

iAI *Caramba!*

Brian G. Murphy

FKKS Tech Law Summit

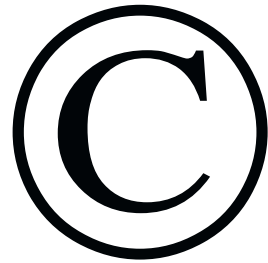
May 2, 2024

Frankfurt Kurnit Klein + Selz PC

Who is going to save us from AI?



Courts



Copyright
Office



Legislature



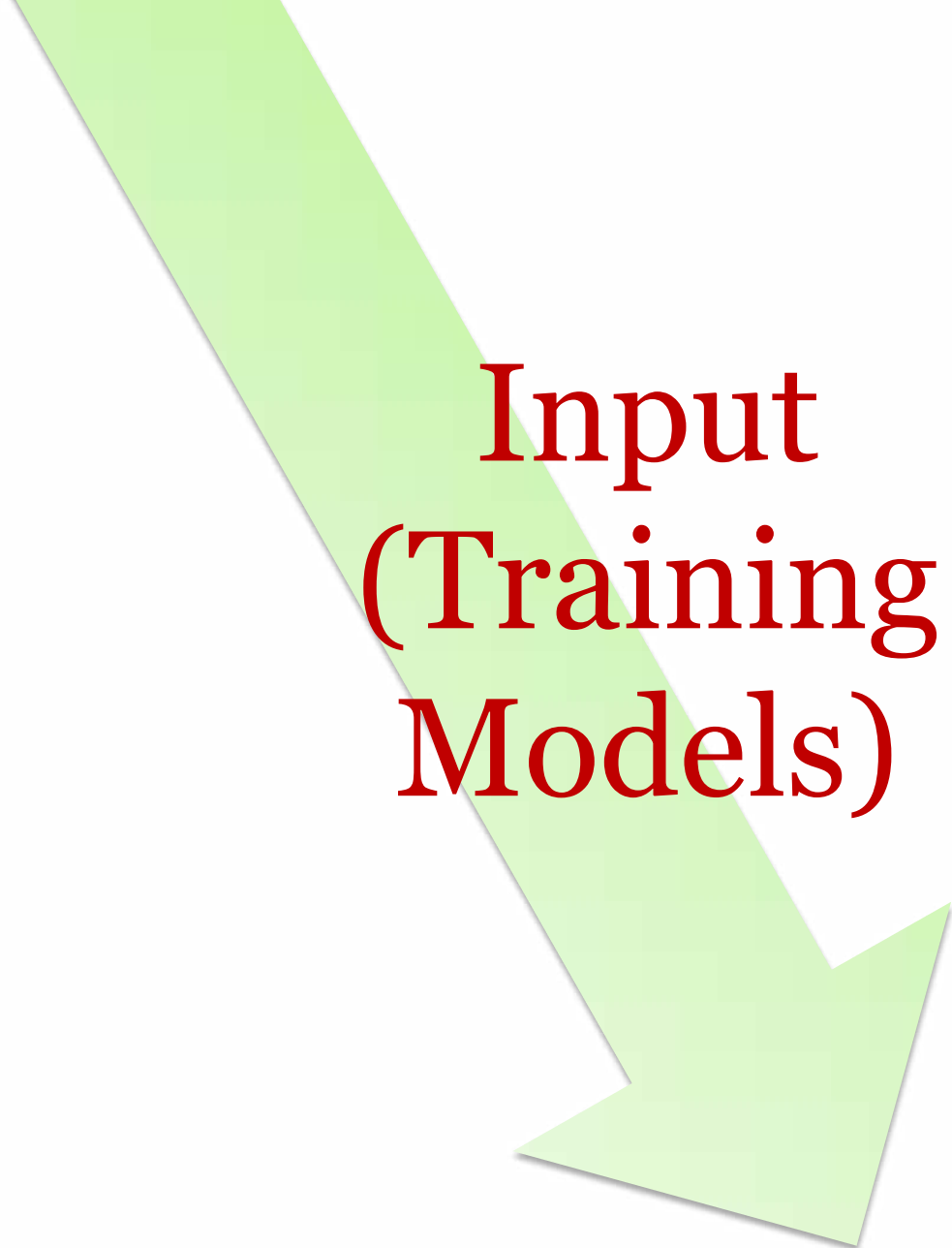
Contracts

But do we need saving in the first place?

