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Generative AI, Plagiarism, and Copyright Infringement in Legal Documents

Amy B. Cyphert*

INTRODUCTION

Lawyers are increasingly using generative AI in their legal practice, especially for drafting motions and other documents they file with courts. As they use this new technology, many questions arise, especially surrounding lawyers’ ethical duties with respect to the use of generative AI. Headlines have been dominated by lawyers who have been disciplined for failure to confirm the output of generative AI systems, wherein the system hallucinates fake cases that the lawyers submit to opposing counsel and the court. Although that problem is certainly noteworthy, there are other potential issues for lawyers that have been more overlooked.¹

The focus of this article is on two intriguing intellectual property questions that emerge when lawyers choose to use large language models like ChatGPT. First, might these lawyers be engaging in actionable, discipline-worthy plagiarism? This is unlikely to be the case, for several reasons, chief among them that copying and using boilerplate forms is standard practice in law. Nonetheless, courts and disciplinary agencies have reached surprisingly different conclusions on what counts as plagiarism in the practice of law and whether it is permissible. Any lawyer using generative AI should bear this in mind. Second, could these lawyers potentially be liable for copyright violations? Although this outcome may be unlikely, it is absolutely possible,

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¹ See generally Amy B. Cyphert, A Human Being Wrote This Law Review Article: GPT-3 and the Practice of Law, 55 U.C. DAVIS L. REV. 401 (2021) (discussing multiple potential ethical issues for lawyers who use generative AI like large language models).
especially if lawyers do not understand that these tools can reproduce copyrighted text verbatim or if courts adopt some of the most aggressive arguments that plaintiffs are making in the current generative AI copyright infringement lawsuits working their way through the court system.

This article proceeds in three parts. Part I examines generative AI, and specifically large language models (LLMs). It focuses especially on three crucial technical aspects of these tools that bear on the issues of plagiarism and copyright: the presence of copyrighted materials in the data training set, the ability of researchers to prompt the tools to reproduce verbatim entire sections of copyrighted material as outputs, and the possibility that entire sections of copyrighted materials could be reproduced verbatim as outputs in the absence of intentional prompting (in other words, the possibility that a user could prompt a tool and unknowingly get copyrighted material in the output). Part II explores the confusing and unusual approach the legal profession takes to the concept of plagiarism. Unlike many other professions, and certainly in contrast to their experiences as law students, lawyers are often encouraged to “plagiarize,” to use boilerplate documents or reuse whole portions of briefs written by someone else. In light of this, does the use of generative AI constitutes “plagiarism” for lawyers? The answer to that question is hardly clear, and dependent on many moving parts. Finally, Part III looks at how the use of generative AI could potentially raise copyright infringement issues for lawyers who use LLMs in their practice. Over a dozen lawsuits have been filed against generative AI developers, several alleging that the very process of training these tools constituted copyright infringement and thus that any use of the tools is per se infringement as well. These lawsuits are just now working their way through the court system, and so final judicial resolution of certain theories of infringement is still years away. But what we already know about the ability of these tools to reproduce text verbatim from their data training should give lawyers pause as they use LLMs.

PART I: GENERATIVE AI AND LARGE LANGUAGE MODELS: THREE CRUCIAL POINTS

When ChatGPT was released to the public in late 2022, lawyers (and law students) were among the many millions of users who enthusiastically embraced the tool. Generative AI
applications such as LLMs have incredible potential to revolutionize the way lawyers do their work.\textsuperscript{2} They also have the potential to be misused, however, including by lawyers who do not understand the technology and its limitations.

Much ink has been spilled (including by this author)\textsuperscript{3} on how LLMs work, and the scope of this article is too narrow to go into depth about that complicated and technical process. For purposes of understanding why plagiarism and copyright are potential issues for lawyers who use LLMs, it is most important to understand three technical points about them. First, these tools are trained on massive datasets that were scraped from books, newspapers, and the larger internet. Many of the works they were trained on were in-copyright, and nearly all were written by another person.\textsuperscript{4} Second, although the companies that develop these tools have made and continue to make efforts to prevent their ability to reproduce verbatim unaltered passages of their training data sets, their tools nevertheless can be intentionally prompted to do so. Third, even when a user of an LLM is not intentionally trying to prompt the tool to reproduce whole portions of a copyrighted work, it may nonetheless do so.

