

RANIA'S BUSINESS ROUNDTABLE

MARCH 2024



RANIA'S BUSINESS FIRM HAPPENINGS

New Law Related To Independent Contractor Status



RANIA SEDHOM

The US DOL propounded new law related to independent contractor status. The new law contains a six-factor balancing test that is discussed below. Please note that no one factor has more weight than the other and the DOL states clearly that this is a facts and circumstances test.

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OpenAI Responds to New York Times



ALEX AUFRICHTIG

Our January 2024 newsletter covered the New York Times complaint against OpenAI and Microsoft for using New York Times articles to train their AI chatbot models. On February 26, 2024, OpenAI filed its motion to dismiss the Times' claims of contributory copyright infringement, Digital Millennium Copyright Act (DMCA) violations, and state law unfair competition by misappropriation. Additionally, OpenAI seeks partial dismissal of the direct copyright infringement claim because it argues that some of the underlying facts are time-barred.

Contributory copyright infringement: The Times alleged that OpenAI contributes to the direct infringement of its copyrights by the end-users (e.g., consumers) of GPT-based products. OpenAI argues that the Times failed to plead that OpenAI had actual knowledge of specific infringements.

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In honor of its 10-year anniversary, SLG is busy modernizing its logo, letterhead, and social media picture to better reflect its image and mission for stellar service. Stay tuned for the big reveal! We hope you love our new logo as much as we do!

*Stay
Tuned*

OpenAI Responds to New York Times

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Alex Aufrichtig

Rather, the Times' only allegation supporting a contributory claim states that OpenAI "had reason to know of the direct infringement by end-users" because of its role in developing, testing, and troubleshooting its products (emphasis added). Overall, OpenAI argues that "generalized knowledge" of the "possibility of infringement" is not enough to plausibly state a claim for contributory copyright infringement.

DMCA violations: The Times alleged that ChatGPT removed copyright-management information (CMI) (e.g., "all rights reserved" disclaimers) from each of the Times's infringing works. OpenAI relies on recent authority from the U.S. District Courts for the Northern District of California to argue that there is a heightened pleading requirement for DMCA violations. OpenAI responded that because the Times' allegations do not specifically identify the CMI included with each work, the claim is too generalized to adequately plead a DMCA violation.

Unfair competition by misappropriation: The Times alleged that, under New York law, OpenAI's use of its content will result in loss of revenue and a loss of its audience because ChatGPT, in collaboration with Microsoft's Bing search engine, will eliminate the need for news readers to pay for a Times subscription. OpenAI responded that this state law claim is preempted by federal copyright law. The Copyright Act's preemption applies under two conditions: (1) if the work is a "work of authorship" within copyright's subject matter and (2) if the rights asserted are equivalent to the rights provided by federal copyright law. OpenAI argues that both conditions are satisfied: (1) The Times articles are "literary works" within the subject matter of copyright laws and (2) the unfair competition claim is not qualitatively different from the copyright claim because both rely on the same allegation – that OpenAI uses Times content to train models that produce outputs similar to Times articles. On March 3, 2024, Microsoft filed its motion to dismiss and makes the same arguments as OpenAI. For now, the parties await the judge's decision.

OpenAI asked the court to dismiss these claims to "focus the litigation on the core issues that really matter[.]" specifically "whether it is fair use under copyright law to use publicly accessible content to train generative AI models to learn about language, grammar, and syntax, and to understand the facts that constitute humans' collective knowledge." Let us know your thoughts by sending an email to info@bespokelawfirm.com.

MATTHEW SCOTT'S BOOK CLUB:



*Want to grow
your business?*

TRY GETTING NAKED.

In *Getting Naked*, A Business Fable About Shedding the Three Fears that Sabotage Client Loyalty, Patrick Lencioni identifies three factors that hurt your chances of success. He argues that by "getting naked," or being honest and transparent with clients, you gain their loyalty. Why? Because they'll trust you.

The Fear of Losing the Business

It's natural to be afraid of losing the business of a prospect or current client. However, when we're afraid, we tend to put our guard up. Clients will see this as defensiveness or desperation, which will repel them rather than attract them.

The key to overcoming this fear is to "give away your business." Don't sell the client or prospect on what you'll do for them if you're hired. Instead, just start serving them! This will show that you're more interested in helping them and building a strong relationship than you are in making money from them.

But what if the client takes your advice but doesn't hire you? Won't you feel like you were ripped off? Lencioni acknowledges that these are real concerns. However, he finds the silver lining: if someone does this to you, then they would have been a terrible client. While it may sting at first, you'll be spared the headache of dealing with those people in the long run.

The Fear of Being Embarrassed

To avoid being embarrassed or looking stupid in front of clients, people often pretend to know more than they actually do. This might cause them to hold back questions or suggestions. Clients want results.

