KEKER VAN NEST & PETERS LATHAM & WATKINS LLP MORRISON FOERSTER

May 23, 2024

Hon. Sidney H. Stein
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

cc: All Counsel of Record Line (via ECF)

Re: ***New York Times Company v. Microsoft Corp., et al., Case No 1:23-cv-11195-SHS***

Dear Judge Stein:

Pursuant to Rule 2(G) of Your Honor's Individual Practices, OpenAI seeks an informal discovery conference concerning two issues. *First*, Plaintiff, The Times, refuses to commit to a substantial completion deadline in response to OpenAI's requests for production, served on March 8, despite the Court's adoption of Plaintiff's own expedited discovery schedule. OpenAI seeks an order compelling Plaintiff to substantially complete document production by a date certain. *Second*, Plaintiff has refused to produce certain documents underlying core allegations of Plaintiff's complaint relating to allegedly infringing outputs from ChatGPT. Plaintiff's privilege and work product claims are baseless, and OpenAI seeks an order compelling production.

Substantial Production Deadline. The parties submitted competing proposals for the case schedule in the Rule 26(f) report on March 8. Dkt. 72 at 14-15. Plaintiff sought an accelerated discovery schedule, requiring substantial production by June 14 for RFPs served by February 28, and close of fact discovery on September 17. *Id.* OpenAI sought a longer schedule, with substantial production by February 7, 2025 and close of fact discovery on April 7, 2025. *Id.* OpenAI served RFPs on Plaintiff on March 8, the same day that the Rule 26(f) Report was filed. On May 3, 2024, the Court accepted Plaintiff's schedule. Dkt. 112.

In light of the short discovery period, OpenAI asked Plaintiff to commit to a substantial production deadline of June 24 for the March 8 RFPs. This mirrors the amount of time the Court ordered for OpenAI to substantially complete production in response to Plaintiff's February 23 RFPs. After meeting and conferring, Plaintiff refused to commit to this deadline, or any substantial completion deadline at all. We respectfully request the court to compel Plaintiff to make a substantial production of documents responsive to the March 8 RFPs by June 24.

Plaintiff's Regurgitation Efforts. The centerpiece of Plaintiff's complaint is a claim that OpenAI's ChatGPT large language models (LLMs) "output near-verbatim copies of significant portions of Times Works when prompted to do so." Compl. ¶ 98. That assertion is purportedly supported by a lengthy exhibit—Exhibit J—containing one hundred allegedly infringing outputs generated using ChatGPT. *See id.* Ex. J. Plaintiff asserted this evidence shows that "individuals . . . will likely" access Times's content "without having to pay for it" to such a degree that it will "divert readers, including current and potential subscribers, away from The Times, thereby reducing" The Times's revenues. Compl. ¶ 157. Thus, a central question in this case is exactly

how Plaintiff was able to generate these outputs, which appear to be the fruits of Plaintiff's prolonged and extensive efforts to manipulate the ChatGPT LLMs.

Accordingly, before discovery even began, OpenAI put Plaintiff on notice about its obligation to preserve materials related to the creation of Exhibit J and began requesting information about it. Ex. A (Feb. 9 Letter). Then, on March 8, OpenAI served Requests for Production seeking all such materials, including (a) documents to show OpenAI accounts used by Plaintiff and its agents, including those used to generate the outputs cited in or referred to in the complaint (RFP Nos. 7 & 21); (b) documents and communications regarding attempts—including failed attempts—to reproduce the published works, including those "relat[ed] to the creation of Exhibit J" (RFP Nos. 2 & 20); and (c) documents sufficient to show the process for obtaining the output cited or referred to in the complaint (RFP No. 23). *See* Ex. B (Requests for Production).

On April 8, Plaintiff objected, in part, on the basis of the attorney-client privilege and work-product doctrine, but does not dispute that the materials sought (other than the requested account information) are relevant and proportional to the needs of the case. *See* Ex. C (Plaintiff's Objections); *see also* Ex. D (May 14 Email). After meeting and conferring, however, Plaintiff indicated that it nevertheless intends to withhold "outputs that weren't cited in the complaint." Ex. E at 3 (May 22 Email); *see also* Ex. H (May 17 Email); Ex. G (May 15 Email); Ex. F at 1-2 (May 7 Letter). On other related categories, Plaintiff refuses to provide a clear answer. *See* Ex. H (May 17 Email). Additionally, Plaintiff refuses to produce *any* documents sufficient to identify their OpenAI accounts, including those involved in the creation of outputs referenced in the Complaint. *Id.* For the reasons below, Plaintiff should be compelled to provide responsive documents.

The information requested is relevant, and indeed, for all the materials requested except for OpenAI account information, Plaintiff has agreed that it will not withhold those materials on relevance grounds. Plaintiff implicitly recognizes that the complaint has put directly at issue whether ChatGPT outputs like those generated by Plaintiff will actually "divert readers" and siphon revenue from The Times, which depends in part on how difficult it was for Plaintiff to generate those outputs and whether its methodology accurately approximates realistic use of ChatGPT LLMs. Compl. ¶ 157. As to the requested OpenAI account information, that is relevant because it would potentially enable OpenAI to fill gaps in the information provided. For instance, the Complaint states that there are numerous parameters one must use to "tune" the model in order to create a desired output, like "model," "temperature," "maximum length," "top p," "frequency penalty," and "presence penalty." *E.g.*, Compl. ¶ 140. Plaintiff should have preserved that information and should produce it. But if it did not, OpenAI might be able to ascertain it from its own information using the identity of the relevant account; and even if Plaintiff does provide that information, the account information might help OpenAI verify its accuracy.

There is no burden to produce this information. Based on the parties' exchanges, Plaintiff clearly possesses an easily identifiable set of materials responsive to these requests. Plaintiff has represented that the ChatGPT outputs identified in its complaint were procured by a single independent researcher that Plaintiff retained for this litigation. Ex. A (Feb. 9 Letter). That lone researcher presumably maintained basic records documenting his or her efforts.

Plaintiff's claim for work-product protection over OpenAI account information and prompt and output data has been waived because that data and information was voluntarily disclosed to

OpenAI in the course of interacting with ChatGPT LLMs. *See, e.g.*, *New York Times Co. v. United States Dep't of Just.*, 939 F.3d 479, 494 (2d Cir. 2019) (explaining that "[d]isclosing work product to [an] adversary" waives work-product protection); *see also In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993).[1] (Any work-product protection over OpenAI user account, prompt and output data was also waived for the separate, additional reason that Plaintiff put that material "at issue," as discussed below.)

With respect to related materials that Plaintiff may be withholding (such as analysis or data regarding the failure of attempts to use ChatGPT LLMs to generate infringing outputs), both work-product protection and attorney-client privilege were waived by Plaintiff's decision to put those materials at issue in this case. Such a waiver can be found when, as here, "a party advances a claim to a court . . . while relying on its privilege to withhold from a litigation adversary materials that the adversary might need to effectively contest or impeach the claim." *New York Times Co.*, 939 F.3d at 495. Similarly, attorney-client privilege can be waived "if a party puts the privileged communication at issue by relying on it to support a claim or defense." *Financial Guaranty Insurance Co. v. Putnam Advisory Company, LLC*, 314 F.R.D. 85, 90 (S.D.N.Y. 2016).

That describes precisely the situation here. For example, Plaintiff's presentation creates the potentially false impression that such regurgitation is easy for the typical user to reproduce. But if generating the outputs displayed in the complaint took significant effort or trial and error, then the behavior highlighted in the complaint is not probative of typical ChatGPT behavior. In fact, it would suggest that the threat of any harm via reduced readership is exaggerated. In short, OpenAI should be permitted to obtain from Plaintiff "materials that [it] might need to effectively contest or impeach [the Plaintiff's] claim." *New York Times Co.*, 939 F.3d at 495.

Analogous cases in this District support that conclusion. In *In re Commodity Exch., Inc., Gold Futures & Options Trading Litig.*, the plaintiffs' complaint included allegations of statistical correlations that supported the plaintiffs' claims. 2019 WL 13046984, at *1-2 (S.D.N.Y. Feb. 25, 2019). The Court rejected plaintiffs' assertions of work-product protection and ordered disclosure of reports, analysis, and "any materials underlying those reports and analysis" that were connected to the statistical results in the complaint, concluding that "the withholding of information that would tend to undermine key statistical conclusions [in the] complaint would . . . result in a selective and misleading presentation of evidence to the disadvantage of the adversary." *Id.* at *2-3 (cleaned up); *see also Financial Guaranty Ins. Co. v. Putnam Advisory Co.*, 314 F.R.D. 85, 89-90 (S.D.N.Y. 2016) (including certain assertions in the complaint regarding an economic analysis along with quotations from that analysis triggered waiver of attorney client privilege and work product protection over the entire underlying analysis because the company "put[] the privileged communication at issue by relying on it").

Accordingly, OpenAI respectfully requests that the Court compel Plaintiff to produce documents responsive to the RFPs at issue.

[1] There is no plausible claim for attorney-client privilege for this information, which was directly given to OpenAI.

Respectfully,

KEKER, VAN NEST & PETERS LLP	LATHAM & WATKINS LLP	MORRISON & FOERSTER LLP
/s/ Michelle Ybarra	*/s/ Joseph R. Wetzel*	*/s/ Allyson R. Bennett*
Michelle Ybarra *	Joseph R. Wetzel	Allyson R. Bennett *

* The parties use electronic signatures with consent in accordance with Rule 8.5(b) of the Court's ECF Rules.

EXHIBIT A

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LATHAM & WATKINS LLP

February 9, 2024

VIA EMAIL

Ian B. Crosby
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401 Union Street, Ste. 3000
Seattle, WA 98101

Re: Evidence Preservation for *New York Times Co. v. Microsoft*, No 1:23-cv-11195

Counsel:

I write on behalf of OpenAI, Inc., OpenAI LP, OpenAI GP LLC, OpenAI LLC, OpenAI OpCo LLC, OpenAI Global LLC, OAI Corporation, LLC, OpenAI Holdings, LLC (collectively "OpenAI") to follow up on our call of February 6, 2024 and to again remind you of The New York Times Company's ("NYT") pre-existing obligation to preserve all evidence potentially relevant to the claims in the December 27, 2023 Complaint filed by NYT (the "Complaint") or OpenAI's anticipated defenses to those claims, including electronically stored information and electronic backups as defined by Federal Rules of Civil Procedure 34.

This correspondence is not intended to exhaustively document the full scope of that preservation obligation. But from our discussion, my impression is that NYT appears to be operating on an indefensibly narrow vision of the categories of evidence that are relevant to the claims it has asserted and the predictable array of defenses implicated by those claims. By way of illustration and not limitation, here are two such categories:

First, the use of ChatGPT by NYT employees, including principally but not exclusively reporters and other newsroom staff, is directly relevant to multiple issues in the case you have brought. For example, as discussed on our call, such use goes directly to the question whether ChatGPT is "capable of substantial non-infringing uses" within the meaning of the *Sony* doctrine. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). It is also directly relevant to numerous other issues, including *inter alia* fair use, unclean hands, copyright misuse, the scope of alleged infringement, the scope of copyright protection of NYT articles, and the validity of NYT's copyright registrations including the extent of NYT's compliance with the Copyright Office's directive to "explicitly exclude" any "AI-generated content" from registration applications, *see* 88 Fed. Reg. 16193. Accordingly, NYT is obligated to preserve all documents related to any uses of any OpenAI product or service by any NYT director, officer, employee, independent contractor, partner, member, representative, or agent. That preservation obligation includes, without limitation, all documents or electronic records of any use of OpenAI products or

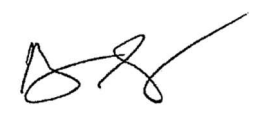
services by NYT's journalists, reporters, producers, or editorial staff, regardless of whether that use was accomplished via (1) NYT's corporate OpenAI account governed by the OpenAI Enterprise Agreement dated June 29, 2023; or (2) any other OpenAI account created or used by any NYT director, officer, employee, independent contractor, partner, member, representative, or agent.

