Podcast Transcript

Rev Up! What to Know BEFORE You Use that AI Tool

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Kattman: Welcome to Rev Up!, a podcast series focusing on the people and issues driving the fast-paced automotive / mobility industry. With a view on the future of mobility, the discussions on Rev Up! will offer insights on the realistic and the futuristic in this evolving industry. I'm Amy Kattman, and you're listening to BakerHosts.

On today's episode of Rev Up!, our host, Ashley Hess, a partner and co-leader of BakerHostetler's Automotive / Mobility Industry team, is discussing artificial intelligence and questions business owners, CEOs, and managers should have top of mind as artificial intelligence improves and drives the fourth Industrial Revolution. Ashley is joined by BakerHostetler partner, Teresa Weisenberger, co-leader of BakerHostetler's Artificial Intelligence or AI practice. Let's listen to Rev Up! Where the Rubber Meets the Law.

Hess: Welcome to Rev Up!, our podcast focusing on the automotive and mobility industry. My guest today is Teresa Weisenberger, a partner at BakerHostetler and co-leader of BakerHostetler's IP and Technology Transactions and

Outsourcing team. Today, Theresa and I continue our conversation from last month. We are talking about the use of artificial intelligence in the automotive industry and some of the potential pitfalls along the way. Let's get started with Rev Up! Where the Rubber Meets the Law.

Alright, Theresa, thanks for coming back. I want to pick up where we left off on our discussion last time, which was really an intro to the use of artificial intelligence in the automotive industry, and I want touch on some of the potential pitfalls that people can run into when they're trying to implement the use of artificial intelligence in their industry. So let me dive in with a question, really about the use of artificial intelligence, and we'll get started from there. Sound good?

Weisenberger: Sure.

Hess: Let's dig into this for a few minutes and talk about the legal issues or common legal issues that you are seeing in your practice in terms of companies as they are implementing programs around the use of AI in the organization, or they're buying goods and services, or implementing robotics equipment in manufacturing processes. Let's just talk about some of the main legal issues. Maybe we start with the intellectual property issues since, as you noted, you are an attorney who works in the intellectual property area. What are the legal issues? What needs to be top of mind when people are bringing in goods and services and will be utilizing artificial intelligence?

Weisenberger: I am biased, but I think starting with the intellectual property areas is the best place to start when you're talking about AI technology.

Hess: I knew you would.

Weisenberger: The first issue that we want to talk about is protecting the confidentiality of information, and this does bleed a little bit into data privacy and protecting personal information. But one of the horror story headlines that came out of the proliferation of ChatGPT was a group, it was a tech company, they had input trade secret chip designs into ChatGPT to have it assess something about that technology. Well, the public models of ChatGPT are public. They continue to train themselves on the inputs. The correct implementation of this technology is that it would never actually output any of its inputs or output any of its training data.

Hess: Right. Hang on now. You have to speak English for me. So what does that mean exactly?

Weisenberger: So the ideal implementation of generative AI, from a pure technology perspective, is that it is generating new content.

Hess: Yeah.

Weisenberger: That it isn't going to regurgitate either what its quote, unquote learned from the way the technology was built or from the way the technology is used. But it does

adapt based off of the inputs that it is getting, and so it does continue to learn more. And there is a risk that the technology could, if prompted enough, spit out sensitive information about your business strategy or your other trade secrets. So…

Hess: So it could use that information in generating answers for prompts, and I think the main issue here is it could be for users outside of your organization once it's gone into the large language model. Is that the concern?

Weisenberger: Yes.

Hess: Okay.

Weisenberger: Yeah. So the concern is that if somebody wanted to try to dig around into a organization's future business plans or marketing plans, that they could prompt the tool to actually output some of that information.

Hess: And would you prompt the tool by asking specific information about, say, your competitor company?

Weisenberger: Yes.

Hess: Or and you could, if you were trying to sell to them, to that company, maybe you are asking prompts that have the name of the company, about pricing and other financial terms that might pull up information. But I guess as the user trying to do that, you wouldn't know if that is real information or if it is just generated by the model you're using.

Weisenberger: That is definitely true.

Hess: Yeah.

Weisenberger: I think the concern about the confidential information leaking out is more theoretical than something that actually has a high risk of happening, but it does implicate your ability to protect your IP. So for you to maintain something as a trade secret, the court has to determine that you've taken reasonable measures to protect the confidentiality of that. And if you're pouring this information into public models, I think the other side would have a good argument that is not a trade secret.

Hess: That is a great point.

Weisenberger: So some of the other issues that come up with IP are the ability to protect whatever outputs or whatever works you're creating using AI, and it's been a hot topic both on the copyright side and on the patent side. The big concern is if I use AI as part of my development process, can I still protect what I create out of that? And the cliche answer is, it depends.

Under copyright law, the way the Copyright Office is interpreting it now, the raw outputs of any of these AI tools is not protectable under copyright law, that it is

public domain. I think that this law is going to change and people are watching it very closely, but the way the copyright officer approaches it now is they want to know what the human contribution to that work was and separate that out from the AI contribution. So that is going to introduce some evidentiary challenges down the road, particularly if you're looking at enforcing copyright in your source code because developing source code with AI tools is one of the more effective uses of it that we've seen. So clients do have to think about, how is this going to affect my ability to protect this IP and what records or what information do I need to maintain it in order to do that down the road?

Hess: So let me ask you a question here out of curiosity. If the AI tool generates copyright, it could be source code, images, etc., what about if the generated content infringes another party's copyright and who is responsible for that?

