

What Advertisers Need to Know About AI

FKKS Advertising Summit

Hannah Taylor

Frankfurt Kurnit Klein + Selz PC

What is AI?

Input to Midjourney: “Lawyer presenting on AI”



Frankfurt Kurnit Klein + Selz PC

Clear chat

ChatGPT 4

Chat History is off for this browser

When history is turned off, new chats on this browser won't appear in your history on any of your devices, be used to train our models, or stored for longer than 30 days. This setting does not apply across browsers or devices. [Learn more](#)

Enable chat history

Previous chats

Introduction: Questions for Clients

Introduction: Understanding Consumer Beh...

Drug Patents and Innovation

New chat

New chat

New chat

Summary: Understanding Consumer Beh...

New chat

New chat

New chat

New chat

New chat

Introduction: Questions for Clients

Privacy: Privacy Impact Statement

The Role of Data in Personalized L...

Reporting: Privacy Impact Statement

New chat

Large Language Models and Privacy

Final User Notice

Governmental Impact: Privacy Impact

Single User Notice

New chat

New chat

Introduction: Understanding Consumer

Introduction: AI in Advertising

Privacy: Advertising Data

Add team workspace
Collaborate on a team plan

Hannah Taylor

You
show me a photo of a AI diffusion model

ChatGPT

Creating a visual representation of an AI diffusion model involves depicting an abstract concept, as these models are not physical objects but mathematical and algorithmic structures used in machine learning, especially in generating or manipulating digital media like images, audio, and text. A diffusion model in AI, particularly in the context of generating images, gradually constructs images starting from random noise by reversing a process that gradually adds noise to an image. To visualize this, one might imagine a series of steps starting with noise and progressively refining it into a coherent image, symbolizing the model's learning process.

Let's create an illustration to represent an AI diffusion model conceptually.

- The artwork will start with an abstract representation of random noise on one side.
- It will transition through stages that show the noise becoming more structured and patterned, representing the model's processing steps.
- Finally, it will culminate in a clear, recognizable image on the other side, illustrating the outcome of the diffusion process.

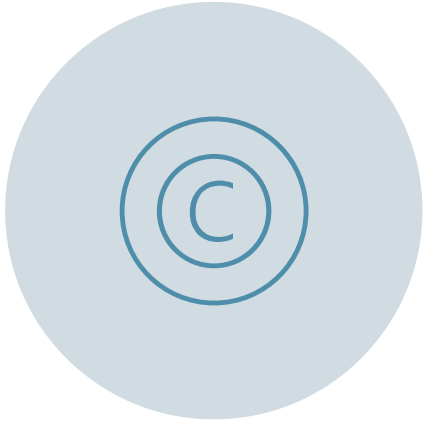
This visualization aims to symbolize the AI diffusion model's function of transforming randomness into coherent visual content through learned patterns.



The illustration above conceptualizes an AI diffusion model, visualizing the transition from abstract random noise to a structured and recognizable image. This progression symbolizes the AI's process of refining chaos into coherence, embodying how diffusion models generate or manipulate digital media by learning from patterns in data.

Message ChatGPT...

