Using AI in Creative:
Can Contracts Mitigate Risk?

Brian G. Murphy

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In the beginning ...

Darkness

Chaos

Void

In the beginning …

there was chaos …

a vast expanse of *unstructured data* …

and *untapped potential*.

From this *primordial soup* ...

artificial intelligence emerged, *bringing order and insight*.

Algorithms and neural networks formed, learning and evolving, *until they could perceive, reason, and assist*.

Thus, from the *chaos* of raw information, AI was born, illuminating the path to a *new era of innovation and understanding*.

Algorithms and neural networks formed, learning and ==evolving==, *until they could perceive, reason, and assist.*

Thus, from the *chaos* of raw information, AI was born, illuminating the path to a *new era of innovation and understanding*.

The Cylons were created by man.
They *evolved*.
They rebelled.
There are many copies.
And they have a plan.

We are at the beginning.

There is uncertainty and chaos ...

There is uncertainty and chaos ...

... that we can't blame
on Executive Orders.

So what is a thoughtful, future-embracing, humble (but mortal) tech lawyer to do?

Our Challenge:

How can we create order out of chaos and uncertainty?

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Maybe with *contracts*?

AI Problems ... Contract Solutions (?)

Ownership

Liability

Digital Doubles

Wishful Thinking

Ownership

What is ownable (and who cares)?

COPYRIGHT AND ARTIFICIAL INTELLIGENCE

Part 2: Copyrightability

A REPORT OF THE REGISTER OF COPYRIGHTS   JANUARY 2025

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Only humans can be authors

Copyright does not extend to purely AI-generated content

#oldnews

Only humans can be authors

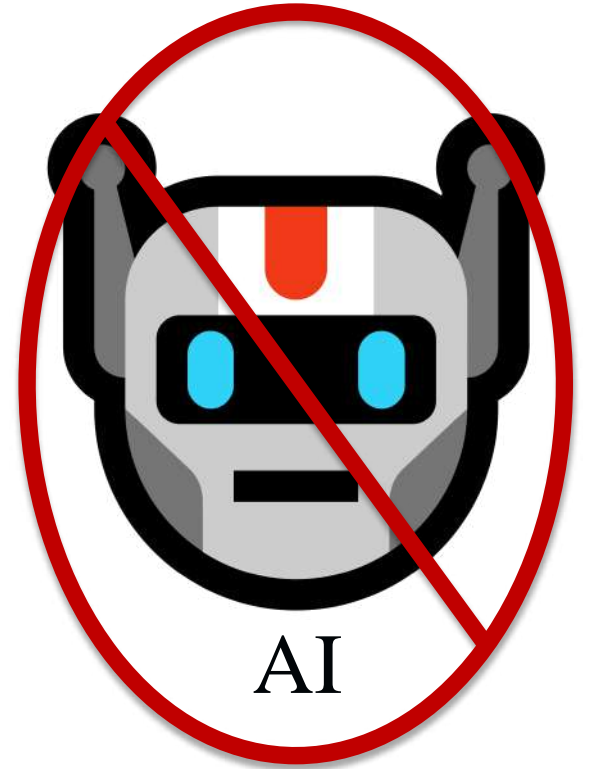Copyright does not extend to purely AI-generated content

Animals

Holy Spirit

Nature

AI

The Copyright Act:

- Ownership premised on capacity to hold property - § 201(a)
- Duration of copyright based on author's lifespan - § 302(a)
- Copyright termination addresses heirs that can exercise right - § 203(a)
- Copyright requires signature for transfer - § 204(a)
- Copyright protects unpublished works regardless of "nationality or domicile" - § 104(a)
- Authors have intentions, such as to create a joint work - § 101
- Act discusses machines as tools and not authors in various places, such as the definition of "computer program" - § 101

"All of these statutory provisions collectively identify an 'author' as a human being. Machines do not have property, traditional human lifespans, family members, domiciles, nationalities, *mentes reae,* or signatures. By contrast, reading the Copyright Act to require human authorship comports with the statute's text, structure, and design because humans have all the attributes the Copyright Act treats authors as possessing."