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RANIA SEDHOM

Factor One – Opportunity for profit and loss depending on managerial skill

The DOL expects you to ask yourself whether the individual (1) determines or can meaningfully negotiate the charge for the work provided, (2) is able to accept or decline jobs or choose the order and/or time in which the jobs are performed, (3) engages in marketing, advertising or other efforts to expand their business or secure more work, and (4) makes decisions to hire others, purchase materials and equipment, and/or rent space. The DOL clarifies that the decision to work additional hours or take more jobs when paid a fixed rate per hour or per job does not reflect the exercise of managerial skill indicating independent contractor status.

Example – If someone does not independently choose assignments but agrees to work additional hours to earn additional pay, the person is not an independent contractor. An individual who merely waits for a company to call him or her for additional work and does not advertise or market their abilities to the general public or work for other entities will be deemed an employee.

Factor Two – Investments by the individual and the potential employer

This factor considers “whether any investments by a worker are capital or entrepreneurial in nature.” The final rule says that investments can be measured by the dollar amount invested or “similar types of investments” as the hiring party.

Example – a graphic designer who utilizes the software, computer, office space and equipment of the hiring company is an employee. If the individual utilizes their own, preferred drafting tools for certain job but works in the company’s office during company business hours, they will likely be characterized as an employee.

Factor Three – the Degree of permanence of the relationship

If the work performed is “indefinite in duration, continuous, or exclusive of work for other employers” the person is likely to be deemed an employee. On the other hand, achieving contractor status requires work that is “definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities.”

Example – an event company hires a chef for all of its banquet dinners. The chef prepares his own recipes but only works for this event company because they are very busy, with an average of 4 banquet dinners per week. The chef will not meet the independent contractor test because of the permanence and continuity of his relationship with the event company.

Factor Four – Nature and degree of control

While most of us are familiar with this test. The DOL adds a twist; that is, “reserved control” by the hiring party, even if not exercised, weighs in favor of

employee status. Control exerted “for the sole purpose of complying” with a “specific applicable” law is not relevant to the control analysis. However, control that goes “beyond compliance” may be indicative of employee status if these actions “instead serve the potential employer’s own compliance methods, safety, quality control, or contractual or customer service standards.” This is likely where new contractor status laws will prove challenging.

Example – a registered nurse provides nursing care to a nursing home. The nurse has regular check ins with managers although they perform their work without supervision. The nurse is permitted to provide a preferred work schedule. Because of the regular checkins, the nurse may be deemed an employee of the nursing home.

Factor Five – Extent to which the work performed is an integral part of the employer’s business

Here, the DOL focuses on whether the “function” the individual performs is integral to the business rather than whether the person is integral to the business.

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Example – A tomato farmer grows tomatoes and sells them to distributors. The farmer pays several people to pick tomatoes during tomato season. Since a necessary part of the tomato farm is picking tomatoes, the tomato pickers are integral to the business and are, therefore, employees.

Factor Six – Skill and initiative

Here, employers should focus on whether (a) the individual uses specialized skills to perform the work and (b) those skills contribute to “business-like initiative.” If, for example, the individual requires training, the DOL is likely to classify the person as an employee. Unfortunately, the law does not define a “business-like initiative.”

Example – a welder performs welding services for a construction firm. The welder performs the services at the direction of the construction firm. While welding is a skill, allowing a third party to determine when welding is needed, where it is needed, and how frequently it is needed, swings the pendulum toward the welder being an employer.

While we anticipate that the new law will face legal challenges, employers should review their current independent contractor agreements and consulting arrangements to ensure that they do not run afoul of the law.

Please reach out to one of our attorneys with any questions.

**MATTHEW
SCOTT'S
BOOK CLUB:**

*Want to grow your business?
TRY GETTING NAKED.*



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If you help them solve their problems, then they won't care if you asked a stupid question or made a dumb suggestions. However, make sure to acknowledge your mistakes and explain your thought process. work and your client will be loyal to you.

The Fear of Feeling Inferior

The fear of feeling inferior is similar to the fear of being embarrassed but addresses our natural desire to maintain a certain level status with clients, rather than our desire not to look bad in front of them.

Lencioni provides four principles to address the fear of feeling inferior: “take a bullet for the client,” “make everything about the client,” “honor the client's work,” and “do the dirty work.”

Be willing to take the blame for something that may not entirely be your fault. Then prove to the client that you care about their work and that you'll make things right. Get excited about their work and show how happy you are to contribute to it. And be comfortable doing some “grunt work” for them, whether that means typing up notes, sending the meeting invites, or ordering the food for the group. You don't have to do these things all the time, but it's good to show clients that you'll do your share of it to help them succeed. Putting your ego aside will demonstrate loyalty to the client, which will earn you their loyalty in return.

Shedding Lencioni's three fears will take time and practice. But keep at it and you'll see the results in your bottom line. If you have questions or comments, please email us at info@bespokelawfirm.com!