



Constantin Rehaag

Dentons

**All you ever wanted to know about
copyright and AI
... or demystifying AI related
copyright issues**

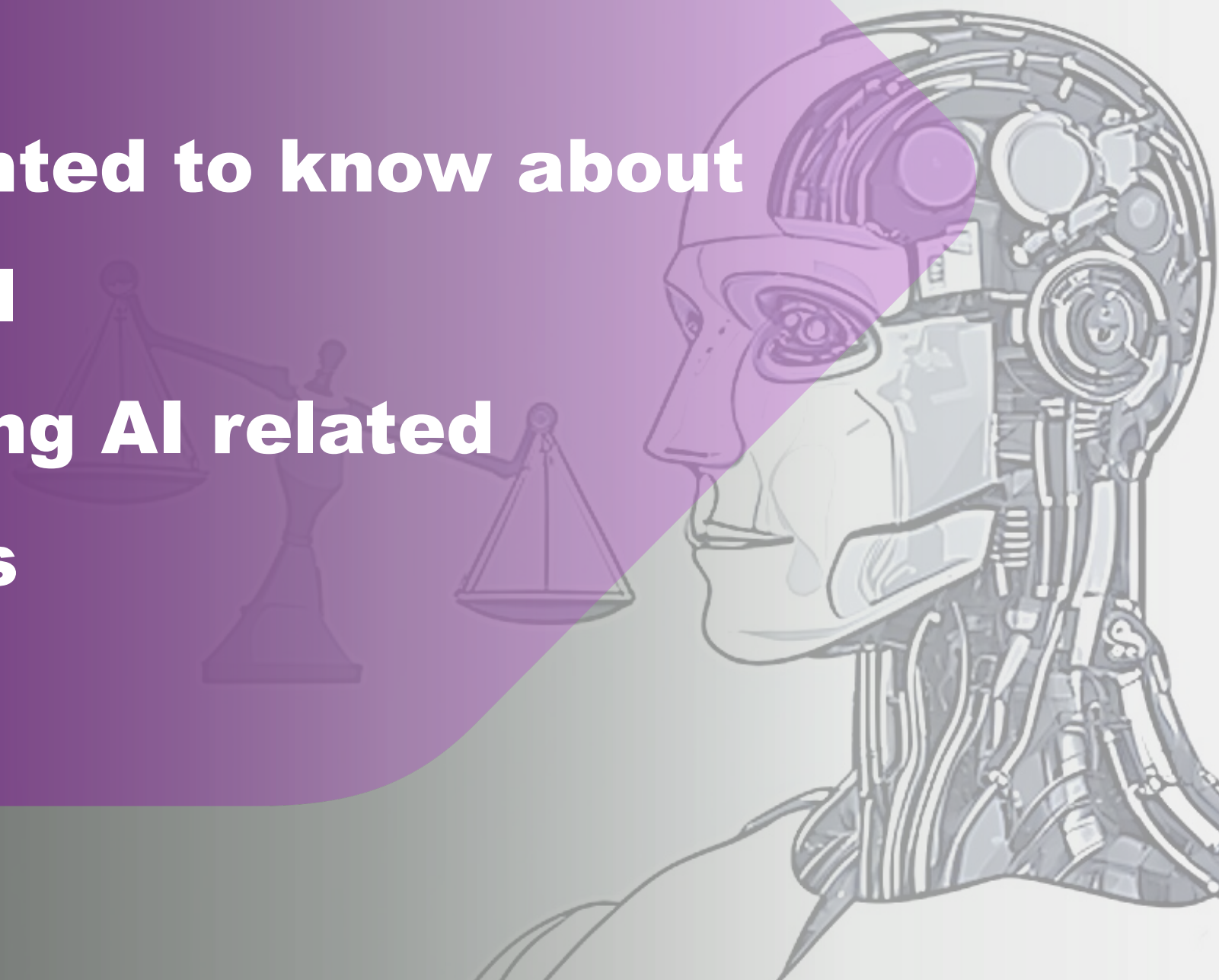


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AI and Copyright: A Balancing Act for the Future of Creativity



AI and Copyright: A Balancing Act for the Future of Creativity

AI is a technology that enables machines to perform tasks that normally require human intelligence, such as learning, reasoning, and generating outputs.

AI has become increasingly prevalent and influential in various fields and sectors, such as health, education, entertainment, and media.

However, the development and use of AI also raises complex and novel legal questions, especially in the area of copyright.