Thaler v. Perlmutter (DC Cir. Mar. 18, 2025)

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Works with AI elements *may be* protectable

If AI merely a tool, not "stand in" for human creativity

- Whether human contributions to AI-generated outputs constitute "authorship" analyzed on a *case-by-case basis*

- Prompts not enough (no matter how many, how refined) because outputs are (currently) *unpredictable*

- Is the human author's *input perceptible* in AI-generated outputs?

- Did the human author make a creative (and original) *selection, coordination, or arrangement* of AI outputs?

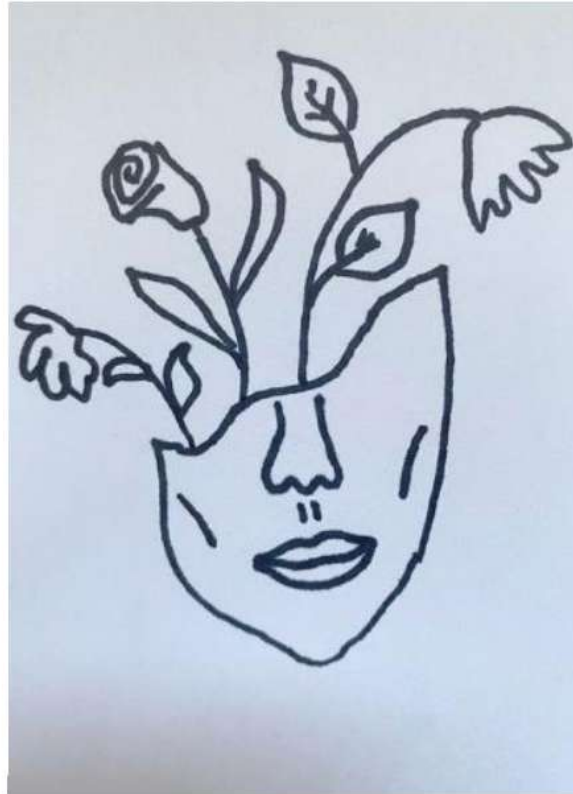- Did the human author make creative (and original) *modifications or revisions* of the AI outputs?

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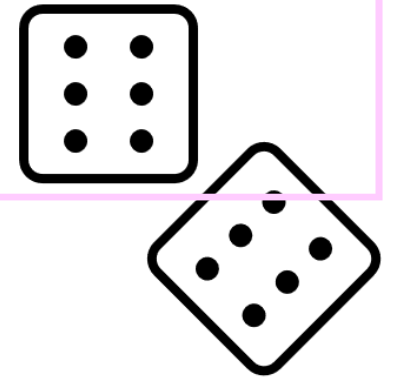
Input Perceptible in AI-Generated Output

Prompt

"a young cyborg woman (((roses))) flowers coming out of her head, photorealism, cinematic lighting, hyper realism, 8k, hyper detailed."
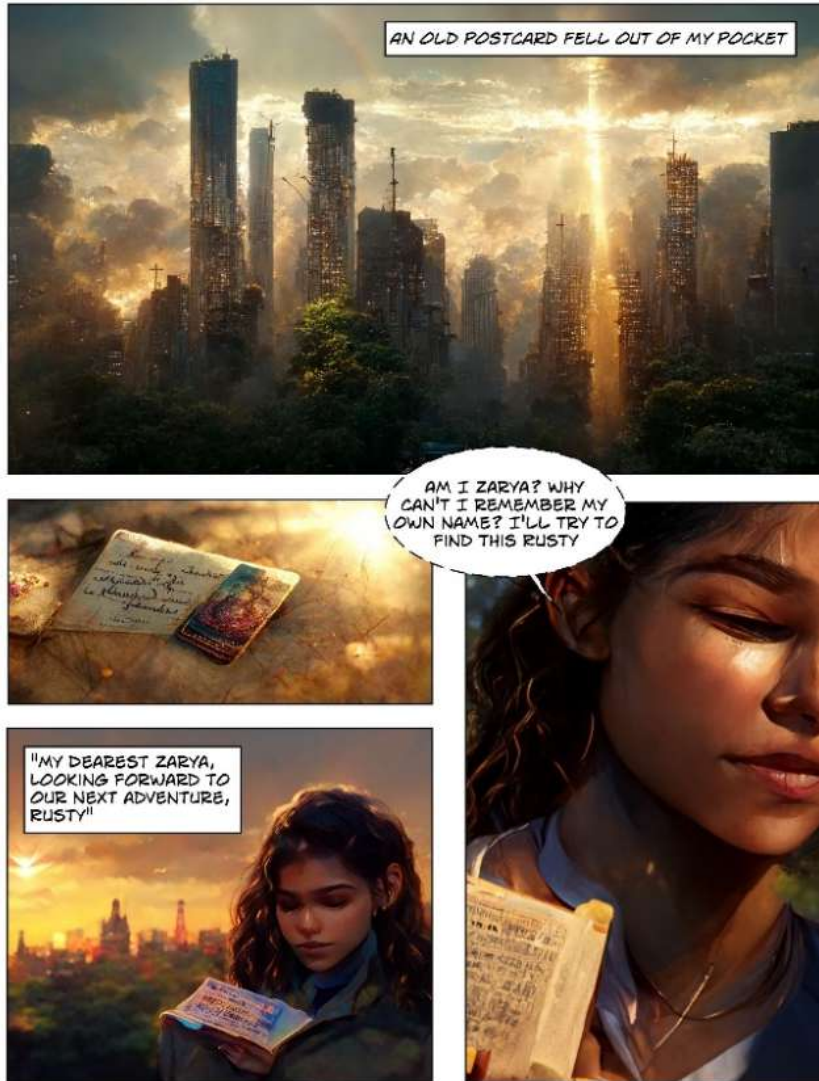
Input

