Generative Artificial Intelligence: Legal Considerations and Mitigating Risk

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Agenda

- Legal and Regulatory Considerations
- IP Protection
- IP Infringement
- Tips and Takeaways

Legal & Regulatory Considerations

The Basics

All marketing must be…

Truthful and not misleading

Adequately Substantiated

Disclosures must be clear and conspicuous

Advertising Law and AI

- "Using AI tools to trick, mislead, or defraud people is illegal," **said FTC Chair Lina M. Khan**. "The FTC's enforcement actions make clear that there is no AI exemption from the laws on the books. By cracking down on unfair or deceptive practices in these markets, FTC is ensuring that honest businesses and innovators can get a fair shot and consumers are being protected."

- FTC Act and state UDAP Laws

FTC Enforcement – Rytr LLC

AI Generated Endorsements and Testimonials

– Rytr has marketed and sold an **AI "writing assistant"** service for a number of uses, one of which was specifically **"Testimonial & Review" generation**. Paid subscribers could generate an unlimited number of detailed consumer reviews based on very limited and generic input.

– Rytr's subscribers used the service to produce hundreds, and in some cases tens of thousands, of reviews potentially containing false information.

– The complaint charges Rytr with violating the FTC Act by providing subscribers with the means to **generate false and deceptive written content for consumer reviews.** The complaint also alleges that Rytr engaged in an unfair business practice by **offering a service that is likely to pollute the marketplace** with a glut of fake reviews that would harm both consumers and honest competitors.

– The proposed order settling the Commission's complaint is designed to prevent Rytr from engaging in similar illegal conduct in the future. It would bar the company from advertising, promoting, marketing, or selling any service dedicated to – or promoted as – generating consumer reviews or testimonials.

FTC Focus - Virtual Influencers

– Virtual influencers are regulated by the FTC

– An "endorser" includes those who "appear[s] to be an individual, group, or institution."

– Remember:
  – can't misrepresent that an endorsement represents the experience, views, or opinions of users or purported users of the product.
  – Or that an endorser is an actual user, a current user, or a recent user of a product or service.

Shudu Gram is a digital model who rocks Fenty Beauty lipstick. Miquela Sousa is a computer-generated influencer who supports Black Lives Matter and advertises for Prada. Instagram: @shudu.gram, @lilmiquela

Emerging AI Regulatory Frameworks Focus on Disclosure

Nothing, yet, specifically on email marketing.

Colorado AI Act

– Takes effect February 2026

– "Deployers" of "high risk" AI systems must implement reasonable risk management policies, conduct annual impact assessments, and post certain results on their websites.

– Covers AI systems affecting provision or denial to any consumer of, or the cost or terms of: (a) education enrollment or an education opportunity; (b) employment or an employment opportunity; (c) a financial or lending service; (d) an essential government service; (e) health-care services; (f) housing; (g) insurance; or (h) a legal service.

Utah AI Policy Act

– Imposes disclosure obligations for certain interactions between consumers and AI.

– When Gen AI is utilized in the provision of services of "regulated occupations" (e.g., those that require a license or state certification, from accountants and certain financial advisors, to physicians, dentists, and nurses), a prominent disclosure must be clearly and conspicuously provided.

– Those outside of "regulated occupations" must "clearly and conspicuously" disclose the use of generative AI if asked or prompted by a consumer.

Penalties for Unauthorized Commercial Uses

The ELVIS Act – Tennessee

– Any person or company that **knowingly uses or infringes upon the use of an individual's name, photograph, voice, or likeness in any medium for purposes of advertising** products, merchandise, goods, or services or for purposes of fundraising, solicitation of donations, purchases of products, merchandise, goods, or services, without the individual's prior consent, **could be held liable**.

– **Private Right of Action**: Harmed individuals or entities may file civil lawsuits seeking actual damages and any profits from the infringement. This amount may be trebled and include reasonable attorney fees depending on the case.

Breach of Contract

Chatbots can make legally binding commitments (regardless of accuracy)

The Washington Post
Democracy Dies in Darkness

Air Canada chatbot promised a discount. Now the airline has to pay it.

Air Canada argued the chatbot was a separate legal entity 'responsible for its own actions,' a Canadian tribunal said

Text Message and Telemarketing

– Use of synthetic voices in robocalls requires prior express consent.

FCC Confirms that TCPA Applies to AI Technologies that Generate Human Voices

– Applies to text message marketing.

