

Lights, Camera, Prompt: AI and Advertising Production

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Frankfurt Kurnit Klein + Selz_{PC}

Your creatives come to you.

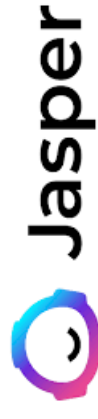
They are working on a 50th anniversary campaign for a pickle brand and have decided to do something retro, reminiscent of the original campaign that helped launch Peter Piper's Pickles in the 70's before it became the mega-brand that it is today.

They are tight on time and on budget. They're not sure exactly what they want to produce, but they want to use AI to help produce the creative.

Any concerns?

1. What is the proposed AI use?

AI Possibilities



Claude



What are the needs for the project?

- Possibilities include:
- Using AI tools to assist or enhance human-created content
- Using generative AI platforms to create new content
- Engaging production companies that use AI tools/generative AI platforms

2. AI-enabled tools

In order to kick things off,
the creatives just want to
take one of the current Peter
Piper Pickle's ads and
change the background color
to make it feel more retro.
OK to use AI?

What is an AI-Enabled Tool?

- **Core Characteristic:** AI assists or enhances human-created content
- **Definition:** Technology that uses AI to aid, modify, or improve existing human-authored work or to automate technical tasks that would traditionally be done manually by a human operator.
- **Key Indicators:**
 - **Starts with existing content** – There’s already a photo, text, audio that a human created
 - **Human directs specific changes** – “Remove this object,” “Extend this edge,” “Fix this color”
 - **Iterative human control** - Human reviews each change, accepts/rejects, refines
 - **Aids human authorship** - Makes the human’s work better/faster, doesn't replace creative decisions
 - **Technical assistance** - Automates tasks like masking, color matching, noise reduction
- **Why does it matter?**

Human Authorship Required

- In the U.S., *only human authorship* is protectable (and “ownable”)
- Thaler v Perlmutter
 - Work entirely “autonomously created by a computer algorithm running on a machine” (AI)
 - Denied Registration – Affirmed by court
- Importance
 - If output not protected by copyright, can’t grant ownership to client.



A Recent Entrance to Paradise

How do AI enabled tools impact copyright ownership?

- The use of AI tools to assist rather than stand in for human creativity does not affect the availability of copyright protection for the output.
 - U.S. Copyright Office Copyright and Artificial Intelligence, Part 2: Copyrightability
- Human makes the final creative choices

So, you're ok with using an AI enabled tool from an IP perspective. What next?

- Is the tool an approved tool?
- Do you have the tool or do you need to license it?
- What does your MSA say?
 - Do you have to notify?
 - Should you have to notify?
- Any concerns?
 - Concern about input into the tool?
 - Will the input be accessible to others?
 - Will it be used for training?

– “We will not use these rights to train generative AI models on your content and will not use the sublicense rights to have anyone else train generative AI models on your content, except at your specific request (like you asking us to train a custom model on your content)”

3. Generative AI

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Your creatives now tell you
that they also want to use
AI to add some new,
updated imagery.
What now?

You're considering the request...

Preliminary Questions

- Quality – Will the output be suitable for intended use?
- Security and needs of a project
 - Does the project involve data or special security concerns that may be compromised by use of AI?
- Will the output communicate a demonstration or communication that you won't be able to substantiate?
- Will you have to disclose the use of AI? Are you ok with that?

Preliminary questions

- **Notification** - If you're an agency, what does the MSA require?
- **Peter Piper Pickles MSA:**
“Agency shall not use any generative artificial intelligence tools or systems (including but not limited to AI used for content creation, copywriting, image or video generation, media planning, or consumer interaction) in connection with the Services **without Client's prior written consent**. If Client approves such use in writing, Agency shall **disclose** to Client the specific AI tools or platforms used and their intended application;”

Do you need to be concerned about ownership?

- AI will be used to generate original materials
- AI will be used to replace human authorship
- The client or company will not be able to secure copyright ownership in the AI generated components.

–What does that mean?

- Exclusive rights to use
- Right to prevent others from using

How to proceed?

- Even if you don't have to notify, do you have to vary the ownership requirements of an MSA?
- **Peter Piper Pickle's MSA:**

“Other than as specifically agreed, all materials and all intellectual property rights in the materials will be the sole and exclusive property of Client and will be deemed to be a “work made for hire” (as defined in Section 101 of Title 17 of the United States Code) or the equivalent concept under applicable law or otherwise shall vest in Client unconditionally and immediately on their creation. The Agency shall be solely responsible for including all necessary contractual provisions to ensure the total and definitive transfer of all materials and all intellectual property rights in the materials.”

Does ownership matter in the context of the project?

- Does it matter? Do the needs of the project require exclusive ownership and the rights that come with copyright? Or can you live without it?

