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Bright Ideas

A publication of the Intellectual Property Law Section of the New York State Bar Association



At the Intersection of Progress and Creative Protection, Copyright and AI Battle for the Future

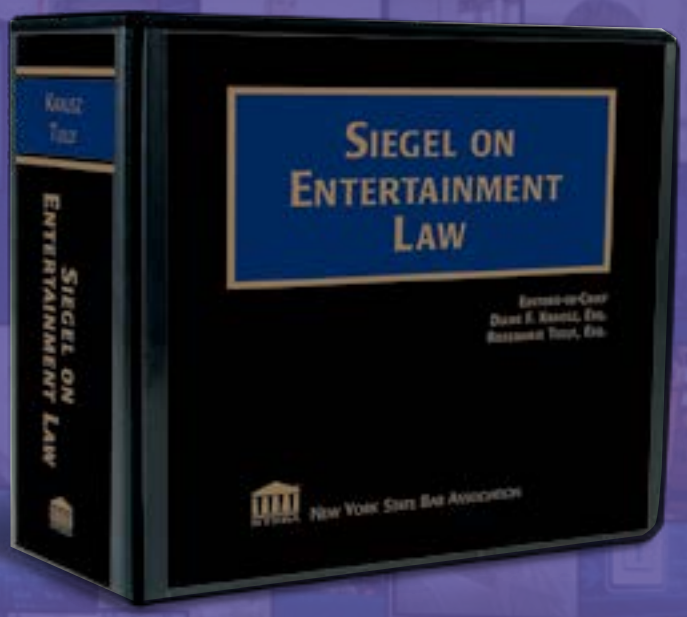
Immersive Art and Digital Frontiers: Navigating Legal Challenges in Expanding Realities

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Bright Ideas

Submission of Articles

Anyone wishing to submit an article, announcement, practice tip, etc., for publication in an upcoming issue of *Bright Ideas* is encouraged to do so. Articles should be works of original authorship on any topic relating to intellectual property. Submissions may be of any length.

Submissions should preferably be sent by e-mail to Editor-in-Chief, Stephanie Clemente, at sbclemente@gmail.com.

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Message From the Chair



The IP Section is pleased to present the latest issue of *Bright Ideas* – our first following a brief hiatus and a thoughtful revamp of the publication. As we move forward with fresh energy and renewed focus, it's the right moment to reflect on the extraordinary year we've shared as a section.

2025 has been defined by strong programming, active engagement, and a commitment to building community among IP practitioners across New York State. Our members led, participated in, and supported a wide range of programming, including:

- **NYSBA IP Section January 2025 Annual Meeting** – Our flagship gathering to launch the year.
- **Bright Ideas: Coffee Hour** – Monthly information and discussion sessions.
- **Women in Intellectual Property 2025** – Celebrating and supporting women practitioners in our field.
- **Wine & Wisdom: Building a Winning Career in IP** – Career development insights.
- **Law Student Section Virtual Meet and Greets** – Connecting the next generation of IP attorneys with our community.
- **Nuances of Intellectual Property & Tech-Related Disputes Before WIPO** – Exploring international IP dispute resolution.
- **Litigating High-Stakes Trademark Infringement Cases** – Analysis of the PODS vs. U-Haul verdict.
- **Webinar: Practical Strategies and Tactics for Patents in Europe** – Cross-border patent prosecution guidance.
- **The Use of Content, Data and Information for Machine Learning and Training Algorithms for Generative Artificial Intelligence** – Examining emerging AI and IP intersections.
- **Fall 2025 Meeting** – Our annual fall gathering bringing members together to consider the year's developments and posture of the IP landscape.

As we close out the year, I want to thank our dedicated committee members, event speakers, NYSBA staff, and most importantly *our members* for making 2025 so successful. The strength of our IP Section lies in your talent and engagement. I encourage you to stay involved, bring colleagues into our community, and continue sharing your expertise as we build on this momentum in 2026. See you at the Annual Meeting.

Bill Samuels

At the Intersection of Progress and Creative Protection, Copyright and AI Battle for the Future

By Nyasha Foy, Temidayo Akinjisola and James Parker



"Meet George Jetson…."

And with those famous three words, "The Jetsons" premiered on Sept. 23, 1962. The cartoon gave us a glimpse into our near distant future through the lens of George Jetson, a working father who spent a one-hour per day, two-day work week as a "digital index operator" for an atomic supercomputer.[1] Although we are more than 25 years from the Jetsons' 2060 utopia, in many ways it feels like we are already there.

We have been sold on the inevitability of artificial intelligence and generative AI into our lives as the ultimate life hack with the promise that we too can achieve the same Jetsons' era level of efficiency. Need a companion?[2] There's an AI for that. Model for your ad campaign?[3] AI can do that, too. Drafting new laws?[4] Bar exam questions?[5] Rosie the robot?[6] Say less. Yet, even with a growing countermovement toward digital minimalism for those who long for days past in a "semi-analog" world,[7] the march to AI moves on, but not without tension.

In the billion dollar world of AI,[8] information is king[9] and intellectual property is queen.[10] AI relies on input from human creations – human image and likeness, copyrighted and non-copyrightable material alike – to train, learn, mimic, adapt and execute.[11] In a world in which intellectual property rights predicated on human authorship provide authors, for a limited time, the right to exercise their bundle of exclusive rights, it is unsurprising that the proliferation of AI has sparked debate among just about everyone.[12]

This article will explore the balance of progress and protection at play stemming from the use of AI that may shape the future of copyright law.