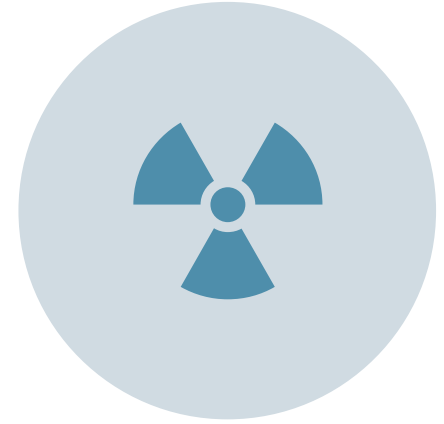
The Three Main Buckets of Risk



IP RISK

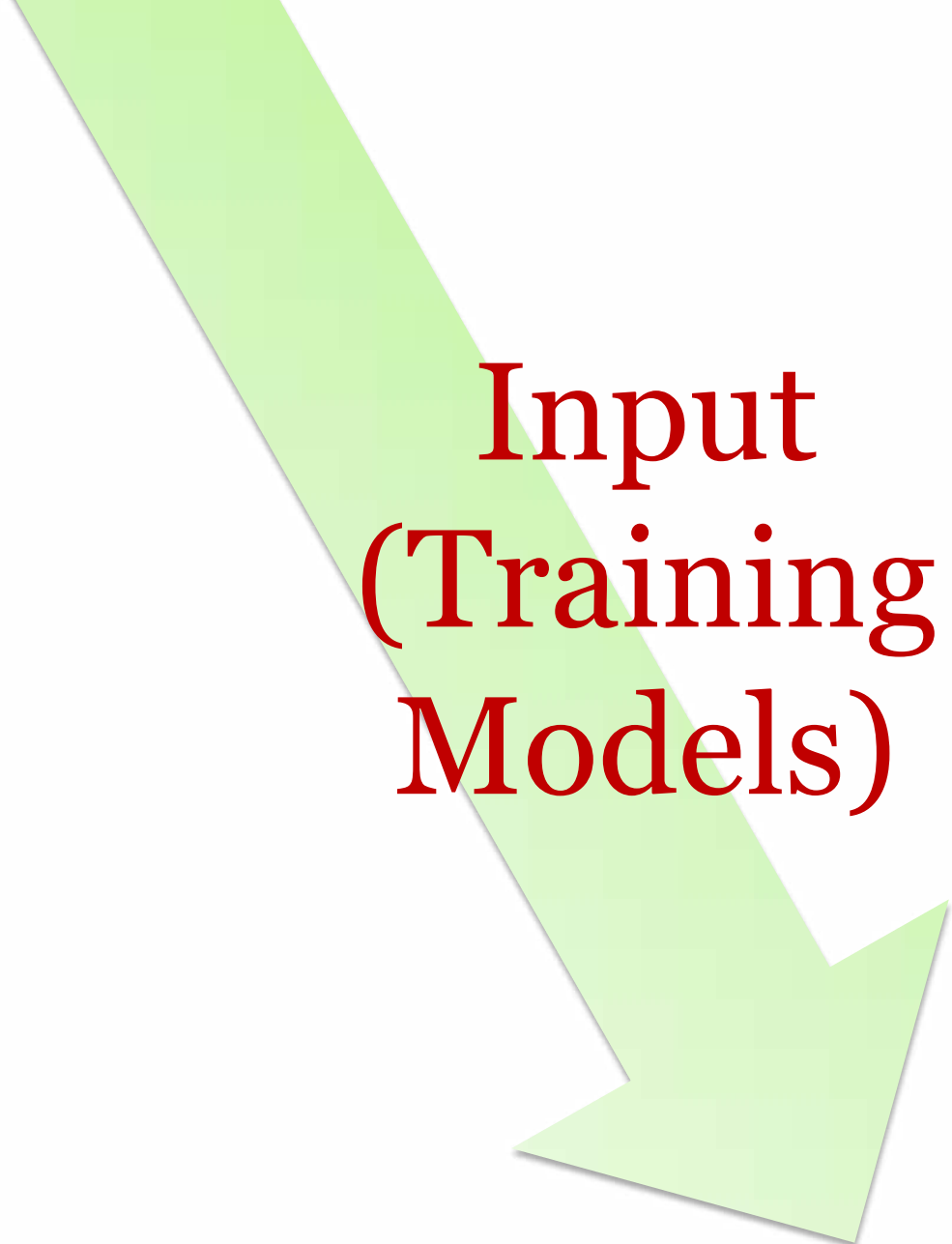


CONSUMER
PROTECTION RISK

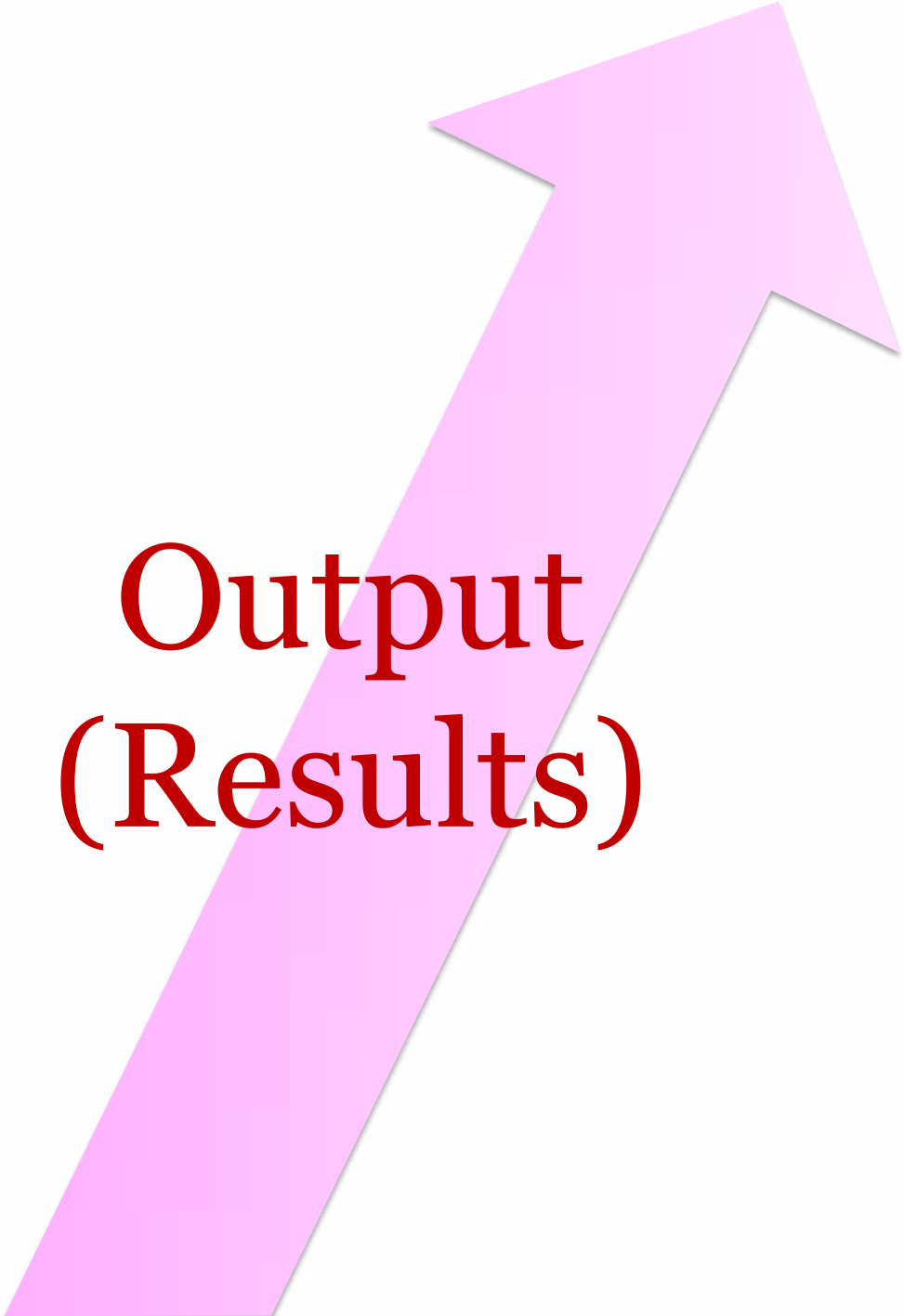


REPUTATIONAL
RISK

Intellectual Property Issues



Input
(Training
Models)



Output
(Results)

Loads of © Litigation

- *Getty Images v. Stability AI* (D. Del) (and in the UK) (2/03/23) Complaint raises claims of copyright infringement, DMCA violations, trademark infringement and dilution, unfair competition, and unfair and deceptive practices; (12/11/23) UK proceedings move forward
- *Doe v. GitHub* (N.D. Cal) (5/11/23) In granting motion to dismiss, court held: Copyright Act pre-empted state law claims for unjust enrichment; plaintiffs stated claims for DMCA violations for removing CMI and breaching of license agreements
- *Silverman v. OpenAI* (N.D. Cal) (7/7/23) Complaint raises claims of direct and vicarious copyright infringement, DMCA violations, unfair competition, and negligence
- *Tremblay v. OpenAI* (N.D. Cal) (8/28/23) Defendants move to dismiss claims of vicarious infringement, DMCA violations, unfair competition, negligence, and unjust enrichment
- *Authors Guild v. OpenAI* (S.D.N.Y.) (9/19/23) Class action complaint filed for direct, vicarious, and contributory copyright infringement
- *Chabon v. Meta Platforms* (N.D. Cal) (10/5/23) Amended class action complaint raises claims of direct and vicarious copyright infringement, DMCA violations, unfair competition, negligence, & unjust enrichment