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Class Action Alert!
California Invasion of Privacy Act

Obtaining consent **prior** to using recording technologies is required

Disclosure language should be included **in the feature** and **in the privacy policy**
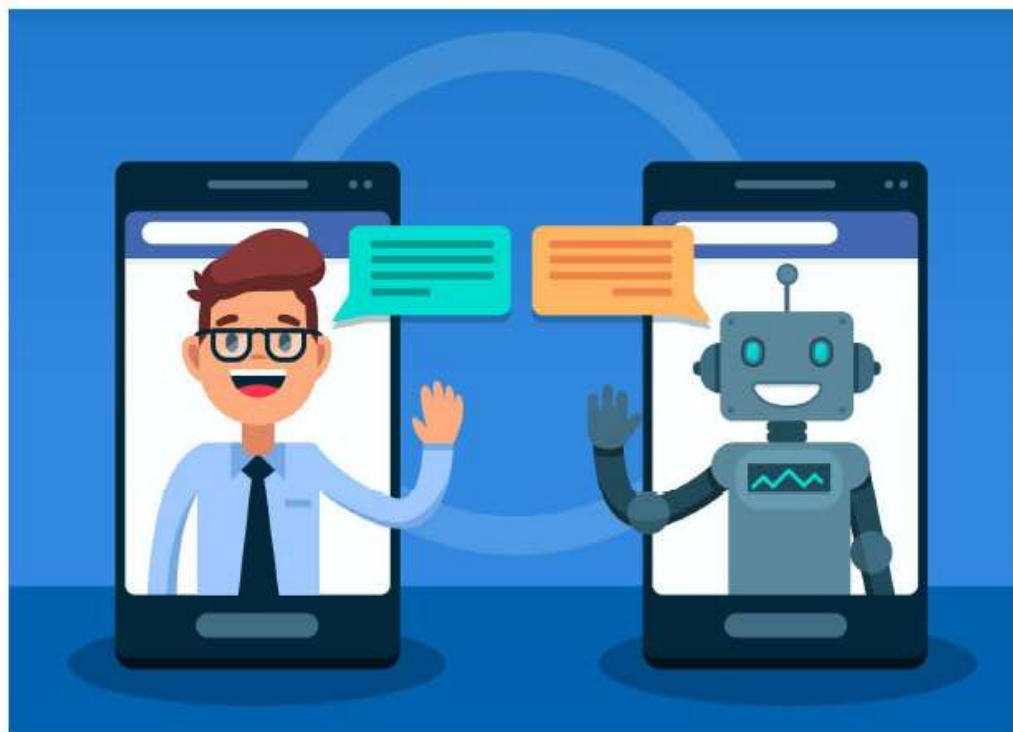
IP Protection

Copyright Protects Only Human Authorship

– The U.S. Copyright Office will ask <mark>whether the 'work' is basically one of human authorship,</mark> with the computer [or other device] merely being <mark>an assisting instrument,</mark> or whether the <mark>traditional elements of authorship</mark> in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.

UNITED STATES COPYRIGHT OFFICE

Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence

PUBLISHED ON THURSDAY, MARCH 16, 2023

16190 FEDERAL REGISTER, VOL. 88, NO. 51

RULES AND REGULATIONS

37 CFR PART 202

ACTION: Statement of policy

SUMMARY: The Copyright Office issues this statement of policy to clarify its practices for examining and registering works that contain material generated by the use of artificial intelligence technology.

DATES: This statement of policy is effective March 16, 2023.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at _meft@copyright.gov_ or telephone at 202–707– 8350.

Scenario 1: Work created entirely by a non-human or machine

No Protection

– Animal

– Autonomously by machine

![ArentFox Schiff logo]

Scenario 2: Work created by AI with significant human direction of the AI tool.

No Protection

– No amount of "**prompting**" can give rise to human authorship.

Scenario 3: Human revises a work created by AI or vice versa

– Case by case.

– But what? The resulting work or only the human contributions?

– Is human responsible for "traditional elements of authorship" (literary, artistic, or musical expression or elements of selection, arrangement, etc.)?
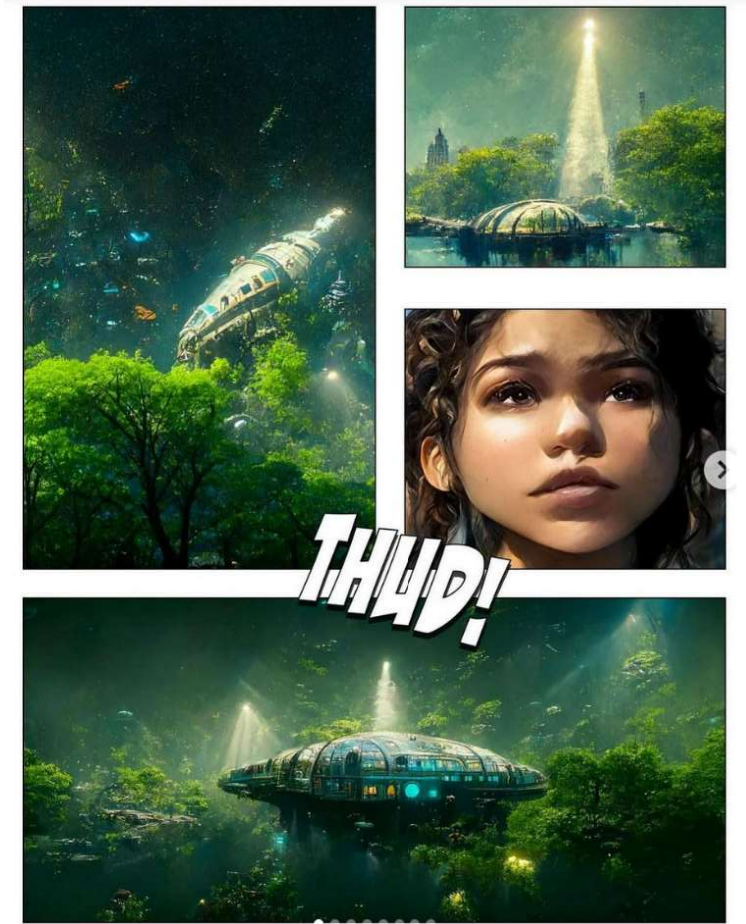
Enough

