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Protecting Intellectual Property in the AI Age

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With the recent advent of ChatGPT and other Artificial intelligence ("AI")-enabled technologies, implementing AI in the workplace has become an increasingly hot topic amongst businesses and across industries and presents exciting new opportunities for companies. Most legal discussions surrounding the use of AI have been largely hypothetical, and the legal and regulatory frameworks necessary to address AI-related issues are still being developed. However, companies implementing AI technology or working with third parties who use AI technology should consider the potential legal implications of using such AI. They can take active measures to address and minimize legal risks and unintended consequences. For example, two recent events demonstrate how AI could affect the creation and protection of intellectual property rights.

First, on August 18, 2023, in *Thaler v. Perlmutter*, the United States District Court in the District of Columbia held that a piece of art generated autonomously by AI without human involvement was not eligible for copyright law protection. The court rejected the plaintiff's argument that copyright ownership should vest in the AI's owner. The court held that the very fact that there was no human involvement in generating the artwork precludes it from any copyright protections. The court further clarified that human authorship is at the core of copyright law and no copyright exists without human involvement.

Although the *Thaler* case dealt with copyright protection for visual work, its holding could be applied to musical compositions, literary works, and even software code that is created by AI. Additionally, although *Thaler* addressed a situation where AI entirely generated the work, it leaves the question of how much of a work can be created by AI without jeopardizing copyright protection in the work.

Second, after a protracted strike by the Writers' Guild of America ("WGA"), the recently negotiated 2023 Minimum Basic Agreement ("MBA") between the WGA and the Alliance of Motion Picture and Television Producers ("AMPTP") provides an example of how parties can incorporate various provisions on the use of AI in the workplace to address copyright creation and protection issues (as well as to protect job security for the writers). For example, the MBA includes explicit language indicating that both parties agree that AI shall not be considered a person, "writer," or a "professional writer." The MBA also provides that companies cannot require writers to use AI and that companies may not use AI to write or rewrite literary material. The MBA further provides that, where needed, writers may use AI with the company's consent. Finally, while not expressly prohibiting writers' material from being used to train AI, the MBA recognizes the WGA's reservation of the right to assert that "exploitation of writers' material to train AI is prohibited by MBA or other law."

Although the legal and regulatory frameworks surrounding AI are still in their infancy, as demonstrated by the two instances in this article, businesses should begin considering the legal implications of using AI. Companies can also start taking proactive steps to protect against the risk that AI may jeopardize their intellectual property or expose them to liability. Such steps could include, for example, the development of internal company policies or the inclusion of specific terms in third-party contracts governing the use of AI. Please contact the attorneys in Masuda Funai's Intellectual Property and Technology Practice Group with any questions regarding the legal implications of AI.