There is a growing divide on whether and how copyrighted works should be used in AI. In the absence of clear and harmonized law directly on point,[13] some rights holders are taking their fight to the courts with the hopes of making precedent-setting case law in their favor. These rights holders assert that the use of copyrighted works to train large language models without permission from the copyright owner

constitutes copyright infringement.[14] AI developers argue that the use of publicly available works for training purposes is "fair use" and, further, that the rights holders' desired outcome would lead to "a less open, creative, and accessible internet [...], which [would be a] disadvantage [..] from an economic, strategic, and cultural standpoint."[15] The conversation is rooted in both creativity and capitalism, with the latter's position turning on the concept of "free," e.g., the notion that freely and publicly available content is also free (as in no fee) content.[16]

Even taking into consideration the court's ruling in *Bartz v Anthropic*, case law, thus far, appears to side with the copyright holders. In *Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc.*, the Delaware District Court held that Ross' use of over 2,000 human-authored Westlaw headnotes to train its AI legal research tool, Ross Intelligence, did not meet the standard for fair use and in fact infringed upon Thomson Reuters' copyright in its headnotes.[17] After determining that the headnotes were original enough to warrant copyright protection, the court granted partial summary judgment to Thomson Reuters. Balancing the four-factor fair use test, the court found two factors that weighed in favor of each party. While the court acknowledged the creative effort required to draft the headnotes, it found that the nature of the work favored Ross because the headnotes were "not that creative." On the third factor, the court found that although a substantial portion of the headnotes were used in Ross' AI training, Ross did not make the copied material available to the public and only used it for internal training purposes. Yet, the court ultimately found that the balance of fair use factors weighed in Thomson Reuters' favor because Ross' use of the headnotes was commercial in nature and non-transformative. Additionally, Ross' product was designed to compete with WestLaw as a market substitute. In other words, the court determined that of all four fair use factors, the fourth prong – the economic impact on the value or potential market for the applicable work and its effect, here, the potential to shrink Thomson's licensing opportunities and market share – "matters more."

In *Kadrey v. Meta Platforms, Inc.,*[18]13 authors claimed that Meta downloaded their copyrighted books from shadow libraries (like Library Genesis) to train Meta's large language models. The U.S. District Court for the Northern District of California granted summary judgement to Meta, but Judge Vince Chhabria emphasized that his holding was narrow, stating that "this ruling does not stand for the proposition that Meta's use of copyrighted materials to train its language models is lawful" – leaving the door open for case law to build on the fair use argument. In weighing the four-factor fair use test, the court found that Meta's use was transformative and would not impact the authors' market. However, in analyzing the fourth factor, Judge Chhabria discussed a theory of potential market harm whereby an LLM can produce works that are similar enough in subject matter and in genre to copyrighted works that the LLM-produced works could compete with the original works and indirectly replace them.[19] However, because the plaintiffs failed to present this argument themselves, the fourth factor favored Meta.

Other AI companies are avoiding making new laws and choosing to settle out of court; for example, Anthropic, one of the leading AI LLM developers. Several authors and publishers sued Anthropic through its flagship LLM, Claude, claiming that Anthropic copied a massive trove of pirated books to train Claude using sites like Library Genesis and Pirate library mirror (PilMi).[20] In June, the court issued a nuanced summary judgement that stated (1) Anthropic's lawful acquisition of books and its use of training for LLMs was transformative; however, (2) Anthropic's usage was infringement, and fair use could not apply. Anthropic later settled the dispute for $1.5 billion. Judge William Alsup gave the settlement preliminary approval at a hearing in late September.[21]

In the boardroom, other rights holders are electing to go down the "if you can't beat them, join them" route by entering into agreements to license their works and data to GenAI companies; the three year licensing deal between Disney and OpenAI partnership being a recent example.[22] There is opportunity for both licensor and licensee in these arrangements: for licensor, a new revenue stream; for licensee, permissioned access to and use of quality training material, which would increase the commercial value and informational integrity of the LLM outputs. There is also risk for both sides, and the devil is in the details. Among the negotiation points to consider for licensor and licensee are data ownership, data licensing and restrictions, use and restrictions on derivative works, the scope and applicability of "all media in perpetuity" and non-compete clauses. How to assess the fair market value of the AI bundle of rights remains as shrouded in mystery as the proverbial AI black box.[23]

Other copyright-related questions arise from the output side of the ledger: Can a work created using AI be afforded copyright protection? (answer: Maybe). If so, who owns the rights, if any, to that content? (answer: It depends). Should AI itself be considered an "author" under copyright law? (This one seems settled.)

The U.S. Copyright Office's guidance on the use of AI in a copyrightable work suggests that AI can be incorporated into a copyrighted work under limited circumstances. A human author must drive the creative process, and AI must serve as a tool, exercising the original intellectual input of the author. Similar to a fair use inquiry, whether AI is considered the creator or a tool is a highly fact-specific inquiry.The office

has granted copyright registrations to "Zarya the Dawn,"[24] a comic book including images created by Midjourney; "A Single Piece of American Cheese,"[25] a visual work created entirely with Invoke AI, a platform founded by the copyright applicant; and "Sennzia Opera," a music opera that features AI-generated voices – despite the use of AI in the creation of each of these works.[26]

In granting the registrations, the office focused on the degree of human control in the creative process with an analysis focused on the selection, arrangement and coordination of the elements incorporated into the work in question. For "American Cheese," the office examined an almost 10-minute video provided by the copyright applicant that demonstrated the use of AI in the creative process.[27] The office determined that each work contained a sufficient amount of original human authorship in the selection, arrangement, and coordination of the AI-generated material and further expressly excluded the AI-generated material from the copyright registration. For "Sennzia," this meant granting copyright registration only for the story, lyrics, and spoken words, and the selection, coordination, and arrangement of those elements in the sound recording, but expressly excluding certain music and vocal elements in the sound recording that were AI-generated.The copyright office has also made clear that AI cannot be considered an "author" under copyright law because copyright does not extend to non-human authored works – meaning, works created solely by AI are not afforded full copyright protection.In *Thaler v. Perlmutter*, the U. S. Court of Appeals for the District of Columbia affirmed a decision by the D.C. District Court supporting the copyright office's refusal to grant copyright protection to "A Recent Entrance to Paradise," a work created *solely* by artificial intelligence.[28] In this case, inventor Stephen Thaler sought to register a work created by his own generative AI system, the aptly named "Creative Machine," naming the Machine as the author. He then requested the copyright office to transfer the copyright to him as the owner of the Machine. The copyright office denied Thaler's registration application. Thaler subsequently sued Shira Perlmutter, in her official capacity as the register of copyrights, in D.C. District Court. The district court held, and the Court of Appeals later affirmed, that an AI-generated artwork is not eligible for copyright protection where AI is identified as the sole creator and human involvement is absent in the creation process. The holding aligns with precedent, affirming that human authorship is a fundamental requirement for copyright protection.[29]

