MLRC Media Law Conference
October 4-6, 2023
Lansdowne Resort Hotel, Leesburg, VA

PLENARY 5 Oct. 6th 12:00 – 1:30pm

Generative AI: Will it overwhelm us. Panel discussion on the impact of AI in journalism and society.

Dr. Nicol Turner Lee is a senior fellow in Governance Studies, the director of the Center for Technology Innovation, and serves as Co-Editor-In-Chief of TechTank. Dr. Turner Lee researches public policy designed to enable equitable access to technology across the U.S. and to harness its power to create change in communities across the world. Her work also explores global and domestic broadband deployment and internet governance issues. She is an expert on the intersection of race, wealth, and technology within the context of civic engagement, criminal justice, and economic development.

Sy Damle is a partner in the Copyright Practice of the Litigation & Trial Department of Latham & Watkins. A former software engineer, Mr. Damle specializes in high technology matters, including those involving computer systems and networks and artificial intelligence. He is also an accomplished music lawyer. Mr. Damle joined Latham after serving as General Counsel and Associate Register of Copyrights at the US Copyright Office. In this role, he was responsible for the agency's litigation, regulatory, and other legal work. Previously, he served as a litigator in the US Department of Justice, focusing on IP, administrative law, and constitutional matters.

Evan Young is a co-Founder and COO of Nota, a technology company that creates AI tools that can help to empower journalists, modernize newsrooms and enhance publishing experiences. With an impressive operations pedigree, Evan has 5 years of experience serving as a Chief of Staff for notable startups like Community and ServiceTitan. Combined with over a decade of management consulting and program management execution, Evan has overseen the growth and success of several startups, including a unicorn, and brings that expertise to the Nota team.

Lauren Chamblee is Senior Corporate Counsel, Microsoft Open Innovation.

Artificial intelligence has taken the world by storm this past year. The release of ChatGPT in November 2022 gave the public a breathtaking glimpse into the forthcoming impact of AI and has spurred deep reflection on the legal, ethical, and cultural consequences of the technology. From warnings that AI threatens human civilization to optimism over its potential to transform society, discussion and debate has been intense. More than discussion is occurring. Industries from journalism to medicine are implementing AI and multiple lawsuits have already been filed asserting that the AI has "learned" by grossly copying without permission the digital content and images of others.

The breakthrough in the public's imagination was spurred by the arrival of ChatGPT. As described by the [Reuters Institute](#), "the arrival of ChatGPT, from OpenAI [now with over 100 million users] has transformed the debate. Its speed and capabilities are awe-inspiring and frightening at the same time."

> While the underlying models have been around for some time, ChatGPT has turned these into an accessible prototype that gives a real sense of where AI may be heading. It can tell jokes (but has been trained not to tell racist or sexist ones), come up with plots for a film or book, write computer code, and even summarise the challenges facing local journalism in a few sentences.

Our panel of experts will discuss how AI will impact the journalism landscape, the ethical implications of its use, and whether intellectual property law or other regulation will or should slow the AI revolution. Buckle up for the ride!

Is ChatGPT a threat or an opportunity for journalism? Five AI experts weigh in
Oxford Internet Institute (March 2023)
https://reutersinstitute.politics.ox.ac.uk/news/chatgpt-threat-or-opportunity-journalism-five-ai-experts-weigh

> How many journalists will be replaced by the rise of generative artificial intelligence? How fast will this process take place? Which journalists will be most vulnerable to this kind of disruption? And should we see ChatGPT as a challenge or as an opportunity to solve some of the problems the news industry faces?

AI and journalism: What's next?
Oxford Internet Institute
By David Caswell (Sept. 2023)
https://reutersinstitute.politics.ox.ac.uk/news/ai-and-journalism-whats-next

- The public release of ChatGPT in late November of 2022 demonstrated capabilities with such obvious and profound potential impact for journalism that AI-driven innovation is now the urgent focus of the senior leadership teams in almost every newsroom. The entire news industry is asking itself 'what's next'?

- Questions include:

- What will journalism look like, for example, in an environment in which text, audio and video is fluid and malleable to the preferences of each individual consumer?
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- What should the tangible output of a newsroom be in an environment in which that output is consumed primarily by machines?
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- How will a coherent record of news – an archived 'first draft of history' – be maintained in such an environment?