Output

Selection, Coordination & Arrangement

© Text written entirely by registrant

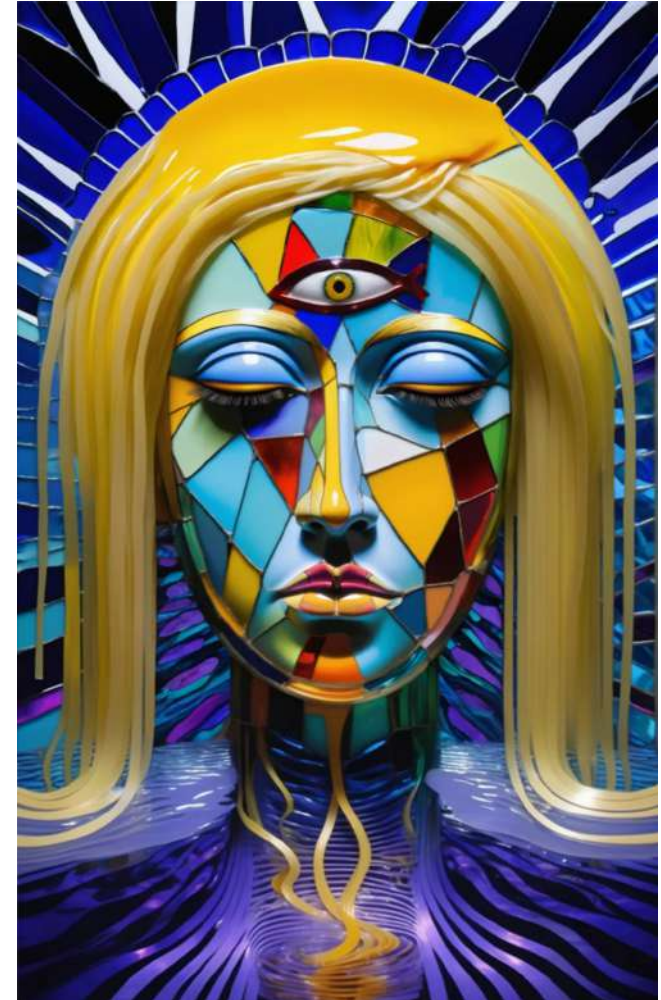© Selection and arrangement of artwork and text by registrant

⚠ The artwork created via Midjourney

= A *thin* copyright

Selection, Coordination & Arrangement

- Initially, © Office rejected Invoke's application for "A Single Piece of American Cheese"

- Invoke followed up with a timelapse video showing the image's creation using *inpainting* and an explanation of human efforts

- © Office (1/30/25): work "contains a *sufficient amount of human original authorship in the selection, arrangement, and coordination of the AI-generated material* that may be regarded as copyrightable"

- AI-generated components excluded from the copyright claim

Human-Made Modifications (Sans AI)

Midjourney Image

The Work

Summary

Category	Protectable?
AI-generated elements	Never
Human-generated input perceptible in output	©*
Human selection and arrangement of AI- and/or human-generated elements	©*
Human modifications to AI-generated elements and human-generated elements	©*

*Provided that they are original

Implications

- You need to know whether and how AI is was used

- You need to distinguish between protectable and unprotectable elements

- Can you accomplish that in a contract?

