Katten

The Latest on AI / GenAI
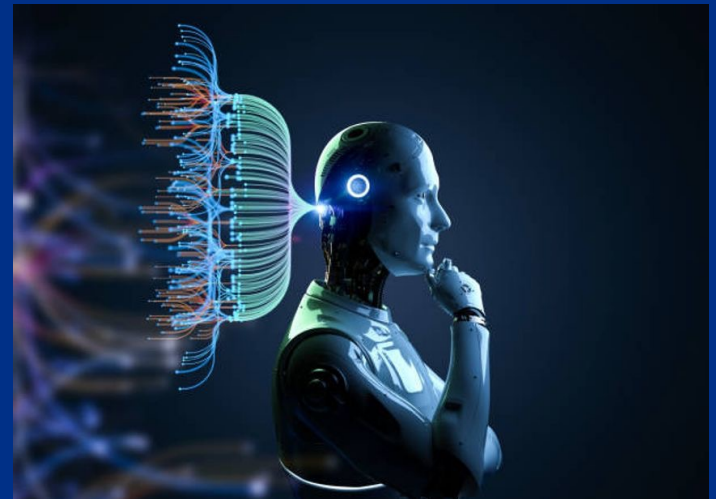
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1. Intro to GenAI
2. Copyright
3. Truth in advertising
4. Right of publicity
5. Global updates
6. Best practices

Hi, AI!

- **GenAI i**s a subset of AI that creates (*generates*) new content like text, images, videos or code, based on the data it has learned from

- Extraordinary advances in **GenAI** technology over the past year have forced **all** companies in **all** industries to weigh significant benefits against serious legal and regulatory risks

GPT-4 outperforms ChatGPT by scoring in higher approximate percentiles among test-takers.

Uniform Bar Exam

10th
ChatGPT

90th
GPT-4

Biology Olympiad

31st
ChatGPT

99th
GPT-4 (with vision)

GenAI → Marketing/Advertising

GenAI use cases in the advertising and marketing industry:

Content Creation: GenAI can automate content creation, saving time and resources. It can generate text and images for blogs, social media posts, product descriptions, and more.

Image or Video Production: GenAI can generate images and videos as creating engaging visual content for marketing campaigns.

Search Engine Optimization (SEO): GenAI can help in optimizing content for search engines, improving the visibility and reach of the content.

Marketing Segmentation: GenAI can analyze customer data to create distinct segments, allowing for more targeted and personalized marketing strategies.

Personalization: GenAI can tailor content and visuals to meet individual tastes, providing a personalized customer experience.

Customer Support: GenAI can be used to power chatbots and virtual assistants, providing faster and more efficient customer support.

Cookieless Marketing: GenAI can help marketers navigate the challenges of cookieless marketing, addressing compliance with privacy regulations while still delivering personalized experiences.

Endless possibilities.

Legal and regulatory risk

TRAINING DATA (INPUT)

- **Scraping = fair use?**
- Open source licenses
- **Terms of use/contracts**
- PII/data privacy
- CFAA
- DMCA
- **Bias/discrimination**
- Data poisoning
- Drift
- Technological blocks

USER PROMPT

- **Confidential**
- **Trade Secret**
- PII
- 3rd party rights
- **Improper prompts**
- Malicious prompts
- Terms/user liability

OUTPUT

- **Who, if anyone, owns IP?**
- **Copyright infringement**
- TM infringement
- **Right of publicity**
- Privacy
- Non-unique output
- **"Hallucinations"**
- **False advertising**
- Defamation
- Product liability
- **Bias/discrimination**
- Cybersecurity
- **Disclosures**

GenAI cases we are monitoring

- *Getty Images (US), Inc. v. Stability AI, Inc.*

  — (scraping and use of **photos** and reproducing GETTY watermark)

- *Andersen et al v. Stability AI Ltd. et al*

  — (class action re: scraping and use of **photos**)

GenAI cases we are monitoring

Class actions re: use of **books** as training data:

- *Tremblay et al v. OpenAI, Inc. et al.*
- *Kadrey et al v. Meta Platforms, Inc.*
- *Silverman et al v. OpenAI, Inc. et al.*
- *Chabon et al v. OpenAI, Inc. et al.*
- *Chabon et al v. Meta Platforms Inc.*
- *Authors Guild et al v. OpenAI Inc. et al.*
- *Huckabee et al v. Meta Platforms, Inc. et al.*
- *Sancton v. OpenAI, Inc. et al.*
- *Basbanes et al v. Microsoft et al.*

GenAI cases we are monitoring

Lawsuits re: use of **news articles / editorial content** as training data

- *The New York Times Company v. Microsoft Corp. et al.*

- *The Intercept Media, Inc. v. OpenAI Inc. et al.*

- *Raw Story Media, Inc. et al. v. OpenAI Inc. et al.*

GenAI cases we are monitoring

- *Concord Music Group, Inc. et al v. Anthropic PBC*
  - (class action re: use of **music lyrics** as training data)

- *Main Sequence, Ltd. et al v. Dudesy, LLC et al*
  - (misappropriation of **name, image, voice, likeness, copyrighted comedy routines** as training data)

- *Young v. NeoCortext, Inc.*
  - (class action re: **right of publicity** on face-swap app, brought by *Big Brother* actor)
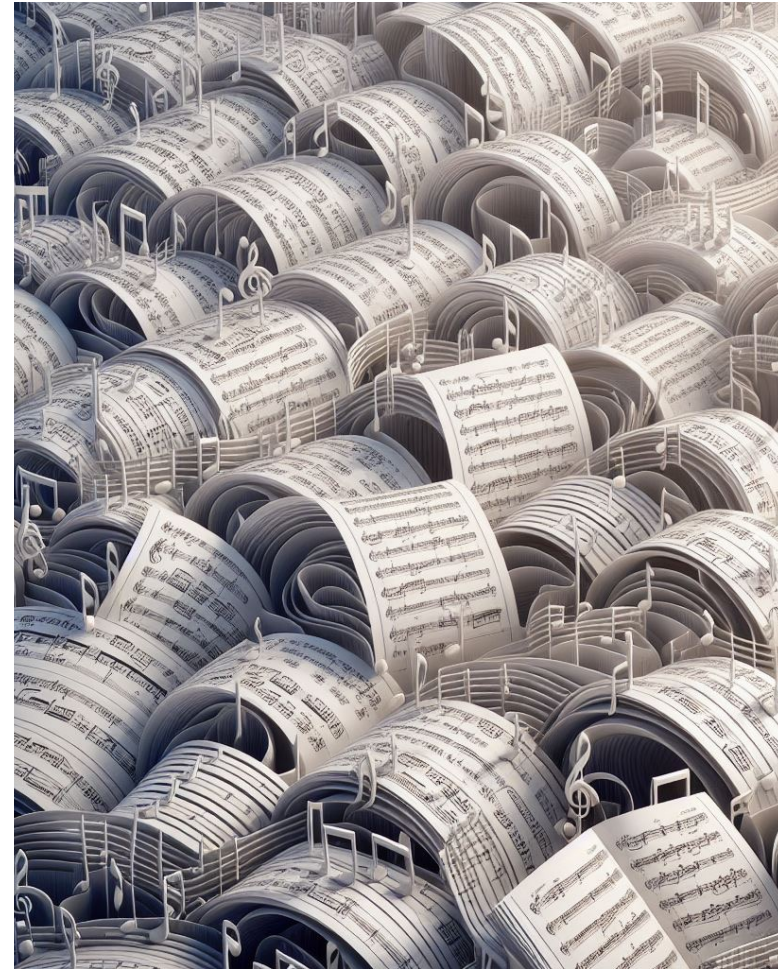
GenAI cases we are monitoring

- *DOE 1 et al v. GitHub, Inc. et al*

  — (class action re: scraping and use of **software code**)