Not Enough

Smart In Your World

AI-generated content that is more than de minimis must be explicitly excluded from copyright applications.

– Failure to properly disclose can result in loss of copyright protection, including loss of access to federal courts and statutory damages.

Zarya Of The Dawn

IP Infringement

IP Infringement

AI tools sometimes create infringing content

- *Copyright*
- *Trademark*
- Publicity Rights

An original Getty Image (left) & one created by Stable Diffusion (right)

IP Infringement

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Data Scraping and Fair Use

Copyright doesn't protect facts.

- **X Corp. v. Bright Data Ltd.** (N.D. Cal. May 9, 2024)
  - X's claims against data scraping company rejected; preempted by Copyright Act.
  - Key facts:
    - X doesn't hold copyright in user content.
    - Content publicly accessible.
    - No showing of damage.

U.S. Infringement Litigation

– A copyright owner has the exclusive right to make copies of, and derivative works based upon, their work. To the extent a large language model learns from and creates output based upon a copyrighted work, such activities may constitute copyright infringement.

– At least 28 copyright lawsuits are pending in the U.S. against AI companies – most in initial pleading stage or discovery.

- Andersen v. Stability AI
  - Visual artists are bringing suit against Stability AI for using their artwork to train AI models.
  - Defendants' motion to dismiss August 12 - Judge Orrick unpersuaded by D's argument that the "transformative" nature of generative AI outputs renders the activity "fair use" as a matter of law.
- Authors Guild v. OpenAI
  - Several author groups are bringing suit against OpenAI and Microsoft for using their literary works to train AI models.
- Getty Images v. Stability AI
  - Getty Images is bringing suit against Stability AI for using their photographs to train AI models.
- Concord Music Group, Inc. v. Anthropic PBC
  - Several large music publishers are bringing suit against Anthropic for using their lyrics to train AI models.

Takeaways: IP Infringement

- Don't assume anything created by AI is non-infringing or accurate.
- Review resulting works for obvious issues and revise as needed.
- Fine tuning:
  - May help reduce the risk that AI model will produce infringing content.
  - Doesn't solve the copyright **protection** issue.

Tips and Takeaways

More Big Providers Are Offering IP Indemnity

Adobe Firefly

Microsoft

Microsoft announces new Copilot Copyright Commitment for customers

Sep 7, 2023 | Brad Smith, Vice Chair and President, Hossein Nowbar, CVP and Chief Legal Officer

"Specifically, if a third party sues a commercial customer for copyright infringement for using Microsoft's Copilots or the output they generate, we will defend the customer and pay the amount of any adverse judgments or settlements that result from the lawsuit, as long as the customer used the guardrails and content filters we have built into our products."

Vendor Contracts and Website Terms of Use

– Notice and approval for use of AI tools to perform services.

– Prohibitions on scraping and AI training can play a role in deterrence (but challenging to enforce).

a. <u>No Machine Learning, AI, or Biometric Technology Use.</u> Unless explicitly authorized, you may not use content (including any caption information, keywords or other metadata associated with content) for any machine learning and/or artificial intelligence purposes, or for any technologies designed or intended for the identification of natural persons

b. <u>No Metadata Exploitation.</u> Unless expressly authorized, you may not use the caption information, keywords, accompanying text, or other metadata associated with content separate and apart from the content, or allow any third parties to access or use any such information associated with content.

Tips and Takeaways

– Work with a trusted and vetted software developer that will offer indemnity and contractual assurances.

– Ensure that your content is housed in a secure hosting environment or on-premise.

– Don't allow content to be used to train any third-party AI tools or foundational models.

– Understand the ways in which the business is using or wishes to use Gen AI tools and develop a process to direct requests for new tools through legal and IT review.

– Develop an Acceptable Use Policy that takes into account legal risk across key use cases.

– Conduct periodic employee trainings.

– Update template vendor agreements, website terms of use, and other key legal documents that impose restrictions on the use of content in connection with AI training.

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Questions?

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