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The D&O Diary

A Periodic Journal Containing Items of Interest From the World of Directors & Officers Liability, With Occasional Commentary

Guest Post: Does Employee Use of AI at Work Create Executive Risk?

By Kevin LaCroix on April 28, 2025



Sarah Abrams

Workplace utilization of artificial intelligence-enhanced tools, including AI-based Large Language Models, is becoming pervasive. But could employee use of AI tools potentially lead to executive liability? That is the question addressed in this guest post, from Sarah Abrams, Head of Claims at Baleen Specialty, a division of Bowhead Specialty. I would like to thank Sarah for allowing me to publish her article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is Sarah's article.

In early 2024, we queried whether there “**[Could] Be Misappropriation of Trade Secret[s] in the Age of AI?**” In mid-2025, AI is the horse that has left the barn and run out of town. Given the increased use of AI by employees in the workplace, does executive liability for violation of IP rights increase as well?

There are at least two pending lawsuits against generative AI (genAI) developers alleging violation of intellectual property rights; both claiming copyright infringement from the use of published material to train Large Language Models (LLMs). The complaint allegations and arguments made during motion

practice indicate potential future exposure to company directors and officers of companies where genAI is used by at work.

The New York Times Company, et. al v. OpenAI, et. al, alleges OpenAI used NYT material without author compensation to train OpenAI's LLM. OpenAI has argued its conduct constitutes "fair use" because its use of the NYT copyrighted content to train GenAI models serves a new "transformative" purpose. Whether the Southern District of New York agrees, remains to be seen. However, a similar case involving Meta's LLM filed on the West Coast is gaining traction.

In **Richard Kadrey et. Al. v. Meta Platforms Inc., et. al**, award-winning authors allege that to train Meta's LLM "Llama," it "knowingly used pirated databases to copy massive quantities of copyrighted works — all of plaintiffs' copyrighted books, books written by hundreds of thousands of other authors." The *Kadrey* court **denied Meta's initial motion to dismiss**, finding that the authors adequately alleged that Meta intentionally removed copyright notice information to conceal infringement.

The author's case against Meta was allowed to proceed on the theory that Meta violated the Digital Millennium Copyright Act claim with Llama. In early March, the *Kadrey* plaintiffs filed a **motion for summary judgment**, asking the judge to find Meta directly infringed on their copyrights. If OpenAI and/or Meta are found to have misappropriated the intellectual property of the plaintiff authors, is there downstream exposure for companies and executive leadership?

Most private company **D&O coverage parts** have an *entity* exclusion for Claims based upon or arising out of violation of intellectual property rights (including copyright), misappropriation and plagiarism [except for Securities Claims]. Private company directors and officers may be individually covered under the Side A directors and officers liability coverage part and the company entitled to reimbursement under Side B in a case alleging IP infringement.

Most public company D&O company policies are restricted to cover only a Securities Claim, which an IP infringement lawsuit is not. However, individual directors and officers may be named as defendants in an intellectual property lawsuit and held liable for alleged misappropriation and infringement.

The Third District Court of Appeals in Ohio (while determining coverage applied for company directors and officers named in an underlying infringement action) held that:

"Vicarious 'liability for copyright infringement may be imposed upon an officer, directors, or shareholder so long as [1] the individual 'has the right and ability to supervise the infringing activity' and [2] has a direct financial interest in such activities." See **Eighth Floor Promotions, LLC v. Cincinnati Ins. Co, 71 N.E.3d 1262 (2016)**

According to the New York Times and *Kadry* plaintiffs, the generative AI LLMs that OpenAI and Meta created allegedly pull data from protected sources without permission. Thus, will executives at companies that rely on genAI responses face vicarious liability allegations from the original content creators?

Notably, many company executives are unaware of how often employees use generative AI or LLMs to complete job-related tasks.

A **January 2025 McKinsey report** on use of genAI in the workplace surveyed 3,616 employees and 238 C-level executives in October and November 2024. Three-quarters of the McKinsey report survey respondents in the United States work at organizations generating at least \$100 million in annual revenue, and half work at companies with annual revenues exceeding \$1 billion. All US C-suite leader respondents work at organizations with annual revenues of at least \$1 billion.

Nearly all employees (94 percent) and C-suite leaders (99 percent) surveyed by McKinsey reported some level of familiarity with gen AI tools. However, responding C-suite leaders estimated that only 4% of their employees use genAI for at least 30% of their daily work. Three times the number of responding employees indicated that they used genAI for at least 30% of their daily work. C-suite leadership is underestimating the use of AI by its workforce.

And, while the McKinsey report touted the desire for employees to increase training and use of gen AI in the workplace, it did not acknowledge the pending litigation against LLM developers or exposure to C-level executives with or without knowledge of gen AI use. And, according to the court in *Eighth Floor Promotions*, the ability to supervise and profit from the protected material may be enough to find leadership vicariously liable for infringement.

It is further important to note that there may be damage caps contractually set in enterprise agreements between a company and vendor LLM developers, like Meta or OpenAI. There may also be agreed-upon liability shifting provisions for intellectual property exposure depending on who and how the genAI LLM is being used. Contractual guardrails aside, with the increase in use of employee use of AI tools at work, the risk to company and executive teams exists.

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