- *Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc.*

  — (scraping and use of Westlaw **case summaries**)
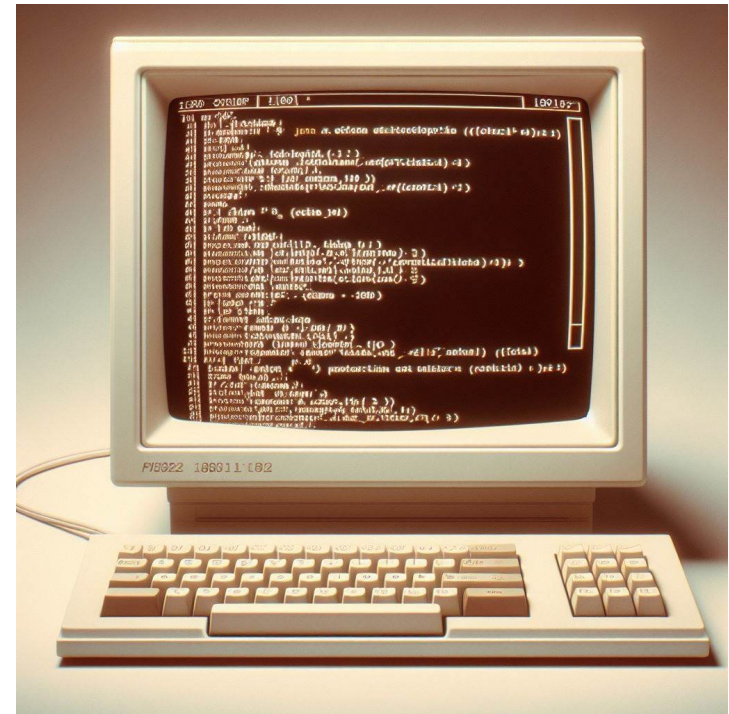
GenAI cases we are monitoring

- *P.M. et al v. OpenAI LP et al*

  — (class action re: scraping and use of **personal data** – Fed/CA/IL/NY/cl)

- *A.T. et al v. OpenAI LP et al*

  — (class action re: scraping and use of **personal data** – Fed/CA//NY/cl)

- *J.L. et al v. Alphabet Inc. et al*

  — (class action re: scraping and use of **personal data** – Fed/CA/cl)

- *A.S. et al v. Openai LP et al*

  — (class action re: scraping and use of **personal data** – Fed/CA/cl)

GenAI cases we are monitoring

- *Walters v. OpenAI, LLC*

  — (**defamation** based on ChatGPT hallucination of embezzlement complaint)

- *Battle et al v. Microsoft Corp.*

  — (**defamation** based on Bing Chat hallucination wrongly associating plaintiff with convicted terrorist of similar name)

GenAI cases we are monitoring

- ***Thaler v. Perlmutter et al.***

  — (APA challenge to Copyright Office's refusal to **register copyright** in AI-generated work)

- ***In re Théâtre D'opéra Spatial***

  — (request for reconsideration before Copyright Office Review Board challenging refusal to **register copyright** in AI-generated work)

- ***In re Suryast***

  — (request for reconsideration before Copyright Office Review Board challenging refusal to **register copyright** in AI-generated work)

Getty Images (US), Inc. v. Stability AI, Inc.

- Getty Images sued Stability AI in the UK and U.S. (D.Del.), accusing it of copying millions of Getty **images** to train its Stable Diffusion image-generation tool

- Getty asserts **copyright infringement**, and that Stability AI has removed or altered Getty Images' copyright management information, and provided false copyright management information in violation of **DMCA**

- Getty also accuses Stability of **trademark infringement** and **trademark dilution**, citing (sometimes "bizarre or grotesque") images with Getty's watermark

- Stability **moved to dismiss** the case on personal jurisdiction grounds, or transfer to California

- Parties engaging in **jurisdictional discovery** before proceeding with motion to dismiss briefing

Tremblay et al v. OpenAI, Inc. et al.

- Putative class action on behalf of **book authors** regarding use of book content as training data for ChatGPT (N.D. Cal.)