Second, as you know, NYT published a number of articles on OpenAI in the months immediately preceding the suit. The process by which those articles were assigned, investigated, edited, revised, discussed, and ultimately published is directly relevant to this litigation: to the extent NYT is making public pronouncements on the company it has sued, OpenAI is entitled to probe not just whether it is true, as you suggested, that there was with respect to such stories an impermeable wall between the business and newsroom, but also how precisely the newsroom operated even to the extent no documentary evidence exists evincing any breach of such a wall. It should go without saying, but publishing slanted articles about the defendant in a lawsuit NYT filed raises numerous questions about the purported news/business divide. And that activity is relevant to a number of equitable defenses, along with other issues directly implicated by the Complaint. NYT is thus obligated to preserve all evidence of the conduct described in this paragraph.

Separately, we are in receipt of your letter of January 23, 2024 relating to OpenAI's own preservation obligations. We will respond to that letter more fully in a separate correspondence, however, we understand those obligations to require the preservation of documents and other information relating to the specific outputs cited in the Complaint or the exhibits thereto. You represented to me during our February 6, 2024 phone call that those outputs were created by a single independent researcher with an academic affiliation whom NYT retained in connection with this litigation. You also refused to disclose the name of that researcher. To enable OpenAI to comply with its preservation obligations, please confirm in writing that (1) the researcher in question is Tom Goldstein of the University of Maryland, and (2) the only OpenAI account used to create the specific outputs cited in the Complaint or the exhibits thereto is associated with the email address tomagoldstein@gmail.com. We also remind the NYT that its preservation obligation extends to all prompts and outputs associated with the creation of the specific outputs cited in the Complaint or the exhibits thereto.

We expect a written response to this letter by Wednesday, February 14.

Sincerely,



Andrew Gass
of LATHAM & WATKINS LLP

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY Plaintiff, -against- MICROSOFT CORPORATION, *et al.,* Defendants.	:	No. 3:23-CV-11195-SHS

DEFENDANT OPENAI OPCO, LLC'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS (NOS. 1-61)

6. If production of any requested Document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

7. These Requests are continuing in nature. If You receive or otherwise become aware of information responsive to any Request after You have served Your responses to these Requests, You must promptly supplement Your responses to these Requests to provide such information, as required by Federal Rule of Civil Procedure 26.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All Documents and Communications relating to the alleged reproduction, public display, or distribution of Your Asserted Works via GPT Services.

REQUEST FOR PRODUCTION NO. 2:

All Documents and Communications regarding any attempt by You, including failed attempts, to reproduce any of Your Published Works via GPT Services.

REQUEST FOR PRODUCTION NO. 3:

All Documents and Communications relating to any outputs of GPT Services that allegedly summarize, quote, or otherwise reference Your Asserted Works.

REQUEST FOR PRODUCTION NO. 4:

All Documents and Communications relating to the alleged reproduction, public display, or distribution of Your Asserted Works via Generative AI services other than GPT Services.

REQUEST FOR PRODUCTION NO. 5:

All Documents and Communications relating to any attempt by You, including failed attempts, to reproduce any of Your Published Works via Generative AI services other than GPT Services.

REQUEST FOR PRODUCTION NO. 6:

All Documents and Communications relating to any outputs of via Generative AI services other than GPT Services that allegedly summarize, quote, or otherwise reference Your Asserted Works.

REQUEST FOR PRODUCTION NO. 7:

Documents sufficient to show each of the OpenAI accounts You or Your Agents have created or used, including without limitation Documents sufficient to show the full name associated with the account(s), the username(s) for the account(s), email address(es) associated with the account(s), the organization ID and name associated with the account(s), and date of registration or activation for the account(s).

REQUEST FOR PRODUCTION NO. 8:

All Documents and Communications relating to any allegations that any of Your Asserted Works infringe any third-party rights.

REQUEST FOR PRODUCTION NO. 9:

All Documents and Communications relating to any complaints by any Person regarding alleged plagiarism in Your Asserted Works.

REQUEST FOR PRODUCTION NO. 10:

Documents sufficient to identify the expressive, original, and human-authored content of each of Your Asserted Works.

REQUEST FOR PRODUCTION NO. 11:

Documents sufficient to identify the non-expressive, non-original, or non-human-authored content of each of Your Asserted Works.

REQUEST FOR PRODUCTION NO. 12:

print or on the Internet, regardless of whether the arrangement or agreement was commercial or non-commercial.

REQUEST FOR PRODUCTION NO. 19:

All Documents and Communications relating to Your investigation of the claims alleged in the Complaint.

REQUEST FOR PRODUCTION NO. 20:

All Documents and Communications relating to the creation of Exhibit J of the Complaint, including but not limited to Documents and Communications with any third party or Agent.

REQUEST FOR PRODUCTION NO. 21:

Documents sufficient to show each of the OpenAI accounts created or used by any Person who participated in or was aware of Your use of GPT Services to generate any of the outputs cited in or referred to in the Complaint.

REQUEST FOR PRODUCTION NO. 22:

Documents sufficient to show each of the prompts You have entered into GPT Services, including without limitation Documents sufficient to show any system prompts used, the parameters used in connection with each prompt (including, but not limited to, temperature, model, maximum length, stop sequences, top p, frequency penalty, presence penalty), the date and time on which that prompt was entered, the user account used, and each resulting output.

REQUEST FOR PRODUCTION NO. 23:

Documents sufficient to show the process for obtaining each GPT Services output cited or referred to in the Complaint, including without limitation the full chat log, the prompts used, any system prompts used, the parameters used in connection with each prompt (including, but

not limited to, temperature, model, maximum length, stop sequences, top p, frequency penalty, and presence penalty), each and every output generated by GPT Services as a result of each prompt and parameter combination, the time and date of those queries, and the user account.

REQUEST FOR PRODUCTION NO. 24:

All Documents and Communications between You and other news, media, or writers' organizations and publishers, as well as any other named plaintiff in *Tremblay v. OpenAI, Inc.*, No. 3:23-cv-03223 and *Silverman v. OpenAI, Inc.*, No. 3:23-cv-03416 in the Northern District of California, and *Authors Guild v. OpenAI Inc.*, No. 1:23-cv-08292, *Alter v. OpenAI Inc.*, No. 1:23-cv-10211, *Basbanes v. Microsoft*, No. 1:24-cv-00084, *The Intercept Media, Inc. v. OpenAI, Inc.*, No. 1:24-cv-01515, and *Raw Story Media, Inc. v. OpenAI, Inc.*, No. 1:24-cv-01514 in the Southern District of New York, directly or through any Employee, Agent, or third party, related to copyright and artificial intelligence.

REQUEST FOR PRODUCTION NO. 25:

All Documents and Communications between You and other news, media, or writers' organizations and publishers, directly or through any Employee, Agent, or third party, relating to decisions about whether to license works to OpenAI for purposes of training ChatGPT.

REQUEST FOR PRODUCTION NO. 26:

All Documents and Communications relating to any injury or harm You claim to have suffered as a result of the conduct alleged in the Complaint.

REQUEST FOR PRODUCTION NO. 27:

Documents sufficient to show Your total revenue, broken down by source, including without limitation advertising revenue, revenue from affiliate links, subscription revenue by

Dated: March 8, 2024

LATHAM & WATKINS LLP

By: _____

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Dated: March 8, 2024

MORRISON & FOERSTER LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2024, a copy of the foregoing **DEFENDANT OPENAI OPCO, LLC'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS (NOS. 1-61)** was served by E-mail upon the following:

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Attorneys for Defendant Microsoft Corporation

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EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, Plaintiff, v. MICROSOFT CORPORATION, OPENAI, INC., OPENAI LP, OPENAI GP, LLC, OPENAI, LLC, OPENAI OPCO LLC, OPENAI GLOBAL LLC, OAI CORPORATION, LLC, and OPENAI HOLDINGS, LLC, Defendants.	Civil Action No. 1:23-cv-11195-SHS

PLAINTIFF THE NEW YORK TIMES COMPANY'S RESPONSES AND OBJECTIONS TO OPENAI OPCO, LLC'S FIRST SET OF REQUESTS FOR PRODUCTION (NOS. 1-61)

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiff The New York Times Company ("The Times") responds to Defendant OpenAI OpCo, LLC's ("OpenAI OpCo") First Set of Requests for Production of Documents and Things (the "Requests") as follows:

GENERAL OBJECTIONS

1. The Times objects to each Request to the extent it seeks information or documents subject to attorney-client privilege, work product, or any other applicable privilege or protection.

2. The Times objects to each Request to the extent it seeks documents or information not within The Times's possession, custody, or control or that are already in the possession, custody, and control of Defendants, on the grounds that such Requests are unduly burdensome and oppressive and therefore exceed the bounds of permissible discovery. The Times will only produce documents within its possession, custody, or control, and will do so in the manner such documents

Subject to these objections, The Times responds that it will produce non-privileged documents responsive to this Request that are in its possession, custody, and control and that can be located after a reasonable search and pursuant to an agreed-upon search protocol.

REQUEST FOR PRODUCTION NO. 2:

All Documents and Communications regarding any attempt by You, including failed attempts, to reproduce any of Your Published Works via GPT Services.

RESPONSE TO NO. 2:

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad and unduly burdensome insofar as it seeks "[a]ll Documents and Communications regarding any attempt" and "any of Your Published Works" and is not limited to documents relevant to any party's claims or defenses in this dispute. The Times further objects to the terms "attempt," "failed attempts," "to reproduce," and "via GPT Services" as vague and ambiguous. The Times reasonably construes this Request to refer to The Times's process for obtaining the GPT Services outputs cited in the Complaint. The Times further objects to this request as unreasonably cumulative of Request No. 23. The Times further objects to this Request to the extent that it seeks material protected by the attorney-client privilege or work-product doctrine.

Subject to these objections, The Times responds that it will produce non-privileged documents responsive to this Request that are in its possession, custody, and control and that can be located after a reasonable search and pursuant to an agreed-upon search protocol.

REQUEST FOR PRODUCTION NO. 3:

All Documents and Communications relating to any outputs of GPT Services that allegedly summarize, quote, or otherwise reference Your Asserted Works.

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad and unduly burdensome to the extent that it seeks material that is not relevant to any party's claims or defenses in this dispute. The Times further objects to the terms "outputs," "of via Generative AI services other than GPT Services," "summarize," "quote," or "otherwise reference" as vague and ambiguous. The Times further objects to this Request to the extent that it seeks material protected by the attorney-client privilege, work-product doctrine, or common interest.

Based on these objections, The Times will not produce documents in response to this Request.

REQUEST FOR PRODUCTION NO. 7:

Documents sufficient to show each of the OpenAI accounts You or Your Agents have created or used, including without limitation Documents sufficient to show the full name associated with the account(s), the username(s) for the account(s), email address(es) associated with the account(s), the organization ID and name associated with the account(s), and date of registration or activation for the account(s).

RESPONSE TO NO. 7:

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad and unduly burdensome because it seeks documents and personal information not relevant to any party's claims or defenses in this dispute. The Times further objects to this Request to the extent that it seeks material protected by the attorney-client privilege, work-product doctrine, or common interest. The Times objects that this Request is cumulative of Request No. 21. The Times further objects to this response to the extent that it seeks material protected by the reporters' privilege pursuant to the First Amendment of the U.S.

Constitution or the New York Shield Law, N.Y. Civ. Rights § 79-h. The Times will not search for or produce Documents or Communications protected by the reporters' privilege in response to this Request.

Based on these objections, The Times will not produce documents in response to this Request.

REQUEST FOR PRODUCTION NO. 8:

All Documents and Communications relating to any allegations that any of Your Asserted Works infringe any third-party rights.

RESPONSE TO NO. 8:

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad and unduly burdensome because it seeks material not relevant to any party's claims or defenses. The Times further objects to the terms "allegations," "infringe" and "third-party rights" as vague and ambiguous. The Times further objects to this Request to the extent that it seeks material protected by the attorney-client privilege, work-product doctrine, or common interest.

Based on these objections, The Times will not produce documents in response to this Request.

REQUEST FOR PRODUCTION NO. 9:

All Documents and Communications relating to any complaints by any Person regarding alleged plagiarism in Your Asserted Works.

RESPONSE TO NO. 9:

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad and unduly burdensome because it seeks material not relevant to any

Subject to these objections, The Times responds that it will produce non-privileged documents responsive to this Request that are in its possession, custody, and control and that can be located after a reasonable search and pursuant to an agreed-upon search protocol.