First, it is important to understand how massive the data training sets these tools were trained on are. GPT-3’s data training set included nearly a trillion words,\textsuperscript{5} and also included many works that were protected by copyright.\textsuperscript{6} Subsequent

\begin{enumerate}
\item Id.
\item Id. at 409–13 (describing the creation of GPT-3).
\item Text that was generated by chatbots is now all over the internet, but the datasets for early LLMs like GPT-3 were almost entirely made of text generated by humans. There is research that suggests there may be strong reasons to continue to use older datasets that contain mostly human-generated text, as the inclusion of too much AI-generated text in a dataset can cause a phenomenon known as model collapse. See Amy Cyphert, Sam Perl & S. Sean Tu, Artificial Intelligence Cannibalism and the Law, 23 COLO. TECH. L.J. (forthcoming 2024).
\item OpenAI acknowledged in the GPT-3 research paper that GPT-3 was trained on the Common Crawl dataset, “which includes everything from traditional news sites like the New York Times to sites like Reddit.” Cyphert, supra note 1, at 407, citing Liz O’Sullivan & John Dickerson, Here Are a Few Ways GPT-3 Can Go Wrong, TECHCRUNCH (Aug. 7, 2020, 9:45 AM), https://techcrunch.com/2020/08/07/here-are-a-few-ways-gpt-3-can-go-wrong/.
\end{enumerate}
iterations of that tool, like Chat-GPT and GPT-4, have been trained on even more data. In a December 2023 complaint filed by the New York Times against OpenAI and Microsoft, the Times alleged that Chat-GPT was “built by copying and using millions of The Times’s copyrighted news articles, in-depth investigations, opinion pieces, reviews, how-to guides, and more.” In written evidence recently submitted to the House of Lords Communications and Digital Select Committee, OpenAI acknowledged that “it would be impossible to train today’s leading AI models without using copyrighted materials.” Thus, these tools are, and perhaps must be, trained on copyrighted works.

Second, despite attempts by developers to prevent it, it is possible to prompt these tools to reproduce entire sections of copyrighted works as outputs. There is a well-documented phenomenon known as memorization, wherein LLMs can produce, as outputs, entire portions of their data training set.

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7. It is difficult to state with precision exactly how much larger GPT-4’s data training set is than GPT-3’s because OpenAI released less information about GPT-4 than it did GPT-3. The company’s chief scientist explained to a reporter that this is because the landscape for LLMs has become much more competitive and also due to safety concerns. James Vincent, OpenAI Co-Founder on Company’s Past Approach to Openly Sharing Research: ‘We Were Wrong’, THE VERGE (Mar. 15, 2023, 12:59 PM), https://www.theverge.com/2023/3/15/23640180/openai-gpt-4-launch-closedresearch-ilya-sutskever-interview. But the company has acknowledged that its GPT-4 LLM is a larger model with more parameters. See Will Douglas Heaven, GPT-4 Is Bigger and Better than ChatGPT—but OpenAI Won’t Say Why, MIT TECH. REV. (Mar. 14, 2023), https://www.technologyreview.com/2023/03/14/1069823/gpt-4-is-bigger-and-better-chatgpt-openai/.


9. OpenAI—Written Evidence, UKHL COMM’NS. & DIGIT. SELECT COMM., (LLM0113) (U.K.) (Dec. 5, 2023), https://committees.parliament.uk/writtenevidence/126981/pdf/ (“Limiting training data to public domain books and drawings created more than a century ago might yield an interesting experiment, but would not provide AI systems that meet the needs of today’s citizens.”).

10. OpenAI, for example, says it has “measures in place to limit inadvertent memorization and prevent regurgitation in model outputs,” and that it is “continually making our systems more resistant to adversarial attacks to regurgitate training data, and have already made much progress in our recent models.” OpenAI and Journalism, OPENAI (Jan. 8, 2024), https://openai.com/blog/openai-and-journalism.

