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Damon Key Director Christine A. Kubota Elected President

Damon Key is pleased to announce that Christine A. Kubota, attorney and Director, has been elected by the board to serve as the firm's President. This change in leadership comes at an opportune moment in the firm's 60-year history, as we look forward to continuing to meet the needs of our clients and the community with excellence. In this new position, she will oversee the firm's operations, as well as its vision, strategy and workforce development.

"The directors were unanimous in electing Christine as the firm's next leader," said Damon Key Vice President Douglas Smith. "Her extraordinary legal background and business and community acumen make her uniquely qualified to guide Damon Key through the next chapter of its journey."

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Christine joined the firm in 1988 and has been a director since 1994. She has a long history of professional and community accomplishments, making significant contributions at Damon Key and many other organizations. Born and reared in Japan, Christine initially built her legal career addressing the needs of her Japanese-speaking clients. Today, she practices in the areas of business & commercial law, employment, immigration & naturalization law, real estate, and wills, trusts & estates.

“I’ve been a part of the Damon Key ohana for 35 years, and the success of the firm and its many clients is always my goal and focus,” said Christine. “It is my greatest honor to be elected by my colleagues to serve as President of this special firm, with its talented team of attorneys and staff.”

The focus of Christine’s noteworthy career has been to assist Japanese investors and businesses – such as Ito En Hawaii, Hawaii Tokai International College, Kintetsu Hawaii, Arancino Restaurants, Sendai Ikuei, Herve Chapelier, and many other individual investors – to acclimate to Hawaii and the legal challenges they face that may be very different from Japan. Christine examines and explores the differences between cultures and the business environment and addresses complications before they arise. She assists with due diligence in purchase transactions, the opening of bank accounts, retention of consultants, and navigating Hawaii’s challenging probate process.

A trailblazer on many fronts, Christine is the first woman elected to serve on the Board of Directors of the Waialae Country Club. She also serves on the Board of Kristi Yamaguchi’s Always Dream Foundation, focusing on early literacy and family engagement in Hawaii.

Christine’s leadership in the Japanese community in Hawaii spans decades. It includes serving as past board chair of the Honolulu Japanese Chamber of Commerce, United Japanese Society of Hawaii, Japanese Cultural Center of Hawaii, and co-chair of the 150th Anniversary of the Gannenmono Celebration. She currently serves as director of the Pan-Pacific Festival Foundation, Hiroshima Kenjinkai, and Hawaii Aloha Life Enrichment Association. She is an honorary member of the Shufu Society of Hawaii and a member of the Board of Governors of the Japanese Cultural Center of Hawaii.



In 2019, Christine was one of 2,000 distinguished guests from around the world to personally witness the Sokuirei-Seiden-No-Gi, the official enthronement proclamation ceremony for His Majesty Emperor Naruhito in Japan. She was also awarded a Certificate of Appreciation in 2018 from the Japanese Consulate in Honolulu for her role in the Gannenmono Celebration.

In 2023, Christine once again was selected by her peers for inclusion in The Best Lawyers in America® for her work in Business Organizations (including LLCs and Partnerships), Corporate Law, Real Estate, and Employment Law-Management. She is a past director of Meritas, a worldwide affiliation of commercial law firms with members in over 255 global markets.

Christine earned her law degree from the University of the Pacific, McGeorge School of Law. She is also a graduate of Chaminade University, where she earned her B.A. in International Relations and Asian Studies.

The firm looks forward to many exciting and productive years ahead under Christine’s keen and thoughtful leadership.

Do Androids Paint Electric Sheep? Copyright Issues and AI-Generated Art

By David H. Abitbol



Several months ago, a Colorado man made national news for his prize-winning, albeit controversial, submission in the Colorado State Fair's annual art competition. The controversy behind "Théâtre D'opéra Spatial" was that it was created through an artificial intelligence ("AI") platform called Midjourney. Midjourney allows users to use a process called "diffusion" where they input specific parameters, such as brush style, texture, and subject matter, and AI algorithms create images by drawing on an extensive dataset of images and art styles. While some loathe to call this AI-generated content "art," platforms like Midjourney have undoubtedly fed a growing interest in the use of AI technology across the digital media space.

The growing interest in AI-generated art raises questions about the ownership of digital media and how copyright laws will address the growing use of AI-generated content in today's digital space. As we dive into the uncharted waters around the legality of AI-generated art, there are a couple of legal (and moral) considerations we should account for.