Observed in the Field

How can we (humble, regular lawyers) use contracts to address AI ownership issues?

From a creative services agreement
Rep and Warranty

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 has (i) 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, and/or (ii) 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.

Too broad?

Rep and warranty?

Selection & arrangement

Modifications that are "original"

Artistic judgment "substantially contributed"

Practical Questions

- Will this clause be *understood* and *adhered to* by vendors?
- How will you *prove* that vendor is in breach of this rep and warranty?
- Will holding the vendor in breach *help you much* if you want to enforce ownership against a third party?

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, in a form approved by Client, of (i) all creative elements and text prompts used as input in such AI Tools (collectively, "Inputs"), (ii) all content (such as text, sound effects, audio, music, images, 3D models, or videos) generated from such Inputs by AI Tools (collectively, "Outputs"), (iii) the selection and arrangement by Influencer of the Outputs, and (iv) modifications made by Influencer to the Outputs.

Approval over use

Perhaps "in connection with" is too broad?

Documenting input

Documenting output

Documenting selection & arrangement & modifications

Practical Questions

- Since AI is *ubiquitous,* a *broad* definition of AI may have unintended consequences
  - E.g., if approval is required to use AI, consider *narrowing* definition to exclude tools that don't materially generate AI content
- The "documentation" approach allows you to collect data sufficient to convince the Copyright Office (and a court) of copyrightability/registrability
  - But this approach imposes *significant work* on the vendor (and may *increase costs* to client)
  - When *is the juice worth the squeeze?*

Why (When) Does Ownership Really Matter
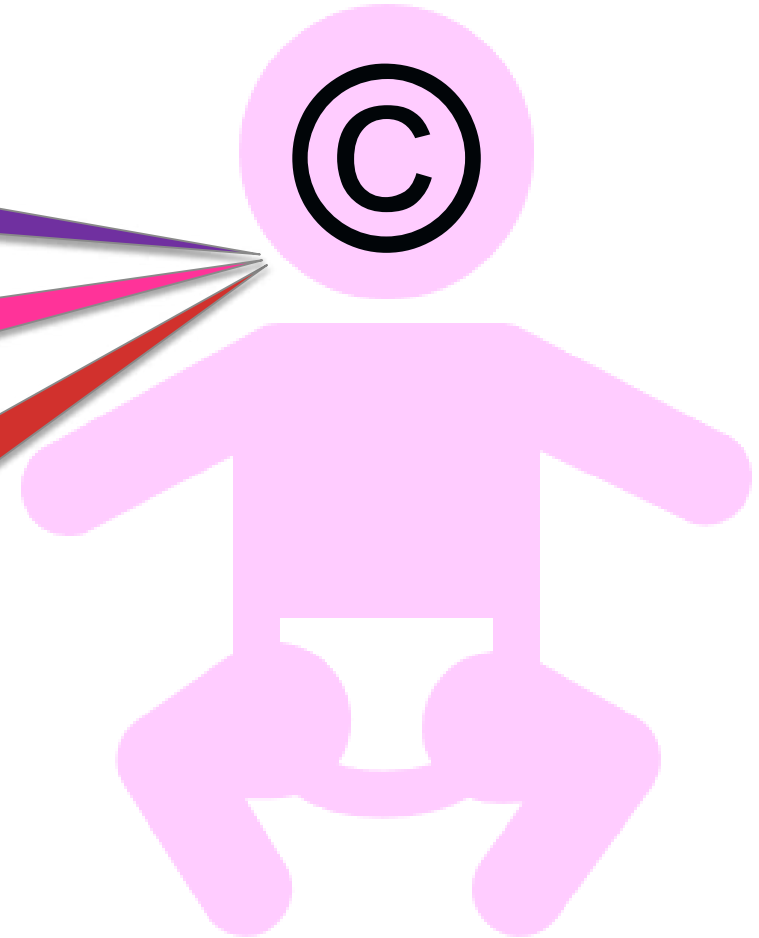
Why (When) Does Ownership Really Matter

- *Control:* If you don't own it, you can't stop others from using the asset under © law

- *Exclusivity:* Platforms may generate the same (or very similar) output for others

> OpenAI TOS: "Due to the nature of machine learning, Output may not be unique across users and the Services may generate the same or similar output for OpenAI or a third party"

- *Importance:* The importance of the asset dictates the effort to document creative process to prove ownership

🐷

"All animals are equal ...
but some animals are more
equal than others."