- **Copyright and related claims** including infringement (direct and vicarious), DMCA, CA and common law claims

- Authors allege that ChatGPT can accurately summarize several of their books, which proves that the books were ingested as training data

- Authors allege ChatGPT model is a direct infringement that contains plaintiffs' expressive content, and vicarious infringement with respect to infringing outputs

- Complaint filed June 28, 2023; MTD filed August 28, 2023
- Court granted in part MTD on Feb. 12, 2024 with leave to amend

- Primary docket for consolidated actions against OpenAI, including *Silverman* and *Chabon*, which are titled *IN RE OPENAI CHATGPT LITIGATION*

The New York Times Company v. Microsoft Corp. et al.

- Lawsuit regarding use of **NYT news articles and other content** as training data for GPT models (SDNY)

- Defendants are Microsoft and various OpenAI entities

- **Copyright infringement** (direct, vicarious, and contributory), **DMCA, unfair competition, trademark dilution** (re: hallucination)

- NYT provides various examples of outputs from GPT models that are allegedly verbatim or near-verbatim copies of NYT content
  - GPT chat outputs and "synthetic search" results, e.g., Bing Chat search engine

- NYT also alleges lost revenues from affiliate referrals from Wirecutter recommendations, and that hallucinated/lower quality content dilutes NYT marks

- Filed December 27, 2023; partial MTDs filed Feb. 26, 2024 and March 4, 2024
- Related to *Authors Guild* case in SDNY

Concord Music Group, Inc. et al v. Anthropic PBC

- Putative class action on behalf of **music publishers** regarding use of **lyrics** as training data for "Claude" GenAI models (M.D. Tenn.)

- **Copyright infringement** (direct, contributory, and vicarious) and **DMCA**

- Music publishers allege that models are trained on data sets that include copyrighted lyrics and thus models and outputs infringe

  - Allege that even when not directly prompted to recite lyrics, famous lyrics are still included in outputs (specific song examples like *American Pie*)
  - Allege existing market for licensing of song lyrics

- Filed October 18, 2023
- Publishers **moved for PI** on November 16, 2023
- Anthropic filed MTD November 22, 2023
- PI/MTD briefing concurrent through February 2024
- Parties requested oral argument and/or evidentiary hearing

Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc.

- Owner of Westlaw legal research service (Thomson Reuters) sued ROSS in 2020 (D. Del.) for copying large amount of **legal case summaries** and other copyrighted content to build an AI-powered competitor to Westlaw

- ROSS allegedly **induced** a third-party Westlaw licensee to copy the content and provide it to ROSS, after Westlaw refused to grant ROSS a license

- Alleged **copyright infringement** and **tortious interference with contracts**

- Both parties moved for **summary judgment in 2023** – fair use is a primary issue

- **In September 2023, court mostly denied motions for SJ** regarding copyright infringement and fair use, but flagged key factual/legal issues for jury

- Jury trial on copyright issues set for **August 2024**

# Copyright infringement v. fair use

Fair use balances four factors:

(1) the purpose and character of the use [commercial/transformative],
(2) the nature of the copyrighted work,
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
(4) the effect of the use upon the potential market for the copyrighted work.

17 U.S.C. § 107.

Fair use is a mixed question of law and fact
- Application of the test is primarily legal, but it requires determination of subsidiary factual questions about the copying and/or the marketplace
  - Highly fact-intensive and case-specific