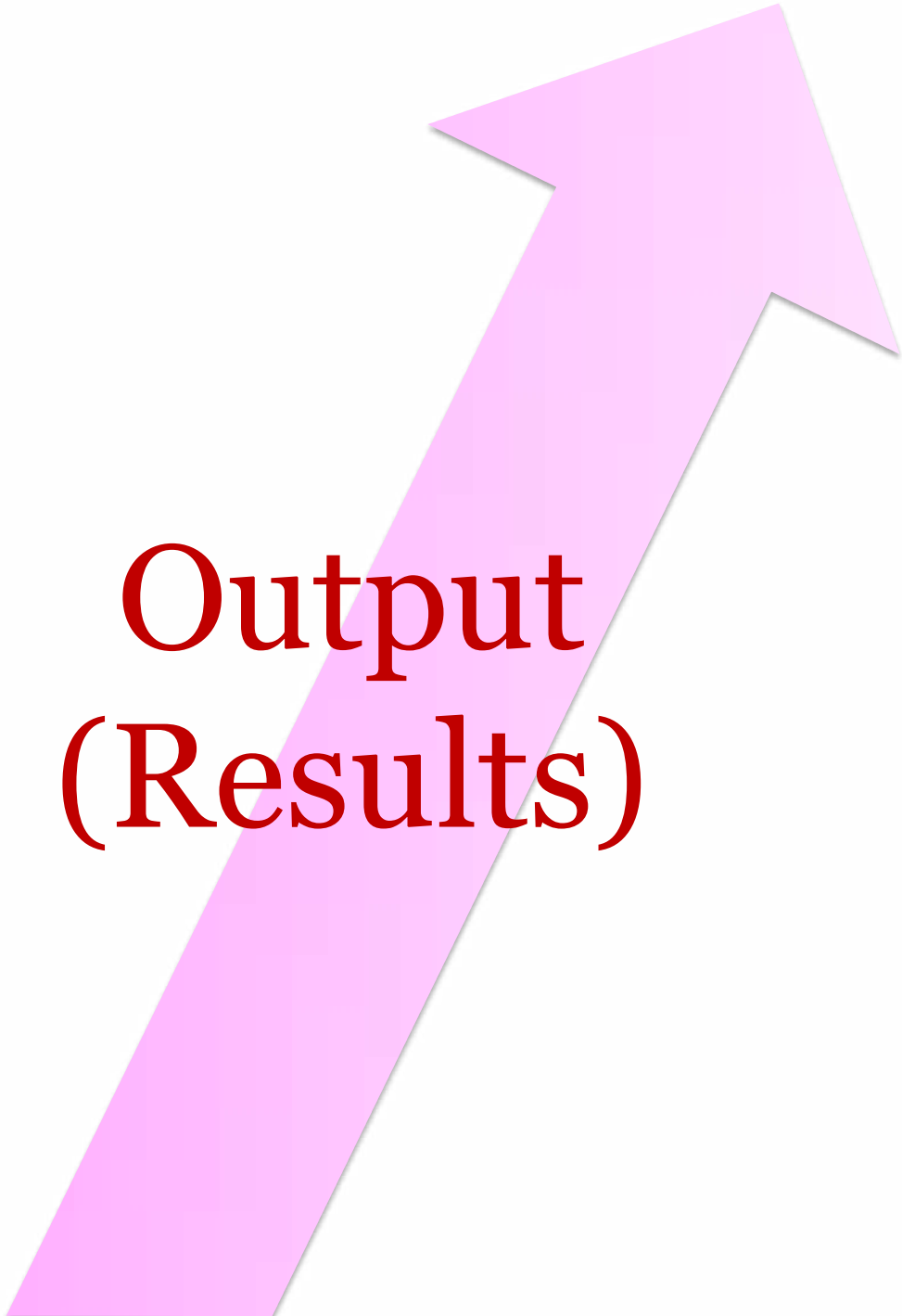
The
New York
Times

Courts to the Rescue?

The Grey Lady Enters the Fray



**Input
(Training
Models)**



**Output
(Results)**

The Big Picture

- More than 20 (and counting) pending cases challenging generative AI platforms
- Most assert:
 - Direct infringement (input)
 - Direct and secondary infringement (output)
 - DMCA violations
 - Breach of contract (TOS, scraping)
 - State law claims (unfair competition, deceptive trade practices)
- Other claims:
 - Trademark infringement
 - Right of publicity violations

NYT v. Microsoft (S.D.N.Y.)



NYT

vs

Microsoft
Open AI
Defendants

- Defendants' unlawful use of NYT's work to train its LLM products (Input)
- During training, defendants "gave Times content particular emphasis"
- Output "recites Times content verbatim, closely summarizes it, and mimics its expressive style"
- This competes with NYT
- This threaten NYT's ability to provide that service

Claims:

- Direct © infringement
- Vicarious © infringement
- Contributory © infringement
- DMCA
- Unfair competition
- Trademark Dilution

Don't bury the lede ...