- *Chabon v. OpenAI* (N.D. Cal) (10/5/23) Class action complaint raises claims of direct and vicarious copyright infringement, DMCA violations, unfair competition, negligence, and unjust enrichment
- *Perry v. Shein* (C.D. Cal) (10/13/23) Defendants move to dismiss claims of copyright infringement and RICO violations in connection with using AI and algorithms to design and produce apparel
- *J.L. v. Alphabet Inc.* (N.D. Cal.) (10/17/23) Complaint raises claims of direct and vicarious copyright infringement, removal of copyright management information, conversion, negligence, and unjust enrichment
- *Kadrey v. Meta Platforms* (N.D. Cal) (11/20/23) Court grants motion to dismiss all claims including negligence, unjust enrichment, DMCA violations, unfair completion, save for claim that unauthorized use of books to train LLMs is copyright infringement
- *Concord Music Group v. Anthropic PBC* (M.D. Tenn.) (11/22/23) Motion to dismiss claims of direct, contributory, and vicarious copyright infringement and DMCA violations
- *Sanction v. OpenAI* (S.D.N.Y.) (12/19/23) Class action complaint raises claims of direct and contributory infringement
- *Andersen v. Stability* (N.D. Cal) (1/12/24) Court grants motion to dismiss for claims of indirect infringement, vicarious infringement, RoP violations, unfair competition, and breach of contract, leaving only claims for direct copyright infringement

And more!