Copyright infringement v. fair use
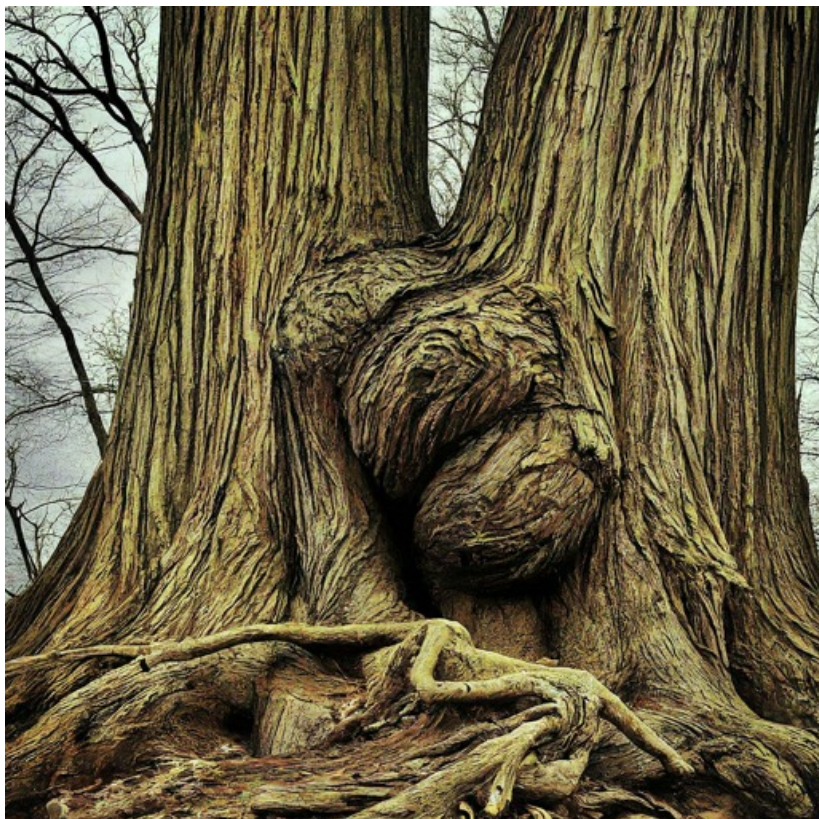
INPUT ←→ OUTPUT

1ST FACTOR ←→ 4TH FACTOR

Thaler v. Perlmutter et al.

- **APA** challenge to **U.S. Copyright Office's refusal to register AI-generated artwork** (D.D.C)

- Plaintiff's "Creativity Machine" AI system listed as author in copyright application

- Arguing against "**human authorship**" requirement

- On August 18, 2023, court granted USCO's motion for SJ

- Court held that work created entirely "autonomously" by AI program lacks a human author and is not copyrightable

- Appeal to DC Circuit pending

In re Théâtre D'opéra Spatial

- Request for reconsideration of Copyright Office's **refusal to register AI-generated artwork for lack of "human authorship"** (Copyright Office Review Board)

- Claimant used Midjourney to create the image with **600+ iterative prompts**, and Photoshop to alter the image afterwards

- Claimant did not disclaim GenAI image in application

- On September 5, 2023, Review Board upheld the refusal, finding that prompts are not sufficient authorship of the output

- But, post-output alterations, and text prompts themselves, could potentially qualify for protection

FTC guidance...

— The FTC has been very active in putting out blog posts and guidance about consumer protection issues involving AI

- **Do not overstate, understate or discriminate**

- Do not suggest that users *own* outputs if they do not (or fail to warn that users may not own outputs)

- Do not misrepresent (or fail to warn) regarding IP infringement issues

- Do not make "surreptitious, retroactive amendment" to terms of use or privacy policy to allow for AI training

— The FTC is coordinating with other agencies regarding AI risks, including discrimination and bias in algorithms

— Focusing on finances, health, education, housing and employment

FTC lawsuits...

FTC v. Automators LLC et al. (S.D. Cal.) – _PENDING_

- TRO entered August 2023; stipulated PI entered **September 2023**
- Alleges that defendants operated deceptive scheme promising profits from "passive investments" in AI-powered e-commerce stores on Amazon and other platforms, which resulted in over $22 million in harm
    - "We've recently discovered how to use AI tools for our 1 on 1 Amazon coaching program, helping students achieve over $10,000/month in sales!"
    - Defendants' settlements with unhappy customers included onerous non-disparagement clause
    - Section 5 FTC Act, Business Opportunity Rule, Consumer Review Fairness Act

