

Navigating Intellectual Property in the Age of AI

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Burger, and today we are being joined by our colleague, Marc Misthal, who is a intellectual property and trademark attorney.

He is also the chair of our intellectual property group here at the firm, so very happy to have you with us, Marc, to talk about some intellectual property issues that are facing business owners these days. So, thanks for coming.

Marc Misthal: Well, thank you so much for having me.

Sarah Sawyer: Yeah. So today, we wanted to talk to Marc a little bit about just what Marc is seeing in the world of, intellectual property as it relates to modern times.

So we talk a lot about AI on OK at Work, and the implications of AI. We talk about it in employment context, and maybe with customers and different contracts and uses of AI. [00:01:00] But what is something that you're seeing, Marc, as it relates to AI and intellectual property that your clients are running into?

Marc Misthal: Oh, one thing that we're seeing is clients are, like all businesses, are using AI to create things, but that raises some questions as to whether what's being created can actually be protected by copyright, trademark, patent, whatever it might be. It also raises a question on the other side of things which is if something actually is created by AI, is what's being created, does that infringe on whatever the AI was trained with, and who really knows what it's been trained with.

Russell Berger: Yeah. So on that latter point I assume, especially if it was like a visual piece of IP that was created, you could in theory, verify, potential infringement the way you would any other visual [00:02:00] IP. But I assume this goes deeper than that. Can you talk a little bit more about that?

Marc Misthal: Visual, y- you can look at it and you can try to tell if there's an infringement there. Sometimes that's easy to do, sometimes it's not. But it would pertain to anything that the AI spits out, whether it's music, text a- anything that's spit out if it incorporates- something that it was trained on, that potentially could be an infringement.

Sarah Sawyer: And what are you seeing as the practical effect for clients with that?

So what Are some examples of how when some type of infringement... So I assume there's obviously there's the receiving end, and then there's the end that, so the people who maybe they have the protected work that is now out there in the world and being used in a way that it shouldn't be, and then there's the people who might be taking it and using it.

So, what are the practical impacts that you're seeing on both ends?

Marc Misthal: The question, one of the [00:03:00] questions we've talked about is on the creation end, how do you protect it? If you create something with AI and you can't protect it,

there's not much that you can do to stop people from knocking it off or using it without authorization.

On the flip side, if you

create something and it turns out to be infringing and there's a whole host of questions about who's ultimately responsible for that, whether it's the person, the party responsible for creation, or the AI company, or both, or that's a whole separate question, and I'm not sure that there have been too many answers on that yet.

Russell Berger: Yeah. Yeah. Is there anything that, business owners that are leveraging AI can do to increase the chances that whatever they create with AI is more likely to be protected?

Marc Misthal: Best thing to do is to [00:04:00] document everything that you're doing with AI. So if you're creating something, keep track of all the prompts, right? Because the more detailed you get and the more instructions you give the AI, the more likely it is that something's protectable. But it's really evaluated on a case by case basis right now.

Russell Berger: Yeah. I think that's a good general bit of advice, and because it's the same advice we've been giving on things like, accuracy and bias risk or confidentiality we wanna make sure there's a human in charge at the helm and using this as a tool as opposed to just taking whatever AI spits out and running with it.

Marc Misthal: Exa- exactly. The more human involvement, the more likely protection is, but it's really case by case right now.

Sarah Sawyer: This sounds like an age-old problem with a new twist, in the sense that I know on the employment side, I've definitely dealt with ownership issues of IP, obviously [00:05:00] when you've got a contractor or an employee, and whether you've contracted properly to own what you're getting.

So a lot of this sounds like it comes down to similar themes that I've seen in other areas prior to AI That you've gotta be considering the ownership aspect as one of the main things you wanna be thinking about as it relates to intellectual property. Is that fair to say?

Marc Misthal: I think that's fair. When new technology is introduced, the law tends to be a little bit behind, and IP is definitely guilty of that, but it eventually does catch up and it eventually does get applied. We saw that a number of years ago with all the file sharing sites and music downloads.

So it's going to catch up. There are a lot of cases pending in the courts, they just haven't been decided yet. And I think once those cases start really getting decided, we're gonna get some more guidance on how things will [00:06:00] play out.

Sarah Sawyer: Yeah. So there'll still be more to come always with AI and these developments.

I know we've talked about that a couple times on here, so we'll have to keep having you back, Marc, to walk us through um, the developments, but-

Marc Misthal: Happy to do it ...

Sarah Sawyer: but in the meantime, you have one final takeaway just for the audience as we wrap up here this episode. What's your number one takeaway from this conversation that our clients should be doing or considering as it relates to this topic?

Marc Misthal: I mean, really be careful about what you're using AI for, what you're asking it to do. If you are using it to create things that are valuable to the business, document what you're doing. Talk to counsel to see if it can be protected. We always like to get in there early to protect things because it's...

If we get in there, if we get the phone call that's, "My thing," whatever that is, "is being knocked off. What do I do about it?" It's always a scramble, and it's harder to [00:07:00] address, and if we can get in early and get the protection, it makes life a lot easier down the road. So if you're creating something with the AI and want to protect it, talk to counsel.

Sarah Sawyer: Yeah. Good advice, and being proactive. Russell and I always like that here on OK at Work for these topics.

Marc Misthal: Exactly.

Russell Berger: I mean, it's the same stuff we say about every topic is be proactive, stay in front of it. The law's evolving in this area, so stay up to date on how this develops.

Sarah Sawyer: Yeah, and make sure you're thinking about it, 'cause I think it's so easy.

As this technology gets easier, it's easy to not think about these things. So appreciate the insight, Marc.

Marc Misthal: It's my pleasure. Definitely keep thinking about it.

Sarah Sawyer: All right, thanks.

Marc Misthal: Thank you.