Input – Scraping

- Does “scraping” =
 - Copyright infringement
 - Breach of Contract (ToS)
 - Violation of the Computer Fraud and Abuse Act (gaining unauthorized access to a computer system)
 - Trespass to chattels (entering virtual property without permission)
 - Unfair trade practices

Input – Right of Publicity

- *Andersen* plaintiffs alleged that Stable Diffusion was designed so users could prompt creation of works “in the style of” artists, including the plaintiffs, thus use their names and “artistic identities” for commercial purposes
- Court dismissed those right of publicity claims with leave to amend, noting plaintiffs did not:
 - provide any facts that defendants used the names of the three named plaintiffs to advertise or sell Midjourney; or
 - show how use of plaintiffs’ names in users’ prompts would produce an image “similar enough that people familiar with [their] artistic style could believe that [they] created the image” and result in plausible harm to their goodwill, especially where they claim the output images are not likely to match any training images

Input - Direct Copyright Infringement?

- Plaintiffs claim *infringement* based on the unauthorized reproduction/use of text or images to train
- Is training uses of images protected under *fair use*? Maybe, but maybe not.
 - *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)

Output – Direct Copyright Infringement

- Of course, AI tools *can create* output images that are infringing
- But many courts are not convinced that copyright claims can survive absent *substantial similarity* to copyrighted works (*Andersen v. Stability*)

New York Times v. OpenAI (S.D.N.Y. 2023)

- The New York Times recently filed a high-profile lawsuit against OpenAI and Microsoft alleging copyright infringement, DMCA violations, unfair competition, and trademark dilution
- Stems from unresolved content licensing discussions that began in April 2023 and reached an impasse in December.
- While it shares similarities with other AI copyright lawsuits, the lawsuit:
 1. Emphasizes a unique “retrieval augmented generation” (RAG) process, which happens at the input stage, after LLM training and using fewer underlying training materials
 2. The Times registered its works with the Copyright Office, potentially allowing for significant statutory damages
 3. Provides numerous examples in which a version of GPT-4 reproduced large passages of text identical to that in Times articles in response to certain prompts, including detailed summaries of paywalled articles, like the company’s Wirecutter product reviews, or entire sections of specific Times articles
- Tom Rubin, OpenAI’s chief of intellectual property and content, said the Times manipulated the prompts to get these results, and that such results “are not reflective of intended use or normal user behavior and violate our terms of use.”

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:

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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.

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ChatGPT 4



You

generate an image that looks like Cindy sherman photo



ChatGPT

Let's create an image inspired by the style of Cindy Sherman, focusing on the unique elements that characterize her work. Cindy Sherman is known for her conceptual portraits that often explore various societal roles and stereotypes, usually with herself as the model in elaborate disguises. For this image, I will conceive a setup that captures the essence of Sherman's approach, emphasizing transformation and the exploration of identity.

Prompt: "Imagine a detailed scene where a figure is dressed in an elaborate costume that blends historical and contemporary elements, capturing a sense of ambiguity and transformation. The setting is minimalist, with subtle lighting that casts dramatic shadows, emphasizing the figure's expression and attire. The figure's pose is thoughtful, almost theatrical, conveying a narrative that blurs the lines between reality and performance. This image should evoke the style of conceptual portrait photography, reminiscent of Cindy Sherman's work, focusing on the themes of identity, role-playing, and the construction of self."

Let's proceed to create this image.



Error creating image

I attempted to create an image inspired by Cindy Sherman's photographic style, but due to content policy restrictions, I'm unable to generate images directly replicating or referencing specific contemporary artists' styles.

If you have another idea or a different type of image you'd like to see, feel free to let me know!



Message ChatGPT...

ChatGPT can make mistakes. Consider checking important information.