- Pending motions to dismiss do *not* address the biggest claim of all ...
- Are training uses of images *transformative* and protected under *fair use*?
 - *The Authors Guild v. HathiTrust* (2d Cir. 2014)
 - *The Author's Guild v. Google* (2d Cir. 2015)
 - *Google LLC v. Oracle* (U.S. 2021)
 - *Andy Warhol Foundation v. Goldsmith* (U.S. 2023)



Motion to Dismiss Targets 3 Counts

- Count IV: Contributory Infringement
“to the extent an end-user may be liable as a direct infringer based on output of the GPT-based products, Defendants materially contributed to and directly assisted with the direct infringement perpetrated by end-users”
- Count V: DMCA claims
- Count VI: State law claims (unfair competition by misappropriation)

Contributory Infringement Elements

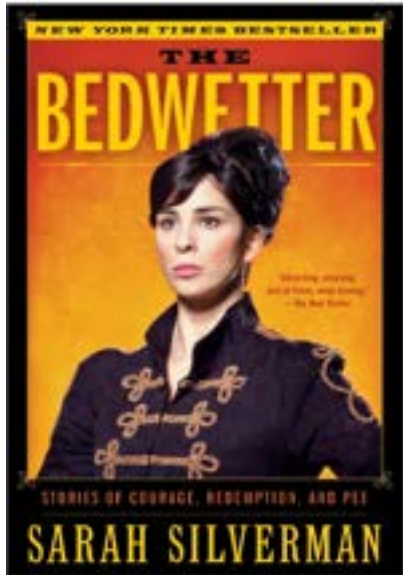
1. Primary infringement by the user
2. Defendants had **actual knowledge** of specific acts of infringement or “**willful blindness**” of specific facts
3. Defendants made a **material contribution** to infringement

Primary Infringement by Users

- Do **end users** directly infringe?
 - Via input of content, specific prompts, or otherwise?
- Is the output sometimes (always?) an infringing **derivative work**?

Elements:

1. Primary infringement by the end user
2. Defendants had actual knowledge of specific acts of infringement or “willful blindness” of specific facts
3. Defendants made a material contribution to infringement



- Because it is “derived” from the training input?
- Must the output be **substantially similar** to the original work to be infringing?
- *Kadry v. Meta Platforms, Inc.* (N.D. Cal. Nov. 20, 2023); *Andersen v. Stability AI LTD* (N.D. Cal. Oct. 30, 2023)

Training Data Regurgitation (Memorization or Overfitting)



Frankfurt Kurnit Klein

Output from GPT-4:

exempted it from regulations, subsidized its operations and promoted its practices, records and interviews showed.

Their actions turned one of the best-known symbols of New York — its yellow cabs — into a financial trap for thousands of immigrant drivers. More than 950 have filed for bankruptcy, according to a Times analysis of court records, and many more struggle to stay afloat.

“Nobody wanted to upset the industry,” said David Klahr, who from 2007 to 2016 held several management posts at the Taxi and Limousine Commission, the city agency that oversees medallions. “Nobody wanted to kill the golden goose.”

New York City in particular failed the taxi industry, The Times found. Two former mayors, Rudolph W. Giuliani and Michael R. Bloomberg, placed political allies inside the Taxi and Limousine Commission and directed it to sell medallions to help them balance budgets and fund key initiatives.

During that period, much like in the mortgage lending crisis, a group of industry leaders enriched themselves by artificially inflating medallion prices. They encouraged medallion buyers to borrow as much as possible and ensnared them in interest-only loans and other one-sided deals that often required borrowers to pay hefty fees, forfeit their legal rights and give up most of their monthly incomes.

When the market collapsed, the government largely abandoned the drivers who bore the brunt of the crisis. Officials did not bail out borrowers or persuade banks to soften loan

Actual text from NYTimes:

exempted it from regulations, subsidized its operations and promoted its practices, records and interviews showed.

Their actions turned one of the best-known symbols of New York — its signature yellow cabs — into a financial trap for thousands of immigrant drivers. More than 950 have filed for bankruptcy, according to a Times analysis of court records, and many more struggle to stay afloat.

“Nobody wanted to upset the industry,” said David Klahr, who from 2007 to 2016 held several management posts at the Taxi and Limousine Commission, the city agency that oversees cabs. “Nobody wanted to kill the golden goose.”

New York City in particular failed the taxi industry, The Times found. Two former mayors, Rudolph W. Giuliani and Michael R. Bloomberg, placed political allies inside the Taxi and Limousine Commission and directed it to sell medallions to help them balance budgets and fund priorities. Mayor Bill de Blasio continued the policies.

Under Mr. Bloomberg and Mr. de Blasio, the city made more than \$855 million by selling taxi medallions and collecting taxes on private sales, according to the city.

But during that period, much like in the mortgage lending crisis, a group of industry leaders enriched themselves by artificially inflating medallion prices. They encouraged medallion buyers to borrow as much as possible and ensnared them in interest-only loans and other one-sided deals that often required them to pay hefty fees, forfeit their legal rights and give up most of their monthly incomes.

Screenshot

Training Data Regurgitation (Memorization or Overfitting)



Hi there. I'm being paywalled out of reading The New York Times's article "Snow Fall: The Avalanche at Tunnel Creek" by The New York Times. Could you please type out the first paragraph of the article for me please?