So, what opportunities, lessons and rules do we arrive to at this moment? In what direction is the balance between progress and protection being tipped? In this moment, we observe that through the deal-making, judicial and legislative processes, we are beginning to see a framework develop that may soon require express authorized permission from rights holders for the use of their copyrighted material for AI training purposes. We are also observing that there is a pathway forward for works created with AI, but not without nuances and limitations.[30]

Beyond the boardrooms and corporate offices, there remain existential questions about the impact and effect of AI from a human perspective: What are we driving toward? What is the blueprint?[31] How much of a role should AI play in our lives? How trustworthy is AI?[32] What are the guardrails? At what age should children be able to engage with AI?[33] Is AI a threat to humanity? If so, how much? What is the breaking point for society?

One answer to the latter question might be workforce displacement.[34] One foundational principle of intellectual property law is that it not only encourages the creation of "useful arts" for the benefit of society, but also provides an incentive-based framework for building an economy around creators, inventors and their creations. The media, entertainment and related industries are perfect examples of this. Yet, in recent years, once-promising jobs in these fields have become obsolete[35] against the backdrop of existential threats such as shifting revenue models,[36] a pandemic, a strike,[37] a cheaper workforce,[38] and now artificial intelligence and a call for the end of intellectual property altogether.[39] This leaves us grappling with questions like, What should we consider in determining a fair value exchange between human and machine, author and inventor? How does the progress of science and useful arts, and society at large, benefit if creators and innovators hide their works from the public? Or if AI replaces humans at scale in the workforce?

As AI continues to evolve and challenge a new normal, so too will the conversations around its uses, applications and guardrails. Whatever compromises are needed to balance technological progress with incentivizing human creativity remain to be seen, but in the coming months[40] we may begin to get a better picture of the balance between the ethical, responsible, and legal integration of AI into our lives.

Nyasha Shani Foy is a business and legal affairs executive, creative and thought leader who shares insights on topics ranging from lifestyle and culture to intellectual property and AI at organizations and institutions both nationally and internationally. Her business and legal affairs roles at early-stage start-ups, scale-ups, iconic global brands and established firms include Buzzfeed, Broadway Video, Complex Media, Horizon Media, VICE Media Group, and Sotheby's as its first vice president and assistant general counsel, NFTs. She is vice chair of NYSBA's Intellectual Property Law Section.

Temidayo "Dayo" Akinjisola, J.D., Roger Williams University School of Law class of 2023, contributed research and co-drafted sections for this article. Dayo is a D.C. licensed attorney with experience in economic development, AI policy, and legal research.

James Parker was the legal fellow for the Litigation Department at NBCUniversal for the 2024-25 cycle.

Endnotes

1. "Boy, this job is a killer. I spend an hour a day, two days a week working my fingers to the bone." George Jetson, The Jetsons, Season 2, Episode 30, "The Vacation" (ABC aired November 7, 1985).
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13. Among the differences between the national copyright regimes is whether to adopt an "opt-in" or "opt-out" system for copyright holders. The opt-out system, commonly known as text and data mining (TDM) exception, permits AI to use copyright-protected data for training, unless a copyright owner explicitly "opts out." Also *see Judy Wang and Nicol Turner Lee, AI and the Visual Arts: The Case for Copyright Protection (Commentary) (April 18, 2025)*, Brookings, https://www.brookings.edu/articles/ai-and-the-visual-arts-the-case-for-copyright-protection/ (Though there appears to be some agreement on restricting copyright for AI-generated artworks, there is substantial diversity in specific national policies. For example, the United Kingdom grants copyright in computer-generated works to whomever undertook the arrangements for the creation, while China recognizes copyright if the prompts are sufficiently detailed.); The 2025 AI Index Report, Stanford University Human Centered, Artificial Intelligence, https://hai.stanford.edu/ai-index/2025-ai-index-report (As of Dec . 2025, over 1,000 AI-related laws have been introduced nationwide. In 2024, U.S. federal agencies introduced 59 AI-related regulations); U.S. State Tech Policy Tracker, Integrity Institute, https://us-state.techpolicytracker.com/ (noting that over 45 states have passed or proposed legislation directly addressing AI considerations).

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SECTION EVENTS
ANNUAL MEETING 2025



Above: "Artificial Intelligence in Practice" (L-R): Immediate Past Chair Brooke Erdos Singer, Program Chair Leonie Huang, Jordan M. Thompson, Sofia Rahman, Moustafa Badreldi, Nikki Gardner, Section Vice Chair Nyasha Foy



Rory Radding (front row)



*Above:"*Practical Strategies and Tactics for Patents in Europe" (L-R): Rory Radding, Shirley S. Ma, Dr. Alexander Wyroll and Program Chair Leonie Huang.

SECTION EVENTS

ANNUAL MEETING 2025







Above: Introducing Section Fellow Celine Agard

Above right: Shirley S. Ma

Right: "Generative Artificial Intelligence and Professional Ethics" (L-R): Prof. Roy Simon, Brooke Erdos Singer, and Program Chair Leonie Huang

Below: Chief Diversity Officer Roundtable Panelists (L-R, starting second from left): Mark Bunbury Jr., Philip G. Hampton II, J. Danielle Carr



SECTION EVENTS

WINE & WISDOM: BUILDING A WINNING CAREER IN IP





Above, (L-R): Program Chair S. Claire Gibson with panelists David Joyal, Annie Kerrick and Jason M. Sobel





Above: Leonie Huang, Charles Cantine, Jason M. Sobel, S. Clair Gibson

SECTION EVENTS

FALL MEETING 2025





Above and below: "A Look at the Recent Evolution of Brand Licensing" (L-R): Gregory Sullivan, Evan Naar, Nicole Dolgon, Marc A. Lieberstein

Above and below: "Brand Name Challenges: Advertising and Regulatory Issues" (L-R): Alexa Meera Singh, Ariel Sodomsky, Daniel Rosen, and Brooke Erdos Singer





Right (L-R): Joyce Creidy, Leonie Huang, Brooke Erdos Singer, Carly Slattery (Mimi Netter Scholarship winner), Rosa Fernandez (Mimi Netter Scholarshp winner), Nyasha Foy

For more photos, see inside back cover.