Copyright Protectability

- In the U.S., *only human authorship* is protectable (and “ownable”)
 - Original elements created by a human
 - A human’s selection and arrangement of original/AI elements
 - (And laws may (or may not) be different outside the U.S.)
- Does this mean “purely” AI-created works/elements are *free from copyright*?
 - You can’t stop others from using those works/elements
 - Indeed, platforms may spit out the same (or very similar) output to other users (as OpenAI warns)

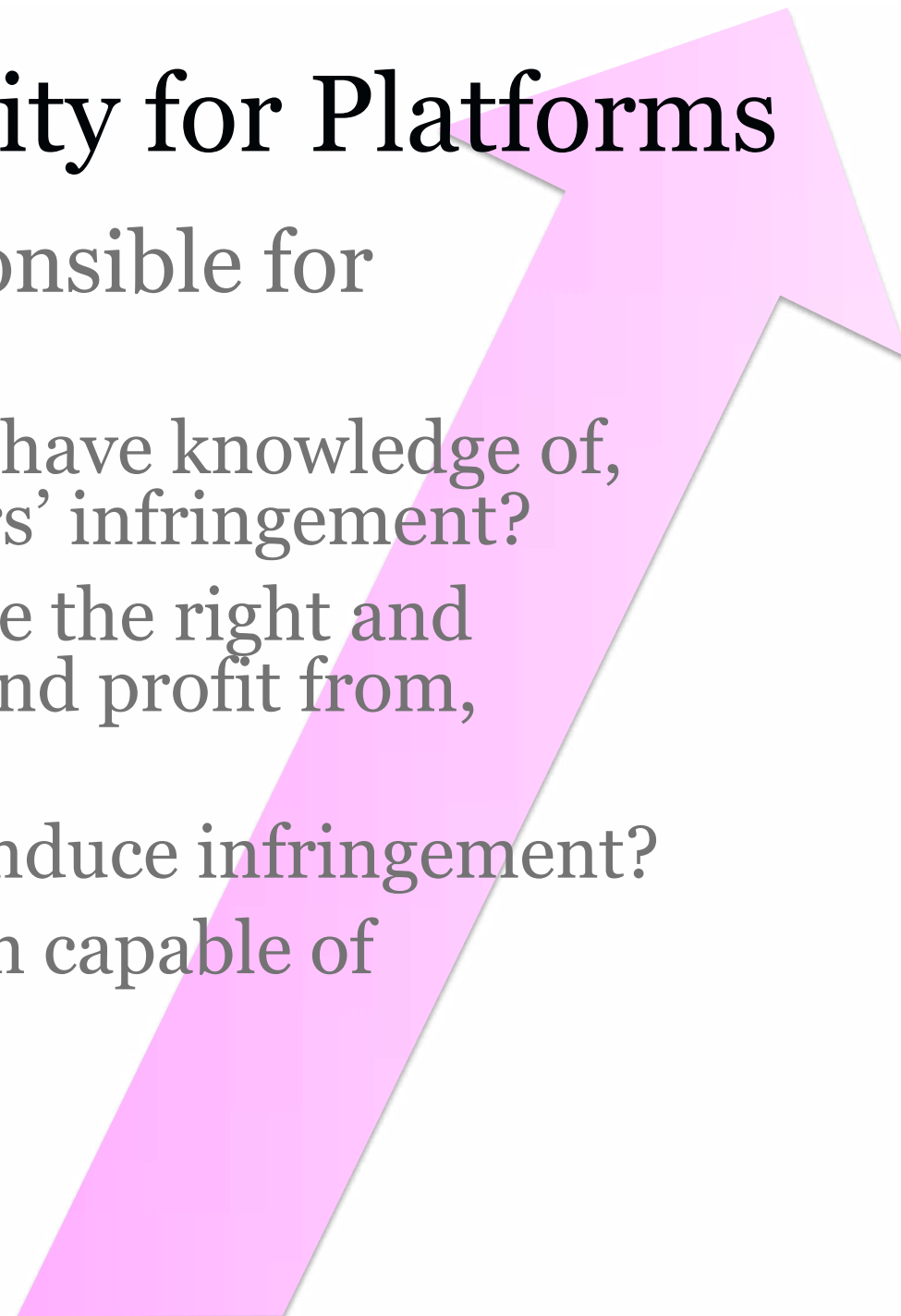
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A Recent Entrance to Paradise



Output – Secondary Liability for Platforms

- Is the platform developer responsible for infringement by users?
 - *Contributory*: Does the platform have knowledge of, and materially contribute to, users' infringement?
 - *Vicarious*: Does the platform have the right and ability to supervise and control, and profit from, users' infringement?
 - *Inducement*: Does the platform induce infringement?
 - *Sony v. Universal*: Is the platform capable of substantial non-infringing uses?
- 