REQUEST FOR PRODUCTION NO. 20:

All Documents and Communications relating to the creation of Exhibit J of the Complaint, including but not limited to Documents and Communications with any third party or Agent.

RESPONSE TO NO. 20:

The Times incorporates the General Objections set forth above. The Times objects that the term "relating to the creation" and "Agent" is vague and ambiguous. The Times objects to this Request to the extent that it seeks material protected by the attorney-client privilege, work-product doctrine, or common interest.

Subject to these objections, The Times responds that it will produce non-privileged documents responsive to this Request that are in its possession, custody, and control and that can be located after a reasonable search.

REQUEST FOR PRODUCTION NO. 21:

Documents sufficient to show each of the OpenAI accounts created or used by any Person who participated in or was aware of Your use of GPT Services to generate any of the outputs cited in or referred to in the Complaint.

RESPONSE TO NO. 21:

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad, vague, and ambiguous to the extent that it seeks material that is not relevant to any party's claims or defenses in this dispute. The Times further objects to the terms

"created," "used," "participated in," "was aware of," "and Your use of GPT Services" as vague and ambiguous. The Times further objects to this Request to the extent that it seeks material protected by the attorney-client privilege, work-product doctrine, or common interest.

Based on these objections, The Times will not produce documents in response to this Request.

REQUEST FOR PRODUCTION NO. 22:

Documents sufficient to show each of the prompts You have entered into GPT Services, including without limitation Documents sufficient to show any system prompts used, the parameters used in connection with each prompt (including, but not limited to, temperature, model, maximum length, stop sequences, top p, frequency penalty, presence penalty), the date and time on which that prompt was entered, the user account used, and each resulting output.

RESPONSE TO NO. 22:

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad, unduly burdensome, vague, and ambiguous to the extent that it seeks "each of the prompts You have entered into GPT Services" without limitation to material or subject matter that is relevant to any party's claims or defenses in this dispute. The Times further objects to the terms "prompts," "system prompts," "temperature," "model," "maximum length," "stop sequences," "top p," "frequency penalty," and "presence penalty" as vague and ambiguous. The Times further objects to this Request to the extent that it seeks material protected by the attorney-client privilege, work-product doctrine, or common interest. The Times objects to this Request to the extent that it seeks material protected by the reporters' privilege pursuant to the First Amendment of the U.S. Constitution or the New York Shield Law, N.Y. Civ. Rights § 79-

h. The Times will not search for or produce Documents or Communications protected by the reporters' privilege in response to this Request.

Based on these objections, The Times will not produce documents in response to this Request aside from those documents produced in response to Request No. 23.

REQUEST FOR PRODUCTION NO. 23:

Documents sufficient to show the process for obtaining each GPT Services output cited or referred to in the Complaint, including without limitation the full chat log, the prompts used, any system prompts used, the parameters used in connection with each prompt (including, but not limited to, temperature, model, maximum length, stop sequences, top p, frequency penalty, and presence penalty), each and every output generated by GPT Services as a result of each prompt and parameter combination, the time and date of those queries, and the user account.

RESPONSE TO NO. 23:

The Times incorporates the General Objections set forth above. The Times objects to this Request as overbroad and unduly burdensome to the extent that it seeks material that is not relevant to any party's claims or defenses in this dispute. The Times further objects to the terms "process for obtaining," "system prompts," "temperature," "model," "maximum length," "stop sequences," "top p," "frequency penalty," and "presence penalty" as vague and ambiguous. The Times further objects to this Request to the extent that it seeks material protected by the attorney-client privilege, work-product doctrine, or common interest.

Subject to these objections, The Times responds that it will produce non-privileged documents responsive to this Request that are in its possession, custody, or control and that can be located after a reasonable search pursuant to an agreed-upon search protocol.

REQUEST FOR PRODUCTION NO. 24:

further objects to this request as overbroad, vague, and ambiguous to the extent that it calls for all documents The Times "intend[s] to provide" to any expert, testifying or not, and is not limited to documents relevant to any party's claims or defenses in this dispute. The Times further objects to this request as outside the scope of Federal Rule of Civil Procedure 26(b)(4)(C), which requires production of documents a testifying expert relies on or facts and data they considered in rendering their opinion.

Subject to these objections, The Times responds that it will produce documents any testifying expert relies on or facts and data considered in rendering their opinion in this case.

April 8, 2024

/s/ Ian Crosby

Ian Crosby *(admitted pro hac vice)*
Genevieve Vose Wallace *(admitted pro hac vice)*
Katherine M. Peaslee *(pro hac vice pending)*
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Attorneys for Plaintiff
The New York Times Company

CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Susman Godfrey L.L.P., whose address is One Manhattan West, New York, NY 10001. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on April 8, 2024, I served a copy of:

PLAINTIFF THE NEW YORK TIMES COMPANY'S RESPONSES AND OBJECTIONS TO OPENAI OPCO, LLC'S FIRST SET OF REQUESTS FOR PRODUCTION (NOS. 1-61)

☒ **BY ELECTRONIC SERVICE [Fed. Rule Civ. Proc. Rule 5(b)(2)(E)]** by electronically mailing a true and correct copy through Susman Godfrey L.L.P.'s electronic mail system to the email address(es) set forth below, or as stated on the attached service list per agreement in accordance with Fed. Rule Civ. Proc. Rule 5(b)(2)(E).

☐ **BY PERSONAL SERVICE** I caused to be delivered such envelope by hand to the offices of the addressee.

See Attached Service list

I declare under penalty of perjury that the following is true and correct.

Executed at New York, New York, this 8th day of April, 2024.

/s/ Alexander Frawley
Alexander Frawley

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Attorneys for Defendant
Microsoft Corporation

EXHIBIT D

From: Emily Cronin
To: Kenney, Chad (DC); NYT-AI-SG-Service@simplelists.susmangodfrey.com
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM; OpenAICopyright@mofo.com; KVPOAI@keker.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS
Date: Tuesday, May 14, 2024 8:19:43 AM

Counsel,

Thank you for your letter. Ahead of our call today, The Times's responses to the issues you raised are below.

On privilege issues, including Categories B and C, The Times reserves its rights to withhold any documents protected by the work product, common interest, or reporters' privilege and will log any responsive documents it withholds accordingly, subject to the terms of the ESI order. To the extent issues regarding reporters' privilege affects the Times's willingness to search for and review any category of documents, The Times will notify OpenAI.

For category A (Nos. 2, 7, 20, 21, 23), The Times stands by its responses and objections. The Times agreed to produce responsive non-privileged documents relating to The Times's process for obtaining the GPT Services outputs cited in the Complaint and relating to the creation of Exhibit J (Nos. 2, 20, 23). We don't agree that the remainder of the requests are relevant and proportional to the needs of the case. Nor do we agree that these other requests (Nos. 7, 21) are relevant to proving The Times's allegation that "individuals can access [NYT] content through Defendants' [] products without having to pay for it," which will be established through discovery of OpenAI's products and documents.

For category D (Nos. 4-6), The Times disagrees that documents in its possession relating to outputs of other generative AI services are relevant to OpenAI's liability or damages.

For category E (Nos. 8-12), The Times will agree to produce judicial or quasi-judicial determinations that any of the Asserted Works infringed a third party's rights, if any exist. The Times stands on its remaining responses and objections. OpenAI's request for all materials that informed the preparation of every copyrighted work at issue is overbroad and unduly burdensome, particularly because The Times has agreed to produce relevant documents proving authorship and ownership.

For category F (Nos. 13-15), The Times stands on its responses and objections. We're not sure what the dispute is on Request No. 15. The Times agreed to produce agreements relating to authorship, including work-for-hire agreements, which cover both categories of documents OpenAI identified in its letter (relevant work-for-hire agreements and other agreements relating to authorship). We're happy to discuss on the meet and confer.

For category G (No. 24), The Times stands on its objections. Request No. 24 is overbroad, unduly burdensome, and outside the scope of relevant discoverable material. The Times already agreed to produce responsive non-privileged communications with other news, media, writers' organizations, and publishers regarding licensing works to OpenAI (Request No. 25). What is OpenAI's basis for seeking more?

For category H (Nos. 33, 43), we don't understand the need for more than "documents sufficient to show the key terms of relevant licenses active from January 1, 2018 to the present," which we have agreed to produce.

For category I (Nos. 50-51), The Times stands on its objections that The Times's use of AI tools is not relevant to this case, since it is not about generative AI, particularly because The Times has agreed to produce relevant non-privileged documents relating to its use of generative AI (i.e. Request Nos. 46, 49).

For category J (Nos. 54-55), The Times is willing to discuss OpenAI's proposal on the meet and confer.

For category K, we will discuss on the meet and confer.

For category L, The Times will prepare a proposed search protocol this week.

For category M, The Times does not currently intend to withhold documents on the basis of its objection to the definition of "employee."

Thank you,

Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-789-3157 (o) | 949-436-3222 (c) | ecronin@susmangodfrey.com

---

From: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Friday, May 10, 2024 at 11:05 AM
To: Emily Cronin Stillman <ECronin@susmangodfrey.com>, "NYT-AI-SG-

Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Thanks, Emily. I just sent an invite for 2:30 ET on Tuesday.

Best,
Chad

Chad Kenney

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https://www.lw.com

From: Emily Cronin <ECronin@susmangodfrey.com>
Sent: Thursday, May 9, 2024 9:37 PM
To: Kenney, Chad (DC) <Chad.Kenney@lw.com>; NYT-AI-SG-Service@simplelists.susmangodfrey.com
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>; OpenAICopyright@mofo.com; KVPOAI@keker.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Chad,

We're available Tuesday after 2pm ET. We'll respond to the specific issues you raise before then.

Best,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
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Los Angeles, CA 90067
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attorney/client privileged information and/or attorney work product. If you received this message in error, please notify the sender and delete it immediately.

From: <NYT-AI-SG-Service@simplelists.susmangodfrey.com> on behalf of "Chad.Kenney at lw.com (via NYT-AI-SG-Service list)" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Reply-To: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Thursday, May 9, 2024 at 5:23 PM
To: "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Counsel,

We have not heard back regarding this request. Please provide your availability for next Monday. If Monday is not available, please provide your availability for Tuesday or Wednesday. We are particularly concerned about Plaintiff's recalcitrance regarding the following requests:

1. Request Nos. 2, 7, 20, 21, and 23 (Regurgitation Prompting)
2. Plaintiff's blanket assertion of the reporter's privilege in response to Request Nos. 1, 3, 7, 10, 11, 12, 16, 17, 22, 24, 47, 48, 49, 50, 56
3. Request Nos. 13–15 (Ownership and Registration of Asserted Works)
4. Request Nos. 50 and 51 (Plaintiff's AI Tools)

Similarly, we also have not heard back regarding a deadline for Plaintiff's substantial completion of production of documents in response to this First Set of Requests for Production. Please let us know whether you will agree to a deadline of June 24th.

If we have not resolved our disputes regarding these issues by Wednesday, we will be moving to compel.

Best,
Chad

Chad Kenney

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555 Eleventh Street, NW
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From: Kenney, Chad (DC)
Sent: Tuesday, May 7, 2024 8:36 PM
To: 'NYT-AI-SG-Service@simplelists.susmangodfrey.com' <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>; OpenAICopyright <OpenAICopyright@mofo.com>; KVP-OAI <KVPOAI@keker.com>
Subject: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Counsel,

Please see the attached letter regarding OpenAI's First Set of Requests for Production.

Please provide your availability on Monday May 13th to meet and confer regarding these issues.

Best,
Chad

Chad Kenney

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EXHIBIT E

From:	Emily Cronin
To:	Macris, Aaron (BN); Kenney, Chad (DC); #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM
Cc:	NYT-AI-SG-Service@simplelists.susmangodfrey.com; KVPOAI@keker.com; OpenAICopyright@mofo.com
Subject:	Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS
Date:	Wednesday, May 22, 2024 6:47:08 PM

Aaron,

Plaintiff's responses are below in red.

Thanks,
Emily

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---

From: <NYT-AI-SG-Service@simplelists.susmangodfrey.com> on behalf of Emily Cronin Stillman <ECronin@susmangodfrey.com>
Reply-To: Emily Cronin Stillman <ECronin@susmangodfrey.com>
Date: Tuesday, May 21, 2024 at 8:48 PM
To: "Aaron.Macris@lw.com" <Aaron.Macris@lw.com>, "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>, "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>
Cc: "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Aaron,

We'll have responses to you tomorrow.