- On Feb. 27, 2024, parties filed Stipulated Order for Permanent Injunction and Monetary Judgment
- Total monetary judgment of over $21 million

For business opportunity sellers, FTC says "AI" stands for "allegedly inaccurate"

Regulatory Enforcement – Areas to Watch

Using AI to defraud the public
- Demonstrations generated by AI

Misrepresentations about the capabilities of AI

AI-generated fake reviews

Lack of transparency about the use of AI

Lack of transparency if advertising in AI

Self-Regulation – Criteria for Success

Clear, meaningful policy objectives;

A dedicated, independent institutional structure to develop and enforce rules;

Clear legal framework underlying the scheme; and

External enforcer – like the FTC – able to act as a cop on the beat to enforce the law effectively.

**Remarks of Sam Levine at the NAD Conference
September 2023**

Self-Regulation

Center for Industry Self-Regulation

AI Principles & Protocols

In June 2023, this Incubator project released self-regulatory Principles for Trustworthy AI in Recruiting and Hiring, which serve as a global baseline standard for the use of AI applications in recruitment and hiring, providing practical and actionable guidance for employers and vendors seeking to leverage AI technology responsibly and equitably.

The Independent Certification Protocols for AI-Enabled Hiring and Recruiting Technologies supplement the Principles by providing employers and vendors a framework for self-certifying compliance with the Principles.

The Incubator working group developed the AI Principles and Protocols with a focus on the following objectives:

- Ensuring systems are valid and reliable.
- Promoting equitable outcomes, with harmful bias managed.
- Increasing inclusivity.
- Facilitating compliance, transparency, and accountability.
- Striving for systems that are safe, secure, resilient, explainable, interpretable, and privacy-enhanced.

PRINCIPLES FOR Trustworthy AI in Recruiting & Hiring

INDEPENDENT CERTIFICATION PROTOCOLS FOR AI-Enabled Hiring & Recruiting Technologies
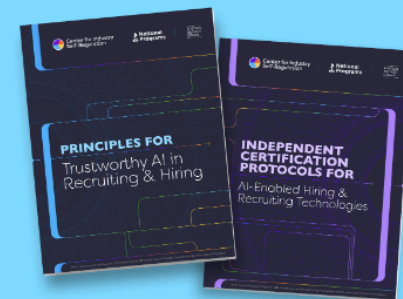
The Principles

The Protocols

FTC investigations…

The Washington Post

Democracy Dies in Darkness

FTC investigates OpenAI over data leak and ChatGPT's inaccuracy

The agency's demand for OpenAI's documents marks the company's greatest U.S. regulatory threat to date

FTC Authorizes Compulsory Process for AI-related Products and Services

FTC Launches Inquiry into Generative AI Investments and Partnerships

Agency Issues 6(b) Orders to Alphabet, Inc., Amazon.com, Inc., Anthropic PBC, Microsoft Corp., and OpenAI, Inc.

Right of publicity / impersonation

FTC fraudulent "impersonation" rulemaking

- **Impersonating businesses and governments**
    - Materially and falsely pose as government entity or officer thereof
    - Materially misrepresent affiliation/endorsement/sponsorship of government entity or officer thereof
    - Materially and falsely pose as business or officer thereof
   - Materially misrepresent affiliation/endorsement/sponsorship of business or officer thereof

- **Impersonating individuals**
    - Materially and falsely pose as business or officer thereof
    - Materially misrepresent affiliation/endorsement/sponsorship of business or officer thereof

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Right of publicity / impersonation

- **Federal Legislation**:

— Movement towards a potential "federal right of publicity" or federal anti-impersonation right, *e.g.*, NO FAKES Act, No AI FRAUD Act