One consideration is the rights of attribution and integrity under the Visual Artists Rights Act ("VARA"). Attribution ensures the author's right to be known as the author of a work, to prevent others from claiming authorship in it, and avoid having authorship of others' work falsely attributed to the original author. The right of integrity is the right to protect one's works from distortion in a way that may prejudice their reputation. Simply, VARA gives the holder of a copyright a moral right to control the method and manner in which their art is used.

The problem with AI-generated content is that AI algorithms pull images across a number of databases, without permission, to create a new work that blends the works and styles of other human artists. The resulting work makes it difficult to identify the original artists or the original works that were used to create the AI-generated image. The original artist typically gets no credit for their original works' contribution to the AI-generated image. And once an artwork is thrust into the digital space, artists seemingly have no means to control the manner in which AI art generators use their work. While VARA does provide a legal avenue for artists to protect their rights, it is unclear whether an artist could even exercise those rights given the complexities of AI-generated works.

Another issue is whether AI-generated artwork constitutes fair use. Fair use is a valid defense to copyright infringement claims that considers the character of the use, the nature of the original work, and the extent to which the new work is transformative. A work is transformative if it adds something new, with a further purpose or different character, altering the original work with new expression, meaning, or message.

In the case of AI-generated artwork, fair use will have to be determined on a case-by-case basis. One relevant consideration will be whether the AI-generated artwork is used for commercial purposes. Individuals selling AI-generated artwork have a weaker fair use defense because courts have found it inherently unfair for a user to profit from exploiting copyright material.

Another consideration is the transformative nature of AI-generated art. One could argue that AI-generated images differ from the original source materials so much so that the AI image is sufficiently transformative.

Beyond the issues discussed, the world of AI-generated artwork will undoubtedly be subject to a host of legal challenges. Originality issues, improper appropriation, ownership issues, digital rights management issues—just to name a few. As the use of AI expands into the digital media space, it is crucial that these questions be addressed and resolved in order to protect the rights of artists and even the creators of AI-generated works.



For more information or questions regarding this subject, please call David at (808) 531-8031, email him at dha@hawaiilawyer.com or scan the code with your smartphone.



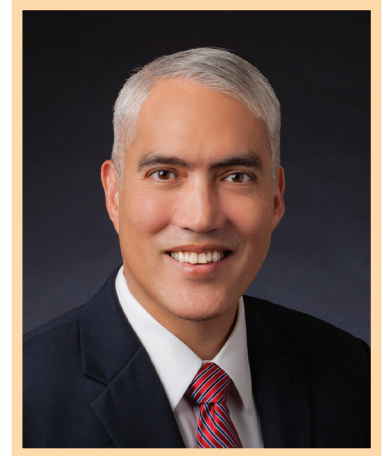
Damon Key Director Mark M. Murakami Elected Vice President of Hawaii State Bar Association

Damon Key Director Mark Murakami has been elected to serve as the Vice President of the Hawaii State Bar Association (HSBA) in 2023. The election sets Mark on a path to assume the offices of President-Elect next year and President in 2025. Mark's leadership role continues a long legacy of Damon Key attorneys who have served as leaders of the Hawaii State Bar Association.

In his prior tenure with HSBA, Mark was elected as a Director in 2012 and was then elected as Treasurer from 2014 to 2017.

At Damon Key, Mark practices real estate, commercial, and maritime matters with an emphasis on property rights, land use and eminent domain. He also handles probate and trust disputes representing trustees and beneficiaries as they navigate the post-death asset transfer process.

Born on Maui and raised on Oahu, Mark graduated Valedictorian of the Class of 1999 from the William S. Richardson School of Law at the University of Hawaii. He is a graduate of the U.S. Coast Guard Academy. He served 13 years on active duty before joining the U.S. Coast Guard Reserve in 2005. In 2022, Mark retired as a Captain culminating thirty years of active duty and reserve commissioned service.



"We're so proud that Hawaii's attorneys recognized Mark's strong leadership qualities and legal aptitude and elected him Vice President of this important organization that guides our profession," said Damon Key Vice President Douglas Smith. "Mark follows in the footsteps of Damon Key Founder Frank Damon, who served as President in 1968 and Charles W. Key who was President in 1989."

Indeed, Damon Key attorneys have a long history of supporting the HSBA. During his time as President, Frank Damon was a strong and active advocate for the regulation of ethical conduct among attorneys in the association. He helped create and continue a system in the HSBA of regulating ethical conduct among attorneys, which continues today. Charles Key was one of the early champions of a unified bar association which came to fruition in 1989 when the Hawaii Supreme Court required that all licensed attorneys become HSBA members. In the late 1980s, Diane Hastert served as an HSBA Director for four years, serving as Secretary during one of those years. More recently, Christine Kubota served on the Board in 2010 and 2011.