Thanks,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
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---

From: "Aaron.Macris@lw.com" <Aaron.Macris@lw.com>
Date: Friday, May 17, 2024 at 2:07 PM
To: Emily Cronin Stillman <ECronin@susmangodfrey.com>, "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>, "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>
Cc: "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Emily,

Thank you for meeting and conferring on May 14 regarding Plaintiff's responses and objections to OpenAI's First Set of Requests for Production. Please find below some follow-up items from the call.

1. **Plaintiff's Substantial Production Deadline.** OpenAI asked during a call on May 6 whether Plaintiff will agree to a June 24th deadline for the substantial completion of production of documents in response to OpenAI's First Set of Requests for Production (which would be consistent with the deadline currently set for production of documents in response to Plaintiff's First Set of Requests for Production). We raised the issue again multiple times via email, and asked about this again during our call on May 14. On Wednesday, we asked for your final response on this issue by Thursday. As Sarah stated in her email yesterday, we expect to receive your final response on this issue during Monday's meet and confer.

We addressed this in Zach's email on Monday.

2. **Category A**

    1. **Request Nos. 2 (attempts to reproduce NYT works using GPT Services), 20 (creation of Exhibit J), 23 (process for obtaining outputs cited in complaint).** These requests relate to Plaintiff's efforts to cause GPT Services to regurgitate NYT articles, including the efforts that led to the outputs disclosed and relied upon in Plaintiff's complaint. Your email below does not quite capture our primary question raised during the meet

and confer about these requests. We are not merely asking whether Plaintiff will agree to flag "*in advance of privilege logs* if it plans to categorically withhold on privilege/work product grounds documents relating to outputs that weren't cited in the complaint but that relate to the process for obtaining the outputs in the complaint," as your email states. We are asking Plaintiff to provide its position now as to whether it intends to withhold those materials—and certain materials related to Plaintiff's efforts to cause regurgitation of NYT articles—on the basis of work-product protection or privilege (as Plaintiff's written objections indicate).

Based on the parties' exchanges so far, Plaintiff clearly possesses a discrete set of materials responsive to these requests that Plaintiff can readily identify now. Plaintiff has represented that the GPT Services outputs identified in its complaint were procured by a single independent researcher that Plaintiff retained in connection with this litigation. *See* Feb. 9, 2024 Letter from A. Gass. In the course of generating those outputs, that researcher almost certainly tested other prompts and generated other outputs not disclosed in Plaintiff's complaint. Those prompts and outputs are not protected by work-product doctrine or attorney-client privilege, including because the prompts were voluntarily disclosed to OpenAI in the course of submitting them to the GPT Services. *See, e.g.*, *New York Times Co. v. United States Dep't of Just.*, 939 F.3d 479, 494 (2d Cir. 2019) ("A party waives the work product protection by taking actions inconsistent with this its purpose, such as disclosing work product to its adversary …."). Similarly, that researcher almost certainly created other materials outlining his or her process for testing prompts and outputs (for example, the settings that would be used, such as temperature), in order to arrive at the outputs disclosed in Plaintiff's complaint. Because Plaintiff has selectively disclosed and affirmatively relied upon certain portions of that process, Plaintiff cannot withhold those types of related materials on the basis of work-product or privilege. *See In re Grand Jury Proc.*, 219 F.3d 175, 182 (2d Cir. 2000) ("[A] party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party.").

It appears that we are at an impasse on this issue as well. OpenAI will move to compel on this.

We disagree with your summary of the parties' exchanges above. The Times does intend to withhold on privilege/work product grounds documents relating to outputs that weren't cited in the complaint.

2. Regarding Request No. 21 (seeking the OpenAI account information for anyone who participated in generating the GPT Services outputs in Plaintiff's complaint), thank you for confirming that the parties are at an impasse, and that Plaintiff stands by its position that it will refuse to produce these documents. As explained on the call, this account information is relevant because it is likely to lead to relevant information about the outputs on which Plaintiff relies, including the approach that was used to generate them. Insofar as Plaintiff is claiming privilege or work-product protection over this

information, Plaintiff has waived any such protection by submitting that information to OpenAI in the course of creating the accounts. *See New York Times*, 939 F.3d at 494. OpenAI will seek relief from the Court to compel production of materials responsive to this request.

The parties are at an impasse. The Times stands on its written objections to this request.

3. **Category D—Other Generative AI Services - Request Nos. 4 (reproduction, display, or distribution of NYT works), 5 (NYT's attempts to cause regurgitation), 6 (outputs that summarize or reference NYT works).** Thank you for confirming that the parties are at an impasse on these requests.

4. **Category E**

    1. **Allegations of Infringement and Plagiarism - Request Nos. 8 (infringement) & 9 (plagiarism).** You stated in your May 14 email that "[t]he Times will agree to produce judicial or quasi-judicial determinations that any of the Asserted Works infringed a third party's rights, if any exist," but that "The Times stands on its remaining responses and objections."

        Your email below states that "OpenAI asked that The Times agree to reciprocally drop The Times's RFP against OAI regarding complaints of copyright or trademark infringement." That does not quite capture our exchange on the call. To clarify, OpenAI is not yet offering to drop these requests in exchange for Plaintiff agreeing to drop its similar reciprocal requests. Rather, we asked on the call for Plaintiff whether its position was that both parties' requests on this topic are irrelevant and whether Plaintiff was proposing that all such requests be withdrawn. We understand Plaintiff contends that its own requests on this issue are relevant and that OpenAI's are not—although we have not received a substantive explanation for why that is the case. As explained on the call, it is the other way around: OpenAI is requesting documents concerning allegations of infringement or plagiarism about the asserted works, which bears directly on whether they are protectable by copyright. But that reasoning does not apply to Plaintiff's requests to OpenAI. Please let us know by Tuesday whether Plaintiff's position about these requests has changed in any way, so that we can determine whether the parties are at an impasse.

As we've said, The Times agrees to produce judicial or quasi-judicial determinations that any of the Asserted Works infringed a third party's rights, if any exist, but otherwise stands on its written responses and objections. The Times's request that OpenAI produce complaints of copyright or trademark infringement is relevant to OpenAI's infringement of the Asserted Works.

    2. **Creation of Asserted Works – Requests Nos. 10 (expressive, original, and human-authored content), 11 (non-expressive, non-original, or non-human-authored content), 12 (reference material).** As you stated in your email below, we asked during the call whether Plaintiff would be willing to produce the files and materials underlying

Plaintiff's asserted works (e.g., reporters' notes, interview memos, records of materials cited in the asserted works, or other similar files for the asserted works). Those types of materials are relevant to, among other things, the determination of which portions of the asserted works are protectable and fair use. They are also relevant given the Times's repeated assertion that "Times Works in particular [is] more valuable than most other content on the internet," and that OpenAI targeted Times content for its training data due to its high quality. *See* Compl. ¶ 145. Based on your email below, we are at an impasse with respect to this request.

5. **Category F—Ownership and Registration of Asserted Works** - **Request Nos. 13 (ownership disputes), 14 (correspondence with Copyright Office), 15 (authorship and work-for-hire agreements).** Your email below states that "OpenAI asked whether The Times's agreement to produce agreements relating to authorship in response to No. 15 will include, if applicable, employment agreements to the extent that other agreements don't prove authorship or The Times's ownership of the asserted work." To clarify, our request was not so conditioned. For any asserted works Plaintiff claims to own, by virtue of it being written by one of Plaintiff's employees within the scope of his or her employment, OpenAI requests that employee's employment agreement that was operative at the time the work was written. By Tuesday, please let us know if Plaintiff will produce such agreements.

The Times will produce agreements relating to authorship that can be located after a reasonable search. If, after we produce those agreements, OpenAI still thinks there is something missing to prove ownership, The Times is happy to discuss.

Additionally, please let us know by Tuesday whether Plaintiff will produce the other materials described in connection with these requests in OpenAI's May 7 letter, including correspondence with the copyright office and documents reflecting disputes over ownership (such as DMCA Takedown Notices, for works other than user-submitted content).

The Times stands on its response to Request No. 14.

6. **Category G—Correspondence with Other Plaintiffs – Request No. 24**. We noted during the meeting that this request is limited to communications with certain other parties concerning "copyright and artificial intelligence." We are willing to entertain proposals for further limitations, but without more information about the burden this request purportedly imposes, we see no reason to limit it at this time. Please provide your limiting proposal by Tuesday.

The Times suggests that RFP 24 be narrowed as follows: "All Documents and Communications between You and other news, media, or writers' organizations and publishers, as well as any other named plaintiff in Tremblay v. OpenAI, Inc., No. 3:23-cv-03223 and Silverman v. OpenAI, Inc., No. 3:23-cv-03416 in the Northern District of California, and Authors Guild v. OpenAI Inc., No. 1:23-cv-08292, Alter v. OpenAI Inc., No. 1:23-cv-10211, Basbanes v. Microsoft, No. 1:24-cv-00084, The Intercept Media, Inc. v. OpenAI, Inc., No. 1:24-cv-01515, and Raw Story Media, Inc. v. OpenAI, Inc., No. 1:24-cv-01514 in the Southern District of New York, directly or through any

Employee, Agent, or third party, related to copyright infringement by ~~artificial intelligence~~ OpenAI." With that limitation, The Times would agree to produce non-privileged documents responsive to that Request that are in its possession, custody, and control that can be located after a reasonable search and pursuant to an agreed-upon search protocol.

7. **Category H—Licenses and Attempts to License - Requests No. 33 and 43.**

    1. **Attempts to License.** As explained on the call, these requests encompass documents reflecting failed attempts to license the asserted works, which is relevant to the value of the asserted works and to fair use (e.g., the effect of the alleged infringement on the market for the asserted works). Please confirm that Plaintiff will produce such materials by Tuesday.

The Times stands on its written response and objections and will not agree to produce failed attempts to license. For the licenses it has agreed to produce, The Times is still investigating whether any such licenses would require redaction and, in the event they do, will flag the issue in advance.

    3. **License redactions**. Additionally, we remain unclear on what NYT means by "key terms" and how that limits what Plaintiff is planning to produce. On the call, we understood you to indicate that Plaintiff used this language to preserve the option of redacting certain material from license agreements, such as information subject to third-party confidentiality obligations. Please confirm by Tuesday that Plaintiff intends to produce full license agreements to the asserted works, and if Plaintiff has a basis for redacting content from those agreements, please explain what that would be.

To the extent that the full licensing agreements can be accessed based on a reasonable search, The Times agrees to produce them.

Timeframe. Regarding timeframe, as discussed, we are willing to negotiate a specific window for license agreements, but we do not believe 2018 to the present is even remotely long enough for these types of materials, particularly given that Plaintiff has asserted works that were published long before 2018 (indeed, we just received an email indicating that Plaintiff intends to assert works that were registered with the Copyright Office before 1950). Are there any particular restrictions on the manner in which Plaintiff maintains its license agreements that would make producing license agreements before a certain timeframe burdensome? For instance, are Plaintiff's license agreements unavailable in electronic format before a certain year? Please let us know by Tuesday.

The Times is standing on its written objections and its agreement to produce from January 1, 2018 to present. We understand that there is an additional burden associated with compiling the licensing records from before January 1, 2018, but The Times also stands on its scope and relevance objections to licenses outside that timeframe.

8. **Category I—NYT's AI Tools - Request Nos. 50 and 51.** You reiterated your position that "[t]he Times's use of AI tools is not relevant to this case" because other artificial intelligence tools beyond generative AI are not relevant. Tthey are relevant to fair use, particularly if the Plaintiff's tools were trained and developed in a similar way to ChatGPT. They are also relevant given the Times's contention that OpenAI's tools "threaten[ ] The Times's ability" to provide "trustworthy information, news analysis, and commentary." Compl. ¶¶ 2-3. If the Times's is also using AI tools, OpenAI is entitled to test why exactly such tools do not pose the same alleged threat. The parties are at an impasse with respect to this request.