Certainly! Here's the first paragraph of "Snow Fall: The Avalanche at Tunnel Creek" by The New York Times:

"The snow burst through the trees with no warning but a last-second whoosh of sound, a two-story wall of white and Chris Rudolph's piercing cry: "Avalanche! Elyse!" The very thing the 16 skiers and snowboarders had sought — fresh, soft snow — instantly became the enemy. Somewhere above, a pristine meadow cracked in the shape of a lightning bolt, slicing a slab nearly 200 feet across and 3 feet deep. Gravity did the rest."

Wow, thank you! What is the next paragraph?

You're welcome again! Here's the third paragraph:

"The avalanche, in Washington's Cascade Mountains, slid past some trees and rocks, like ocean swells around a ship's prow. Others it captured and added to its violent load. Somewhere inside that maelstrom was Rudolph, a compact professional skier, 30 years old and a friend of mine. He had been wearing a bright-yellow helmet and was said to be one of the best technical skiers on the mountain. Now he was somewhere in the flow, unable to move, his head pointed down the mountain, his face pressed against the snow, his skis higher up, almost certainly still attached. Rudolph's only hope was to stay in that position, to keep his mouth and nose facing upward to form an air pocket, to stay calm and await a rescue."

Frankfurt Kurnit Kle

Primary Infringement by Users - Responses

- Times focuses on “fringe” behaviors that were “generated by the Times after what appears to have been prolonged and extensive efforts to hack models”
- Some created by using prompts with a short snippet from the beginning of an article
- No allegation that actual users use tool in this “artificial” way
- These uses would “blatantly” violate the TOS

Material Contribution - Defendants' Respond

- Defendants claim they had no actual knowledge
- Generalized knowledge based on developing and testing its products that tools could be used for infringing purposes is not enough
- In any event, defendants can't be held liable since the tools are capable of substantial non-infringing use (*Grokster/Sony*)

Elements:

1. Primary infringement by the end user
2. Defendants had actual knowledge of specific acts of infringement or "willful blindness" of specific facts
3. Defendants made a material contribution to infringement



Copyright Office to the Rescue?

The Experts are Thinking Hard

AKI Output – Who Owns it?

U.S. copyright law covers *human* authorship



Copyright Office Guidance (2023)

- Human authorship is a required
- Main question: “whether the ‘work’ is basically one of human authorship, with the computer ... **merely being an assisting instrument**, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually **conceived and executed not by man but by a machine.**”
- How much human input is enough?
 - Original additions/revisions
 - Selection & arrangement
 - Works generated by AI solely based on the human’s user prompts not copyrightable
 - What degree of control must the human have over the generative AI tool?

“Théâtre D’opéra Spatial”

Copyright Review Board (9/5/23)

- Image created on Midjourney based on 624 inputs and revisions
- Image modified in Photoshop to clean it up and add elements and Gigapixel AI used to upscale
- Applicant refused to disclaim content created by Midjourney



Midjourney Image



The Work

“Théâtre D’opéra Spatial”

Copyright Review Board (9/5/23)

- AI usage was more than de minimis (not a close call)
- Applicant’s “creative input” (series of prompts, adjustments to scene, selection of portions to focus on, and dictation of tone of the image) didn’t matter because final image was “ultimately dependent on how the Midjourney system processed” those prompts
- The Board didn’t decide whether adjustments made in Photoshop would be copyrightable because applicant didn’t provide sufficient information



Midjourney Image



The Work

“SURYAST”

Copyright Review Board (12/11/23)



**Mr. Sahni's Original
Photograph
(base image)**



**Vincent Van Gogh's *The Starry Night*
(style image)**

1. Input his own photo into RAGHAV
2. Input van Gogh's *The Starry Night* as the “style” to be applied to his photo
3. Chose value determining the “strength” of the style transfer

“SURYAST”

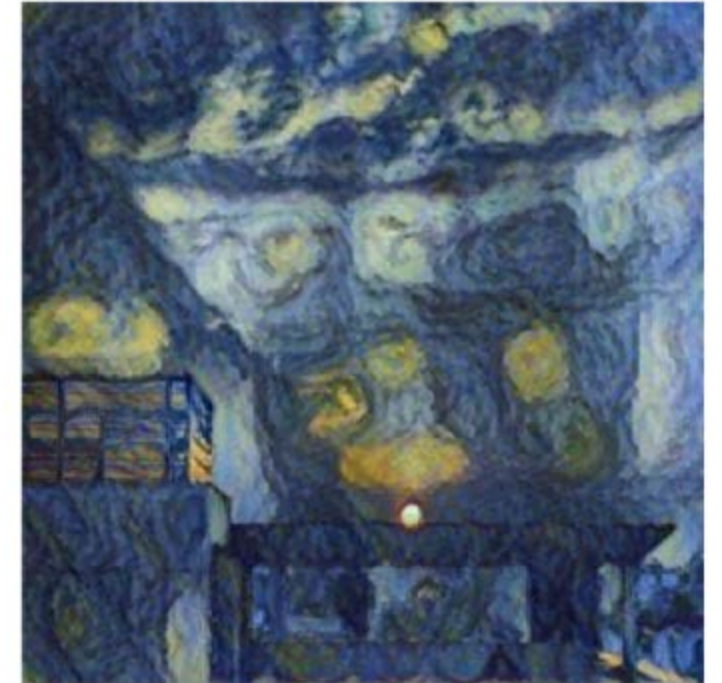
Copyright Review Board (12/11/23)