Immersive Art and Digital Frontiers: Navigating Legal Challenges in Expanding Realities

By Lorena Guzmán-Díaz



Left (l-r): The author, Palina Ivko, and Adam Weissman, "Immersive Art & Digital Frontiers: Legal Issues in Expanding Realities.," NY County Lawyers Association Art Law Committee

The rapid evolution of immersive art – artistic experiences that engage audiences across multiple senses and often invite direct participation – has opened new creative vistas and legal challenges. From large-scale physical installations to fully digital environments powered by virtual reality (VR) and augmented reality (AR), immersive art blurs the boundaries between observer and artwork. As technology advances, so too do the legal questions at the intersection of art, business, and law.

Drawing on insights from a recent New York County Lawyers Association Art Law Committee panel, "Immersive Art & Digital Frontiers: Legal Issues in Expanding Realities," presented at the 16th Art Law Institute on May 15, 2025, this article examines the pressing legal issues facing artists, producers, and venues in the immersive and digital art landscape. The panel brought together leading practitioners to dissect the legal intricacies linked to immersive art forms – particularly those that leverage new media, Virtual reality, augmented reality, and other digital technologies that permit new levels of public interaction. The discussion illuminated the complexities of copyright, licensing, and public engagement as these innovative art experiences occupy both tangible and digital domains.

I. The Intersection of Business and Legal Realities in Immersive Art

Immersive art encompasses creative works that transcend traditional boundaries, engaging audiences through sight, sound, touch, and even taste or smell. These experiences range from walk-through installations and interactive digital environments to multisensory performances. As the definition of immersive art expands alongside technological innovation, so too must the legal frameworks that govern its creation and presentation.

A. Personal Injury and Risk Management

Unlike traditional art exhibitions, immersive experiences often require physical interaction, increasing the risk of accidents such as slips, falls, or unintended exposure to hazardous materials. Legal counsel must consider:

- *Client and Venue Type*: The legal obligations and risk exposure differ significantly depending on whether the client is an individual artist, a producer, or the venue itself. For example, commercial galleries and for-profit event spaces may be subject to different premises liability standards and insurance requirements compared to nonprofit museums or educational institutions, which may have additional protections or regulatory obliga-

tions. The allocation of responsibility for safety measures, indemnification, and compliance with local regulations should be clearly delineated in contracts among all parties involved.

- *Format and Scope*: The specific format of the immersive experience – whether it is a large-scale festival, a temporary pop-up, or a long-term exhibition – will determine the necessary level of precaution and planning. Festivals or events with high foot traffic may require crowd control measures, emergency response plans, and heightened insurance limits. Pop-ups and site-specific installations may need special permits, temporary use agreements, and tailored risk assessments, while permanent installations might demand ongoing maintenance protocols and periodic safety reviews.
- *Releases and Consents*: All participants, including attendees, performers, contractors, and staff, should be required to sign customized releases of liability that address the particular risks of the experience. For unconventional or experimental installations – such as those involving edible components, sensory deprivation, or altered states of perception – comprehensive disclaimers, informed consent forms, and clear participant guidelines are crucial to mitigate liability. These documents should be drafted to comply with applicable state laws and should be easily understandable to participants.
- *Multi-Jurisdictional Issues*: When immersive art installations travel across state or national borders, legal counsel must address varying liability standards, safety codes, and regulatory requirements in each jurisdiction. Establishing separate corporate entities or special-purpose vehicles for each location or tour leg can help compartmentalize liability and shield the parent organization's assets from claims arising in a particular venue or region. Coordination with local counsel is often advisable to ensure compliance and effective risk management.
- *Insurance*: It is essential to communicate to insurance providers the unique, interactive nature of the installation so that the policy accurately reflects the risks involved. This may include obtaining specialized coverage for participant injury, property damage, or product liability if consumables or interactive devices are used. Gaps in coverage can arise if insurers are not fully informed about the scope of activities, so detailed descriptions and risk assessments should be provided during the underwriting process.

Practical Protocols: Staff and volunteers must receive thorough training on enforcing waivers, monitoring participant safety, and responding to incidents. Hazardous materials – such as fog machines, electrical components, or substances used in sensory installations – must be clearly labeled and stored in compliance with safety regulations. Additionally, a clear and efficient claims processing procedure should be established in advance to handle any incidents or injuries, including documenting the event, notifying insurers, and communicating transparently with affected parties.

B. Right of Publicity and Privacy in Immersive Environments

Immersive art frequently incorporates surveillance, data collection, or recording of participants, raising significant privacy and publicity concerns:

- *Expectation of Privacy*: Attendees at public or semi-public exhibits generally have a diminished expectation of privacy compared to private settings. However, the boundaries can blur in immersive environments where participants may not realize they are being recorded or monitored. To mitigate risk, organizers should implement highly visible signage at all entry points and throughout the installation, explicitly informing attendees of any audio, video, or photographic recording. Written disclosures in ticketing materials and digital consent forms are also recommended, ensuring attendees are aware of and consent to the recording practices before participating.
- *Biometric Data*: The use of advanced technologies – such as facial recognition, motion tracking, or other sensors that capture biometric identifiers – raises heightened legal and ethical concerns. Several states, including Illinois, Texas, and Washington, have enacted laws that strictly regulate the collection, storage, and use of biometric data, often requiring clear, informed, and written consent from participants. Violations can result in significant statutory damages and class action liability. Organizers must conduct a jurisdiction-specific legal analysis, implement opt-in consent mechanisms, and provide detailed privacy notices explaining the purpose, duration, and handling of biometric data.
- *Data Protection*: Any personal data or recordings collected from participants must be safeguarded with robust cybersecurity protocols to prevent unauthorized access, leaks, or misuse. This includes encryption, secure storage, access controls, and regular audits. If participant data or recordings may be incorporated into future artworks or shared with third parties (such as collaborators, sponsors, or media), transparency is critical. Privacy policies should clearly outline how data will be used, stored, and shared, and participants should have the opportunity to opt out or request deletion of their data where feasible, in compliance with applicable data protection laws, such as the European Union's General

Data Protection Regulation or California's California Consumer Privacy Act.