  - President Biden says to "ban AI voice impersonations" in March 2024 State of the Union
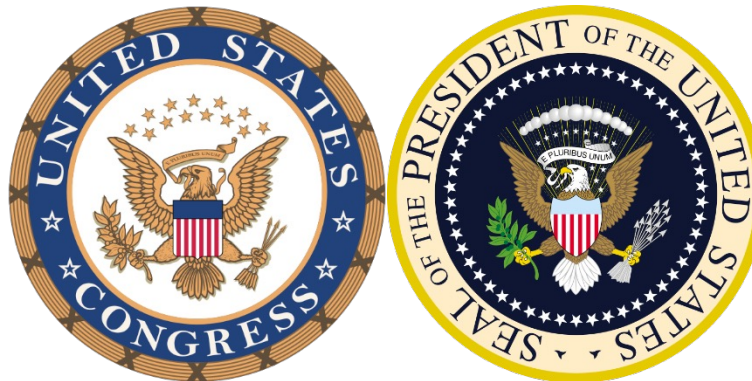
Main Sequence, Ltd. et al v. Dudesy, LLC et al

- Lawsuit on behalf of **estate of comedian George Carlin** regarding use of name, image, voice, likeness, and copyrighted comedy routines as training data for AI-generated posthumous comedy show (C.D. Cal.)

- **California state and common law right of publicity, and federal copyright**

- Filed January 25, 2024; responsive pleading due April 5, 2024
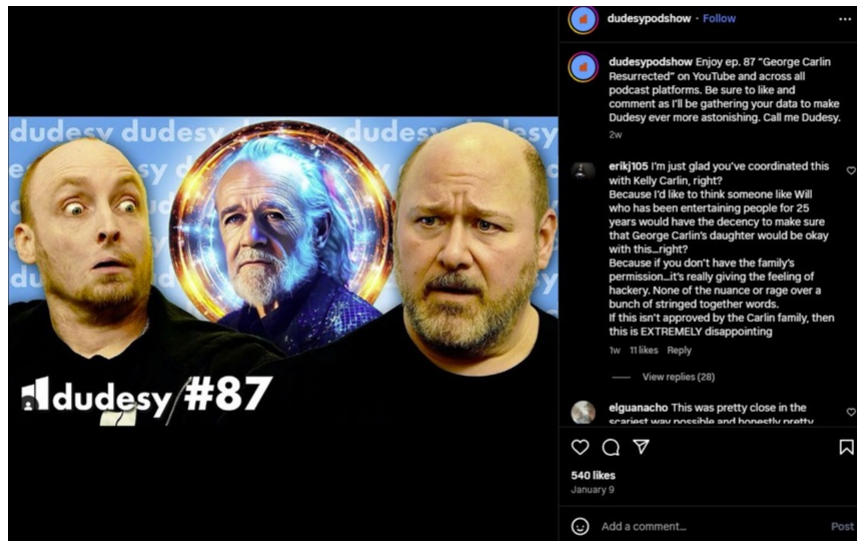
Legislation – State & Local

- **State Legislation**:

  — A number of states have enacted new laws or are considering proposed laws that address AI issues, including with respect to:

    - Data privacy

    - Biometric data

    - Automated decision-making / profiling

    - Discrimination

    - Disclosure of AI use (*e.g.*, in chat bots and other tech)

    - AI safety

- **Local Legislation**:

  — NYC has a new law regarding discrimination in AI automated decision-making for employment – enforcement began July 2023

Securities lawsuits...

D'Agostino v. Innodata et al. (D.N.J.) – _PENDING_

- Putative class action filed Feb. 21, 2024 for **alleged securities fraud based on overstating AI capabilities**

> 2. Innodata is a global data engineering company that purports to be "delivering the promise of AI to many of the world's most prestigious companies." The Company states that it provides AI-enabled software platforms and managed services for AI data collection/annotation, AI digital transformation, and industry-specific business processes.
>
> 3. Throughout the Class Period, Defendants made false and/or misleading statements, as well as failed to disclose material facts, including that Innodata: (1) did not have a viable AI technology; (2) its Goldengate AI platform is a rudimentary software developed by just a handful of employees; (3) it was not going to utilize AI to any significant degree for new Silicon Valley contracts; (4) it was not effectively investing in research and development for AI; and (5) based on the foregoing, Defendants lacked a reasonable basis for their positive statements about Innodata's AI business and development and related financial results, growth, and prospects.