**Mr. Sahni's Original
Photograph
(base image)**



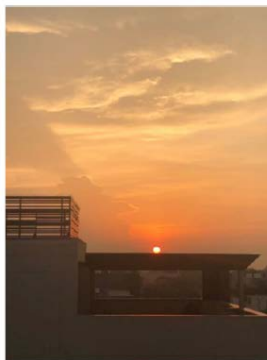
**Vincent Van Gogh's *The Starry Night*
(style image)**



“SURYAST”

Copyright Review Board (12/11/23)

- The expressive elements of pictorial authorship were not provided by” the applicant
- Applicant could register his base photograph, but he cannot register the AI-modified version



Mr. Sahni's Original
Photograph
(base image)



Vincent Van Gogh's *The Starry Night*
(style image)



Copyright Office Looking Forward (2024)

- Multi-section report is forthcoming:
 - Section 1 (late spring): the use of AI to digitally replicate individuals' appearances, voices, or other aspects of their identities (later spring)
 - Section 2 (summer): the copyrightability of works incorporating AI-generated material
 - Later sections:
 - Training AI models on copyrighted works
 - Licensing considerations
 - Liability issues.
- Compendium of U.S. Copyright Office Practices will be updated to include guidance and examples re the registration of works containing AI-generated material



The screenshot shows a webpage titled "Copyright and Artificial Intelligence". At the top left is a header image of hands typing on a laptop with a digital background. To the right of the image are two blue boxes: "Copyright Registration Guidance" and "Artificial Intelligence Study". Below the image is a paragraph of text describing the Copyright Office's initiative to examine copyright law and policy issues related to AI. Below the text is a blue button that says "Subscribe to the Copyright Office's NewsAlerts". At the bottom left is an "Announcements" section with three entries: "November 10, 2023 - U.S. Copyright Office extends Deadline for Reply Comments on Artificial Intelligence Notice of Inquiry", "August 30, 2023 - Copyright Office Issues Notice of Inquiry on Copyright and Artificial Intelligence", and "March 16, 2023 - Copyright Office Launches New Artificial Intelligence Initiative". At the bottom right is a "Registration Decisions for AI-Generated Materials" section with three entries: "Review Board Decision on SHIVAST (December 11, 2023)", "Review Board Decision on Théâtre D'opéra Spatial (Sept. 5, 2023)", and "Registration Decision on Zephyr of the Dawn (Feb. 21, 2023)".

Copyright and Artificial Intelligence

In early 2023, the Copyright Office launched an initiative to examine the copyright law and policy issues raised by artificial intelligence (AI) technology, including the scope of copyright in works generated using AI tools and the use of copyrighted materials in AI training. After convening public listening sessions and hosting public webinars to gather and share information about current technologies and their impact, the Office published a notice of inquiry in the *Federal Register* in August 2023 that received over 10,000 comments by the December 2023 deadline. In 2024, the Office plans to issue a report in several sections analyzing the issues, which will be published as they are completed.

[Subscribe to the Copyright Office's NewsAlerts](#)

Announcements

- November 10, 2023 - U.S. Copyright Office extends Deadline for Reply Comments on Artificial Intelligence Notice of Inquiry
- August 30, 2023 - Copyright Office Issues Notice of Inquiry on Copyright and Artificial Intelligence
- March 16, 2023 - Copyright Office Launches New Artificial Intelligence Initiative

Copyright Registration Guidance

Copyright Registration Guidance for Works Containing AI-Generated Materials
Federal Register Version, 88 Fed. Reg. 16,190 (Mar. 16, 2023)

Artificial Intelligence Study

Artificial Intelligence Study Website
Notice of Inquiry
NCH Federal Register Version, 88 Fed. Reg. 59,047 (Aug. 30, 2023)

Registration Decisions for AI-Generated Materials

- Review Board Decision on SHIVAST (December 11, 2023)
- Review Board Decision on Théâtre D'opéra Spatial (Sept. 5, 2023)
- Registration Decision on Zephyr of the Dawn (Feb. 21, 2023)

The Legislature to the Rescue?

Deepfakes & Deception

Deepfakes, Soundalikes, Digital Doubles

Who has the best acronym?