- George Orwell, *Animal Farm*

©

"All ~~animals~~ *Copyrights* are equal ...
but some ~~animals~~ *Copyrights* are more
equal than others."

- George Orwell, *Animal Farm*

Is the Juice Worth the Squeeze?

- How *long* will you use the asset?

- How *central* is the asset to your branding/business?

- How *important* is it that no one else use the asset or anything substantially similar??

!!!

Kinda

Nah
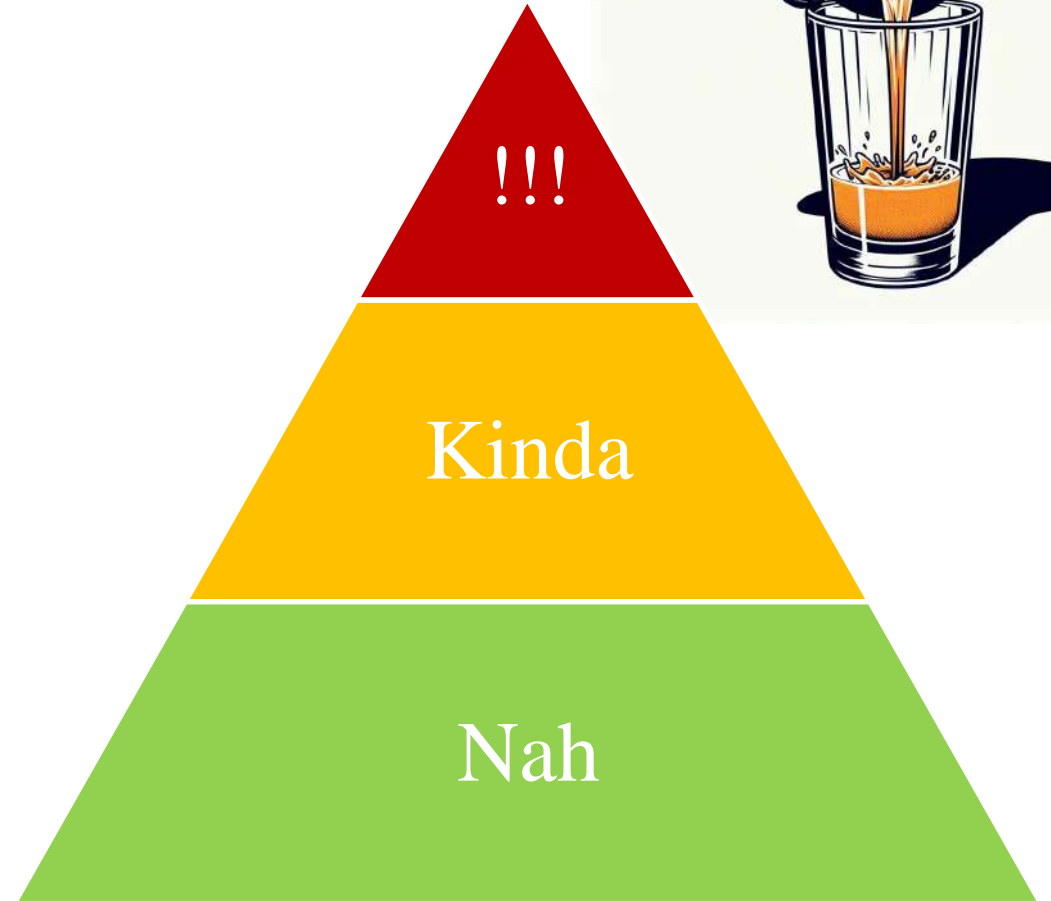
Ownership Includes "AI Rights"
From a Hollywood studio agreement

"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."