- What might news become when useful reporting can be done on almost every word of text or speech, or every byte of data, produced in public by society?

- How will newsrooms capture value from their work in such an environment? What will that work be?

AI Will Change Media Profoundly; Regulation Must Reflect That
The Messenger
Joshua Brandau, CEO Nota (July 2023)
https://themessenger.com/opinion/ai-will-change-media-profoundly-regulation-must-reflect-that

- Generative AI is bound to change nearly everything humans do, but the first thing it is likely to change is the media landscape and, through them, our institutions. Some estimate that up to 90% of online content could be AI-generated by 2025. That means that we have to make some quick, collective decisions about how we are going to use and regulate this technology. To be successful, regulation must be developed in collaboration with experts in the field, and its aim should be to shape the technology for the public good. Any attempt to slow or stop its already rapid adoption is bound to fail.

AI, the media, and the lessons of the past
Columbia Journalism Review (July 2023)
https://www.cjr.org/the_media_today/openai_deals_ap_ajp.php

- The bottom line is that cutting deals with OpenAI—or Google's Bard, or Meta's Llama, for that matter—raises a host of potential concerns that in many ways are similar to those raised by past deals with Google and Meta. Any assistance provided to these companies could ultimately help put journalists out of business, and the risk remains that, once the media's utility to the world of AI has been exhausted, the funding tap will quickly be turned off. Media executives can argue that having a seat at the table is better than not having one, but it might just make it easier for big tech to eat their lunch.

Artificial intelligence is a great tool, but not a journalist
Daily Iowan Sept. 2023
https://dailyiowan.com/2023/09/19/opinion-artificial-intelligence-is-a-great-tool-but-not-a-journalist/

- I will admit I was scared about my future in this career when I heard about the rampant use of AI in Hollywood writing rooms and the increase in AI-generated news articles. However, as I learned about the limitations of artificial intelligence, I understood that it doesn't have the capability to be imaginative or opinionated without plagiarizing human beings and cannot distinguish fact from fiction. AI can mimic human writing, but it cannot entirely replace us.

Google Tests A.I. Tool That Is Able to Write News Articles
New York Times July 2023
https://www.nytimes.com/2023/07/19/business/google-artificial-intelligence-news-articles.html

- The tool, known internally by the working title Genesis, can take in information — details of current events, for example — and generate news content, the people said, speaking on the condition of anonymity to discuss the product.

Guidance & Regulation

Blueprint for an AI Bill of Rights
The White House
https://www.whitehouse.gov/ostp/ai-bill-of-rights/#discrimination

Outlining five principles to guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence.

- Safe and Effective Systems

- Algorithmic Discrimination Protections

- Data Privacy

- Notice and Explanation

- Human Alternatives, Consideration, and Fallback

  Algorithmic Discrimination Protections

You should not face discrimination by algorithms and systems should be used and designed in an equitable way. Algorithmic discrimination occurs when automated systems contribute to unjustified different treatment or impacts disfavoring people based on their race, color, ethnicity, sex (including pregnancy, childbirth, and related medical conditions, gender identity, intersex status, and sexual orientation), religion, age, national origin, disability, veteran status, genetic information, or any other classification protected by law. Depending on the specific circumstances, such algorithmic discrimination may violate legal protections. Designers, developers, and deployers of automated systems should take proactive and continuous measures to protect individuals and communities from algorithmic discrimination and to use and design systems in an equitable way. This protection should include proactive equity assessments as part of the system design, use of representative data and protection against proxies for demographic features, ensuring accessibility for people with disabilities in design and development, pre-deployment and ongoing disparity testing and mitigation, and clear organizational oversight. Independent evaluation and plain language reporting in the form of an algorithmic impact assessment, including disparity testing results and mitigation information, should be performed and made public whenever possible to confirm these protections.