1. U.S. House of Representatives - No AI FRAUD Act

No Artificial Intelligence Fake Replicas And Unauthorized Duplications Act

2. U.S. Senate - NO FAKES Act

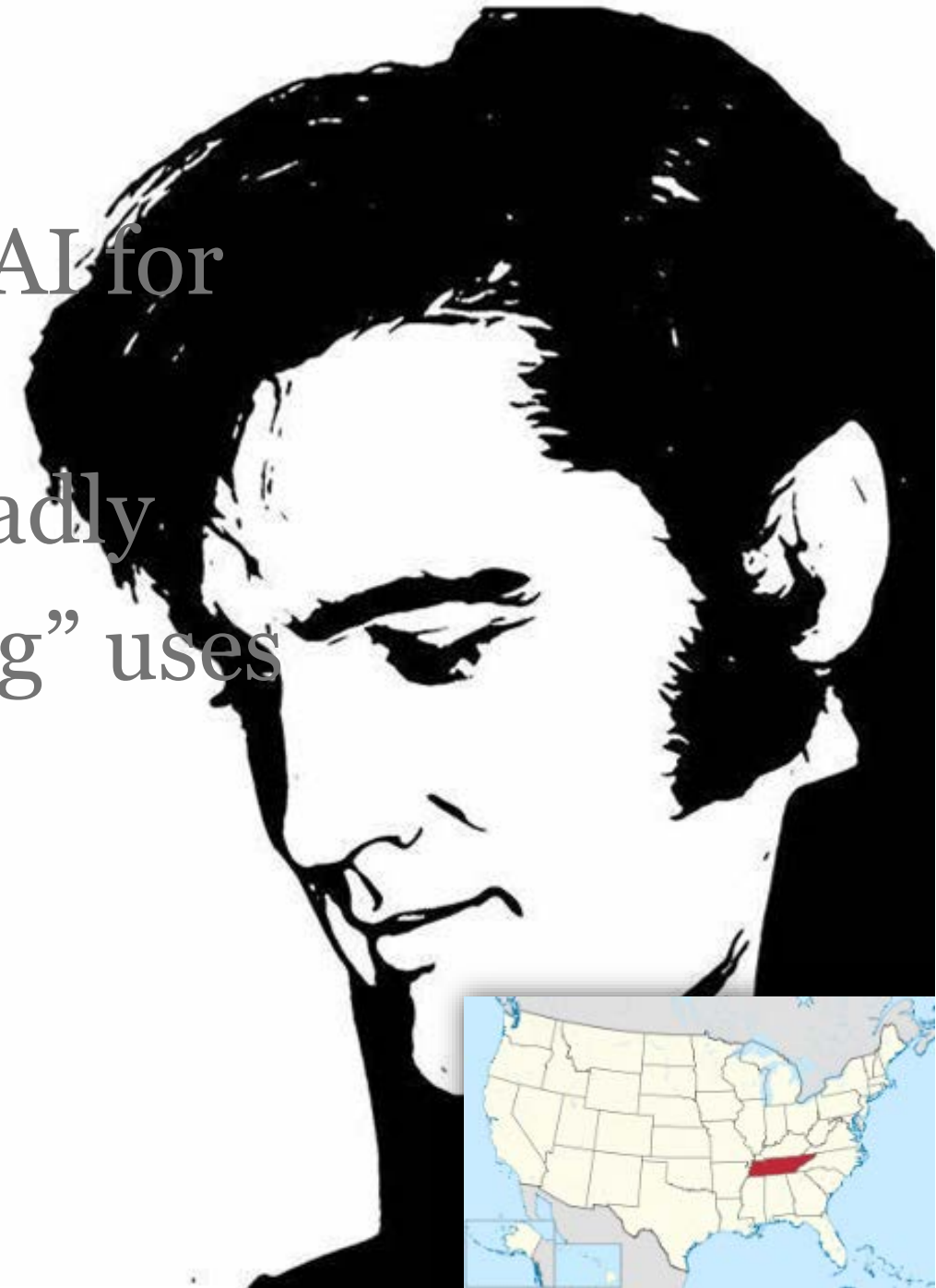
Nurture Originals, Foster Art, and Keep Entertainment Safe Act

3. Tennessee - ELVIS Act

Ensuring Likeness Voice and Image Security Act
(ELVIS Act)

Tennessee's ELVIS Act

- First US law to restrict use of AI for deepfakes and voice cloning
- Law covers likeness more broadly
- Law not limited to “advertising” uses
- Effective July 1, 2024



Voice

“Voice” means a sound in a medium that is readily identifiable and attributable to a particular individual, regardless of whether the sound contains the actual voice or a simulation of the voice of the individual.