9. **Request No. 18 (All Documents and Communications relating to any arrangement or agreement by which You permitted a third party to reproduce or display Your Asserted Works, or any part thereof, in print or on the Internet, regardless of whether the arrangement or agreement was commercial or non-commercial).** Plaintiff objects on overbreadth grounds. As noted on the call, we are willing to narrow this request to agreements themselves (i.e., excluding other related documents and communications). Please confirm by Tuesday that Plaintiff will produce such agreements.

The Times stands on its written objections to this request. We appreciate your offer to narrow but it still does not resolve The Times's scope and burden concerns.

10. **Request No. 42 (For each of Your Asserted Works, Documents sufficient to show the relevant category of that work as referenced in Paragraphs 33–37 of the Complaint. Categories can include, without limitation, "Investigative Reporting," "Breaking News Reporting," "Beat Reporting," "Reviews and Analysis," or "Commentary and Opinion.")** —We understand that Plaintiff's concern with this request is that there may not be documents that exist in the ordinary course of business that show how these works fit into the categories outlined in Plaintiff's complaint. As stated on the call, if that is the case, we're happy to explore other forms of obtaining this discovery (for example, perhaps through a 30(b)(6) deposition topic). However, if the categories outlined in Plaintiff's complaint are categories that Plaintiff uses in the ordinary course of business for cataloguing its journalism, it would surprise us if no records exist that classify them in that manner. By Tuesday, would you please clarify whether Plaintiff uses those categories to catalog its works? If so, would you please explain why it would be burdensome to investigate whether Plaintiff maintains records that classify its works according to those categories?

The Times does not have readily accessible documents that are responsive to this request and stands on its written objections to scope, relevance, and undue burden.

We will follow up on any other issues not addressed in this email.

Regards,
Aaron

From: Emily Cronin <ECronin@susmangodfrey.com>
Sent: Wednesday, May 15, 2024 8:25 PM

To: Kenney, Chad (DC) <Chad.Kenney@lw.com>; #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>
Cc: NYT-AI-SG-Service@simplelists.susmangodfrey.com; KVPOAI@keker.com; OpenAICopyright@mofo.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Counsel,

Thank you for the meet and confer yesterday. To recap:

- For category A (Nos 2, 7, 20, 21, 23):
  - OpenAI asked if The Times will agree to flag in advance of privilege logs if it plans to categorically withhold on privilege/work product grounds documents relating to outputs that weren't cited in the complaint but that relate to the process for obtaining the outputs in the complaint. We'll get back to you on this soon.
  - The parties are at an impasse on Nos. 7 and 21.
- For categories B & C (reporters' privilege and common interest):
  - I reiterated The Times's agreement to notify OpenAI if issues regarding the reporters' privilege affects The Times's willingness to search for and review any category of documents.
  - OpenAI asked if The Times will flag in advance of privilege logs if it plans to categorically withhold responsive documents on the basis of a common interest agreement. We'll get back to you on this soon.
- For category D (Nos. 4-6), the parties are at an impasse.
- For category E (Nos. 8-12):
  - OpenAI asked that The Times agree to reciprocally drop The Times's RFP against OAI regarding complaints of copyright or trademark infringement. I emphasized that the The Times's relevance objections aren't the same, so this was unlikely, but we'd confirm.
  - For request Nos. 10-12, OpenAI asked if The Times would be willing to produce the underlying reporter's notes, interview memos, records of materials cited, or other "files" for each asserted work. The Times is not willing to produce this material and stands on its objections.
- For category F (Nos. 13-15), OpenAI asked whether The Times's agreement to produce agreements relating to authorship in response to No. 15 will include, if applicable, employment agreements to the extent that other agreements don't prove authorship or The Times's ownership of the asserted work. We'll get back to you on this soon.
- For category G (No. 24), OpenAI asked if The Times is willing to propose a way to limit this request. We'll get back to you on this soon. In the meantime, please also suggest a narrower version of this RFP for The Times to consider.
- For category H (Nos. 33, 43):

OpenAI asked The Times to confirm whether it is planning to produce portions of key terms of relevant licenses or whether it will produce the entire underlying licenses (with possibly redactions if applicable). We'll get back to you on this soon.
    - OpenAI said it may revert with a different proposed date cutoff.
- For category I (Nos. 50-51), the parties are at an impasse.
- For category J (Nos. 54-55), OpenAI asked if The Times would agree to produce licensing agreements relating to these corpora. We'll get back to you on this soon.
- For category K (responses with potential for narrowing scope):
    - No. 18 – OpenAI offered to limit this request to agreements to reproduce asserted works. We'll get back to you on this soon.
    - No. 30 – OpenAI explained that this request is seeking documents showing page views in the first 14 days, which is more granular than RFP No. 29 (page views for each month). We'll let OpenAI know if we are standing on our responses/objections or if there is a subset of responsive documents we can produce soon.
    - Nos. 35 & 37 – OpenAI agreed to try narrowing these two requests. The Times will consider what they propose.
    - No. 42 – OpenAI agreed to propose alternative methods of getting this information through discovery. The Times will consider what they propose.
    - No. 45 – OpenAI explained that the goal of this request is to discover any other ways The Times is/was planning to use generative AI. If OpenAI proposes a narrower version of this request, The Times will consider it.

Thanks,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-789-3157 (o) | 949-436-3222 (c) | ecronin@susmangodfrey.com

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From: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Friday, May 10, 2024 at 11:05 AM
To: Emily Cronin Stillman <ECronin@susmangodfrey.com>, "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>,

"OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Thanks, Emily. I just sent an invite for 2:30 ET on Tuesday.

Best,
Chad

Chad Kenney

LATHAM & WATKINS LLP
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Direct Dial: +1.202.350.5388
Email: chad.kenney@lw.com
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From: Emily Cronin <ECronin@susmangodfrey.com>
Sent: Thursday, May 9, 2024 9:37 PM
To: Kenney, Chad (DC) <Chad.Kenney@lw.com>; NYT-AI-SG-Service@simplelists.susmangodfrey.com
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>; OpenAICopyright@mofo.com; KVPOAI@keker.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Chad,

We're available Tuesday after 2pm ET. We'll respond to the specific issues you raise before then.

Best,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-789-3157 (o) | 949-436-3222 (c) | ecronin@susmangodfrey.com

From: <NYT-AI-SG-Service@simplelists.susmangodfrey.com> on behalf of "Chad.Kenney at lw.com (via NYT-AI-SG-Service list)" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Reply-To: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Thursday, May 9, 2024 at 5:23 PM
To: "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Counsel,

We have not heard back regarding this request. Please provide your availability for next Monday. If Monday is not available, please provide your availability for Tuesday or Wednesday. We are particularly concerned about Plaintiff's recalcitrance regarding the following requests:

1. Request Nos. 2, 7, 20, 21, and 23 (Regurgitation Prompting)
2. Plaintiff's blanket assertion of the reporter's privilege in response to Request Nos. 1, 3, 7, 10, 11, 12, 16, 17, 22, 24, 47, 48, 49, 50, 56
3. Request Nos. 13–15 (Ownership and Registration of Asserted Works)
4. Request Nos. 50 and 51 (Plaintiff's AI Tools)

Similarly, we also have not heard back regarding a deadline for Plaintiff's substantial completion of production of documents in response to this First Set of Requests for Production. Please let us know whether you will agree to a deadline of June 24th.

If we have not resolved our disputes regarding these issues by Wednesday, we will be moving to compel.

Best,
Chad

Chad Kenney

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Email: chad.kenney@lw.com
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From: Kenney, Chad (DC)
Sent: Tuesday, May 7, 2024 8:36 PM
To: 'NYT-AI-SG-Service@simplelists.susmangodfrey.com' <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>; OpenAICopyright <OpenAICopyright@mofo.com>; KVP-OAI <KVPOAI@keker.com>
Subject: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Counsel,

Please see the attached letter regarding OpenAI's First Set of Requests for Production.

Please provide your availability on Monday May 13th to meet and confer regarding these issues.

Best,
Chad

Chad Kenney

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EXHIBIT F

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May 7, 2024

VIA EMAIL

Zach Savage
zsavage@susmangodfrey.com
Susman Godfrey L.L.P.
One Manhattan West
New York, NY 10001-8602

Re: *The New York Times Company v. Microsoft Corporation, et al.,* Case No.: 23-cv-11195-SHS

Counsel:

I write regarding The New York Times Company's ("NYT") responses and objections to OpenAI's First Set of Requests for Production. Please provide your availability to meet and confer about the items discussed below.

A. Request Nos. 2, 7, 20, 21, and 23 (Regurgitation Prompting)

NYT objects to a number of requests relating to its efforts to cause the GPT Services to regurgitate NYT articles, on grounds of work-product doctrine. NYT Resp. to Request Nos. 2 (attempts to reproduce NYT works using GPT Services), 7 (NYT's OpenAI accounts), 20 (creation of Exhibit J), 21 (OpenAI accounts used to create outputs in complaint), and 23 (process for obtaining outputs cited in complaint).

As a threshold matter, NYT has no claim of work-product protection over data (including, *e.g.*, model and system prompts) it or its agents have submitted to OpenAI via the GPT Services. These submissions to a third party are not confidential, particularly in light of GPT Services users' express assent to terms explicitly reserving OpenAI's right to use such data to defend itself in litigation. *See, e.g.*, OpenAI, Privacy Policy § 2. We are not aware of any authority suggesting that a party can claim work product protection over information submitted directly to its anticipated litigation adversary. To the extent NYT is relying on any such authorities, please provide them. In any case, NYT waived work-product protection over any materials relating to its efforts to cause the GPT Services to allegedly regurgitate data by explicitly relying on selected results of those efforts in its complaint. *See In re Commodity Exch., Inc., Gold Futures & Options Trading Litig.*, No. 14-cv-2548, 2019 WL 13046984, at *2–4 (S.D.N.Y. Feb. 25, 2019). To the extent NYT has authorities that suggest otherwise, please provide them.

Each of these requests is also highly relevant to NYT's claims, which hinge in substantial part on NYT's allegation that "individuals can access [NYT] content through Defendants' [] products without having to pay for it." Compl. ¶ 157. OpenAI, for example, is entitled to documents regarding the scope and extent of NYT's efforts to cause the GPT Services to allegedly regurgitate NYT articles—along with any failed attempts to do so—because those documents may demonstrate that users can neither "access" NYT content through those services as a general matter nor without substantial effort. Similarly, OpenAI is entitled to information sufficient to identify any OpenAI accounts NYT or its agents used during those efforts, which may enable OpenAI's independent discovery of similarly relevant information in its own possession. *See* Request Nos. 7 & 21.

Relatedly, Request No. 2 seeks "[a]ll Documents and Communications regarding any attempt by You, including failed attempts, to reproduce any of Your Published Works via GPT services." In its response, NYT states that it "reasonably construes this Request to refer to [its] process for obtaining the GPT Services outputs cited in the Complaint." NYT Response to Request No. 2. But the scope of Request No. 2 is broader: it encompasses documents arising out of any attempts by NYT to reproduce the asserted works via GPT Services—whether or not the resulting outputs are referenced in the complaint—including user logs, screenshots, spreadsheets, or any other records of outputs created in the course of those attempts, regardless of whether those outputs actually contain expressive material from the asserted works.

As we informed you by our letter of February 9, 2024, NYT had an obligation to preserve all documents relating to its efforts to cause the GPT Services to allegedly regurgitate training data. Please confirm that NYT will search for and produce all non-privileged documents within the scope of these requests. To the extent NYT plans to withhold documents on grounds of attorney-client privilege or work-product doctrine, please confirm that NYT will provide a privilege log that identifies any withheld materials.

B. Objections Based on Reporters' Privilege

NYT objects to other requests on the basis of "reporters' privilege pursuant to the First Amendment of the U.S. Constitution or the New York Shield Law, N.Y. Civ. Rights § 79-h." NYT states that it will "not search for or produce Documents or Communications protected by the reporters' privilege." NYT Responses to OpenAI Request Nos. 1, 3, 7, 10, 11, 12, 16, 17, 22, 24, 47, 48, 49, 50, 56. To the extent NYT is relying on authorities suggesting that the reporters' privilege excuses the owner of a news publication from searching for documents in response to discovery requests in a litigation brought by the news publisher and claiming harm to its reporting activities, please provide those authorities and a description of the categories of documents you plan to exclude from your search. Failing that, please confirm you will not exclude materials from the scope of your search based on reporters' privilege and will provide a privilege log of all documents you intend to withhold on the basis of that alleged privilege.

