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## Keker Van Nest is key player in emerging disputes over AI

By Steve Fox

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The growth of the artificial intelligence sector has led to billion-dollar intellectual property litigation that may well shape and define copyright law for generative AI applications in many industries. At the forefront of these battles is Keker, Van Nest & Peters LLP, the hard-nosed litigation boutique whose clients have included OpenAI, Google, Inc., Electronic Arts Inc., Genentech, Inc., and Taiwan Semiconductor Manufacturing Company.

The firm's IP business is booming this year, with KVP successfully defending against two \$1 billion-plus patent cases and stepping in to help counter an existential copyright threat faced by OpenAI's flagship product ChatGPT. The firm is candid about its forceful strategies, noting on its website: "Depending on the case, our litigation strategy may involve gutting an opponent's case through strategic motions, prevailing at trial, or positioning the case for the best possible settlement."

The firm's willingness to battle cases out in court is significant to potential clients, according to KVP partner Michelle Ybarra.

"One thing our clients respect and appreciate about us is that we know how to try cases and prepare any kind of case to go to trial, and so when we are hired and when a client retains us to represent them in litigation, it sends a message certainly to opposing counsel and everybody involved that we're going to be prepared to take this all the way," she said. "It certainly signals to our adversaries that our clients mean business."



From left: Paven Malhotra, Michelle Ybarra, Bob Van Nest, Leo Lam & Katie Lynn Joyce in San Francisco. Gary Wagner / Special to the Daily Journal

The firm is representing OpenAI in a copyright class action brought by 17 well-known authors, challenging the use of copyrighted works to train OpenAI's flagship large language model. They also claim that ChatGPT's outputs improperly summarize, mimic, or reproduce copyrighted material. The case is *Authors Guild et al. v. OpenAI Inc. et al.*, 1:23-cv-08292 (S.D.N.Y. filed Sept. 19, 2023).

In a similar suit, *New York Times Company v. Microsoft Corporation et al.*, 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023), KVP is defending OpenAI against allegations that ChatGPT's responses to user queries are unlawfully reproducing the newspaper's content.

While the details of each AI

case differ, their resolution usually hinges on how the relevant court views the issues through the lens of "fair use," explains KVP partner Paven Malhotra.

"The central [defense] theme for OpenAI, and frankly, for pretty much all AI companies, is that the use of these materials is fair use. Copyright law is designed, obviously, to protect creators, but it's also designed to promote progress, and science and creativity. One way to balance those competing interests is through the doctrine of fair use," he said.

"Fair use doctrine looks at a few different factors, the two most important of which are: 'Is the use of the material transformative in some way?' And second, 'What effect does

the use have upon the market?'"

KVP partner Bob Van Nest said the firm's reputation as a successful litigator helps outside the courtroom as well.

"If you develop a powerful trial position, you're more likely to get a good settlement," he said, citing *Singular Computing LLC v. Google LLC*, 1:2019cv12551 (D. Mass. filed April 6, 2023) as an example.

"We achieved a settlement [for Google] during trial, on the eve of closings, a pending offer that the plaintiff accepted, I think in large part because our trial presentation was strong. We put the plaintiff's case at risk."

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