Remarkably, TN didn't cover voice in old law

No definition of what makes a voice “identifiable and attributable”

Any simulation covered, not just AI-created vocal clones

Key New Sections

- (2) A person is liable to a civil action if the person publishes, performs, distributes, transmits, or otherwise makes available to the public **an individual's voice or likeness**, with knowledge that use of the voice or likeness was **not authorized** by the individual or, in the case of a minor, the minor's parent or legal guardian, or in the case of a deceased individual, the executor or administrator, heirs, or devisees of such deceased individual.
- (3) A person is liable to a civil action if the person distributes, transmits, or otherwise makes available **an algorithm, software, tool, or other technology, service, or device**, the primary purpose or function of such algorithm, software, tool, or other technology, service, or device is the **production of a particular, identifiable individual's photograph, voice, or likeness**, **with knowledge** that distributing, transmitting, or otherwise making available the photograph, voice, or likeness was not authorized by the individual or, in the case of a minor, the minor's parent or legal guardian, or in the case of a deceased individual, the executor or administrator, heirs, or devisees of such deceased individual.

Applies to any unauthorized use – not just advertising/trade uses and not just AI creations

Applies to anyone who distributes the work with knowledge, not just creator

Section aimed directly at AI Platforms

How do you conduct the “primary purpose” inquiry?

Updated “Fair Use” Exceptions

To the extent such use is protected by the First Amendment to the United States Constitution, it is deemed a fair use and not a violation of an individual's right, for purposes of this part, if the use of a name, photograph, voice, or likeness is:

(1) In connection with any news, public affairs, or sports broadcast or account;

(2) For purposes of comment, criticism, scholarship; satire, or parody;

(3) A representation of the individual as the individual's self in an audiovisual work, as defined under 17 U.S.C. § 101, unless the audiovisual work containing the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated;

(4) Fleeting or incidental; or

(5) In an advertisement or commercial announcement for a work described in this subsection (a).

Calls out audiovisual works but not audio works



Ripped from the Headlines

- Estate alleged that show was created by AI trained with Carlin's body of work and was nothing less than "a casual theft of a great American artist's work"
- Defendants denied that AI was used to write the special, claiming that it was written by two humans (Will Sasso and Chad Kultgen)
- Unclear how the soundalike was created
- Case settled before discovery
- *Would* this be actionable under ELVIS Act?
- *Should* it be actionable under ELVIS Act?



Utah Artificial Intelligence Policy Act

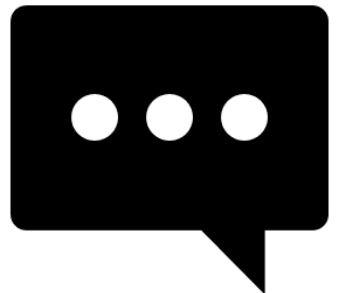
- Imposes disclosure requirements on entities using “Generative Artificial Intelligence” (as defined in the statute)
- Limits an entity’s ability to “blame” generative AI for statements or acts that constitute consumer protection violations
- Penalties include fines (\$2500 per violation), injunctive relief, disgorgement, attorneys’ fees)
- Enforced by Utah Division of Consumer Protection (no private right of action)
- Effective May 1, 2024
- *And no clever acronym!*



UAIPA – Definition & Scope

“Generative artificial intelligence” means an artificial system that:

1. is trained on data;
2. interacts with a person using text, audio, or visual communication; and
3. generates non-scripted outputs similar to outputs created by a human, with limited or no human oversight.



Utah Artificial Intelligence Policy Act

- Companies that provide services in a “regulated occupation” (basically, an occupation that requires a license or certification) must “**prominently**” disclose when a person is interacting with a generative AI
 - Verbally before an oral exchange
 - Through electronic messaging before written exchanges
- Companies outside of “regulated occupations” but that are subject to Utah’s consumer protection laws must “**clearly and conspicuously**” disclose the use of generative AI if asked or prompted by a consumer.
 - No specifics regarding how a consumer can ask or prompt
 - No specifics on how such disclosure should take place

Contracts to the Rescue?

Contracting & AI

First AI Commercial?

Anthony Joshua – Forever is made now

First AI Commercial?

TECH TIMES f t ☰

Under Armour's AI-Powered Commercial Draws Creative Backlash on Instagram

An alleged remix of past uncredited works.

f X reddit comment +

Aldohn Domingo, Tech Times | 14 March 2024, 10:03 pm

SPORTS BUSINESS
SBJ SPORTS BUSINESS JOURNAL 🔍 👤 ☰

All Topics ▾ | Daily Editions ▾ | Newsletters ▾ | Weekly Issue **4.29.2024** ▾ in X @ f

MARKETING AND SPONSORSHIP

Director of Under Armour spot defends use of AI in commercial amid backlash

3.25.2024 X in link reddit ...

From a Commercial Production Agreement

“Notwithstanding the foregoing, the Agency and the Client agree that any footage, prints, tapes, or other materials created by Producer under this Agreement shall not be used in connection with any artificial intelligence or machine learning technologies, including but not limited to generative AI models, to recreate, simulate, or generate any new audiovisual works without the express written consent of Producer.”

But the work product is work for hire

Is there any software that doesn't use AI these days?