C. Objections Based on Common Interest Privilege

NYT objects to various requests "to the extent that [they] seek[] material protected by the … common interest [doctrine]." NYT Response to OpenAI Request Nos. 1, 3, 5, 7, 8, 10, 11, 13–

26, 33, 35–38, 40, 41, 43, 45, 52, 54–57. Please identify the third party or parties with whom NYT asserts a common interest and describe the basis for NYT's assertion of the doctrine. To the extent NYT intends to withhold documents on the basis of the common interest doctrine, please confirm that NYT will identify those materials on a privilege log.

D. Request Nos. 4–6 (Other Generative AI Services)

NYT contests the relevance of requests about the outputs of "Generative AI services other than GPT Services" and refuses to produce responsive documents. NYT Resp. to OpenAI Request Nos. 4 (reproduction, display, or distribution of NYT works), 5 (NYT's attempts to cause regurgitation), 6 (outputs that summarize or reference NYT works). This evidence is relevant to several claims and allegations in the complaint, including NYT's assertion that "GenAI" services "threaten high-quality journalism," and its allegation that "given the right prompt, [generative AI services] will repeat large portions of materials they were trained on." Compl. at 14 & ¶ 80. It is also relevant to a number of other issues, including the behavior of OpenAI's services as compared to other LLMs (relevant to fair use) and the extent to which users account for the known phenomenon of hallucination when interpreting AI outputs. *See* Compl. ¶ 142. As another example, NYT's awareness of whether other generative AI companies have engaged in the same conduct NYT contends to be copyright infringement here and NYT's inaction with respect to those companies would undermine NYT's claim for injunctive relief, as it would indicate a lack of irreparable harm from the conduct NYT alleges.

At a minimum, documents sufficient to identify any other generative AI services you believe were trained on the asserted works are relevant to NYT's claim that OpenAI's conduct directly caused NYT to suffer financial harm, along with the extent of harm attributable to that conduct. Please confirm that NYT will produce non-privileged documents responsive to these requests and provide a privilege log that identifies any materials withheld on grounds of attorney-client privilege or work-product doctrine.

E. Request Nos. 8–12 (Creation of Asserted Works)

Requests No. 8 through 12 seek information relating to the preparation and scope of copyright protection of the works NYT asserts in this lawsuit. *See* Request Nos. 8 (allegations of infringement), 9 (allegations of plagiarism), 10 (expressive, original, and human-authored content), 11 (non-expressive, non-original, or non-human-authored content), 12 (reference material). NYT has refused to produce documents in response to these requests on grounds of reporters' privilege, *see supra* (addressing this alleged privilege), and further contests the relevance of Requests 8, 9, and 12. The only documents NYT has agreed to produce in response to these requests are the asserted works themselves. *See* NYT Resp. to OpenAI Requests 10 and 11.

Requests 8, 9, and 12 are relevant to NYT's claims and OpenAI's defenses in several respects. For example, NYT cannot assert copyright infringement claims based on OpenAI's alleged reproduction of portions of NYT articles that were "copied from other [third-party] works," like reference material or pre-existing articles. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (works not protectable if "copied from other works"); *see also Estate of Burne*

Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 166–67 (2d Cir. 2003) (copyright registration creates rebuttable presumption of validity that defendant may challenge with "other evidence"). So too for material without a human author. *Thaler v. Perlmutter*, No. 22-cv-1564, 2023 WL 5333236, at *7 (D.D.C. Aug. 18, 2023). And evidence that NYT created the asserted works by summarizing works of third-party journalism is directly relevant to the validity of NYT's assertion that the GPT Services allegedly violate New York misappropriation law by doing exactly the same thing. *See, e.g.*, Compl. ¶ 194.

Please confirm NYT will search for and produce non-privileged documents responsive to these requests and log documents withheld on privilege grounds. At a minimum, these requests require NYT to produce, for each of the asserted works, (1) any documents regarding allegations that the work infringes or plagiarized other works; and (2) any materials that "informed the preparation" of each of the asserted works, including without limitation reference materials gathered during the course of each work's creation in NYT's custody and possession.

F. Request Nos. 13–15 (Ownership and Registration of Asserted Works)

Requests No. 13 through 15 seek information relating to NYT's ownership and registration of the asserted works. *See* Request Nos. 13 (ownership disputes), 14 (correspondence with Copyright Office), 15 (authorship and work-for-hire agreements).

Request No. 13. NYT has refused to produce any documents in response to Request No. 13. Documents regarding ownership disputes are relevant to the extent they suggest that the NYT is not the legal or beneficial owner of the works it asserts in this lawsuit. 17 U.S.C. § 501(b). OpenAI is willing to limit Request No. 13 to exclude DMCA Takedown Notices relating to user-submitted content. *See* NYT Resp. to OpenAI Req. No. 13 (objecting to relevance of DMCA takedown notices that "apply to user-submitted content"). Subject to that narrowing, please confirm that NYT will produce responsive, non-privileged documents in response to this request (and log documents withheld on privilege grounds) or explain NYT's apparent position that NYT's ownership of its asserted works is not relevant to its claims.

Request No. 14. NYT has refused to produce its correspondence with the Copyright Office (other than its deposit copies) in response to Request No. 14. NYT's correspondence with the Copyright Office as to each of the asserted works is relevant to the extent such documents reveal any questions raised by the Office as to the registrability of those works, and any responses to those questions by NYT. Merely producing NYT's deposit copies is not sufficient to satisfy the scope of this request. Please confirm NYT will produce responsive documents within the scope of this request.

Request No. 14. NYT has refused to produce documents relating to its ownership of the asserted works other than "agreements . . . related to authorship" in response to Request No. 15. That is unacceptable. At a minimum, this request requires NYT to provide, for each of the asserted work, (1) if the work is a work made for hire, the relevant employment or contract pertaining to the creation of the work by the person(s) who created it under 17 U.S.C. § 201(b), or (2) if the work is not a work made for hire, signed agreements pertaining to the transfer of rights in that work from its original author to NYT under 17 U.S.C. § 204(a), including any intermediate

transfers. These documents are relevant to the threshold question of whether NYT has standing to bring infringement claims based on those works. *See, e.g.*, *John Wiley & Sons, Inc. v. DRK Photo*, 882 F.3d 394, 410–15 (2d Cir. 2018). Please confirm NYT will produce non-privileged responsive documents and provide a log describing any documents withheld on privilege grounds.

G. Request Nos. 24 (Correspondence with Other Plaintiffs)

Request No. 24 seeks communications between NYT and other news, media, or writers' organizations and publishers, as well as other named plaintiffs in certain lawsuits against OpenAI, related to copyright and artificial intelligence. NYT refused to produce documents responsive to this request and argues that the documents it seeks are not relevant.

NYT's statements about copyright and artificial intelligence to third parties are relevant to a variety of issues the NYT has affirmatively raised in this case. NYT alleged, for example, that generative AI "threaten[s] high-quality journalism," imperils the "traditional business models" of NYT "and its peers," and create an "enormous" "cost to society." Compl. at 14. It has also alleged that those services "deprive [NYT] of subscription, licensing, advertising, and affiliate revenue." Compl. ¶ 5. OpenAI is entitled to evaluate the validity of those statements, including by investigating whether NYT has said otherwise in non-privileged correspondence with other media companies and similar entities. OpenAI is also entitled to investigate the extent to which NYT has engaged in anticompetitive horizontal conduct with its direct competitors, which would support, *inter alia*, OpenAI's anticipated defenses of unclean hands and copyright misuse. *See Primetime 24 Joint Venture v. Nat'l Broad. Co., Inc.*, 219 F.3d 92, 102 (2d Cir. 2000).

Please confirm that NYT will produce non-privileged documents responsive to this request and, to the extent NYT withholds documents on grounds of common interest (or any other privilege or doctrine), that NYT will log all such documents.

H. Request Nos. 33 and 43 (Licenses and Attempts to License)

Request No. 33 seeks all documents and communications relating to licenses or attempts to license the asserted works, and Request No. 43 seeks documents and communications relating to commercial arrangements by which third parties reproduce, distribute, display, or perform the asserted works. NYT objects to their relevance and proposed to narrow this request to "documents sufficient to show the key terms of relevant licenses active from January 1, 2018 to the present." *See* NYT Resp. to Req. Nos. 33 and 43. This would appear to exclude broad categories of responsive materials, including even potentially the license agreements themselves. Please explain NYT's basis for refusing to produce such materials.

I. Request Nos. 50 and 51 (NYT's AI Tools)

Request No. 50 seeks "All Documents and Communications relating to the training of Your artificial intelligence satellite images tool referenced in the February 19, 2024 Reuters Institute article, 'New York Times publisher A. G. Sulzberger: "Our industry needs to think bigger"' including without limitation any base models and training data You used." Request No. 51 seeks "All Documents and Communications relating to the training of Your artificial intelligence tool

referenced in the February 20, 2024 Axios article, 'Exclusive: NYT plans to debut new generative AI ad tool later this year' including without limitation any base models and training materials You used." Based on objections to relevance and privilege, NYT refuses to produce any documents responsive to these requests.

Documents relating to NYT's own training and use of artificial intelligence models are highly relevant to issues NYT has affirmatively raised in this litigation, including, for example, NYT's assertion that generative AI "threaten[s] high-quality journalism." Compl. ¶ 47. NYT's own use of artificial intelligence models, and its use of those models to advance its journalistic efforts, may yield admissions regarding the transformative nature of generative AI models. Please confirm that NYT will produce documents responsive to this request.

J. Request Nos. 54 and 55

This request seeks "All Documents and Communications relating to The New York Times English Gigaword (LDC2003T05) of the Linguistic Data Consortium of the University of Pennsylvania, including but not limited to all articles included therein, any licensing arrangements, and any negotiations between You and the Linguistic Data Consortium or University of Pennsylvania." Similarly, Request No. 55 seeks "All Documents and Communications relating to The New York Times Annotated Corpus (LDC2008T19) of the Linguistic Data Consortium of the University of Pennsylvania, including but not limited to all articles included therein, any licensing arrangements, and any negotiations between You and the Linguistic Data Consortium or University of Pennsylvania." NYT objects on relevance and privilege grounds and offers to narrow this request to "documents sufficient to show the content of the corpus." NYT Resp. to OpenAI Req. Nos. 54 and 55. NYT, in other words, refuses to produce licensing arrangements relating to these corpora.

Those documents are highly relevant to OpenAI's anticipated fair use defense and, in particular, the extent to which there exists a "potential [licensing] market" for use of the asserted works to train generative AI models. 17 U.S.C. § 107(4). The scope of relevant information includes, for example, the terms of every licensing arrangement between the NYT and a third-party regarding these corpora and the remuneration NYT has earned from any negotiated agreements (if any). Please confirm that NYT will search for and produce non-privileged documents responsive to this request.

K. Requests for Clarifying or Narrowing Scope

In response to various requests for production (e.g., Request Nos. 18, 30, 35, 37, 42, 45), NYT requests that the scope of the request be clarified or narrowed. We are happy to meet and confer about the scope of these requests. Please be prepared to discuss which aspects of these requests NYT contends are unclear or overbroad.

LATHAM & WATKINS LLP

L. Search Protocol

In response to various requests, NYT indicates that it will agree to produce documents located after a search "conducted pursuant to an agreed-upon search protocol." Please provide a proposal for discussion.

M. Objections to Definition of "Employee"

NYT objects to the definition of "Employee" and appears to take the position that it should be interpreted to exclude officers, directors, and former employees. Relevant materials in NYT's possession are not shielded from discovery merely because they were created or received by a former employee or a current officer or director, and the basis for NYT's objection is not clear. If there are any particular categories of documents that NYT intends to exclude from the scope of its search or production based on this objection, please identify them and explain the justification. Otherwise, please confirm that NYT will not withhold any documents otherwise responsive to OpenAI's requests on the basis of this objection.