There is a plethora of use cases: drug discovery and development, clinical trials and regulatory affairs and marketing and sales

AI and Copyright: A Balancing Act for the Future of Creativity

There is a plethora of use cases: drug discovery and development, clinical trials and regulatory affairs and marketing and sales

Create a new marketing campaign and a slogan for a new Novartis painkiller, please consider limitations for drug names and, thus, potential trademarks. Be creative and modern, create a fancy brand and a cool slogan:

[ChatGPT \(openai.com\)](https://openai.com)

Here we go:

Brand Name: ReliefXcel

Campaign: "Unlock Your Pain-Free Potential with ReliefXcel"

Slogan: "Break Free from Pain, Live Life Unleashed with ReliefXcel!"

Campaign Description:

Welcome to the future of pain relief with ReliefXcel! Say goodbye to the limitations of pain and hello to a life of boundless possibilities. ReliefXcel is not just a painkiller; it's a game-changer in the world of wellness.

Our cutting-edge formula is designed to provide fast and effective relief from a variety of pains, allowing you to reclaim your vitality and embrace each day with renewed energy. Whether it's a headache, muscle soreness, or joint pain, ReliefXcel has got you covered.

Why settle for anything less when you can experience the ultimate in pain relief? Join the movement and unlock your pain-free potential with ReliefXcel. It's time to break free from pain and live life unleashed!

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Uuups – we forgot the packaging!

Please create a modern, cool packaging for Novartis' new painkiller "ReliefXcel" - it must be so creative that one must be able to claim copyright protection under German law for it! Use graphics that symbolize the way it works - its a triptane agent. Thanks!

App | neuroflash (neuroflash.com)



neuroflash

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What is (a) copyright?



What is (a) copyright?

§ Section 1 UrhG: "Authors of literary, scientific and artistic works shall enjoy protection for their works in accordance with this Act."

§ Sec. 2 (2) UrhG: "Works within the meaning of this Act are only personal intellectual creations."

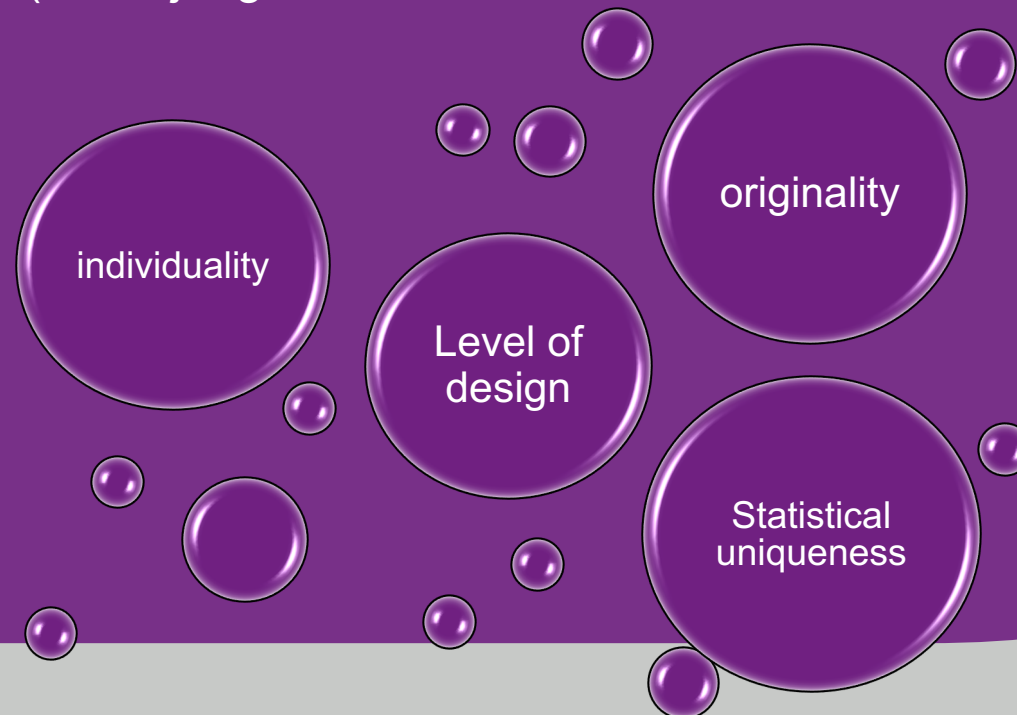
Personal: The work must be created by a human being

What is (a) copyright?

Intellectual → verbal or non-verbal message or information

A merely handcrafted product is not a work (BGH, judgement of 5 November 2015 - I ZR 76/11)

Creation → subjective novelty of the work



AI as a challenge to copyright protection

Training, Input and Output



AI as a challenge to copyright protection – training, input and output

- Some AI models may be more prone to copyright issues, especially generative AI models that can produce new texts or images based on existing ones – taking over copyright protected content
- These models are trained on large datasets that include copyrighted books, images, or other media, without obtaining permission from the original authors or license holders – where does the data come from? Consent?
- Some AI models are not static, meaning that they can search databases or the internet for additional information when they receive a prompt or a query – how is this done?
- However, such real-time scraping of "live data" even increases already existing risks of using inaccurate data or spreading misinformation, as the models may not be able to verify the reliability or quality of the information they find – simply duplicating copyright protected content?
- Prompts: are the questions copying works?