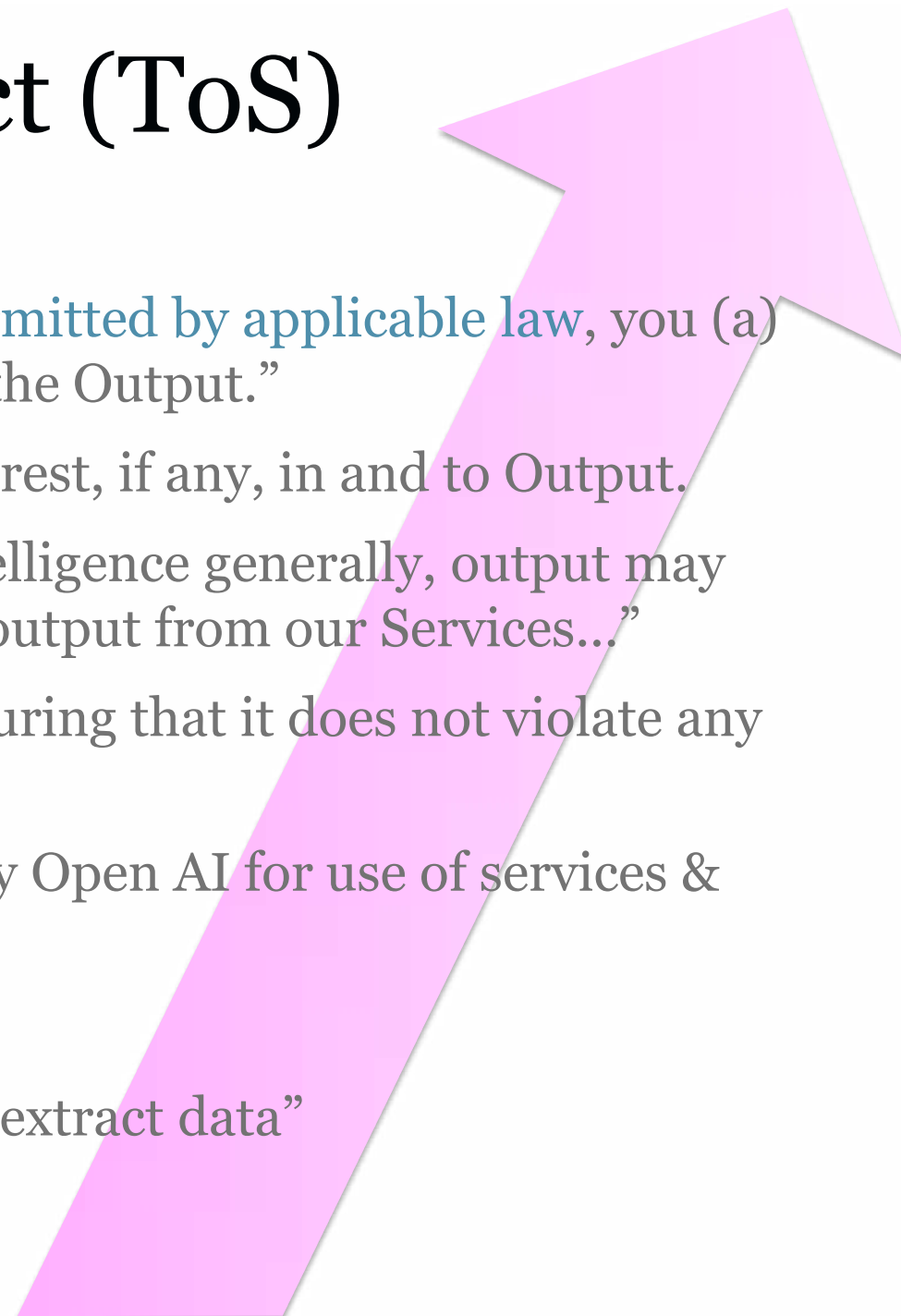
Output – Trademark Infringement

- Claim that unauthorized use of trademark marks in connection with synthetic images generated through the use AI constitutes trademark infringement in violation of the Lanham Act
- “Stability AI’s incorporation of Getty Images’ marks into low quality, unappealing, or offensive images dilutes those marks in further violation of federal and state trademark laws”



Output – Breach of Contract (ToS)

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.”
 - If you are a business or organization, you indemnify Open AI for use of services & content.
 - The service is provided “As Is.”
 - You may not “[a]utomatically or programmatically extract data”
- 

Output - Right of Publicity

- AI tools *can* create output images that, if exploited by the end-user for a commercial purpose, *could* infringe upon right of publicity

Senate Proposes “NO FAKES Act”