Senate Judiciary Committee, Oversight of A.I.: Legislating on Artificial Intelligence,
September 12, 2023
https://www.judiciary.senate.gov/committee-activity/hearings/oversight-of-ai-legislating-on-artificial-intelligence

See, e.g., written testimony of Prof. Woodrow Hartzog, Boston University School of Law

I'd like to make one simple point in my testimony today: To bring AI within the rule of law, lawmakers must go beyond half measures to ensure that AI systems and the actors that deploy them are worthy of our trust.2 To do that, lawmakers must do three things. First, they must accept that AI systems are not neutral. This includes moving swiftly in holding developers of AI systems accountable for their design choices.
Second, they must focus on substantive interventions that limit abuses of power. Such approaches include imposing duties of loyalty, care, and confidentiality and ex ante approaches requiring a sound basis for processing data and deploying technologies.
Third, they must resist the narrative that AI systems are inevitable by creating strong bright-line rules for the development and deployment of AI systems. For the most dangerous designs and deployments, lawmakers should impose outright prohibitions

In U.S., Regulating A.I. Is in Its 'Early Days'
New York Times July 22, 2023
https://www.nytimes.com/2023/07/21/technology/ai-united-states-regulation.html

While there has been a flurry of activity by the White House and lawmakers over artificial intelligence, rules for the technology remain distant, lawmakers and experts said.

Europe moves ahead on AI regulation, challenging tech giants' power
Washington Post June 2023
https://www.washingtonpost.com/technology/2023/06/14/eu-parliament-approves-ai-act/

> Brussels brought a new antitrust challenge against Google on the same day European lawmakers voted to approve the E.U. AI Act — lapping counterparts in the U.S., where legislation has languished.

Reconciling the U.S. Approach to AI
Carnegie Endowment May 2023
https://carnegieendowment.org/2023/05/03/reconciling-u.s.-approach-to-ai-pub-89674

> America's AI policy has been—and likely will remain—a mosaic of individual agency approaches and narrow legislation rather than a centralized strategy.

Do Foundation Model Providers Comply with the Draft EU AI Act?
Stanford Center for Research on Foundation Models
https://crfm.stanford.edu/2023/06/15/eu-ai-act.html

Analyzing ChatGPT4, Stable Diffusion, and other AI foundation models. Concluding:

> We find that foundation model providers unevenly comply with the stated requirements of the draft EU AI Act. Enacting and enforcing the EU AI Act will bring about significant positive change in the foundation model ecosystem. Foundation model providers' compliance with requirements regarding copyright, energy, risk, and evaluation is especially poor, indicating areas where model providers can improve. Our assessment shows sharp divides along the boundary of open vs. closed releases: we believe that all providers can feasibly improve their conduct, independent of where they fall along this spectrum.

The US government should regulate AI if it wants to lead on international AI governance
Brookings Institute (May 2023)
https://www.brookings.edu/articles/the-us-government-should-regulate-ai/

> U.S. regulation of the risks of harm from AI is clearly needed. However, the processes for developing AI regulation increasingly stand in contrast to the current zeitgeist—where AI systems are becoming increasingly powerful and having impact much faster than government can react. This raises the question as to whether the government is even capable of regulating AI effectively. Yet, making progress in regulating AI will be key if the U.S. wants to lead on international cooperation in AI governance.

Recommendation on the Ethics of Artificial Intelligence
UNESCO
https://unesdoc.unesco.org/ark:/48223/pf0000381137/PDF/381137eng.pdf.multi

AI systems raise new types of ethical issues that include, but are not limited to, their impact on decision-making, employment and labour, social interaction, health care, education, media, access to information, digital divide, personal data and consumer protection, environment, democracy, rule of law, security and policing, dual use, and human rights and fundamental freedoms, including freedom of expression, privacy and non-discrimination.

113. Member States should ensure that AI actors respect and promote freedom of expression as well as access to information with regard to automated content generation, moderation and curation. Appropriate frameworks, including regulation, should enable transparency of online communication and information operators and ensure users have access to a diversity of viewpoints, as well as processes for prompt notification to the users on the reasons for removal or other treatment of content, and appeal mechanisms that allow users to seek redress.

114.Member States should invest in and promote digital and media and information literacy skills to strengthen critical thinking and competencies needed to understand the use and implication of AI systems, in order to mitigate and counter disinformation, misinformation and hate speech. A better understanding and evaluation of both the positive and potentially harmful effects of recommender systems should be part of those efforts.

115.Member States should create enabling environments for media to have the rights and resources to effectively report on the benefits and harms of AI systems, and also encourage media to make ethical use of AI systems in their operations.