Exceptions or limitations to copyright for AI



Exceptions or limitations to copyright for AI

Exceptions or limitations to copyright are

- legal provisions that allow certain uses of protected works without the consent of the rights holders, under specific conditions and for specific purposes, such as education, research, or parody
- based on the idea that copyright should not be absolute but should balance the interests and rights of both creators and users of works, as well as the public interest in access to information and culture
- also meant to accommodate new technological developments and social needs, such as the emergence of digital platforms, online services, and AI.

Exceptions or limitations to copyright for AI

Machine Learning: Text and data mining (TDM) is a technique that involves the automated analysis and extraction of information from large amounts of data, such as text, images, or audio, for various purposes, such as research, innovation, or journalism. Generative outputs are the outputs that AI produces based on its analysis and processing of data, such as text, images, or audio, that may imitate, copy, or transform existing works, or create new works. TDM and generative outputs may implicate various copyright-relevant acts, such as reproduction, adaptation, or communication of protected works, depending on the type, format, and scope of the data and the outputs.

Originality, authorship, and ownership of the outputs generated by AI



Originality, authorship, and ownership of the outputs generated by AI

Originality is the main criterion for copyright protection, which means that the work must be the result of the author's own intellectual creation, and not copied from another source.

However, the concept and standard of originality may differ across different jurisdictions and types of works, and may not be easily applicable or measurable for the outputs generated by AI.

Originality, authorship, and ownership of the outputs generated by AI

Authorship is the legal recognition and attribution of the creation of the work, which implies the expression of the human intellect and personality, and the exercise of the personal choices and creative input of the author.

However, the role and contribution of the human and machine actors involved in the creation of the outputs generated by AI may be unclear, complex, or variable, and may not reflect the human-centric and personality-based approach to authorship.

Originality, authorship, and ownership of the outputs generated by AI

Ownership is the legal recognition and allocation of the exclusive rights to exploit and benefit from the protected works, as well as the legal responsibility and liability for the protection and enforcement of the rights, and the compliance and respect of the obligations and duties.

However, the eligibility and suitability for copyright ownership of the outputs generated by AI may depend on the nature, origin, and purpose of the outputs and the existing works, as well as the interests and rights of the human and machine actors.

Originality, authorship, and ownership of the outputs generated by AI –

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Originality, authorship, and ownership of the outputs generated by AI

"First, one has to establish in detail which objective characteristics determine the creative originality of the used work. Then, by comparing the opposing designs, one has to determine whether and to what extent creative features of the older work have been adopted in the new design. The decisive factor for the decision is ultimately a comparison of the overall impressions of the designs, in which all adopted creative features have to be considered in a holistic view. If the overall impressions match, the new design is a reproduction of the older work. Then, if necessary, one has to further examine whether the new design nevertheless exhibits such essential changes that it is not a mere reproduction, but an (unfree) adaptation or other transformation of the used work. If the overall impressions differ, there is neither a reproduction nor an adaptation, but possibly a free use. There is a free use according to § 24 I UrhG aF if an independent work has been created and the older work served as a basis for the creation of the new work".

(German Federal Supreme Court, judgment of April 7, 2022 – I ZR 222/20)

Conclusion and outlook



Bear in mind the risks in relation to

1. The (training and the) input

- a) Manually
- b) TDM
- c) Think of all intellectual property rights!

2. The output

- a) Infringing?
- b) Ownership?
 - Prompting?
 - Typewriter test?
 - Changes (palor theory)?

Your contact in Germany

Dr. Constantin Rehaag, MA, is a partner in Dentons' Frankfurt office. Since 2005 he specialises in intellectual property and unfair competition law, in particular trademarks, designs and copyright law. Constantin has comprehensive experience in IP litigation including patent litigation, in registration and in anti-counterfeiting work as well as related criminal law. His sector experience covers the following industries: luxury goods and fashion, pharma, air transportation, automotive, music and publishing, printing and office machinery, forestry and construction, drinks and tobacco as well as logistics.

Constantin regularly publishes articles on intellectual property law and is a lecturer-in-law at the University of Passau. He gives training courses for judges and public prosecutors at the German Judicial Academy ("Deutsche Richter Akademie"). Recently, he has been appointed to the Legal Expert Group of Observatory at the EUIPO.



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