Businesses and other entities typically seek to maintain a market advantage by distinguishing themselves from their competitors. A common means of accomplishing this goal involves obtaining exclusive rights to use created works, whether by exclusive ownership or license. However, AI platforms' terms of use are often inconsistent with this goal.

Many AI platforms do not give users full ownership rights in generated content. But even with platforms that do, users are generally required to grant back to the AI platform a non-exclusive, fully paid up, perpetual, irrevocable, and freely sublicensable license to use any content generated by the platform—or submitted by users to the platform—to improve the platform's services, to create derivative works, or even to publicize or otherwise use such content in the platform's advertising and promotional campaigns.

In other words, companies can continue training their AI platforms through generated output and can freely exploit user-submitted content for other purposes. User-uploaded images and other user input are generally not considered proprietary or confidential, so other users can use similar prompts to generate similar content. This means that the AI platform could generate similar works, including for a user's competitor—who could potentially tarnish or impair the original user's brand or reputation.

To address these issues, users should specifically investigate whether there may be an option to restrict any grant-back licenses to AI platforms. For example, instead of relying on a "public" option, a user may select a "private" option that restricts the AI platform's ability to use submitted or generated content. This option may require payment of an additional fee or execution of a commercial license.

However, even these protections are typically not robust—for example, [Midjourney](#) only agrees to make "best efforts not to publish" any content generated in private mode. Users should consider conducting diligence to better understand how the AI platform removes submitted or generated content from its training data if a user requests to restrict the platform's ability to reuse such content.

For this reason, users should cautiously consider the type of content they upload to AI platforms—for example, users may consider withholding submission of any key trademarks or brands, any distinctive images of persons, or any valuable graphics since such items could be reused for other purposes. Businesses and other entities can also inquire whether specific exclusivity and ownership terms can be negotiated into terms of use.

Even with permissible terms of use and negotiated exclusivity rights, users still may not be able to secure full exclusivity rights under copyright law for works containing AI-generated content—copyright generally attaches to original works created by *human* authors. While AI's originality or qualification as a "human author" is still unresolved in many jurisdictions throughout the world, the U.S. Copyright Office (USCO) has taken the [position](#) that works solely generated by AI are not entitled to copyright registration, limiting owners' ability to seek damages for copyright infringement.

Even if users further modify AI-generated works, registration opportunities with the USCO may still be limited if substantial human authorship is not demonstrated. [The USCO](#) recently issued guidance for applicants seeking copyright registration for works containing AI-generated content. Applicants have a responsibility to disclose the inclusion of AI-generated content and to distinguish the contributions by human authors from those by the AI technology. AI-generated content that goes beyond a *de minimis* threshold must be specifically excluded from the copyright claim. This guidance applies to all applications—whether pending or registered.

Conclusion

As AI-generated art, music, prose, and other content become increasingly prevalent due to their originality and low costs to produce, businesses and other entities will need to be prepared to evaluate the risks and benefits of such works. Holistic analysis will be critical—while it may be impossible to completely eliminate the associated legal risks, users of AI platforms can rely on the strategies discussed in this article to help minimize risks or place such risks in the broader business or strategy context. Whatever choice a business makes, the decision should be an informed and intentional one following consultation with legal counsel.