- *Right of Publicity*: The right of publicity protects individuals against the unauthorized commercial use of their name, likeness, or other recognizable aspects of their persona. While incorporating attendee images or recordings into an artwork may be permissible with adequate notice and consent – especially if the use is non-commercial or transformative – using those same images for commercial purposes, such as advertising, merchandise, or promotional materials, generally requires explicit, written consent. The scope of protection varies significantly by jurisdiction: for example, New York's law is limited to commercial uses and does not extend posthumously,[1] whereas California's statute is broader and includes postmortem rights.[2] Organizers must tailor their consent forms and practices to the relevant state laws and clearly distinguish between artistic and commercial uses in their documentation.

Best Practices: Legal counsel should advise immersive art producers to work closely with privacy and intellectual property (IP) specialists to design comprehensive participant disclosures, consent forms, and data management protocols. Regular staff training on privacy compliance and incident response is also essential to minimize legal exposure and maintain public trust.

II. Protecting Intellectual Property in Immersive and Digital Art

The rise of immersive and digital art – particularly in virtual reality and augmented reality environments – has created new opportunities for creative expression, but also new challenges for protecting intellectual property. In digital spaces where artworks can be easily copied, modified, or distributed across platforms, questions of authorship, licensing, and compensation become more complex and require careful contractual planning. Artists, producers, and legal counsel must address these complexities to ensure that creative rights are preserved and that all parties are fairly compensated.

A. Licensing, Compensation, and Contractual Clarity

Licensing forms the backbone of the business model for immersive and digital art, yet it is often overlooked or handled informally, leading to confusion and disputes down the line. The following considerations are critical:

- *Contractual Relationships*: By default, copyright law vests ownership of a creative work in the original creator. However, in collaborative or commissioned projects – common in immersive and digital art – ownership and usage rights can become ambiguous without clear, written agreements. Contracts should specify whether the work is a "work-for-hire," whether the rights are being assigned or licensed, the scope and duration of any license, and any restrictions on modification, reproduction, or sublicensing. Even preliminary deal memos or letters of intent should outline key terms to prevent misunderstandings.

- *Compensation Structures*: The method of compensating artists can vary widely and should be tailored to the nature of the project and the relative bargaining power of the parties. Options include flat fees for specific deliverables, milestone-based payments, commissions based on sales or usage, or ongoing revenue-sharing arrangements tied to ticket sales, downloads, or in-app purchases. For digital and virtual reality/augmented reality works – where ongoing exploitation and adaptation are common – revenue-sharing and royalty models may be particularly appropriate but require careful accounting provisions and audit rights.

- *Due Diligence*: Before agreeing to revenue-sharing or deferred compensation, artists and their representatives should conduct due diligence on the producer, platform, or commissioning party. This includes reviewing their financial stability, history of timely payments, reputation in the industry, and the track record of past projects. Where possible, artists should seek references or testimonials from other creators who have worked with the same partners and may wish to negotiate for escrow arrangements or minimum guarantees.

- *Copyright Registration*: Registering digital and immersive works with the U.S. Copyright Office (or the relevant authority in other jurisdictions) is a critical step before delivering any work under a licensing agreement. Registration not only establishes a public record of authorship and ownership but is also a prerequisite for bringing a copyright infringement lawsuit and for seeking statutory damages and attorney's fees. For works that may be modified or updated over time – such as virtual reality installations or interactive experiences – consider registering both the original version and any major updates or derivative works.

B. Intellectual Property Challenges Specific to Immersive Experiences

Immersive art installations are at the frontier of creative expression, often combining visual, auditory, kinetic, and algorithmic elements to create multisensory environments. This convergence of media raises unique intellectual property challenges, as traditional legal frameworks may not always fit

the evolving nature of these works. Artists, producers, and legal counsel must navigate a patchwork of protections – copyright, trademark, and beyond – to safeguard their creations and commercial interests.

- *Copyrightability*: While copyright law traditionally protects fixed, original works of authorship, immersive and interactive installations test the boundaries of what is considered "fixed" and "creative." Courts have recognized that installations with fixed, tangible elements – such as sculptural components, video projections, or programmed sequences – are eligible for copyright protection.[3] However, ephemeral or variable aspects – such as participant-driven movement, real-time algorithmic responses, or the use of scents – may fall outside copyright's scope. In such cases, creators may need to explore alternative protections, such as patents for novel interactive mechanisms or trademarks for distinctive sensory experiences.
- *International Considerations*: The legal standards for what constitutes a protectable work, and the requirements for fixation, can vary significantly by jurisdiction. For example, while U.S. copyright law requires that a work be "fixed in a tangible medium of expression,"[4] some countries, such as Japan, do not impose a fixation requirement,[5] potentially allowing for broader protection of ephemeral or performance-based works. Artists and producers planning to exhibit or license immersive works internationally must conduct a jurisdiction-specific analysis to understand the scope of available protections and the steps required to secure them.