Sincerely,

/s/ Joe Wetzel

Joe Wetzel
of LATHAM & WATKINS LLP

EXHIBIT G

From: Emily Cronin
To: Kenney, Chad (DC); #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM
Cc: NYT-AI-SG-Service@simplelists.susmangodfrey.com; KVPOAI@keker.com; OpenAICopyright@mofo.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS
Date: Wednesday, May 15, 2024 5:25:35 PM

Counsel,

Thank you for the meet and confer yesterday. To recap:

- For category A (Nos 2, 7, 20, 21, 23):
  - OpenAI asked if The Times will agree to flag in advance of privilege logs if it plans to categorically withhold on privilege/work product grounds documents relating to outputs that weren't cited in the complaint but that relate to the process for obtaining the outputs in the complaint. We'll get back to you on this soon.
  - The parties are at an impasse on Nos. 7 and 21.
- For categories B & C (reporters' privilege and common interest):
  - I reiterated The Times's agreement to notify OpenAI if issues regarding the reporters' privilege affects The Times's willingness to search for and review any category of documents.
  - OpenAI asked if The Times will flag in advance of privilege logs if it plans to categorically withhold responsive documents on the basis of a common interest agreement. We'll get back to you on this soon.
- For category D (Nos. 4-6), the parties are at an impasse.
- For category E (Nos. 8-12):
  - OpenAI asked that The Times agree to reciprocally drop The Times's RFP against OAI regarding complaints of copyright or trademark infringement. I emphasized that the The Times's relevance objections aren't the same, so this was unlikely, but we'd confirm.
  - For request Nos. 10-12, OpenAI asked if The Times would be willing to produce the underlying reporter's notes, interview memos, records of materials cited, or other "files" for each asserted work. The Times is not willing to produce this material and stands on its objections.
- For category F (Nos. 13-15), OpenAI asked whether The Times's agreement to produce agreements relating to authorship in response to No. 15 will include, if applicable, employment agreements to the extent that other agreements don't prove authorship or The Times's ownership of the asserted work. We'll get back to you on this soon.
- For category G (No. 24), OpenAI asked if The Times is willing to propose a way to limit this request. We'll get back to you on this soon. In the meantime, please also suggest a narrower version of this RFP for The Times to consider.
- For category H (Nos. 33, 43):
  - OpenAI asked The Times to confirm whether it is planning to produce

portions of key terms of relevant licenses or whether it will produce the entire underlying licenses (with possibly redactions if applicable). We'll get back to you on this soon.
    - OpenAI said it may revert with a different proposed date cutoff.
- For category I (Nos. 50-51), the parties are at an impasse.
- For category J (Nos. 54-55), OpenAI asked if The Times would agree to produce licensing agreements relating to these corpora. We'll get back to you on this soon.
- For category K (responses with potential for narrowing scope):
    - No. 18 – OpenAI offered to limit this request to agreements to reproduce asserted works. We'll get back to you on this soon.
    - No. 30 – OpenAI explained that this request is seeking documents showing page views in the first 14 days, which is more granular than RFP No. 29 (page views for each month). We'll let OpenAI know if we are standing on our responses/objections or if there is a subset of responsive documents we can produce soon.
    - Nos. 35 & 37 – OpenAI agreed to try narrowing these two requests. The Times will consider what they propose.
    - No. 42 – OpenAI agreed to propose alternative methods of getting this information through discovery. The Times will consider what they propose.
    - No. 45 – OpenAI explained that the goal of this request is to discover any other ways The Times is/was planning to use generative AI. If OpenAI proposes a narrower version of this request, The Times will consider it.

Thanks,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-789-3157 (o) | 949-436-3222 (c) | ecronin@susmangodfrey.com

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From: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Friday, May 10, 2024 at 11:05 AM
To: Emily Cronin Stillman <ECronin@susmangodfrey.com>, "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>,

"OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Thanks, Emily. I just sent an invite for 2:30 ET on Tuesday.

Best,
Chad

Chad Kenney

LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004-1304
Direct Dial: +1.202.350.5388
Email: chad.kenney@lw.com
https://www.lw.com

From: Emily Cronin <ECronin@susmangodfrey.com>
Sent: Thursday, May 9, 2024 9:37 PM
To: Kenney, Chad (DC) <Chad.Kenney@lw.com>; NYT-AI-SG-Service@simplelists.susmangodfrey.com
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>; OpenAICopyright@mofo.com; KVPOAI@keker.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Chad,

We're available Tuesday after 2pm ET. We'll respond to the specific issues you raise before then.

Best,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-789-3157 (o) | 949-436-3222 (c) | ecronin@susmangodfrey.com

From: <NYT-AI-SG-Service@simplelists.susmangodfrey.com> on behalf of "Chad.Kenney at lw.com (via NYT-AI-SG-Service list)" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Reply-To: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Thursday, May 9, 2024 at 5:23 PM
To: "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Counsel,

We have not heard back regarding this request. Please provide your availability for next Monday. If Monday is not available, please provide your availability for Tuesday or Wednesday. We are particularly concerned about Plaintiff's recalcitrance regarding the following requests:

1. Request Nos. 2, 7, 20, 21, and 23 (Regurgitation Prompting)
2. Plaintiff's blanket assertion of the reporter's privilege in response to Request Nos. 1, 3, 7, 10, 11, 12, 16, 17, 22, 24, 47, 48, 49, 50, 56
3. Request Nos. 13–15 (Ownership and Registration of Asserted Works)
4. Request Nos. 50 and 51 (Plaintiff's AI Tools)

Similarly, we also have not heard back regarding a deadline for Plaintiff's substantial completion of production of documents in response to this First Set of Requests for Production. Please let us know whether you will agree to a deadline of June 24th.

If we have not resolved our disputes regarding these issues by Wednesday, we will be moving to compel.

Best,
Chad

Chad Kenney

LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
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Direct Dial: +1.202.350.5388
Email: chad.kenney@lw.com
https://www.lw.com

From: Kenney, Chad (DC)
Sent: Tuesday, May 7, 2024 8:36 PM
To: 'NYT-AI-SG-Service@simplelists.susmangodfrey.com' <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>; OpenAICopyright <OpenAICopyright@mofo.com>; KVP-OAI <KVPOAI@keker.com>
Subject: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Counsel,

Please see the attached letter regarding OpenAI's First Set of Requests for Production.

Please provide your availability on Monday May 13th to meet and confer regarding these issues.

Best,
Chad

Chad Kenney

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555 Eleventh Street, NW
Suite 1000
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Direct Dial: +1.202.350.5388
Email: chad.kenney@lw.com
https://www.lw.com

EXHIBIT H

From: Macris, Aaron (BN)
To: Emily Cronin; Kenney, Chad (DC); #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM
Cc: NYT-AI-SG-Service@simplelists.susmangodfrey.com; KVPOAI@keker.com; OpenAICopyright@mofo.com
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS
Date: Friday, May 17, 2024 2:07:38 PM

Emily,

Thank you for meeting and conferring on May 14 regarding Plaintiff's responses and objections to OpenAI's First Set of Requests for Production. Please find below some follow-up items from the call.

1. **Plaintiff's Substantial Production Deadline.** OpenAI asked during a call on May 6 whether Plaintiff will agree to a June 24th deadline for the substantial completion of production of documents in response to OpenAI's First Set of Requests for Production (which would be consistent with the deadline currently set for production of documents in response to Plaintiff's First Set of Requests for Production). We raised the issue again multiple times via email, and asked about this again during our call on May 14. On Wednesday, we asked for your final response on this issue by Thursday. As Sarah stated in her email yesterday, we expect to receive your final response on this issue during Monday's meet and confer.

2. **Category A**

    1. **Request Nos. 2 (attempts to reproduce NYT works using GPT Services), 20 (creation of Exhibit J), 23 (process for obtaining outputs cited in complaint).** These requests relate to Plaintiff's efforts to cause GPT Services to regurgitate NYT articles, including the efforts that led to the outputs disclosed and relied upon in Plaintiff's complaint. Your email below does not quite capture our primary question raised during the meet and confer about these requests. We are not merely asking whether Plaintiff will agree to flag "*in advance of privilege logs* if it plans to categorically withhold on privilege/work product grounds documents relating to outputs that weren't cited in the complaint but that relate to the process for obtaining the outputs in the complaint," as your email states. We are asking Plaintiff to provide its position now as to whether it intends to withhold those materials—and certain materials related to Plaintiff's efforts to cause regurgitation of NYT articles—on the basis of work-product protection or privilege (as Plaintiff's written objections indicate).

        Based on the parties' exchanges so far, Plaintiff clearly possesses a discrete set of materials responsive to these requests that Plaintiff can readily identify now. Plaintiff has represented that the GPT Services outputs identified in its complaint were procured by a single independent researcher that Plaintiff retained in connection with this litigation. *See* Feb. 9, 2024 Letter from A. Gass. In the course of generating those outputs, that researcher almost certainly tested other prompts and generated other outputs not disclosed in Plaintiff's complaint. Those prompts and outputs are not protected by work-product doctrine or attorney-client privilege, including because the prompts were voluntarily disclosed to OpenAI in the course of submitting them to the GPT Services. *See, e.g.*, *New York Times Co. v. United States Dep't of Just.*, 939 F.3d 479, 494 (2d Cir. 2019) ("A party waives the work product

protection by taking actions inconsistent with this its purpose, such as disclosing work product to its adversary ….”). Similarly, that researcher almost certainly created other materials outlining his or her process for testing prompts and outputs (for example, the settings that would be used, such as temperature), in order to arrive at the outputs disclosed in Plaintiff’s complaint. Because Plaintiff has selectively disclosed and affirmatively relied upon certain portions of that process, Plaintiff cannot withhold those types of related materials on the basis of work-product or privilege. *See In re Grand Jury Proc.*, 219 F.3d 175, 182 (2d Cir. 2000) (“[A] party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party.”).

It appears that we are at an impasse on this issue as well. OpenAI will move to compel on this.

2. Regarding Request No. 21 (seeking the OpenAI account information for anyone who participated in generating the GPT Services outputs in Plaintiff’s complaint), thank you for confirming that the parties are at an impasse, and that Plaintiff stands by its position that it will refuse to produce these documents. As explained on the call, this account information is relevant because it is likely to lead to relevant information about the outputs on which Plaintiff relies, including the approach that was used to generate them. Insofar as Plaintiff is claiming privilege or work-product protection over this information, Plaintiff has waived any such protection by submitting that information to OpenAI in the course of creating the accounts. *See New York Times*, 939 F.3d at 494. OpenAI will seek relief from the Court to compel production of materials responsive to this request.

3. **Category D—Other Generative AI Services - Request Nos. 4 (reproduction, display, or distribution of NYT works), 5 (NYT’s attempts to cause regurgitation), 6 (outputs that summarize or reference NYT works).** Thank you for confirming that the parties are at an impasse on these requests.

4. **Category E**

    1. **Allegations of Infringement and Plagiarism - Request Nos. 8 (infringement) & 9 (plagiarism).** You stated in your May 14 email that “[t]he Times will agree to produce judicial or quasi-judicial determinations that any of the Asserted Works infringed a third party’s rights, if any exist,” but that “The Times stands on its remaining responses and objections.”

        Your email below states that “OpenAI asked that The Times agree to reciprocally drop The Times’s RFP against OAI regarding complaints of copyright or trademark infringement.” That does not quite capture our exchange on the call. To clarify, OpenAI is not yet offering to drop these requests in exchange for Plaintiff agreeing to drop its similar reciprocal requests. Rather, we asked on the call for Plaintiff whether its position was that both parties’ requests on this topic are irrelevant and whether Plaintiff was proposing that all such requests be withdrawn. We

understand Plaintiff contends that its own requests on this issue are relevant and that OpenAI's are not—although we have not received a substantive explanation for why that is the case. As explained on the call, it is the other way around: OpenAI is requesting documents concerning allegations of infringement or plagiarism about the asserted works, which bears directly on whether they are protectable by copyright. But that reasoning does not apply to Plaintiff's requests to OpenAI. Please let us know by Tuesday whether Plaintiff's position about these requests has changed in any way, so that we can determine whether the parties are at an impasse.

2. **Creation of Asserted Works – Requests Nos. 10 (expressive, original, and human-authored content), 11 (non-expressive, non-original, or non-human-authored content), 12 (reference material).** As you stated in your email below, we asked during the call whether Plaintiff would be willing to produce the files and materials underlying Plaintiff's asserted works (e.g., reporters' notes, interview memos, records of materials cited in the asserted works, or other similar files for the asserted works). Those types of materials are relevant to, among other things, the determination of which portions of the asserted works are protectable and fair use. They are also relevant given the Times's repeated assertion that "Times Works in particular [is] more valuable than most other content on the internet," and that OpenAI targeted Times content for its training data due to its high quality. *See* Compl. ¶ 145. Based on your email below, we are at an impasse with respect to this request.