11. Id. OpenAI points out that such prompting is against the terms of use for its models.
The frequency with which memorization occurs may be related to the increasing size of the training datasets described above. Some amount of memorization in LLMs may be desirable to guard against other problems that have plagued users, including lawyers, such as hallucinations. But there are obvious copyright concerns raised by memorization. Researchers at Stanford University recently released a research paper examining LLMs and copyright issues. As part of their work, they were able to prompt an LLM to reproduce “the entire story of Oh the Places You’ll Go! by Dr. Seuss[.]” The researchers were able to do this with relatively little trouble, “using just two interactions, with a prompt containing only the author and title.” The researchers were also able to prompt ChatGPT to “regurgitate[,] the first 3 pages of Harry Potter and the Sorcerer’s Stone . . . verbatim.” The New York Times’ complaint also includes multiple examples of a user prompting ChatGPT to return whole paragraphs of New York Times’ articles, including those the user acknowledged were behind a paywall.

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12. See, e.g., Stella Biderman et al., Emergent and Predictable Memorization in Large Language Models 1 (May 31, 2023) (preprint) (available at https://arxiv.org/pdf/2304.11158.pdf) (defining memorization as “the tendency of large language models (LLMs) to output entire sequences from their training data verbatim.”). Note that researchers have different definitions for whether memorization requires verbatim outputs.

13. In a preprint paper on LLMs and memorization, researchers describe how ever-larger data training sets cause increased memorization. Valentin Hartmann et al., SoK: Memorization in General-Purpose Large Language Models 1 (Oct. 24, 2023) (preprint) (available at https://arxiv.org/pdf/2310.18362.pdf) (“Unlike previous machine learning (ML) models that were usually trained on comparatively small, curated datasets, large modern general-purpose generative models are trained on data that was not originally meant for model training, and is too large for careful manual curation. Increasing model sizes brings an increased capability of models to memorize substantial parts of those training sets.”).

14. See Biderman et al., supra note 12, at 2 (“[S]ome forms of memorization are actually beneficial: we want large language models to memorize factual events and details to avoid ‘hallucinating’ plausible-sounding but errant facts to unsuspecting users[.]”)


16. Id. at 10.

17. Id.

18. Complaint at 33, N.Y. Times v. Microsoft Corp., No. 23-CV-11195 (S.D.N.Y. Dec. 27, 2023). OpenAI responded to the complaint in a blog post where it argued that the examples the Times included in its complaint were not representative. “It seems [The New York Times] intentionally manipulated prompts, often including lengthy excerpts of articles, in order to get our model
researchers have concluded that verbatim memorization in LLMs is “quite prevalent.”

Third, even if someone is not trying to intentionally prompt an LLM to reproduce copyrighted material, the resulting output could still theoretically include verbatim text from a copyrighted source in the LLM’s data training set. This possibility is as important for lawyers to understand as the phenomenon of AI hallucinations because both can leave a lawyer vulnerable to embarrassment, discipline, and malpractice claims. As described above, researchers have crafted prompts that cause LLMs to produce verbatim text from their data training sets. Hypothetically, a lawyer using an LLM could inadvertently use a prompt that produces the same problem: an output that includes verbatim text from the data training set. For example, a lawyer could use an LLM to help draft a brief and inadvertently and unknowingly include an entire passage of a Supreme Court opinion in the brief with no quotation marks and no citation. A copyright infringement complaint brought against AI developer Anthropic with respect to their LLM alleges that the models “generate output containing [plaintiffs’] copyrighted text even when the models are not specifically asked to do so.” Research suggests that the more often copyrighted material is included in a dataset, the more likely it is that an LLM will produce an output that includes unaltered text from that work.

to regurgitate. Even when using such prompts, our models don’t typically behave the way The New York Times insinuates, which suggests they either instructed the model to regurgitate or cherry-picked their examples from many attempts.”