The Hawaii State Bar Association was founded by a group of volunteer lawyer members in 1899. HSBA's mission is to unite and inspire Hawaii's lawyers to promote justice, serve the public, and improve the legal profession.

"From my prior time on the Board, I saw firsthand all the good that HSBA does with access to justice initiatives," said Mark. "The association plays a critical role in the administration of the criminal and civil justice systems in Hawaii. It supports the entire administration of the legal industry, including licensure,

renewal, continuing education and more. The HSBA is also a mandatory bar organization, so every person licensed to be an attorney in Hawaii must be a member. This status makes it crucial that the HSBA remain apolitical and focused solely on the legal system as a whole,” he added.

Mark looks forward to supporting 2023 HSBA President Rhonda Griswold during her presidency, which is focused on attorney resiliency and health and a smooth judicial appointment process, an especially timely goal with numerous court vacancies on the horizon.

“As a law firm with 28 attorneys, it is critical for Damon Key to continue to participate in the initiatives and decision-making that impact the practice of law,” explained Mark. “HSBA has an important role in that process. My firm’s clients and the greater Hawaii community benefit from an orderly and accessible civil justice system. It’s my honor to sit among the 21 hard-working HSBA Board members who volunteer their time and effort to fulfill the association’s mission.”



More About Mark M. Murakami

- In 2023, Mark was elected a Fellow of the American College of Real Estate Lawyers (ACREL). Admission to the College is by invitation only to lawyers who are distinguished real estate practitioners and who have contributed to the improvement of real estate law through a combination of speaking, writing, teaching, and serving on relevant boards and commissions.
- In 2022, Mark was elected as the Hawaii member of Owners’ Counsel of America (OCA), an exclusive association of the nation’s leading eminent domain lawyers. Membership in OCA is by invitation-only, and limited to a single member in each state. Members are selected for their experience and dedication in defending the constitutional rights of private property owners in eminent domain, inverse condemnation, regulatory takings, and other property rights matters.
- In 2017 Mark received the CRE (Counselor of Real Estate) credential by The Counselors of Real Estate, an international association of experienced real estate practitioners including, appraisers, lawyers, and brokers, who provide expert advisory services to clients on complex real property and land-related matters.
- Mark once again was selected by his peers for inclusion in the 2023 Edition of The Best Lawyers in America® for his work in Commercial Litigation, Eminent Domain & Condemnation Law, Land Use & Zoning Law, Real Estate Law, Trusts & Estates, Litigation-Real Estate, and Litigation-Trusts & Estates. He was also named the Best Lawyers® Eminent Domain & Condemnation Lawyer of the Year in 2013. Mark has been selected by Super Lawyers for over 10 years.

What You Should Know Before You Enter Into A Commercial Lease

By Christopher H. Pang



Entering into a commercial lease for your small retail business is an important decision that requires careful consideration and good advice from someone who understands commercial leasing. There are several traps and legal issues to be aware of. Avoiding these and other issues will allow you to more comfortably enjoy the benefits of leasing a premises.

Length of Lease

One very important but often overlooked consideration is whether the length of the lease is appropriate for the current needs and future outlook of a business. These may have changed in the aftermath of the recent pandemic. A shorter lease term provides more flexibility for a newer business that may soon need to move to a larger or smaller space. A longer lease term offers a business a more stable location and more predictable rent. Landlords are also more willing to offer better terms and tenant improvement allowances for longer term leases. A business can also negotiate a lease that includes an extension option. An extension option gives the tenant the chance to reconsider the lease before the extension period.

Rent Commencement Date

The tenant must be careful to negotiate a rent commencement date that is as close as possible to the date on which the tenant actually begins operating the business on the premises. The lease commencement date is the date on which the lease officially takes effect. The rent commencement date is the date on which rent begins to accrue and be payable. If tenant improvements are not complete or other issues delay the business from opening by the rent commencement date, the tenant is in effect paying rent for premises that it cannot use yet. Some leases even impose a penalty if the tenant is unable to begin operating the business on the rent commencement date. If this is the case, the tenant should try to negotiate for the penalty not to apply if the delay is due to certain factors beyond the tenant's control. Some examples include delays in building permit issuance or utility connection, casualty losses, and government pandemic shut-down orders. In particular, the City and County of Honolulu Department of Planning and Permitting has recently taken much longer than expected to issue building permits due to staffing issues.