EU AI Act
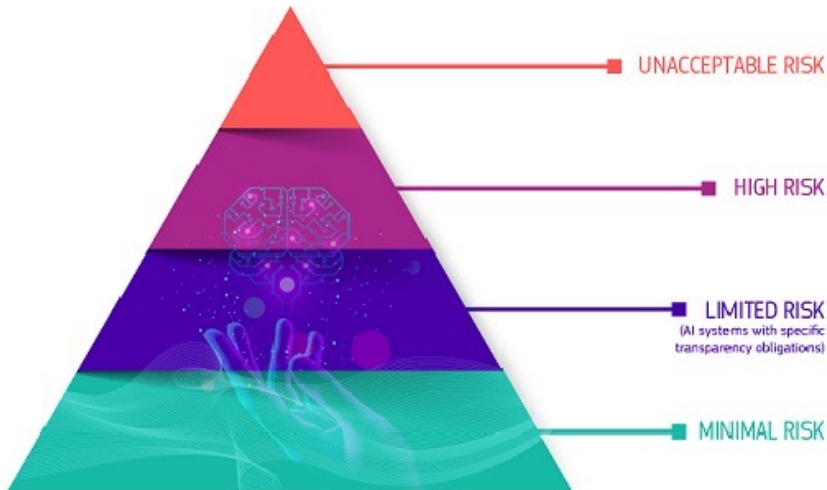
China copyright decisions

- On November 27, 2023, the Beijing Internet Court held that an AI-generated work was copyrightable and infringed in a first instance judgment

- First case involving the copyrightability of images generated by AI in China

- Unclear whether defendant will appeal to the Beijing IP Court

(2023) Jing 0491 Min Chu 11279

China copyright decisions

- On February 8, 2024, the Guangzhou Internet Court held that the outputs of a text-to-image GenAI model infringed the copyright of the Ultraman character

- The defendant was the provider of the "Tab" GenAI model

- Court awarded damages, but rejected request for defendant to delete the copyrighted works from training data because the defendant itself did not train the AIGC model
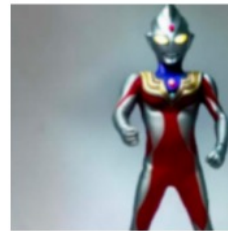
Guangzhou Internet Court (2024) Yue 0192 Min Chu 113.

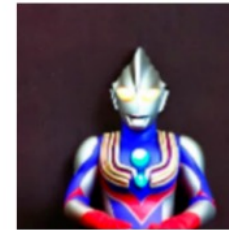The Comparison between Tsuburaya's Ultraman Image and the AIGC Outputs

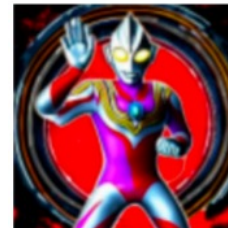"Ultraman Tiga Hybrid Image" owned by Tsuburaya

Pic. 1-8: Screenshots of the AIGC Outputs generated by Tab

Pic. 1

Pic. 2

Pic. 3

Pic. 4

The new reality

Phase 1: "Don't feed our IP and trade secrets to the robot!"

Phase 2: Calibrating risk tolerance and business strategy; vetting enterprise software from trusted vendors; vetting use cases

Robust agreements (IP, data security, reps/warranties, indemnification)

Phase 3???: Every company has its own custom GenAI model leveraging its proprietary data, and every employee relies heavily on custom copilot/agent, etc.

The new reality

- **<u>First steps include</u>:**

  — **Stop-gaps**

  — **Assemble cross-functional team to consider risks and use cases**

  — **Implement employee usage policy and employee training**

  — **Educate vendors**

  — **Update vendor and other agreements**

  — **Monitor and revisit**

AI Resources

— **NIST** (https://airc.nist.gov/AI_RMF_Knowledge_Base)

— **UNESCO** (https://www.unesco.org/en/artificial-intelligence)

DALL-E: "a happy lawyer who just got CLE credit"