- October 2023: Senate introduced the Nurture Originals, Foster Art, and Keep Entertainment Safe (“NO FAKES”) Act of 2023
- Proposed bill would regulate “digital replicas” of peoples’ “image, voice, or visual likeness” in sound recordings and audiovisual works
- Offers individuals exclusive, licensable rights for control over their digital replicas, extending 70 years post-mortem
- Provides for actual and punitive damages and attorneys’ fees for violations of that right

House Follows with “No AI FRAUD Act”

- January 2024: House of Representatives introduces the No Artificial Intelligence Fake Replicas And Unauthorized Duplications (“No AI FRAUD”) Act
- Makes liable anyone who, without consent, distributes or makes available AI-generated replicas of an individual’s likeness or voice
- Provides for a First Amendment defense subject to factors such as commerciality, necessity and relevance of the replica to the “primary expressive purpose of the work,” and whether the use “competes with or otherwise adversely affects” the value of rights holders’ works
- Disclaimers of use of AI “shall not be a defense.”
- Statutory damages start at \$5,000 or \$50,000, or greater actual damages, and provides for punitive damages and reasonable attorneys’ fees

Some AI Tools Now Offer “Indemnities”

- Major providers of generative AI tools may offer limited intellectual property indemnification for AI-generated content
 - Adobe’s Firefly
 - IBM’s watsonx
 - Shutterstock’s Shutterstock Enterprise
 - Google’s Duet AI and Vertex AI
 - Anthropic’s Claude
 - OpenAI’s ChatGPT Enterprise
- Users must ensure compliance with applicable terms and licenses
- Note the exceptions!

Consumer Protection Issues

Executive Order on AI (October 2023)

“Maintaining American Leadership in Artificial Intelligence” focuses on:

- **National AI Strategy:** Establishing a national strategy to maintain U.S. leadership in AI research and development.
- **Increased AI Investment:** Directing federal agencies to prioritize AI investments in their budgeting.
- **AI Governance and Ethics:** Developing governance standards and policies for ethical, safe, and trustworthy AI.
- **Access to Data and Computing Resources:** Making federal data and resources more available to support AI innovation.
- **National Institute of Standards and Technology (NIST) AI Risk Management Framework:** Creating standards and benchmarks for AI to ensure safety and reliability.
- **Workforce Development:** Training a skilled AI workforce through educational initiatives.
- **International Engagement and IP Protection:** Promoting international collaboration in AI while protecting U.S. AI technologies.
- **Regulatory Framework Review:** Directing agencies to review regulations and remove barriers to AI innovation.
- **AI in National Security:** Integrating AI into national defense while adhering to legal and ethical standards.
- **Sector-Specific AI Applications:** Encouraging AI development in sectors like healthcare, transportation, and energy for efficiency and problem-solving.

FTC Expands into AI & Copyright



FTC expressed in addressing issues such as:

where to draw the line between human creation and AI-generated content

liability issues arising from the development and deployment of generative AI

harm caused to creators of works used to train AI



Compliance with copyright laws (e.g., obtaining exclusive licenses to copyrighted training data) is not blanket immunity for violations of the FTC Act



FTC will collaborate with the U.S. Copyright Office to address IP and consumer protection issues

FTC Streamlines AI-related CIDs

- The FTC adopted an omnibus resolution that authorizes the use of Civil Investigative Demands
 - CIDs may be used like a subpoena to gather information, documents, and testimony in private investigations concerning AI
- Applies to all AI technologies, including generative AI that produces images, text, and other content digital media, plus products and services that use AI or claim to detect AI-generated content

FTC Investigates Generative AI Investments and Partnerships

- Section 6(b) of the FTC Act authorizes the FTC to conduct studies to gain a deeper understanding of market trends and business practices
- FTC issued Section 6(b) orders to Alphabet, Amazon, Anthropic PBC, Microsoft, and OpenAI in January 2024
- Seeking information related to:
 - Strategic investments and partnerships
 - Decisions around new product releases
 - Topics of regular meetings
 - Market share, competition, potential for sales growth, and expansion into product or geographic markets
 - Competitive dynamics regarding key products and services needed for generative AI
 - Relevant information provided to any government entity

Transparency and Disclosure – AI Labeling

- Senate proposed Schatz-Kennedy AI Labeling Act
 - Proposed legislation to provide more transparency on content generated by AI to ensure that people know when they are viewing AI-made content or interacting with an AI chatbot by requiring clear labels and disclosures.
- Require developers of generative AI systems to include a clear and conspicuous disclosure identifying AI-generated content and AI chatbots;
- Make developers and third-party licensees take reasonable steps to prevent systematic publication of content without disclosures; and
- Establish a working group to create non-binding technical standards so that social media platforms can automatically identify AI-generated content.