19. Hartmann et al., supra note 13, at 6–7 (describing past research into LLMs and memorization).

20. Although Supreme Court opinions are not, of course, eligible for copyright protection, quoting one verbatim in a filing with no citation or quotation marks could still land a lawyer in disciplinary trouble.


inclusion of unaltered text from the data training set in an output (what it terms “regurgitation”) as a “rare bug.” But the company also acknowledges that memorization is “more common when particular content appears more than once in training data, like if pieces of it appear on lots of different public websites.” Anthropic, the AI company that created the LLM Claude, recently said in filings in its own copyright case that Claude “may” “on occasion” “reproduce certain content—particularly texts that escaped deduplication efforts when preparing the training set.” OpenAI says it is “continually making progress” to address this issue, though some researchers have noted how difficult this phenomenon is to address. A recent Atlantic headline described memorization as “the flaw that could ruin generative AI.” In any event, it is important for lawyers and other users of LLMs to be aware of the possibility that an LLM could generate an output that includes entire passages of copyrighted works. This is especially true when the copyrighted work appears more than once in the data training set, as might happen with law review articles and other documents available on multiple public websites.

of highly similar observations, such as duplicates, then it would be expected that these receive an increased weight in the model and are more likely to be generated.

23. OPENAI, supra note 10. The AI company Anthropic also describes memorization as a bug and not a feature in recent motions filed in a copyright lawsuit brought against it. Defendant’s Motion in Opposition to Preliminary Injunction at 2, Universal Music Group v. Anthropic, No. 3:23-CV-01092 (M.D. Tenn. Jan. 16, 2024) (“. . . Anthropic’s generative AI tool is not designed to output copyrighted material, and Anthropic has always had guardrails in place to try to prevent that result. If those measures failed in some instances in the past, that would have been a ‘bug,’ not a ‘feature,’ of the product.”).

24. OPENAI, supra note 10.

25. Defendant’s Motion in Opposition to Preliminary Injunction at 7, Universal Music Group v. Anthropic, No. 3:23-CV-01092 (M.D. Tenn. Jan. 16, 2024) (noting that “as a general matter, outputting verbatim material portions of training data is an unintended occurrence with generative AI platforms, not a desired result”).


27. See Hartmann et al., supra note 13, at 9 (describing possible strategies to mitigate verbatim memorization in LLMs and the various problems with those strategies).

PART II: PLAGIARISM

Law students are expected to comply with their schools’ standards surrounding academic integrity and to avoid plagiarism,\(^\text{29}\) which can be simply defined as presenting others’ work as one’s own without attribution.\(^\text{30}\) Many law schools have recently amended their academic integrity policies to make clear that the use of generative AI may be considered a form of plagiarism.\(^\text{31}\) Thus, law students use the technology at their own peril, unless they have explicit permission from their professor.

However, once they graduate and are duly licensed, the rules for lawyers change. For example, it is not unusual for a law firm partner to sign their name to a brief that was largely written by a junior associate, edited by a legal secretary, and formatted by a paralegal, because “[a] lawyer’s signature on a brief is not a claim of authorship or of exclusive authorship.”\(^\text{32}\) That brief may well contain elements the associate found in the firm’s motion bank and which were drafted by other lawyers. Further, as part of their research, the associate may have reviewed briefs filed by attorneys outside of the firm in similar cases in order to generate legal arguments. Any of these actions could potentially get a law student in hot water, but are not necessarily problematic for practicing lawyers, who should strive, after all, to save their clients’ money.\(^\text{33}\) As one

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29. See generally Michael L. Smith, Language Models, Plagiarism, and Legal Writing, 22 U.N.H. L. REV. (forthcoming 2024) (noting that “numerous law schools take a tough stance against plagiarism,” and that penalties can include suspension and expulsion.)

30. Plagiarism is a concept that can mean different things to different people. See Roger J. Kreuz, Plagiarism Is Not Always Easy to Define or Detect, THE CONVERSATION (Jan. 9, 2024, 8:27 AM) (“Plagiarism can be the inadequate citation of a source, paraphrasing without providing a reference, the wholesale copying of someone else’s work – or anything in between[,] . . . . The concept is so broad that reasonable people can disagree about what constitutes plagiarism.”).