Percentage Rent

Some commercial leases, especially for retail space in shopping centers, require the tenant to pay percentage rent in addition to base rent and the tenant's share of operating expenses. Percentage rent is usually calculated as a percentage of the "gross sales" of the business that exceed a specified breakpoint amount. The tenant should make sure that it understands what items are included in "gross sales" before signing the lease.

The landlord would like to include all revenue that is even remotely attributable to the premises. As a result "gross sales" may actually include items that the tenant does not consider to be sales, such as pass-through items like sales tax, non-profit producing income, and income received outside of the ordinary course of business. The tenant should consider what sort of "non-sales" items make up a significant portion of total revenue and try to negotiate an exclusion for those items.



Assignment/Subleasing Clause

For flexibility in case the tenant no longer needs to use some or all of the premises, the tenant should negotiate for inclusion of a clause that allows assignment and/or subleasing. Assignment occurs when the tenant transfers the entire remaining interest in the tenancy to another tenant. Subleasing occurs when the tenant only transfers part of the interest. Assignment and subleasing enable another tenant to occupy part or all of the premises and pay rent thereon. Commercial leases usually require the landlord's consent to assignment or sublease. The tenant should try to negotiate for language stating that the landlord's consent shall not be unreasonably withheld. Such language requires the landlord to act reasonably in evaluating potential assignors or sublessees.

Change of Business Ownership

Transfer of the lease may also become an issue when there is a change in ownership of the business that is the tenant under the lease. Depending on the terms of the lease, the landlord could deem the change in ownership to be a transfer of the lease that requires the landlord's prior consent. Some commercial leases require the landlord's prior consent to any change in ownership of the business, but most leases only require landlord consent when there is change in control of the business or over 50% ownership change. The tenant should be aware that under Hawaii law, change in ownership does not constitute an assignment or violate a non-assignment clause in a lease, unless the lease terms explicitly provide that the change is deemed to be an assignment.

Inducement Recapture Clause

Commercial tenants need to be careful of inducement recapture clauses. Inducements are concessions offered by the landlord to induce or encourage the tenant to lease the premises. Common inducements include rent-free periods or temporary rent abatement as well as tenant improvement allowances. These are great benefits, but the landlord can also take them away. An inducement recapture clause requires the tenant to pay back all inducements if the tenant defaults on the lease. Such clauses are often triggered by any default, not just by a payment default. The clause also may or may not provide for a period in which the default can be cured. If there is no cure period, the value of all inducements is due immediately upon default.

Conclusion

These are only a few traps and legal issues that you might encounter when entering into a commercial lease for your small business. When entering into a commercial lease, you should consider hiring an attorney in Damon Key Leong Kupchak Hastert's Business & Commercial Law group to represent you and advise you during negotiations.



For more information or questions regarding this article, please call Christopher at (808) 531-8031, email him at chp@hawaiilawyer.com or scan the code with your smartphone.

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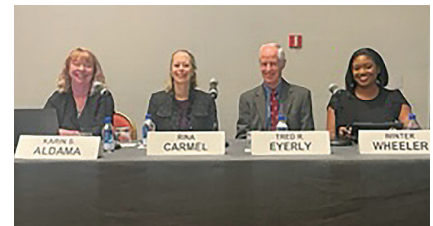
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Attorneys in the News

Tred R. Eyerly was a panelist at the American Bar Association's (ABA) Section of Litigation Insurance Coverage Conference. The panel presented a paper and addressed "Coverage Issues After Dobbs v. Jackson Women's Health Organization." Tred also wrote an article called "Cyber Heist Excluded from Coverage," which was published in the ABA Tort Trial and Insurance Practice Section's Cybersecurity & Data Privacy Committee newsletter.



Mark M. Murakami attended the American Law-CLE 40th Annual Eminent Domain and Land Valuation Litigation Conference in Austin, Texas. He was on the faculty, and along with colleague Steve Clarke of Virginia, presented on "Avoiding the Real Jeopardy: Structuring Eminent Domain Settlements," a session on structuring settlements in land condemnation cases in a creative way, and to avoid future problems. This conference is the annual gathering of the nation's most experienced eminent domain and property lawyers.



Amber M. Yonamine, on March 31, 2023, was crowned a 71st Cherry Blossom Festival Princess at the annual Festival Ball and coronation ceremony at the Sheraton Waikiki. The Firm showed up in force to support and cheer on their colleague. The Queen and Princesses were selected by a panel of esteemed judges for their dedication to perpetuating Japanese culture, commitment to education and passion for community service. The Festival Ball was the culmination of seven months of cultural and professional development classes.