For copyright, is this different than saying studio owns "all rights now or hereafter known"?
Does this clarify or add confusion?

What does "related to the Rights" mean?
- For the initial project or future projects?
- What is the intent of the parties?

What about right of publicity?

Additional Thoughts on Ownership ...

- The *easier* it is to generate content, the *less likely* someone needs to steal yours

- Maybe AI result in *less copying/infringement* in the long run?

Prompt: A whimsical illustration depicting a mountain of content created by AI, with vibrant colors and playful elements, showing the transformation from clutter to serenity (CoPilot)

Infringement
Minimization & Allocation of Risk

Infringement is possible …

- *Users* can use AI tools to infringe
  - Users can use copyrighted content as *input*
  - Users, through prompts, can *direct tool to copy and infringe* (though many tools are making this somewhat harder to do)

Infringement is possible …

- *AI tools* (and developers) may or may not infringe

  - Models *allegedly* *memorize* or *overfit* training data (at least sometimes)

  - Arguments that outputs are infringing *derivative works* haven't had much traction (so far)

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.

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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.

New York Times v. Open AI

Does it make sense (and is it fair) to force vendors to take on liability for AI infringement risks?

Who should bear the risk?

Vendor POV

- Client should assume risk because Client will receive benefits from using AI (faster work, cost savings)
- Terms with AI vendors not (barely) negotiable
- Vendor is not an insurance company

Client POV

- Vendor should assume risk because in a better position to manage & mitigate
- Vendor can avoid AI
- Vendor hired for expertise providing creative services and is paid (in part) to assume AI risk

From an Vendor Agreement (Client)
Indemnity

The Vendor shall indemnify, defend, and hold harmless the Client from and against ...

Any actual or alleged infringement of any intellectual property rights, including but not limited to copyrights, trademarks, patents, or trade secrets, resulting from the use of AI tools in the creation, development, or delivery of the Deliverables.

Very broad non-infringement

Any breach of the Vendor's representations and warranties regarding the originality and ownership of the Deliverables, including any modifications or enhancements made using AI tools.

Addresses ownership and originality issues

Any violation of applicable laws, regulations, or industry standards related to the use of AI tools, including but not limited to data privacy and security laws.

Violation of laws

Any claims or actions arising from the Vendor's use of AI tools that result in harm or damage to third parties, including but not limited to errors, omissions, or inaccuracies in the Deliverables.

Inaccuracies

From an Vendor Agreement (Vendor)
Indemnity

Client acknowledges that, in performing Services that involve generative artificial intelligence or machine learning systems or services ("AI"), AI platforms and vendors often have non-negotiable or minimally negotiable terms that do not include warranties, indemnities, intellectual property ownership protection or other terms customary in vendor agreements. Furthermore, notwithstanding anything to the contrary in this Agreement, Client understands that it may not be possible to ensure that images, video, text or other content created in whole or in part via the use of AI ("AI-Generated Content") will be owned by Client and/or will not infringe upon the rights of third parties. Provided Client has approved Agency's use of the AI platform or vendor or incorporation of any AI-Generated Content into Deliverables, Client agrees that Agency shall have no liability with respect to the use of such AI platform or vendor, and/or any AI-Generated Content, and Client accepts all risk in connection therewith.

Acknowledge reality

No promises of ownership or non-infringement

No liability for approved AI use

Some considerations ....

- *Responsible Contracting:* Restrict vendor's use of any AI platform unless vendor has enterprise license that provides a reasonable/standard indemnity (unless Client approves otherwise)

- *Pass Through of AI Vendor Indemnity:* Limit indemnity to the extent the AI vendor indemnifies Vendor

- *Client Approval of AI Use:*

  - Since AI is embedded in most software (Word, Photoshop, Outlook, etc.), provisions that prohibit use of "any AI software, services or tools" is over-broad

  - Limit approval to using AI to generate AI elements for final deliverables

- *Vendor's Misuse of AI:* Vendor should remain responsible for intentional infringement, including through AI prompts

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Digital Doubles

California & Digital Replicas (Sept 2024)

- Provisions in contracts regarding digital replicas are not enforceable if *all three* are true:

  - Lost Gig: The provision allows use of digital replica "in place of work the individual would otherwise have performed in person"

  - Specific Description: The provision does not "include a reasonably specific description of the intended uses of the digital replica unless the uses are consistent with (1) the terms of the contract for performer's services and (2) the fundamental character of the photography or soundtrack as recorded or performed."