32. N.Y. City Bar Ass’n, Formal Op. 2018-3: Ethical Implications Of Plagiarism In Court Filings (2018) (“While procedural rules require that briefs be signed by a lawyer, the purpose of these rules is to identify the lawyer who is subject to sanction if the brief is frivolous, not to identify the author.”) [hereinafter NYC Bar Opinion].

33. Id. (“Litigation filings are tailored for clients, who often pay for the lawyer’s time. As a result, clients have an interest in efficiency. If the lawyer
commentator writing for the Maryland Bar Association recently put it, “[w]hile practicing law, plagiarism is encouraged, not frowned upon.”34 Because of this, some commentators have even argued that plagiarism should be taught in law school legal writing courses, rather than prohibited.35

Nonetheless, lawyers have been disciplined for plagiarizing, as the article for the Maryland Bar Association notes.36 Some bar associations have issued guidance concluding that plagiarism can at times rise to a violation of professional standards, most notably the Rule 8.4(c) prohibition against misrepresentation.37 A formal opinion issued in 2018 by the New York City Bar Association concluded that although “copying from other writings without attribution in a litigation filing is not per se deceptive and therefore is not a per se violation of Rule 8.4(c), . . . if the lawyer subjectively intends to commit deception by omitting a citation in a litigation filing, then the lawyer may be violating Rule 8.4(c)” as well as other rules.38 That opinion examines multiple examples of cases where lawyers were disciplined for plagiarizing portions of their briefs, often by copying judicial opinions without citing them as such.39 Because judicial opinions, especially appellate ones, are often available

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34. Although plagiarism is accepted, if not encouraged, in the practice of law, that does not mean lawyers have never been disciplined for it, as the article points out. Pamela Langham, Plagiarism and the Practice of Law, MD. STATE BAR ASS’N (May 16, 2023), https://www.msba.org/plagiarism-and-the-practice-of-law/ (noting that boilerplate language is standard in legal forms, law clerks often draft opinions for judges, and “good lawyering is not in an academic bubble, where citation to an original work is expected”).


36. See Langham, supra note 34; see also Iowa Sup. Ct. Atty. Disciplinary Bd. v. Cannon, 789 N.W.2d 756 (Iowa 2010).

37. See NYC Bar Opinion, supra note 32.

38. NYC Bar Opinion, supra note 32 (also noting “academic writing and litigation writing have very different purposes and norms. As a result, we do not believe that copying without attribution in a brief is necessarily deceitful.”).

on multiple websites, they may be especially vulnerable to memorization in LLMs, as described above.

Ultimately though, lawyers routinely present the work of others as their own without attribution, and examples of discipline for plagiarism in the absence of other bad behavior are relatively sparse. Thus, will a lawyer who uses generative AI actually face discipline for it? As with so many things in the practice of law, the answer is that it depends. Specifically, the answer here likely depends on two things. First, is the lawyer confirming the accuracy of any outputs? Second, is the lawyer complying with any relevant local rules and the judge’s individual practices with respect to disclosing the use of generative AI? If the answer to both of these questions is yes, it is less likely that the lawyer will face discipline for plagiarism (though, as noted below, copyright violations remain a potential headache, and of course any potential rules violation can always be subject to discipline, even if that discipline is unlikely).

First, in order to not run afoul of any plagiarism prohibitions, the lawyer will need to confirm the accuracy of any outputs of the LLM. This is consistent with multiple ethical duties the lawyer has any time they are signing and filing a brief, regardless of whether portions were drafted by a paralegal or lifted from a legal text. In addition to the Rule 8.4(c) prohibition against misrepresentation discussed above, lawyers also have the duties of competence,40 diligence,41 and candor to the court,42 any of which might be violated by a failure to carefully review and confirm any outputs of an LLM. For example, in accepting the stipulation to discipline of an attorney who submitted fake cases to a court that were generated by ChatGPT, the Colorado Supreme Court noted that his behavior violated each of those rules.43 Thus, a lawyer who submits a brief that includes fake

40. MODEL RULES OF PRO. CONDUCT r. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

41. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N 1983) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

42. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 1983) (“A lawyer shall not knowingly... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”).