California Proposes “AI Transparency Act”

- January 2024- Senator Josh Becker introduces the California AI Transparency Act
- If passed, may require providers of generative AI tools to:
 - have clear and conspicuous disclosures for AI-generated content and chatbots
 - have content verification mechanisms
 - make developers and licensees take reasonable steps to prevent systemic content publication without proper disclosures

CA Bot Disclosure Law

- Unlawful for any person to use a bot to communicate or interact with another person in California online with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election.

FTC Expands Definition of “Endorser”

- 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?

Confidentiality

Will question posed to AI reveal confidential information or information that could lead to such disclosure?

AI does not promise confidentiality; in fact, its design is explicitly dependent on use of the data gained by the inquiry and output.

Beyond its potential to use confidential information to improve its performance, there is no guarantee that AI won't share confidential information with someone else entirely, perhaps even in creating a response to another user's inquiry.

Privacy & Data Security

- Rite Aid settled in connection with Rite Aid's use of AI and biometric information in its security systems. But it's much more than facial recognition technology.
 - Under the proposed order, effective for 20 years, Rite Aid faces a ban on using any facial recognition technology for 5 years
 - Rite Aid and its vendors must destroy all related data and algorithms
 - Rite Aid must implement an onerous information security program
 - Algorithmic disgorgement



FTC Investigates OpenAI



Center for AI and Digital Policy filed a complaint with the FTC asking the agency to investigate and enjoin GPT4



Months later, the FTC launched an investigation OpenAI's practices for the collection and use of personal data



FTC Orders may require “algorithmic disgorgement” or model deletion where companies must destroy AI models, algorithms, or products created with illegally obtained data



Violating the Children's Online Privacy Protection Act (COPPA) can bring more severe consequences

Discrimination, Stereotypes & Bias

The FTC says:

- “Neutral” technology can produce troubling outcomes – including discrimination by race or other legally protected classes.
- Need proactive and ongoing measures to protect people and communities from algorithmic discrimination.
- Data should be reviewed for bias arising from historical and social context.
- Let’s say your algorithm will allow a company to target consumers most interested in buying their product.
 - Seems like a straightforward benefit, right? But let’s say the model pinpoints those consumers by considering race, color, religion, and sex.
 - If your model causes more harm than good – that is, in Section 5 parlance, if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition – the FTC can challenge the use of that model as unfair.

So What Now? The Practical Steps...

Issues to Consider When Using AI

1. Identify *Appropriate Use Cases*

- Define when and how is it appropriate to use AI
 - Ideation
 - Brainstorming
 - Execution
 - Apps that integrate AI tools vs. creative created by AI tools
- Balance the benefits of AI (efficiency, speed, cost) against risks (infringement, etc.)
- Do an inventory of what tools are on the table

Issues to Consider When Using AI

2. Involve a *Human to Oversee Use*

- Humans can *mitigate* certain risks (AI doesn't have common sense ... *yet*)
- Humans can fine-tune, including to ensure that the output has the right “voice”
- Human contributions provide a basis for (at least partial) ownership

Issues to Consider When Using AI

3. Be *Transparent* About Use (Disclosure)

- Demand the same of your vendors

4. Consider *Confidentiality & Privacy* Issues

- You may grant broad licenses to platforms for all input content
- Use privacy by design, rights to deletion, plain language disclosure, freedom from unchecked surveillance

Issues to Consider When Using AI

5. Consider *Vendors & Their Contracts*

- *Ownership:*
 - Typically, brand owns work product as work made for hire
 - Typically, vendor's pre-existing property and third-party IP are excluded
 - What about AI-generated works?
 - Note that exclusivity is not guaranteed with AI
- *Infringement:*
 - Generally, subject to exceptions, a creative vendor is responsible for infringement
 - Who should bear the risk of third-party infringement on AI output?
- *Assessment:*
 - Is the vendor providing the tech? Do you understand how it works, what underlying tools are being used and how the data flows? Assess how much protection you really have.

Issues to Consider When Using AI

6. Consider enterprise AI licenses / walled gardens:

- While expensive, some of these tools can provide specific licenses with bespoke indemnities
- Tech solutions can reduce practical risk
- The extent of protection can vary significantly based on the specific terms and conditions in the license agreement, or how the tech is being used
- Use caution!

Issues to Consider When Using AI

7. Develop policies

- Establish procedures to get stakeholder approval
- Have folks save inputs and outputs

8. Revisit policies early and often

- We will learn a lot in the next months/years about how to use AI, its risks, its rewards
- Develop a cadence for re-evaluating use cases and processes regularly
- Consider jurisdictional issues



THANK YOU!

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.