Academic Articles on Generative AI and Copyright

Does Training AI Violate Copyright Law?
Jenny Quang, Berkeley Technology Law Journal Note (2021)

Artificial intelligence and copyright law intersect when expressive data is used to train machines to learn, reason, and act as humans do. Under § 106, the reproduction right grants a copyright holder the exclusive right to make copies of the protected work.41 As explained in Section II.A, developers often use images, video, and text downloaded from the internet to train machine learning models. The downloaded data are essentially copies that are stored via hard drives, cloud storage, or other data repositories. Given the large volume of data—often scraped from the internet en masse—that is needed to train a machine learning model, it is likely that some of that training data is protected by copyright. Because copyright infringement is a strict liability offense, it does not matter if a developer was unaware that copyrighted works existed in the dataset.

An allegedly infringing developer could argue that although she downloaded copyrighted images to train her computer vision model, there is no trace of the copyrighted works in her final model. If a human can learn from reading books without infringing copyright, why can't a machine similarly learn from training data? However, when that training data is comprised of data downloaded from the internet, copies are necessarily created in the process of training a machine learning model.
https://btlj.org/wp-content/uploads/2023/02/0003-36-4Quang.pdf

How Generative Ai Turns Copyright Law on its Head
Prof. Mark Lemley Colum. Sci. & Tech. L. Rev. (forthcoming 2024).
While courts are litigating many copyright issues involving generative AI, from who owns AI-generated works to the fair use of training to infringement by AI outputs, the most fundamental changes generative AI will bring to copyright law don't fit in any of those categories. The new model of creativity generative AI brings puts considerable strain on copyright's two most fundamental legal doctrines: the idea-expression dichotomy and the substantial similarity test for infringement. Increasingly creativity will be lodged in asking the right questions, not in creating the answers. Asking questions may sometimes be creative, but the AI does the bulk of the work that copyright traditionally exists to reward, and that work will not be protected. That inverts what copyright law now prizes. And because asking the questions will be the basis for copyrightability, similarity of expression in the answers will no longer be of much use in proving the fact of copying of the questions. That means we may need to throw out our test for infringement, or at least apply it in fundamentally different ways.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4517702

Foundation Models and Fair Use
Stanford Law and Economics Olin Working Paper No. 584
Henderson, Peter and Li, Xuechen and Jurafsky, Dan and Hashimoto, Tatsunori and Lemley, Mark A. and Liang, Percy
We review relevant U.S. case law, drawing parallels to existing and potential applications for generating text, source code, and visual art. Experiments confirm that popular foundation models can generate content considerably similar to copyrighted material. Second, we discuss technical mitigations that can help foundation models stay in line with fair use. We argue that more research is needed to align mitigation strategies with the current state of the law. Lastly, we suggest that the law and technical mitigations should co-evolve. For example, coupled with other policy mechanisms, the law could more explicitly consider safe harbors when strong technical tools are used to mitigate infringement harms. This co-evolution may help strike a balance between intellectual property and innovation, which speaks to the original goal of fair use. But we emphasize that the strategies we describe here are not a panacea and more work is needed to develop policies that address the potential harms of foundation models.
https://ssrn.com/abstract=4404340 or http://dx.doi.org/10.2139/ssrn.4404340

AI Copyright Lawsuits

Thomson Reuters AI copyright dispute must go to trial, judge says
Reuters (Sept. 2023)
https://www.reuters.com/legal/thomson-reuters-ai-copyright-dispute-must-go-trial-judge-says-2023-09-26/

> A jury must decide the outcome of a lawsuit by information services company Thomson Reuters accusing Ross Intelligence of unlawfully copying content from its legal-research platform Westlaw to train a competing artificial intelligence-based platform, a Delaware federal judge said on Monday.
>
> The decision by U.S. Circuit Judge Stephanos Bibas sets the stage for what could be one of the first trials related to the unauthorized use of data to train AI systems. Tech companies including Meta Platforms, Stability AI and Microsoft-backed OpenAI are also facing lawsuits from authors, visual artists and other copyright owners over the use of their work to train the companies' generative AI software.