Will it be based on human authored input that will be perceptible in the output?

Prompt

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

Input



Output



- If a human contributor meaningfully shapes, arranges, or modifies AI-generated material in a way that reflects original human authorship, copyright protection may be granted for those specific human contributions.
- The human-authored portions remained identifiable and distinct within the final work and registration was granted only for the aspects of the image that could be clearly traced to the artist's original contribution.

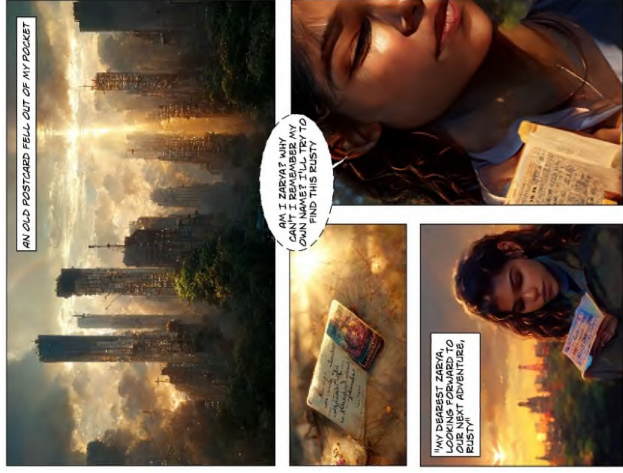
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Will the AI generated output just be one element on a larger creative in which copyright will be owned?

- Do you care about ownership of that AI generated component?
 - Scene extensions or other de minimis or unimportant elements in the context of the project

Will you be able to own the elements you care about?

- Selection, Coordination & Arrangement – Is it enough?



Text written entirely by registrant



Selection and arrangement of artwork and text by registrant



The artwork created via Midjourney



Shupe is considered the author of the “selection, coordination, and arrangement of text generated by artificial intelligence.”

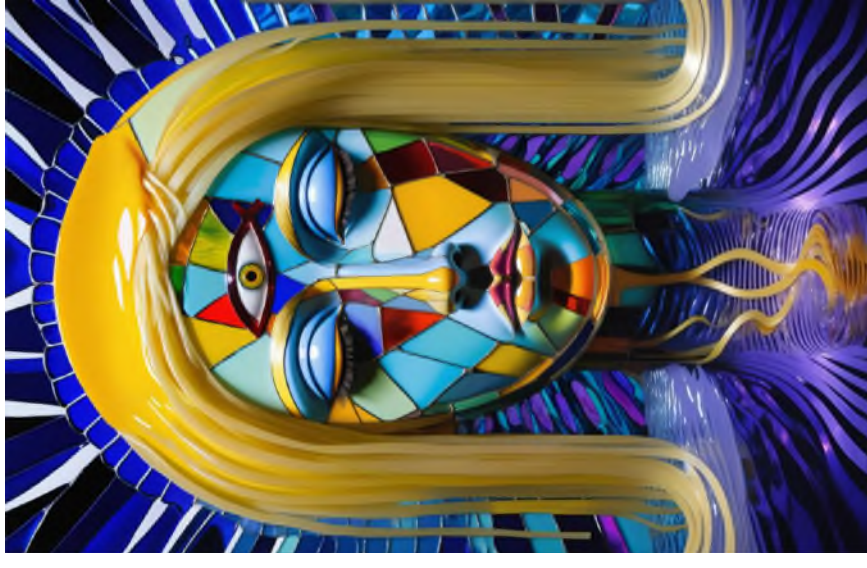
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Will there be human components added that will be enough?

- Will there be human components that are added to the output as an overlay in which ownership rights can be obtained that will provide adequate protection?
- If so, have you recorded or otherwise evidenced the process?

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



What about liability?

- What are the liability and indemnity provisions in the MSA?
- Is it fair?
- Peter Piper Pickles' MSA:

Agency shall:

- (a) ensure that any content provided by Agency is **original, non-infringing**, and complies with all applicable laws; and
- (b) **indemnify** and hold harmless Client from any third-party claims, damages, or liabilities arising out of any breach of the above clause.

What about liability?

- Should you shift risk?
- Can you provide the benefit of a third-party license indemnity?
- Do you know what that indemnity is?

4. Licensing an AI Product

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Licensing an AI Product

- Do you already have the product licensed
 - Enterprise license?
- If not, what are the requirements to license for the project?
- What are your Company requirements
 - Security?
 - Data handling?

Licensing an AI product – T&Cs

Commercial Usage Rights

- Commercial use permitted? Industry/use case restrictions? Geographic limits?

Attribution Requirements

- Must you credit the platform in deliverables? Where/how long?