43. People v. Crabill, 23PDJ067, 2023 Colo. WL 8111898 (Colo. Nov. 22, 2023) (“Through this conduct, Crabill violated Colo. RPC 1.1 (a lawyer must
cases that were hallucinated by an LLM will have problems beyond plagiarism to contend with. A lawyer who confirms the outputs of an LLM system, and one who ideally alters and changes any outputs, is much less likely to raise plagiarism concerns in the first place and more likely to avoid discipline on other grounds.

Second, a lawyer who uses an LLM system in drafting their brief will need to be sure that such use is not required to be disclosed to the court. Judges and even entire court districts are beginning to issue orders requiring that lawyers who use generative AI take a variety of steps, including disclosing such use to the court and opposing counsel. For example, the Fifth Circuit is currently contemplating an amendment to its certificate of compliance which would require that attorneys either certify that they did not use generative AI or, if they did use it, certify that “all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.” If a lawyer uses an LLM to help draft a brief and fails to disclose this in a courtroom or district where such disclosure is required, and such use is revealed, they could be subject to sanctions or discipline.

PART III: COPYRIGHT VIOLATIONS

Although the practice of law may encourage, or at least passively permit, what would be considered plagiarism at law schools, that does not mean it permits plagiarism that rises to the level of copyright infringement. Legal documents filed by lawyers on behalf of their clients are eligible for copyright protection and must be represented in such a way that they are original works of authorship. To ensure compliance with copyright laws, lawyers and their clients must act with reasonable diligence and promptness when representing a client; Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 3.3(a)(1) (a lawyer must not knowingly make a false statement of material fact or law to a tribunal); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

44. Cyphert, Perl & Tu, supra note 4.
45. See Notice of Proposed Amendment to 5TH Cir. R. 32.3, available at https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6. The proposed amendment was available for public comment through January 4, 2024, and so a decision on whether to adopt it is likely imminent.
46. Id. The Fifth Circuit’s proposed rule, for example, could punish a “material misrepresentation” in the certificate of compliance for the amended rule by striking the document or imposing sanctions against whomever signed it.
protection. Indeed, courts have examined whether copyright concepts such as fair use apply when one lawyer copies portions of another lawyer’s brief. In Newegg Inc. v. Ezra Sutton, P.A., an attorney brought a copyright infringement claim against another attorney who had allegedly copied his draft brief, “merely ma[king] minor and cosmetic changes to the draft brief.”47 The attorneys who had drafted the brief had done something rather unusual – they had registered it for copyright protection.48 The attorney who had copied argued his use fell under the “fair use” exception to copyright infringement.49 The court walked through each of the four fair use factors: the purpose and character of the use, including whether such use was transformative; the “nature of the copyright work,” “the ‘amount and substantiality’ of the copyrighted work used by the alleged infringer, . . . [and] whether the allegedly infringing work has an adverse effect on the potential market for, or the value of, the copyrighted work.”50 The court concluded that the first and third factors weighed against fair use, while the second and fourth factors weighed (albeit somewhat weakly) in favor of it.51 Ultimately, the court concluded that the first and third factors should be given more weight, and that the copying of the brief was not fair use.52

Thus, lawyers must be careful to avoid infringing on another lawyer’s copyrighted work product when producing their own documents, and also be careful that they are not inadvertently infringing on copyrighted works by non-lawyers which are included in the data training set of LLMs. There are two theoretical ways a lawyer could potentially engage in copyright infringement when using LLMs to produce work product. First, under a theory that has been advanced by plaintiffs in copyright infringement lawsuits and not yet finally ruled on by courts, a

48. Id. at *1 (noting that Newegg was “the owner of a valid and registered copyright for its draft brief”).
49. Id. at *1. See also 17 U.S.C. § 107 (setting out the four fair use exception factors).
51. Id. at *2–3.
52. Id. at *3 (“Upon consideration of all four factors, with more weight given to the first and third factors based on the facts, circumstances and particular nature of this case, Sutton did not meet his burden of establishing a prima facie case that his copying of Newegg’s draft brief was fair use.”).
judge could deem all outputs of an LLM to be infringing, and thus any use of an LLM by a lawyer would theoretically be copyright infringement. In essence, this would be treating LLMs like Napster: an argument that the system itself is built on and facilitates copyright infringement and therefore all users are responsible.  