5. **Category F—Ownership and Registration of Asserted Works** - **Request Nos. 13 (ownership disputes), 14 (correspondence with Copyright Office), 15 (authorship and work-for-hire agreements).** Your email below states that "OpenAI asked whether The Times's agreement to produce agreements relating to authorship in response to No. 15 will include, if applicable, employment agreements to the extent that other agreements don't prove authorship or The Times's ownership of the asserted work." To clarify, our request was not so conditioned. For any asserted works Plaintiff claims to own, by virtue of it being written by one of Plaintiff's employees within the scope of his or her employment, OpenAI requests that employee's employment agreement that was operative at the time the work was written. By Tuesday, please let us know if Plaintiff will produce such agreements.

   Additionally, please let us know by Tuesday whether Plaintiff will produce the other materials described in connection with these requests in OpenAI's May 7 letter, including correspondence with the copyright office and documents reflecting disputes over ownership (such as DMCA Takedown Notices, for works other than user-submitted content).

6. **Category G—Correspondence with Other Plaintiffs – Request No. 24**. We noted during the meeting that this request is limited to communications with certain other parties concerning "copyright and artificial intelligence." We are willing to entertain proposals for further limitations, but without more information about the burden this request purportedly imposes, we see no reason to limit it at this time. Please provide your limiting proposal by Tuesday.

7. **Category H—Licenses and Attempts to License - Requests No. 33 and 43.**

    1. **Attempts to License.** As explained on the call, these requests encompass documents reflecting failed attempts to license the asserted works, which is relevant to the value of the asserted works and to fair use (e.g., the effect of the alleged infringement on the market for the asserted works). Please confirm that Plaintiff will produce such materials by Tuesday.

    2. **License redactions**. Additionally, we remain unclear on what NYT means by "key terms" and how that limits what Plaintiff is planning to produce. On the call, we understood you to indicate that Plaintiff used this language to preserve the option of redacting certain material from license agreements, such as information subject to third-party confidentiality obligations. Please confirm by Tuesday that Plaintiff intends to produce full license agreements to the asserted works, and if Plaintiff has a basis for redacting content from those agreements, please explain what that would be.

    3. **Timeframe**. Regarding timeframe, as discussed, we are willing to negotiate a specific window for license agreements, but we do not believe 2018 to the present is even remotely long enough for these types of materials, particularly given that Plaintiff has asserted works that were published long before 2018 (indeed, we just received an email indicating that Plaintiff intends to assert works that were registered with the Copyright Office before 1950). Are there any particular restrictions on the manner in which Plaintiff maintains its license agreements that would make producing license agreements before a certain timeframe burdensome? For instance, are Plaintiff's license agreements unavailable in electronic format before a certain year? Please let us know by Tuesday.

8. **Category I—NYT's AI Tools - Request Nos. 50 and 51.** You reiterated your position that "[t]he Times's use of AI tools is not relevant to this case" because other artificial intelligence tools beyond generative AI are not relevant. Tthey are relevant to fair use, particularly if the Plaintiff's tools were trained and developed in a similar way to ChatGPT. They are also relevant given the Times's contention that OpenAI's tools "threaten[ ] The Times's ability" to provide "trustworthy information, news analysis, and commentary." Compl. ¶¶ 2-3. If the Times's is also using AI tools, OpenAI is entitled to test why exactly such tools do not pose the same alleged threat. The parties are at an impasse with respect to this request.

9. **Request No. 18 (All Documents and Communications relating to any arrangement or agreement by which You permitted a third party to reproduce or display Your Asserted Works, or any part thereof, in print or on the Internet, regardless of whether the arrangement or agreement was commercial or non-commercial).** Plaintiff objects on overbreadth grounds. As noted on the call, we are willing to narrow this request to agreements themselves (i.e., excluding other related documents and communications). Please confirm by Tuesday that Plaintiff will produce such agreements.

10. **Request No. 42 (For each of Your Asserted Works, Documents sufficient to show the relevant category of that work as referenced in Paragraphs 33–37 of the Complaint.**

Categories can include, without limitation, "Investigative Reporting," "Breaking News Reporting," "Beat Reporting," "Reviews and Analysis," or "Commentary and Opinion.") —We understand that Plaintiff's concern with this request is that there may not be documents that exist in the ordinary course of business that show how these works fit into the categories outlined in Plaintiff's complaint. As stated on the call, if that is the case, we're happy to explore other forms of obtaining this discovery (for example, perhaps through a 30(b)(6) deposition topic). However, if the categories outlined in Plaintiff's complaint are categories that Plaintiff uses in the ordinary course of business for cataloguing its journalism, it would surprise us if no records exist that classify them in that manner. By Tuesday, would you please clarify whether Plaintiff uses those categories to catalog its works? If so, would you please explain why it would be burdensome to investigate whether Plaintiff maintains records that classify its works according to those categories?

We will follow up on any other issues not addressed in this email.

Regards,
Aaron

From: Emily Cronin <ECronin@susmangodfrey.com>
Sent: Wednesday, May 15, 2024 8:25 PM
To: Kenney, Chad (DC) <Chad.Kenney@lw.com>; #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>
Cc: NYT-AI-SG-Service@simplelists.susmangodfrey.com; KVPOAI@keker.com; OpenAICopyright@mofo.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Counsel,

Thank you for the meet and confer yesterday. To recap:

- For category A (Nos 2, 7, 20, 21, 23):
  - OpenAI asked if The Times will agree to flag in advance of privilege logs if it plans to categorically withhold on privilege/work product grounds documents relating to outputs that weren't cited in the complaint but that relate to the process for obtaining the outputs in the complaint. We'll get back to you on this soon.
  - The parties are at an impasse on Nos. 7 and 21.
- For categories B & C (reporters' privilege and common interest):
  - I reiterated The Times's agreement to notify OpenAI if issues regarding the reporters' privilege affects The Times's willingness to search for and review any category of documents.
  - OpenAI asked if The Times will flag in advance of privilege logs if it plans to categorically withhold responsive documents on the basis of a common interest agreement. We'll get back to you on this soon.

- For category D (Nos. 4-6), the parties are at an impasse.
- For category E (Nos. 8-12):
  - OpenAI asked that The Times agree to reciprocally drop The Times's RFP against OAI regarding complaints of copyright or trademark infringement. I emphasized that the The Times's relevance objections aren't the same, so this was unlikely, but we'd confirm.
  - For request Nos. 10-12, OpenAI asked if The Times would be willing to produce the underlying reporter's notes, interview memos, records of materials cited, or other "files" for each asserted work. The Times is not willing to produce this material and stands on its objections.
- For category F (Nos. 13-15), OpenAI asked whether The Times's agreement to produce agreements relating to authorship in response to No. 15 will include, if applicable, employment agreements to the extent that other agreements don't prove authorship or The Times's ownership of the asserted work. We'll get back to you on this soon.
- For category G (No. 24), OpenAI asked if The Times is willing to propose a way to limit this request. We'll get back to you on this soon. In the meantime, please also suggest a narrower version of this RFP for The Times to consider.
- For category H (Nos. 33, 43):
  - OpenAI asked The Times to confirm whether it is planning to produce portions of key terms of relevant licenses or whether it will produce the entire underlying licenses (with possibly redactions if applicable). We'll get back to you on this soon.
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- For category I (Nos. 50-51), the parties are at an impasse.
- For category J (Nos. 54-55), OpenAI asked if The Times would agree to produce licensing agreements relating to these corpora. We'll get back to you on this soon.
- For category K (responses with potential for narrowing scope):
  - No. 18 – OpenAI offered to limit this request to agreements to reproduce asserted works. We'll get back to you on this soon.
  - No. 30 – OpenAI explained that this request is seeking documents showing page views in the first 14 days, which is more granular than RFP No. 29 (page views for each month). We'll let OpenAI know if we are standing on our responses/objections or if there is a subset of responsive documents we can produce soon.
  - Nos. 35 & 37 – OpenAI agreed to try narrowing these two requests. The Times will consider what they propose.
  - No. 42 – OpenAI agreed to propose alternative methods of getting this information through discovery. The Times will consider what they propose.
  - No. 45 – OpenAI explained that the goal of this request is to discover any other ways The Times is/was planning to use generative AI. If OpenAI proposes a narrower version of this request, The Times will consider it.

Thanks,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
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Los Angeles, CA 90067
310-789-3157 (o) | 949-436-3222 (c) | ecronin@susmangodfrey.com

---

From: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Friday, May 10, 2024 at 11:05 AM
To: Emily Cronin Stillman <ECronin@susmangodfrey.com>, "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Thanks, Emily. I just sent an invite for 2:30 ET on Tuesday.

Best,
Chad

Chad Kenney

LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004-1304
Direct Dial: +1.202.350.5388
Email: chad.kenney@lw.com
https://www.lw.com

From: Emily Cronin <ECronin@susmangodfrey.com>
Sent: Thursday, May 9, 2024 9:37 PM
To: Kenney, Chad (DC) <Chad.Kenney@lw.com>; NYT-AI-SG-Service@simplelists.susmangodfrey.com
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>;

OpenAICopyright@mofo.com; KVPOAI@keker.com
Subject: Re: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Chad,

We're available Tuesday after 2pm ET. We'll respond to the specific issues you raise before then.

Best,
Emily

Emily Cronin Stillman | **Susman Godfrey LLP**
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-789-3157 (o) | 949-436-3222 (c) | ecronin@susmangodfrey.com

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From: <NYT-AI-SG-Service@simplelists.susmangodfrey.com> on behalf of "Chad.Kenney at lw.com (via NYT-AI-SG-Service list)" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Reply-To: "Chad.Kenney@lw.com" <Chad.Kenney@lw.com>
Date: Thursday, May 9, 2024 at 5:23 PM
To: "NYT-AI-SG-Service@simplelists.susmangodfrey.com" <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: "openaicopyrightlitigation.lwteam@lw.com" <openaicopyrightlitigation.lwteam@lw.com>, "OpenAICopyright@mofo.com" <OpenAICopyright@mofo.com>, "KVPOAI@keker.com" <KVPOAI@keker.com>
Subject: RE: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

EXTERNAL Email
Counsel,

We have not heard back regarding this request. Please provide your availability for next Monday. If Monday is not available, please provide your availability for Tuesday or Wednesday. We are particularly concerned about Plaintiff's recalcitrance regarding the following requests:

1. Request Nos. 2, 7, 20, 21, and 23 (Regurgitation Prompting)
2. Plaintiff's blanket assertion of the reporter's privilege in response to Request Nos. 1, 3, 7, 10, 11, 12, 16, 17, 22, 24, 47, 48, 49, 50, 56
3. Request Nos. 13–15 (Ownership and Registration of Asserted Works)

4. Request Nos. 50 and 51 (Plaintiff's AI Tools)

Similarly, we also have not heard back regarding a deadline for Plaintiff's substantial completion of production of documents in response to this First Set of Requests for Production. Please let us know whether you will agree to a deadline of June 24th.

If we have not resolved our disputes regarding these issues by Wednesday, we will be moving to compel.

Best,
Chad

Chad Kenney

LATHAM & WATKINS LLP
555 Eleventh Street, NW
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Email: chad.kenney@lw.com
https://www.lw.com

From: Kenney, Chad (DC)
Sent: Tuesday, May 7, 2024 8:36 PM
To: 'NYT-AI-SG-Service@simplelists.susmangodfrey.com' <NYT-AI-SG-Service@simplelists.susmangodfrey.com>
Cc: #C-M OPENAI COPYRIGHT LITIGATION - LW TEAM <openaicopyrightlitigation.lwteam@lw.com>; OpenAICopyright <OpenAICopyright@mofo.com>; KVP-OAI <KVPOAI@keker.com>
Subject: NYT v. Microsoft, et al. - SDNY Case No 1:23-cv-11195-SHS

Counsel,

Please see the attached letter regarding OpenAI's First Set of Requests for Production.

Please provide your availability on Monday May 13th to meet and confer regarding these issues.

Best,
Chad

Chad Kenney

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