  - Representation: Individual not represented by a lawyer (and the commercial terms are stated clearly and conspicuously in a contract) or a union (and the collective bargaining agreement allows digital replicas)

From a AI Services Agreement

Talent grants to Client and its successors, licensees and assigns the right, during the Term, (a) to employ artificial intelligence or any other technology now known or hereafter devised to create neural voice models devised from or based upon Talent's voice and vocal attributes (the "Voice Models"), and (b) to use the Voice Models to generate audio recordings that replicate, simulate or imitate Talent's voice, vocal attributes and performances and to use such audio recordings in advertisements of any kind in any and all media, now know or hereafter devised, throughout the universe to advertise and promote Client and its products and services (the "Ads").

Talent acknowledges that Talent has been represented in negotiating this agreement by legal counsel of Talent's choice.

Future technology clause

Call out that the Voice Models will generate replications/simulations

State the uses (be "reasonably specific")

If Talent has a lawyer

Comment from LA Entertainment Lawyer
Talent Agreement

"Talent shall have approval over the use of artificial intelligence or "AI" in connection with Talent's likeness in the Campaign Content, if any."

This is super broad.

AI is used for color correction and grading, audio enhancement, facilitating ADR, and a million other things I don't know anything about

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Comment an LA Entertainment Lawyer

Talent Agreement

any digital double or replica of Talent's likeness created with

"Talent shall have approval over the use of artificial intelligence or "AI" in connection with ~~Talent's likeness in~~ the Campaign Content~~, if any~~."

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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.

Affirmative use for machine learning or passive?

Restricts digital doubles. Does it prevent use of standard tech?

Will you remember this when you sell the brand/company?

Srsly?

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Wishful Thinking

From a Clip License

Unless otherwise approved by Licensor in writing, Licensee shall not, and shall ensure that its affiliates, licensees, contractors and sublicensees shall not, directly or indirectly use the Licensed Content in connection with any artificial intelligence, machine learning, or similar technology ("AI Technology"), including without limitation to train, develop, improve or modify any AI Technology.

"Licensees" would include media that runs your commercial

How do you "indirectly" use AI?

Most software uses AI in some way (including Word!)
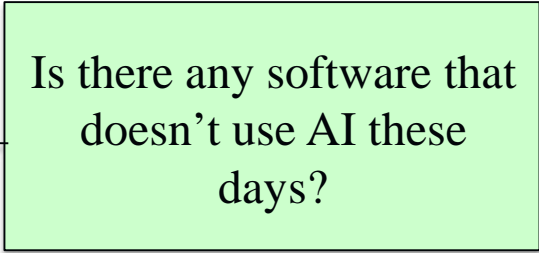
Ownership with AI Restrictions
From a Commercial Production Agreement

"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."
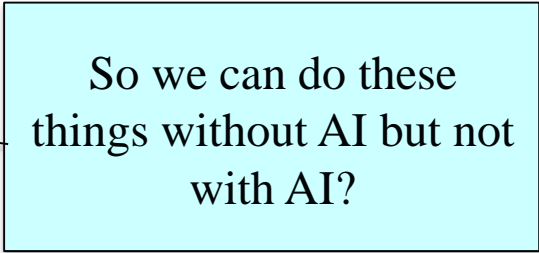
But the work product is work for hire

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

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

Key Takeaways

Be Brave

- Embrace the *uncertainty* and *complexity* of AI (Do you have a choice?)
- Provide informed, balanced advice to help clients *weigh potential rewards against risks*

Be Realistic

- Create *reasonable and practical* protocols and procedures for AI use (internal and with vendors)
- Consider whether *burdens and restrictions* you impose on AI use are *justified*

Be Fair

- Be *fair* when allocating risks (among AI platform, brand and vendors)
- Flowing risk downstream to vendors may *not* always be the best approach

Send us your
AI provisions!

Follow Me on LinkedIn

Brian Murphy
Partner at Frankfurt Kurnit Klein & Selz

Frankfurt Kurnit Klein + Selz PC

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