For the reasons that are discussed below, this is unlikely. Second, an output produced by a lawyer using an LLM tool could be similar enough to a work in copyright that the particular output itself is infringing. This possibility, while still nowhere near a certainty, is more likely than the first, and could happen without the lawyer even realizing the LLM has produced an infringing output.

**THEORY 1: ALL LLM OUTPUTS AS INFRINGING**

As of the time of this article’s drafting, in early 2024, more than a dozen lawsuits have been filed against the companies that create generative AI, alleging various claims of copyright infringement. Some of these lawsuits make the sweeping claim that, because these systems were trained on works that were in copyright, that training was infringement and thus each and every output of them is itself an infringement, violating the copyright holder’s exclusive right to produce derivative works. For example, in a lawsuit that was filed by plaintiffs (including the writer and performer Sarah Silverman) against Meta in relation to its LLM LLaMA, the plaintiffs alleged that “every output of the LLaMA language models is an infringing derivative work, made without Plaintiffs’ permission and in violation of their exclusive rights under the Copyright Act.”

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53. See Jason Boehmig, AI Is Entering its ‘Napster’ Phase. This Is Who’s Going to ‘Own’ It Next, FAST CO. (Aug. 26, 2023), https://www.fastcompany.com/90942310/ai-napster-who-going-to-own-it-next (“In a strikingly similar way, the commercial use of AI may now be entering its Napster phase: an exciting but legally unsustainable moment of innovation and technical progress.”); Matthew Sag, Copyright Safety for Generative AI, 61 Hous. L. Rev. 295, 300 (2023) (“It is tempting to mischaracterize generative AI simply as a more flexible version of... Napster.”).

54. Pamela Samuelson, How to Think About Remedies in the Generative AI Copyright Cases, LAWFARE (Feb. 15, 2024, 1:00 PM) https://www.lawfaremedia.org/article/how-to-think-about-remedies-in-the-generative-ai-copyright-cases (noting that as of February 15, 2024, there were sixteen copyright cases brought against generative AI companies).

Although these cases are still working their way through the legal system, early indications are that judges will be skeptical of the breadth of this claim. For example, on November 20, 2023, the District Court Judge granted Meta’s motion to dismiss all but one of the claims in the Kadrey litigation. In so doing, the judge described certain of plaintiffs’ copyright infringement claims as nonsensical. Regarding the plaintiffs’ theory that “every output of the LLaMA language models is an infringing derivative work,” and that “every output from the LLaMA language models constitutes an act of vicarious copyright infringement,” the judge noted that “the complaint offers no allegation of the contents of any output, let alone of one that could be understood as recasting, transforming, or adapting the plaintiffs’ books. Without any plausible allegation of an infringing output, there can be no vicarious infringement.”

Therefore, at least at present, it seems unlikely that such a sweeping theory will survive judicial scrutiny without stronger allegations of infringement, and so it is unlikely that a lawyer would face copyright infringement claims merely for using a LLM, regardless of the output. However, as is discussed below, as other plaintiffs file complaints with stronger and more robust examples of potential infringement, there is a possibility a judge will adopt the theory that all LLM outputs are copyright infringements. If that theory survives judicial scrutiny, it is hard to see how generative AI would continue.

**THEORY 2: CERTAIN OUTPUTS AS INFRINGING**

Although the Kadrey plaintiffs may have failed, at least in their initial complaint, to make plausible allegations of

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57. But see Oren Bracha, The Work of Copyright in the Age of Machine Production (Feb. 16, 2024) (U. Texas L. Legal Stud. Rsch. Paper) (available at https://ssrn.com/abstract=4581738) (“In the wake of the rise of GenAI, the argument that reproduction of a copyrighted work strictly as part of the training process is in itself infringement has been gathering momentum.”).

