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In Key Decision, Court Affirms Copyright Protection in New AI Licensing Markets

by

Seth L. Cooper *

On September 29, the U.S. Court of Appeals for the Third Circuit issued its decision in [*Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc.*](#) The ruling in *ROSS* marks an important milestone in AI copyright jurisprudence because it is the first federal appellate decision directly addressing fair use in the context of AI training – and it affirmed that *ROSS*'s use of copyrighted material to train its AI system was copyright-infringing. Importantly, the court recognized that an emerging market for licensing copyrighted works as inputs for training AI models is a valuable and protectable interest for copyright owners.

The *ROSS* case involves non-generative AI technology that only returns passages from preexisting texts rather than creating new expression. But the court's decision in *ROSS* is important because it has strong implications for infringement cases percolating through the federal courts regarding unauthorized uses of protected works by generative AI services. Future cases should respect copyright owners' rights and their discretion to develop, license, or to decline to pursue new AI licensing markets. Where new technology creates a valuable market for uses of copyrighted expressions, the resulting licensing opportunities should properly belong to copyright owners.

The Third Circuit's Decision in *ROSS Intelligence*

The legal dispute in *ROSS* arose in connection with unauthorized copying of court case headnotes created by editors for Thomson Reuters's Westlaw legal research platform. Familiar to lawyers and legal researchers, headnotes are annotations explaining the holdings and results of judicial decisions. *ROSS* sought to create an AI-based legal research platform that could compete with the likes of Westlaw. As described in the court's opinion, *ROSS* hired a contractor to create 25,000 training memoranda for *ROSS*'s AI model. Drafters for *ROSS*'s contractor and its subcontractor "used thousands of Westlaw headnotes to create the memos' legal questions, as the headnotes provided 'an easy way [to] fram[e] questions.'" According to the court, "[t]hese memos were converted into machine-readable format to train the *ROSS* AI program to identify patterns regarding which judicial opinion passages respond well to legal questions." In a [February 2025 decision](#), the U.S. District Court for the District of Delaware ruled that *ROSS*'s use of 2,243 Westlaw headnotes infringed Thomson Reuters's copyright and was not a permissible fair use. *ROSS* appealed to the Third Circuit.

Despite the novelty of the AI technology involved in the dispute, the court in *ROSS* made the common-sense observation that "new technology is often at the forefront of our copyright cases" and that "when it is, we regularly apply the principles underlying our venerable copyright laws." In the court's words, "this is no more than an ordinary copyright case," requiring it to determine whether the headnotes at issue were copyrightable and whether *ROSS*'s use of them was fair. The court ruled that the headnotes contained sufficient originality and were therefore copyrightable, but that *ROSS*'s use of those headnotes was not fair.

Under [Section 107 of the Copyright Act](#), "fair use" is an affirmative defense to unauthorized copying. The statute directs courts to consider four nonexclusive factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work. In *ROSS*, the Third Circuit determined that the second, and least consequential, factor slightly favored fair use, but that the first, third, and fourth factors weighed against it.

The court's application of established fair use principles to AI model training is instructive, and its treatment of developing AI-training licensing markets under factor four is especially significant. More broadly, the court's analysis helps illuminate how established copyright principles should apply as generative AI creates new uses of copyrighted works and new licensing markets for them.

Applying Established Fair Use Principles to AI Model Training

On fair use factors one and three, the court in *ROSS* applied established principles with clear relevance to generative AI copyright cases. On factor one – the purpose and character of the use – the court's analysis reflected the Supreme Court's position in [Andy Warhol Foundation v. Goldsmith](#) (2023) that transformation is not the end-all of fair use analysis: commercial purpose and use of copyrighted material to develop potentially competing products remain highly

relevant. That concern is readily foreseeable in generative AI cases, where expressive works are copied as training inputs for systems designed to generate expressive outputs that may compete in the same or related markets.

On factor three – the amount and substantiality of the portion used – the court in *ROSS* applied precedents such as the Supreme Court’s fair use decision in [Campbell v. Acuff-Rose Music, Inc.](#) (1994), explaining “[t]he crux of the inquiry is whether ‘no more was taken than necessary’” to achieve the copier’s purpose. That inquiry should carry substantial force in generative AI cases involving complete expressive works. The availability of public-domain content, uncopyrightable facts and ideas, specially created training material, and licensed works should cause courts to scrutinize – not assume – the necessity of mass copying entire copyrighted works.

Fair Use Factor Four: Protecting Copyright Owner Opportunities in New Licensing Markets

The court’s most attention-grabbing contribution comes under fair use factor four – regarding the effect of the use upon the potential market for or value of the copyrighted work. In *ROSS*, the court recognized a developing AI-training licensing market in terms that ought to carry beyond the legal-research setting. The court noted that “[t]he undisputed evidence here reveals that *ROSS* copied the headnotes to create a competing legal-research platform in the same market as Westlaw,” and therefore reasonably concluded that such copying would harm Westlaw’s position in the legal research platform market.