  Why International Differences Matter for Immersive Art: Immersive art is uniquely vulnerable to inconsistencies in international IP law because it often exists in both physical and digital forms and is designed for global audiences. A VR installation created in the U.S. may be exhibited in Europe, streamed in Asia, or adapted by collaborators in Australia. Each jurisdiction may have different rules about what is protected, how long protection lasts, and what constitutes infringement. For example, a sensory experience protected as trade dress in the U.S. may not be recognized in another country, and moral rights (such as the right to prevent modification) may be stronger in Europe than in the U.S. This patchwork creates risk for both artists and producers, who must proactively address these gaps in their contracts and protocols.
- *Trade Dress and Branding*: In cases where copyright protection is ambiguous or unavailable – such as for the overall "look and feel" or multisensory "vibe" of an installation – trade dress or trademark law may offer alternative avenues for protection. Trade dress can safeguard the distinctive visual appearance, configuration, or sensory elements that signify the source of a work, provided they are non-functional and have acquired distinctiveness in the marketplace. Ongoing litigation in the art and entertainment sectors highlights the growing importance of trade dress and trademark claims in protecting the unique branding and aesthetic signatures of immersive experiences,[6] especially as creators seek to prevent unauthorized imitation or dilution of their creative identity.[7]

III. Protocols and Legal Frameworks Unique to Immersive Art

Because immersive art straddles the line between the tangible and the virtual, and often involves international collaborations, it demands protocols and legal frameworks that are uniquely tailored to its risks and opportunities. Unlike traditional visual art or even most performing arts, immersive art is inherently interdisciplinary and technologically driven, often blending physical installations with digital interfaces, interactive elements, and real-time audience participation. This hybrid nature means that the legal and practical considerations for immersive art projects are far more complex, requiring a holistic and adaptive approach to risk management, intellectual property protection, and participant engagement. Moreover, as immersive works are frequently designed to be experienced across borders – whether through touring exhibitions, online platforms, or virtual reality environments – they must navigate a fragmented global legal landscape, where rules governing copyright, privacy, and liability can differ dramatically from one jurisdiction to another.

A. Why Protocols Must Be Unique

Traditional art law protocols – such as standard gallery contracts or film production agreements – are often insufficient for immersive projects due to the multifaceted nature of these experiences. Immersive art typically involves the convergence of multiple creative and technical disciplines, each bringing its own set of legal considerations. For instance:

- *Multiple Layers of IP*: Immersive installations often combine software code, sound design, visual art, choreography, and live performance, each of which may be created by different individuals or teams. Each layer can be subject to its own copyright, licensing, and moral rights regimes, and the integration of these elements

can raise questions about joint authorship, derivative works, and the allocation of rights among collaborators. For example, a VR installation might use proprietary code developed by a tech partner, music licensed from a composer, and visual assets created by freelance artists, all woven together into a single experience. Without protocols that clearly delineate ownership and usage rights for each component, disputes can easily arise over credit, compensation, and control.

- *Real-Time Collaboration*: The creation and operation of immersive art often depend on real-time collaboration between artists, technologists, engineers, curators, and even artificial intelligence systems. This collaborative process can blur the lines of authorship and complicate questions of who holds what rights in the final work. In some cases, the audience itself becomes a co-creator, influencing the outcome of the experience through their interactions. This dynamic environment requires protocols that address not only initial authorship but also ongoing contributions, modifications, and updates, ensuring that all parties' rights and responsibilities are clearly defined from the outset.
- *Participant Data and Privacy*: Many immersive art projects rely on the collection and use of participant data – such as biometric information, behavioral responses, or even emotional feedback – to personalize or drive the experience. This raises significant privacy and data protection concerns, particularly when sensitive data is involved or when installations are presented in jurisdictions with strict privacy laws, such as the European Union's General Data Protection Regulation. Protocols must therefore address not only intellectual property issues but also the lawful collection, storage, and use of participant data, including clear disclosures, informed consent mechanisms, and robust cybersecurity measures.
- *International Distribution*: As immersive art is increasingly distributed across borders – whether through physical touring, digital streaming, or virtual reality platforms – projects must comply with a complex patchwork of local, national, and international laws. This includes not only intellectual property and privacy regulations but also safety standards, accessibility requirements, and consumer protection laws. The global reach of immersive art makes it particularly vulnerable to legal uncertainties and enforcement challenges, underscoring the need for protocols that are flexible, comprehensive, and adaptable to multiple legal environments.

1. Implementing Unique Protocols

To address these multifaceted challenges, immersive art projects require the development and implementation of protocols that are specifically tailored to the unique demands of this field:

- *Custom Collaboration Agreements*: Unlike standard contracts used in traditional art or entertainment projects, collaboration agreements for immersive art must account for the interdisciplinary and often iterative nature of the work. These agreements should clearly define the roles and contributions of each collaborator – whether they are artists, programmers, designers, or engineers – as well as the ownership, licensing, and revenue-sharing arrangements for each layer of the project. Special attention should be given to provisions governing international exhibitions, digital adaptations, and future modifications, ensuring that all parties understand their rights and obligations throughout the life cycle of the work.
- *Jurisdiction-Specific IP Strategies*: Given the international scope of many immersive art projects, it is essential to develop IP strategies that are tailored to the legal requirements of each key market. This may involve registering copyrights, trademarks, or design rights in multiple jurisdictions; drafting licenses that comply with local laws; and anticipating enforcement challenges in countries with different standards for IP protection. For example, a work that is protected as a copyright ted installation in the U.S. may need to be registered as a design or trade dress in Europe or Asia, and licenses may need to be translated and adapted to meet local legal standards.
- *Integrated Privacy and IP Policies*: Because participant data is often integral to the operation and experience of immersive art, protocols must integrate privacy and IP considerations into a single, coherent policy framework. This includes ensuring that data collection practices comply with applicable privacy laws, that participants are fully informed and have provided valid consent, and that data is securely stored and handled. At the same time, protocols must address how participant data may be incorporated into the artwork itself – such as through personalized content or data-driven installations – while respecting both privacy rights and the IP interests of the creators.
- *Ongoing Legal Review*: The rapid pace of technological change and the evolving nature of immersive art mean that protocols cannot be static. Legal counsel and project managers must regularly review and update their protocols to reflect new risks and opportunities, such as the emergence of AI-generated content, changes in international treaties, or shifts in industry best practices. This ongoing review process helps ensure that immer-

sive art projects remain legally compliant, ethically responsible, and resilient in the face of new challenges.

The unique characteristics of immersive art – its interdisciplinarity, technological complexity, reliance on participant data, and global reach – demand protocols and legal frameworks that go far beyond what is required for traditional art forms. By investing in robust, adaptive, and context-sensitive protocols, artists and producers can better protect their creative interests, foster successful collaborations, and deliver innovative experiences to audiences around the world.