Ownership vs. Usage Rights

- License to use vs. copyright ownership
- Non-exclusive - others may receive identical outputs

Security and Data Handling

- Encryption? Compliance certifications?
- Who accesses your data? Third-party sharing permitted?

Training on Your Inputs

- Will prompts/uploads train the model? Can you opt out?
- "Quality assurance and improvement" language = training on your data

Data Retention and Deletion

- How long retained? True deletion or just de-identified? What happens after cancellation? Backup retention policies?
- Can platform use your data for marketing/case studies? Keep outputs private vs. public by default?

Indemnification

- Often limited or no indemnity for IP infringement
- YOU typically bear the risk if outputs infringe

Liability Limitations

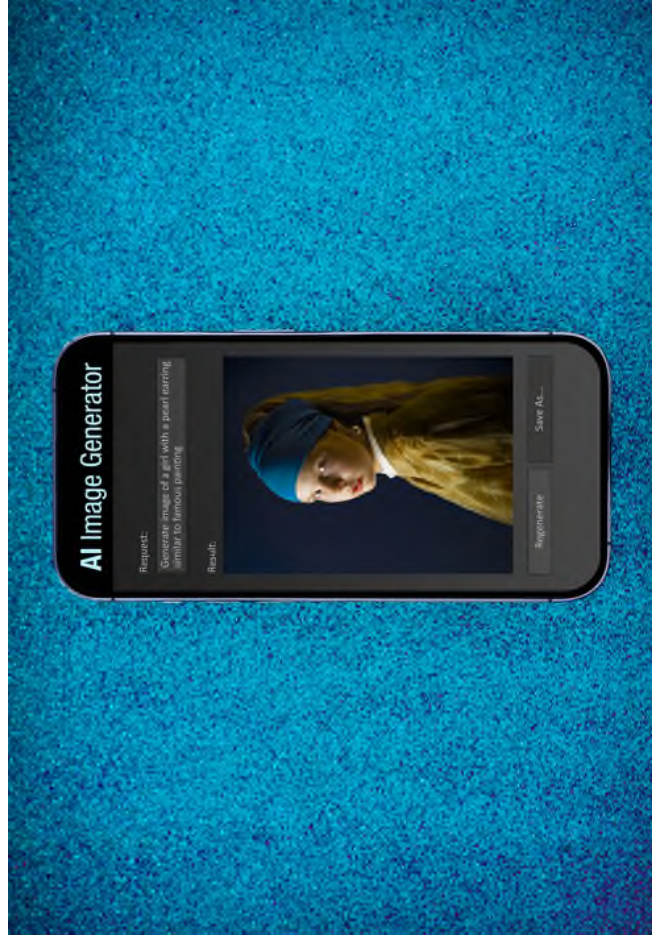
- "AS-IS" - no warranties of non-infringement
- Liability capped at fees paid

Terms of Use

From OpenAI ToS:

- “As between you and OpenAI, and to the extent permitted by applicable law, you (a) retain your ownership rights in Input and (b) own the Output.”
- We hereby assign to you all our right, title, and interest, if any, in and to Output.
- “Due to the nature of our Services and artificial intelligence generally, output may not be unique and other users may receive similar output from our Services...”
- “You are responsible for Content, including for ensuring that it does not violate any applicable law or these Terms.”
- The service is provided “As Is.”

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Free vs. Enterprise License

1. Does your company have, or should your company get, an enterprise license?
2. What's the difference?

Free vs. Enterprise License

Why License Type Matters in Advertising

- Free/consumer tiers often have restrictions incompatible with commercial production
- Enterprise licenses provide critical protections regular licenses don't
- Wrong license = breach of MSA, IP issues, data security violations



Key Differences: Regular/Free Tier

- Training Data:** Your inputs/outputs MAY be used to train the AI model
- Commercial Use:** Often restricted or prohibited entirely
- Data Security:** No guarantees about data handling, storage, or deletion
- Support:** Limited or no customer support, no SLA
- Attribution:** May require "Made with [Platform]" disclosure
- Indemnity:** Typically none - you assume all risk
- Terms Changes:** Platform can change terms at any time

Key Differences: Enterprise License

- Training Data:** Inputs/outputs NOT used for training (closed system)
- Commercial Use:** Explicitly permitted and licensed
- Data Security:** Defined data handling, encryption, compliance certifications (SOC 2, GDPR)
- Support:** Dedicated support, SLAs, account management
- Attribution:** Usually not required (or negotiable)
- Indemnity:** May include limited IP indemnity (read carefully - often still disclaimed)
- Terms Stability:** Negotiated contract, not unilateral changes

5. Using AI: Considerations for Inputs

Using the AI – Input

- Recording prompts
- Third party material – do you have the rights?
 - Do you/client own the inputs?
 - How was the material being input procured?

Confidentiality

What Information Are You Inputting?