58. See, e.g., Henderson, et al., supra note 15, at 2 (discussing legal scholars who have argued that fair use may not apply to models that are “capable of generating content similar to copyrighted data, and [where] deploying them can potentially impact economic markets that benefit the original data creators”).
infringement, subsequent plaintiffs have been able to provide more compelling arguments. In late December 2023, The New York Times Company (The Times) sued OpenAI and Microsoft, alleging that their LLMs, including ChatGPT, “were built by copying and using millions of The Times’s copyrighted news articles, in-depth investigations, opinion pieces, reviews, how-to guides, and more.”

Unlike some of the earlier plaintiffs, the New York Times attached to its complaint examples that it claims demonstrate that these LLMs “can generate output that recites [New York] Times content verbatim, closely summarizes it, and mimics its expressive style.” The Times complaint even includes screenshots that appear to be a user prompting ChatGPT to provide the first paragraph of a New York Times article the user was “paywalled out of.” In the screenshot, ChatGPT responds “Certainly!” and proceeds to provide the user with multiple paragraphs of the article. As of the time of this article’s drafting, both OpenAI and Microsoft have moved to dismiss portions of the complaint, but the judge has yet to rule on those motions. It will likely be years before there is final judicial resolution of this issue given the likelihood of appeals, but the attachments to the complaint are striking and it is much harder to see how a defense of fair use will apply to verbatim memorization outputs.

The examples in the Times’ complaint, coupled with the research discussed in Part II, should give lawyers pause. OpenAI describes regurgitation as a “rare bug” and, in its motion to dismiss the Times’ complaint, alleges that it took the Times “tens of thousands of attempts to generate the highly anomalous results” in the Complaint. But even that is an acknowledgment of the fact that LLMs can be prompted to reproduce entire

60. Id.
61. Id. at 33.
62. Id.
63. This claim is true as of May 2, 2024.
64. See, e.g., Sag, supra note 53, at 312–13 (“If LLMs just took expressive works and conveyed that same expression to a new audience with no additional commentary or criticism, or no distinct informational purpose, that would be a very poor candidate for fair use.”).
65. OPENAI, supra note 10.
sections of their training data as outputs with little to no alteration. Remember that the Stanford researchers were able to prompt LLMs to reproduce copyrighted text using only two basic prompts, and that the plaintiffs in the Anthropic litigation claim its tool reproduces copyrighted song lyrics even when not explicitly asked to. Even if inadvertent regurgitation is much rarer than intentional regurgitation, it would still be a serious concern that attorneys should be aware of. It is theoretically possible that a lawyer seeking a specific argument for a brief or a specific summary of an important Supreme Court case will be provided with an output that is nearly identical to copyrighted material in the tool’s training data, such as a law review article or even another lawyer’s brief. If judges in the New York Times case or other cases rule that such outputs are indeed secondary infringement, the lawyer who prompted the tool to produce them is potentially liable. It is worth noting that OpenAI has announced that it will pay the legal fees for a user who faces “legal claims around copyright infringement.” Again, even if a claim of copyright infringement against a lawyer in such a setting is potentially unlikely, there is still embarrassment and potential disciplinary and malpractice claims associated with such an outcome.

CONCLUSION

Lawyers have already widely adopted generative AI tools like LLMs, and will no doubt continue to do so in ever greater numbers. But lawyers, perhaps even more than most generative AI users, need to think carefully about how the current legal uncertainty surrounding generative AI and copyright might impact their use of generative AI. This is because it has been repeatedly demonstrated by researchers and litigators alike that LLMs can be prompted to reproduce as outputs entire passages of their training data with little to no alterations. This raises

69. New Models and Developer Products Announced at DevDay, OPENAI (Nov. 6, 2023), https://openai.com/blog/new-models-and-developer-products-announced-at-devday (“OpenAI is committed to protecting our customers with built-in copyright safeguards in our systems. Today, we’re going one step further and introducing Copyright Shield—we will now step in and defend our customers, and pay the costs incurred, if you face legal claims around copyright infringement.”).
obvious copyright and plagiarism issues. Even as the concept of plagiarism is a slippery one in a profession that encourages boilerplate documents, and even as the copyright infringement claims against generative AI are far from slam dunks, lawyers need to be mindful of these issues.