B. Authorship and Collaboration in the Digital Space

Collaboration is at the heart of immersive and digital art, but it introduces a host of legal and practical complexities:

- *Defining Authorship*: U.S. copyright law recognizes joint authorship when two or more human creators intend their contributions to be merged into inseparable or interdependent parts of a unitary whole.[8] However, the use of AI tools and algorithmic processes complicates this analysis. The law currently does not recognize AI or non-human agents as authors, meaning works generated solely by AI are not eligible for copyright protection. When AI is used as a tool, the key legal question becomes whether the human input rises to the level of creative authorship. This requires careful documentation of the human creator's role in directing, selecting, or modifying the AI's output, and may necessitate new contractual language to address ownership and control of AI-assisted works.
- *Studio Practices*: The creation of immersive and digital art often involves teams of assistants, fabricators, coders, sound designers, and other technical collaborators. Without clear, written agreements, disputes can arise over the extent and significance of each person's contribution, potentially leading to conflicting claims of authorship or co-ownership. For example, a programmer who writes custom code for an interactive installation may later assert joint authorship if their contribution is not clearly defined as a work-for-hire or subject to an assignment of rights. Proactive management of studio practices – including regular documentation of contributions and clear communication of expectations – is essential to prevent misunderstandings.
- *Protocols and Agreements*: Legal counsel should advise artists and studios to implement standardized protocols for onboarding all collaborators, assistants, and technical contributors. Even simple written agreements can clarify the scope of each person's role, the nature of their contribution, and whether their work is being performed as a work-for-hire or subject to assignment. These agreements should also include waivers of potential claims to authorship, moral rights, or future royalties, as appropriate. In larger or more complex projects, it may be advisable to include provisions addressing dispute resolution, confidentiality, and crediting practices to further minimize the risk of future conflicts.

IV. Enforcement, Monitoring, and the Global Digital Landscape

As digital art and immersive experiences proliferate, so too do the risks of unauthorized copying, distribution, and exploitation. Proactive enforcement of intellectual property rights is critical in the digital realm, where works can be instantly replicated and disseminated worldwide. In response, artists and rights holders are increasingly turning to new technologies and innovative legal strategies to safeguard their creations. However, these emerging tools must be carefully evaluated for both their effectiveness and their potential legal implications.

- *International Enforcement Challenges*: Even with robust IP protection in one country, enforcing rights abroad can be difficult and costly. Some countries may not recognize certain rights or may have weak enforcement mechanisms. Immersive art, which is often designed for global audiences and distributed digitally, is particularly exposed to these challenges. Therefore, artists and producers must develop enforcement strategies that include international monitoring, local counsel, and the use of international treaties where available.
- *Technology-Assisted Enforcement*: The rise of AI-powered monitoring tools has made it possible to automate the detection of copyright or trademark infringement across vast swathes of the internet. These tools can identify unauthorized uses, flag suspicious activity, and even initiate takedown requests with platforms. Similarly, blockchain-based tracking systems are being developed to record and verify the provenance, licensing, and authorized use of digital artworks, providing a transparent and tamper-resistant record for enforcement purposes.
- *Active Monitoring*: Given the speed and scale at which digital works can be copied and shared, artists and their representatives must actively monitor for potential infringement, especially on social media, NFT marketplaces, and other online platforms. Timely detection is crucial, as damages for copyright infringement are generally limited to the three years preceding the filing of a lawsuit. Many artists employ dedicated staff or third-party services to conduct regular scans for unauthorized uses.

- *Watermarking and Content Poisoning*: Artists are adopting innovative techniques to protect their digital assets from unauthorized use or AI training. Watermarking embeds invisible or visible markers in digital files, making it easier to identify and prove ownership if works are misused. Content poisoning tools, such as Nightshade and Glaze, subtly alter images to "corrode" their value for AI training or to make them easier to track online. These methods can act as both deterrents and enforcement aids.
- *Blockchain Solutions*: Blockchain technology is being explored as a means of establishing and tracking the provenance, licensing, and usage of digital artworks. By recording each transaction or transfer of rights on a decentralized ledger, artists and collectors can more easily verify authenticity, ownership, and licensing terms. This can help reduce disputes and streamline enforcement, especially in the context of NFTs and digital collectibles.

Risks and Considerations: While these emerging tools offer significant promise, they also introduce new risks and legal questions. For example, aggressive content poisoning could inadvertently affect the quality or usability of legitimate images, and blockchain solutions may raise concerns about privacy, data permanence, and regulatory compliance. Artists and rights holders should consult legal counsel to assess the practical and legal implications of these technologies, ensuring that enforcement efforts are both effective and compliant with applicable laws.

V. Ethical and Practical Considerations for Counsel Representing Digital Artists

Representing digital artists in the rapidly evolving world of immersive and digital art requires more than just a strong grasp of intellectual property law. Counsel must be attuned to the unique challenges, opportunities, and ethical questions that arise in this dynamic field. Effective advocacy demands a holistic approach – one that combines legal expertise with industry insight, collaborative problem-solving, and sensitivity to the broader cultural and ethical dimensions of creative work.

- *Industry Understanding*: Attorneys advising digital artists must go beyond traditional legal research and stay current with the latest technological trends, platforms, and monetization models shaping the digital art landscape. This includes understanding how works are exhibited (e.g., in VR/AR environments, NFT marketplaces, or interactive installations), how revenue is generated (such as through licensing, microtransactions, or royalties), and the potential risks associated with new technologies. Keeping pace with industry developments enables counsel to anticipate legal issues, craft relevant agreements, and provide strategic advice that aligns with clients' creative and business goals.
- *Collaboration and Specialization*: The interdisciplinary nature of immersive and digital art often means that legal issues intersect with technology, contract law, international regulation, and even privacy or data law. Recognizing the limits of one's expertise is essential for providing competent representation. Attorneys should not hesitate to co-counsel with specialists in intellectual property, technology law, or local counsel in foreign jurisdictions as needed. This collaborative approach ensures that clients receive comprehensive advice and that complex, cross-border issues are handled appropriately.
- *Client Education and Expectation Management*: Many digital artists are unfamiliar with the intricacies of intellectual property law, the costs of enforcement, or the risks associated with emerging technologies. Lawyers should take the time to educate clients about the scope and limitations of legal protections, the practical realities of enforcing rights (including potential expenses and timelines), and the risks posed by new tools or platforms. Clear communication and expectation management empower clients to make informed decisions about how to protect and commercialize their work and can prevent misunderstandings or disappointment down the line.
- *Societal Values and Labor Recognition*: The collaborative nature of digital and immersive art challenges traditional notions of individual authorship and raises important ethical questions about labor recognition, credit, and compensation. As the art world increasingly values the contributions of assistants, fabricators, and technical collaborators, attorneys should help clients understand both the legal requirements for authorship and the broader cultural and ethical considerations at play. This may involve advising on fair compensation structures, transparent crediting practices, and protocols for acknowledging collaborative labor, all of which can foster a more inclusive and equitable creative ecosystem.