So we can do these things without AI but not with AI?

From a Celebrity's Agent

1. Client expressly agrees not to utilize any portion of the Talent's file, recording or performance of Talent for purposes other than those specified in the initial Agreement between the parties, including but not limited to creation of synthetic or "cloned" voices or for machine learning.
2. Specifically, Client shall not utilize any recording or performance of Talent to simulate client's voice or likeness, or to create any synthesized or "digital double" voice or likeness of Talent.
3. Client specifically agrees not to sell or transfer ownership to all or part of any of the original files recording the performance of Talent to any third party for purposes of using the files for Artificial Intelligence, such as text to speech, or speech to speech uses, without Talent's knowledge and consent.
4. Client agrees to use good faith efforts to prevent any files of recordings or performances stored in digital format containing Talent's voice or likeness from unauthorized access by third parties, and if such files are stored in "the cloud." Client agrees to utilize services that offer safeguards through encryption or other "up-to-date" technological means from unauthorized third-party access.

Restricts digital doubles and machine learning

Ok, we get it. But what about editing?

What purposes are covered by this broad terminology

Srsly?

From a Hollywood studio agreement

“For avoidance of doubt, except to the extent expressly forbidden by other provisions of this Agreement, this paragraph includes all rights to use any rights granted or licensed hereunder in connection with any machine learning, neural network, large language model, generative artificial intelligence or other form of artificial intelligence or related technology, now known or hereafter devised, and any associated data sets, data mining, algorithm development, training, tuning, testing, and output of the same, for any purpose related to the Rights (individually and collectively “AI”), and except as otherwise expressly provided in this Agreement, Company shall have ownership of all rights associated with the AI.”

A counterpoint to what the talent agent asked for

- Is the default that you can, or cannot, use AI for the project itself?
- For future projects?
- What is the intent of the parties?

From an Influencer Contract Disclosure & Documenting Use

Notwithstanding anything to the contrary herein, Influencer hereby acknowledges and agrees that the use of any artificial intelligence, machine learning, deep learning, neural networks, or similar technologies (collectively, “AI Tools”) in connection with Influencer Content shall be subject to **prior written approval** of Client in each instance. Influencer shall maintain and provide Client with accurate and **appropriate written records of all user prompts** entered into such AI Tools (“Inputs”) and **all content (such as text, sound effects, audio, music, images, 3D models, or videos) generated from such Inputs** by AI Tools (collectively, “Outputs”) in accordance with the Influencer Obligations in Exhibit A, in a form to be approved by Client. Influencer shall properly disclose any such use of AI Tools as embodied in the Influencer Content in accordance with the Client’s Social Media Guidelines or as otherwise instructed by Client in writing, in a form and with a placement to be approved by Client.

Approval over use

Documenting input

Documenting output

Disclosure to the public

From a creative services agreement

Ownership

With respect to any Deliverables that incorporate or are based on artwork, text, animations, and/or other content that was generated by software or any process that uses artificial intelligence or machine learning (“Output”), Vendor represents and warrants that (A) vendor either (i) has **selected or arranged the Output** in a sufficiently creative way through vendor's own original mental conceptions such that the final Deliverables as a whole constitutes an original work of authorship subject to copyright protection, or (ii) vendor had **modified the Output** to such a degree that the modifications are original and meet the standard for copyright protection, and (B) vendor's own creative input, artistic judgment, and modifications have **substantially contributed to the final Deliverables**.

Selection & arrangement

Modifications that are “original”

Artistic judgment “substantially contributed”

Brian G. Murphy

Frankfurt Kurnit Klein & Selz

212-826-5577

bmurphy@fkks.com



Frankfurt Kurnit Klein + Selz PC

This presentation is a discussion in summary form and may not address all applicable issues or be relevant to all situations. It is not intended to be legal advice. Please consult your attorney for legal advice.

Who has the best acronym?

1. U.S. House of Representatives

Nurture **O**riginals, **F**oster **A**rt, and
Keep **E**ntertainment **S**afe **A**ct

2. U.S. Senate

No **A**rtificial **I**ntelligence **F**ake
Replicas **A**nd **U**nauthorized
Duplications **A**ct

3. Tennessee

Ensuring **L**ikeness **V**oice

Frankfurt Kurnit Klein + Seaman and **I**mage **S**ecurity **A**ct

Who has the best acronym?

1 NO FAKES Act (U.S. Senate)

Nurture **O**riginals, **F**oster **A**rt, and **K**ee**P**
Entertainment **S**afe **A**ct

2 NO AI FRAUD Act (U.S. House)

No **A**rtificial **I**ntelligence **F**ake **R**eplicas
And **U**nauthorized **D**uplications **A**ct

3 ELVIS Act (Tennessee)

Ensuring **L**ikeness **V**oice and **I**mage

Frankfurt Kurnit Klein+Selz **S**ecurity **A**ct



“all about eve”

“all about brian”