- Client confidential information (product specs, unreleased features, pricing, launch dates)
- Strategic campaign plans and creative briefs
- Market research, consumer insights, competitive analysis
- Financial data, budgets, media spend plans
- Trade secrets or proprietary business information
- Unreleased creative assets, taglines, brand positioning

The Confidentiality Problem

- Open AI systems use your inputs for training = disclosure to third party
- Your prompts and uploads may be stored on platform servers indefinitely
- Platform employees may have access to review your inputs
- Data breaches could expose client confidential information
- Information could appear in outputs generated for other users (including competitors)
- You may be violating MSA confidentiality provisions without realizing it

Confidentiality

- OpenAI explicitly [tells users](#) not to share “any sensitive information in your conversations” in the company’s frequently asked questions (FAQ) section
- Information can be used for training – in many cases, the platform has rights to input and output
 - “By using the Services, you grant to Midjourney, its successors, and assigns a perpetual, worldwide, non-exclusive, sublicensable no-charge, royalty-free, irrevocable copyright license to reproduce, prepare derivative works of, publicly display, publicly perform, sublicense, and distribute text and image prompts you input into the Services as well as any Assets produced by You through the Service. This license survives termination of this Agreement by any party, for any reason.”

6. Using AI: Considerations for Outputs

Product Demonstrations

- See for yourself
- Why is it important?
- What does the ad communicate?
 - You're seeing a **real** product demonstration with your own eyes
- Requirements
 - Product demonstrations should be real
 - Substantiate the performance
 - Typicality

See how Peter Piper Pickles stack up against our competitor's Betty Boughta's Butter Pickles

Endorsements

“I wasn’t expecting it to be this good — but wow.”
M. Vittone, New York, New York

- FTC Endorsement Guides
 - An endorsement must reflect the endorser’s *honest* opinions and experiences
 - Claims must be *substantiated* to the same extent that the brand would have to substantiate them.
 - A claim made by an endorser must be *typical or representative* of what consumers will generally achieve
 - And any “*material connections*” between the advertiser and the endorser – connections not reasonably expected by the audience – must be *disclosed clearly and conspicuously*
 - The FTC has expanded the definition of “endorser” in a way that now arguably covers computer-generated avatars and fabricated endorsements.
 - Can a bot’s opinions be truthful and typical?
 - Can a bot really be a bona fide user of a product?
 - Are demonstrations accurate?

Your creatives want to use a digital replica of the company founder Peter Piper for a new print ad and maybe for a commercial.

Any other considerations?

Disclosures and Legal Requirements

- Contracting requirements
 - Digital replicas
- Union requirements
 - Digital replicas and synthetic performers
- Disclosure requirements
 - Law
 - Synthetic performers
 - Demonstrations
 - Other communications
- Platform requirements
- Client requirements

7. Do you have a policy?

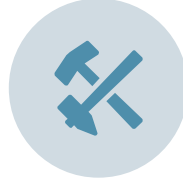
What if you don't have a policy?

- You're flying blind - every decision is ad hoc and risky
- No clear approval process = delays and inconsistent decisions
- Increased risk of MSA violations or client disputes
- Harder to train staff or maintain quality control
- Difficult to shift risk without clear requirements

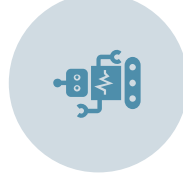
What AI Policies Address



Do you need to document which AI tools you're using?



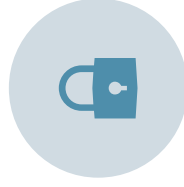
Are there certain approved/prohibited AI tools?



Are you required to log prompts/inputs for generative AI?



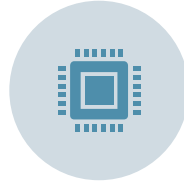
Do you need to assess copyright implications before starting?



Is there a confidentiality/data security review required?



Are there specific formatting or disclosure requirements for outputs?



Does anyone need to approve AI use before you proceed?



Require use of only AI for which you have enterprise licenses?



Any use of AI outside of those platforms require approval of a specific person? Who?

8. Engaging a Production Company that will Use AI

In addition to the print ad, what about a commercial that recreates the old jingle using AI to make it sound authentic? Any other considerations?

Engaging a Production Company that Wants to Use AI

- Do you have bid specs for use of AI?
- Do you have policies?
- What are you including in the production company agreement?
 - Notification requirements?
 - Requirements for the AI?
 - Commercial usage in all media?
 - Ownership?
 - Data?
 - Security?
 - Requirements with respect to use of third-party material, etc.
 - Recording prompts?
 - Handling client confidential information?
- Do you do independent due diligence or rely on the vendor's indemnity?
- Liability vis-à-vis the client?

Transcription and AI assistants

- Record retention
- Privilege?
- Production companies



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