Weisenberger: That is the billion dollar question. Going to depend, I think, on the specific facts and how heavy a role the user played in prompting that tool to output infringing content. But the way it stands right now is that most content owners are focusing on the liability of the AI provider themselves, not the end user. That being said, end users are concerned about the risk of assuming this infringement allegation being brought against them, and some AI tools provide indemnification protections for users if they meet certain criteria or if their use case meets certain criteria. But ultimately, we haven't seen, even in the dozen plus AI copyright cases that are pending right now, we haven't seen a circumstance where the tool outputted infringing content without somehow being prompted to do that, and that can be very difficult to implement from a practical perspective too.

There are tools that can help you screen for verbatim excerpts with a one to one correlation between your output and some type of copyrighted content, but it gets really tricky when you're talking about, like you mentioned, information. Facts themselves are not protectable. For certain facts, there is only so many ways that you can convey that information, and this is particularly true in source code, right? And so then you get into this question of, is this a copy of what somebody else did or is this the way it is done? And that, it is a hard risk to mitigate. The best way that we've seen it is to, particularly if you're a manufacturer and you have a third party using AI to create content for you, is to put the onus on that user to bear that risk of infringement. Because as we said before if, the most likely circumstance this is going to arise is if the end user is prompting it to infringe.

Hess: Yeah. And I think this is going to be a hot area in manufacturing, generally in the automotive industry. Because software source code, as you noted earlier, is copyright. I think that is a use case that we're going to see utilized more and more as it is harder for companies to hire engineers to do the software coding, and this could be a really efficient way for companies to increase their ability to write code. And I think this will be a hot area, I'm sure it is one that you're watching and others in the industry are watching as well.

Weisenberger: Yeah, definitely. And the good thing is, in the software context, we have a past example that we can rely on, which is open source software. Because the same

reasons that you just mentioned, companies are using open source software solutions more and more as part of their larger software programs. So we have a pretty good understanding of how you would determine the scope of protection of your copyright even if subsets of what is in your software is not, by itself, protectable.

Hess: Yeah, and Teresa, one of the things that we really do see in the automotive space is newcomers or new entrants into the supply chain, especially in the software area as there is further and further development of the vehicle as being a software-defined vehicle. And this is an area that I think we'll see a lot of activity in the automotive sector. Let's talk a little bit about trademark and patents as well. What about the use of AI and what are the trademark and patent issues that come up?

Weisenberger: So trademark is pretty easy. You don't have the same problem with being able to protect trademarks that are generated with AI that you do with copyright. Because trademark law doesn't require this human component in the creative process. So the big risk with trademark is that because all of these tools are trained on all of the content on the Internet or most of the content, is that they are trained on other parties' trademarks. And so you want to make sure that whatever output you're getting from there you're doing a good clearance on before actually implementing that as your own type of branding.

The Patent Office takes a more technical approach to figuring out when the use of AI does or does not impact inventorship or patentability, and in that case, every invention is comprised in some way of a few different elements. And it is the combination of those elements that you're generally looking to protect, whether it is parts of a machine, steps in a process, and the test for inventorship, when it comes to humans, is well-established under patent law and it looks at that individual's contribution to it. So if you take out the human co-inventors and you inject an AI co-inventor, as long as that human inventor has contributed enough for them to be considered an inventor, then you can maintain patent protection just like you would if you had not used AI technology at all.

Hess: Can AI actually be an inventor?

Weisenberger: So there are a few cases that have been brought by certain activists or plaintiffs that are looking to actually make law in this space, arguing that exact point. In the United States, no, AI cannot be an inventor. In Australia, the courts found that it can. And then in the middle ground, we have, we're going to go back to copyright for a second, it is a little bit more murky in the EU, especially in the UK, about whether the technology itself can be recognized as an author.

Hess: But in the United States, it is settled in case law, AI cannot be an inventor.

Weisenberger: AI cannot be an inventor. AI cannot be an author under copyright law.

Hess: Okay. Have we seen cases where AI has been used at the initial stages of two different inventions? Is that giving rise to greater degree of litigation or is it a little too early to know if that is going to be a concern?

Weisenberger: It is a little too early to know. We usually don't see litigation for, in the patent space until the technology has been around for 10 years. So it is hard to say. But what I will say from my experience with patent litigation is that the technology, the AI technology is going to make it much harder to prove that your invention was novel or new and therefore was appropriately granted patent protection. And that is where a lot of the focus and patent litigation ends up being, is on showing that whatever that invention wasn't actually new, and the patent never should have been issued in the first place.

Hess: So as a practical point in this area, are most larger companies having their own instance of large language models? In other words, are they setting up systems where the props and the information doesn't go out to a greater network and are they keeping it in house so to speak? Or is that what you feel like you're seeing or not so much?

Weisenberger: That is almost exclusively the way I've seen clients implement generative AI technology just for the reasons that we talked about earlier.

Hess: Yeah. And then I'm assuming they have, as part of their policies in place, that people are not supposed to use confidential information, etc. on the large language models that are like public platforms.

Weisenberger: Correct. That is one of the standard rules across all of the policies I've worked on is do not input confidential information into what we call a public AI tool.

Hess: Theresa Weisenberger, thank you for being on Rev Up! Where the Rubber Meets the Law. It's been great having you.

Weisenberger: Thank you for having me and I'll be happy to come back.

Kattman: Thank you, Ashley and Theresa. If you have any questions for Ashley or Theresa, their contact information is in the show notes. As always, thanks for listening to BakerHosts.