Going further, the court cited [Campbell](#) for the proposition that the “potential market” includes both the market for the original work and markets for derivative uses. According to the court, evidence showed that “the market for licensing headnotes as text to train AI is rapidly developing” and that Thomson Reuters was already using its headnotes as training data for its own AI search products. The court then added an important point for emerging markets generally: “That Thomson Reuters did not license its headnotes to others does not disprove that a market exists to do so.”

The court put the matter directly:

ROSS’s copying harmed Thomson Reuters in this market. By copying the headnotes for use as training data without Thomson Reuters’s authorization, *ROSS* usurped Thomson Reuters’s opportunity to enter that derivative market and license its headnotes for that purpose. The market harm caused by *ROSS*’s use weighs against fair use.

The court’s factor four analysis in *ROSS* is especially noteworthy because it recognized, in the context of AI technologies, that copyright law protects developing as well as mature markets. [Campbell](#) teaches that potential derivative markets include those that copyright owners “would in general develop or license others to develop.” In its *ROSS* decision, the court also relied on [Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.](#) (1998), for the proposition that a potential derivative market is not illusory merely because the copyright owner has shown little interest in exploiting it. [Castle Rock](#) itself put the point more broadly: “copyright law must respect that creative and economic choice.”

Although factor four principally concerns market harm, Supreme Court precedent such as [*Google LLC v. Oracle America, Inc.*](#) (2021) confirms that courts may also consider copyright-related public benefits of the challenged use, including “the risk of creativity-related harms to the public” from enforcement. In its *ROSS* decision, the court therefore considered, but rejected for lack of evidence, arguments that the district court’s infringement finding would “halt AI development.” The court was likewise unimpressed by national security arguments against copyright enforcement, concluding that “[w]hile some AI technology may implicate national security concerns, this does not give *ROSS* carte blanche to violate copyright law merely because it incorporates AI.” The court’s treatment of those arguments in *ROSS* thus offers another useful lesson for future AI copyright cases: ordinary copyright principles should not give way to generalized claims about the social importance of AI, particularly in private commercial disputes, absent specific evidence tying those claims to the challenged use.

***ROSS* and Generative AI: Copyright Principles for Emergent Licensing Markets**

The significance of the court’s reasoning in *ROSS* extends beyond the particular market at issue in the case, especially where unauthorized use itself can impede development of a lawful market. Courts should not authorize widespread uncompensated use of copyrighted works that weakens emerging licensing markets and then point to the resulting lack of licensing activity as favoring fair use. Fair use should not create the market failure later invoked as evidence that no copyright market exists.

[*Campbell*](#)’s recognition that potential markets include those copyright owners reasonably would develop or license others to develop is complemented by [*Warhol*](#)’s first-factor warning that an overly broad conception of transformative fair use could “swallow the copyright owner’s exclusive right to prepare derivative works.” Taken together, those decisions underscore that a use may differ from the purpose for which the original work was created and still implicate a valuable market that the copyright owner may choose to enter, license, or decline to exploit. Different purpose does not mean no market.

The facts in *ROSS* concerned AI training for a legal-research platform. But analogous licensing markets are foreseeable wherever generative AI systems use expressive works – including books, journalism, photographs, music, sound recordings, and audiovisual works – to produce expressive outputs in the same or related media. The broader takeaway is that factor four protects more than sales of existing works; it can also protect a copyright owner’s opportunity to participate in new AI-training markets by developing its own products, licensing works to others, or choosing not yet to exploit the market. The court’s reasoning thus provides appellate-level support for a central proposition: the economic value of AI-training rights should not be presumed to belong to unauthorized users who exploit the new technology first.

The court’s recognition in *ROSS* of an emerging AI-training licensing market also fits comfortably within the constitutional property-rights foundations of American copyright law. A central part of copyright’s value is the owner’s exclusive authority to decide whether, when, and on what terms others may use the work. In its *ROSS* decision, the court applied that principle in the AI context by recognizing that a rightsholder may itself enter a new AI market or license others to do so, and that an unauthorized user can impair or usurp that opportunity.

More broadly, where new uses of copyrighted expression create valuable licensing opportunities, those opportunities should properly belong to the copyright owners of the works. Voluntary AI-training markets should be allowed to develop rather than be distorted through expansive fair use rules. Copyright owners may use their works in their own AI products, license others to use them, or choose not to participate, while AI developers remain free to negotiate for the inputs they value. Such exchange allows prices, contractual terms, and efficient licensing mechanisms to emerge, while the prospect of compensation supports continued creation and dissemination for the public's benefit. By contrast, declaring a developing category of AI uses free at the outset risks effectively extinguishing copyright owners' opportunity to enter a new market.

Conclusion: Protecting Copyright Owners in New AI Licensing Markets

New licensing opportunities arising from AI uses of copyrighted expression should properly belong to copyright owners, including the discretion to decide whether, when, and on what terms to pursue them. The court's treatment of the AI-training market in [ROSS](#) appears to move the analysis a step in that direction by protecting a copyright owner's opportunity to enter and license that market rather than allowing an unauthorized user to usurp it. Other courts should carry that principle forward in the ongoing wave of generative AI copyright litigation.

* Seth L. Cooper is an Adjunct Senior Fellow of the Free State Foundation, a free market-oriented think tank in Potomac, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

Further Readings

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