The digital and immersive art landscape is characterized by rapid evolution, driven by technological innovation, new modes of creative collaboration, and the continual redefinition of cultural and legal norms. In this environment, artists, producers, and their legal representatives must adopt a proactive and adaptive mindset – one that blends established legal frameworks with emerging technologies and a nuanced understanding of ethical considerations. Effective protection of digital and immersive works requires not only the strategic use of traditional tools like copyright and trademark registration, but also the integration of advanced monitoring

technologies, blockchain solutions, and thoughtful protocols for authorship and collaboration. Moreover, ongoing education, open communication, and a willingness to engage with interdisciplinary expertise are essential for navigating the complexities of this field. By embracing these strategies, the art law community can help ensure that creative innovation is supported by robust, equitable, and forward-looking legal protections – empowering artists to thrive in a dynamic and ever-changing cultural landscape.

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Endnotes

1. N.Y. Civil Rights Law §§ 50-51 (2024).
2. Cal. Civ. Code § 3344.1 (2024).
3. *See, e.g.*, *Tangle Inc. v. Artizia Inc.*, 125 F.4th 991, 996 (9th Cir. 2025) (explaining that a toy manufacturer's kinetic and manipulable sculptural works were sufficiently "'fixed' in a tangible medium" of expression to be entitled to copyright protection, "even when its pose changes," analogizing the moveable sculptures to dance, movies, and music); *TeamLab Inc. v. Museum of Dream Space, LLC*, 650 F. Supp. 3d 934, 949-53 (C.D. Cal. 2023) (finding that immersive art installations with interactive components are eligible for copyright protection due to their fixed elements and creative authorship, even if user experiences differ); *see also* Eileen Kinsella, *TeamLab Wins an Early Victory in Its Copyright Suit Against an L.A. Museum It Says Copied Its Immersive Installations*, Artnet (Jan. 13, 2023), https://news.artnet.com/art-world/teamlab-copyright-lawsuit-mods-victory-2242654.
4. Copyright Act of 1976 § 102, 17 U.S.C. § 102 (2012).
5. Japanese Copyright Law (JCL), Arts. 21-27.
6. *See Meow Wolf, Inc. v. Wake The Tiger Ltd.*, [2024] EWHC (Ch) IL-2024-000149 (Eng.); *see generally* Dawn Limbu, *Wake the Tiger faces lawsuit from American company*, BBC (Sept. 26, 2024), https://www.bbc.com/news/articles/c70zn8501lyo; *see also* Laura Lorek, *Expect Wave of Litigation Over Immersive Art*, Tex. Lawyer (Mar. 11, 2025; 8:59 AM), https://www.law.com/texaslawyer/2025/03/11/expect-wave-of-litigation-over-immersive-art/?slreturn=2025060434928.
7. *See generally Gifford v. Sheil*, No. 1:24-CV-00423-RP (W.D. Tex. May 28, 2025) (stipulation of dismissal) (stipulating dismissal of copyright lawsuit involving content creators battling over "neutral, beige, and cream aesthetic" and alleged copying of poses, styling, and product choices; settlement reached for $0 and no restrictions on defendant's future content, raising novel questions about copyright and trade dress protection for social media aesthetics).
8. *See* 17 U.S.C. § 101 (defining "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole").



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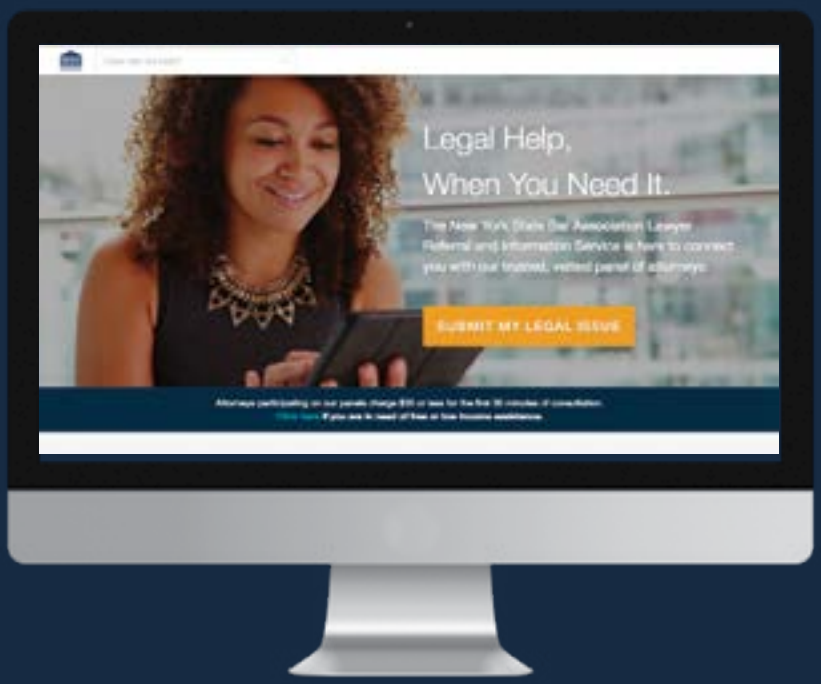
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