Denial of Summary Judgment (Sept. 2023) (holding that a jury must decide whether fair use applies).
https://storage.courtlistener.com/recap/gov.uscourts.ded.72109/gov.uscourts.ded.72109.547.0_3.pdf

> If Ross's characterization of its activities is accurate, it translated human language into something understandable by a computer as a step in the process of trying to develop a "wholly new," albeit competing, product—a search tool that would produce highly relevant quotations from judicial opinions in response to natural language questions. This also means that Ross's final product would not contain or output infringing material. Under Sega and Sony, this is transformative intermediate copying. So whether the intermediate copying caselaw tells us that Ross's use was transformative depends on the precise nature of Ross's actions. It was transformative intermediate copying if Ross's AI only studied the language patterns in the headnotes to learn how to produce judicial opinion quotes. But if Thomson Reuters is right that Ross used the untransformed text of headnotes to get its AI to replicate and reproduce the creative drafting done by Westlaw's attorney-editors, then Ross's comparisons to cases like Sega and Sony are not apt. Again, this is a material question of fact that the jury needs to decide.

Authors Guild v. OpenAI (S.D.N.Y. complaint filed Sept. 19, 2023)
https://fingfx.thomsonreuters.com/gfx/legaldocs/xmvjlbqbnvr/AUTHORS%20GUILD%20OPENAI%20LAWSUIT.pdf

Plaintiffs include best-selling authors David Baldacci, Mary Bly, Michael Connelly, Jonathan Franzen, John Grisham, George R.R. Martin, Jodi Picoult, Scott Turow.

Defendants copied Plaintiffs' works wholesale, without permission or consideration. Defendants then fed Plaintiffs' copyrighted works into their "large language models" or "LLMs," algorithms designed to output human-seeming text responses to users' prompts and queries. These algorithms are at the heart of Defendants' massive commercial enterprise. And at the heart of these algorithms is systematic theft on a mass scale.

Chabon v. OpenAI (N.D. Cal. complaint filed Sept. 8, 2023)
https://fingfx.thomsonreuters.com/gfx/legaldocs/byprrqnbqpe/OPENAI%20COPYRIGHT%20LAWSUIT%20complaint.pdf

Plaintiffs include authors Michael Chabon and Ayelet Waldman.

This is a class action lawsuit brought by Plaintiffs on behalf of themselves and a Class of authors holding copyrights in their published works arising from OpenAI's clear infringement of their intellectual property.

Getty Images v. Stability AI (D. Del. complaint filed Feb. 3, 2023)
https://acrobat.adobe.com/id/urn:aaid:sc:US:a5aa677a-151c-4235-88f6-9c4282cb184a

This case arises from Stability AI's brazen infringement of Getty Images' intellectual property on a staggering scale. Upon information and belief, Stability AI has copied more than 12 million photographs from Getty Images' collection, along with the associated captions and metadata, without permission from or compensation to Getty Images, as part of its efforts to build a competing business. As part of its unlawful scheme, Stability AI has removed or altered Getty Images' copyright management information, provided false copyright management information, and infringed Getty Images' famous trademarks.

Andersen v. Stability AI (N.D. Cal. complaint filed Jan. 13, 2023)
https://stablediffusionlitigation.com/pdf/00201/1-1-stable-diffusion-complaint.pdf

Stable Diffusion is a software product—defined below as an AI Image Product—maintained and sold by Stability. Stability downloaded or otherwise acquired copies of billions of copyrighted images without permission to create Stable Diffusion, including Plaintiffs'. These images are defined below as "Training Images." By training Stable Diffusion on the Training Images, Stability caused those images to be stored at and incorporated into Stable Diffusion as compressed copies. Stability made them without the consent of the artists and without compensating any of those artists.

Is Content Created by AI Copyrightable?

Thaler v. Perlmutter, (D.D.C. Aug. 18, 2023) ("human creativity is the sine qua non at the core of copyrightability").
https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2022cv1564-24

> Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled through new tools or into new media. ….

> Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand, as plaintiff urges here. Human authorship is a bedrock requirement of copyright. ….

> By its plain text, the 1976 Act thus requires a copyrightable work to have an originator with the capacity for intellectual, creative, or artistic labor. Must that originator be a human being to claim copyright protection? The answer is yes.

The so-called "Creativity Machine"—produced the work at issue here, titled "A Recent Entrance to Paradise:"