

# Advertising and Artificial Intelligence: Legal Considerations Amid Ongoing Developments

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# Agenda

- Artificial Intelligence (AI) and the Advertising Industry
- Key Terminology
- “The Input” – Privacy considerations, submission of content, and applicable regulations
- “The Output” – Copyright ownership considerations, IP rights, and IP loopholes
- Best Practices – Thoughtful utilization of AI, and licensing considerations

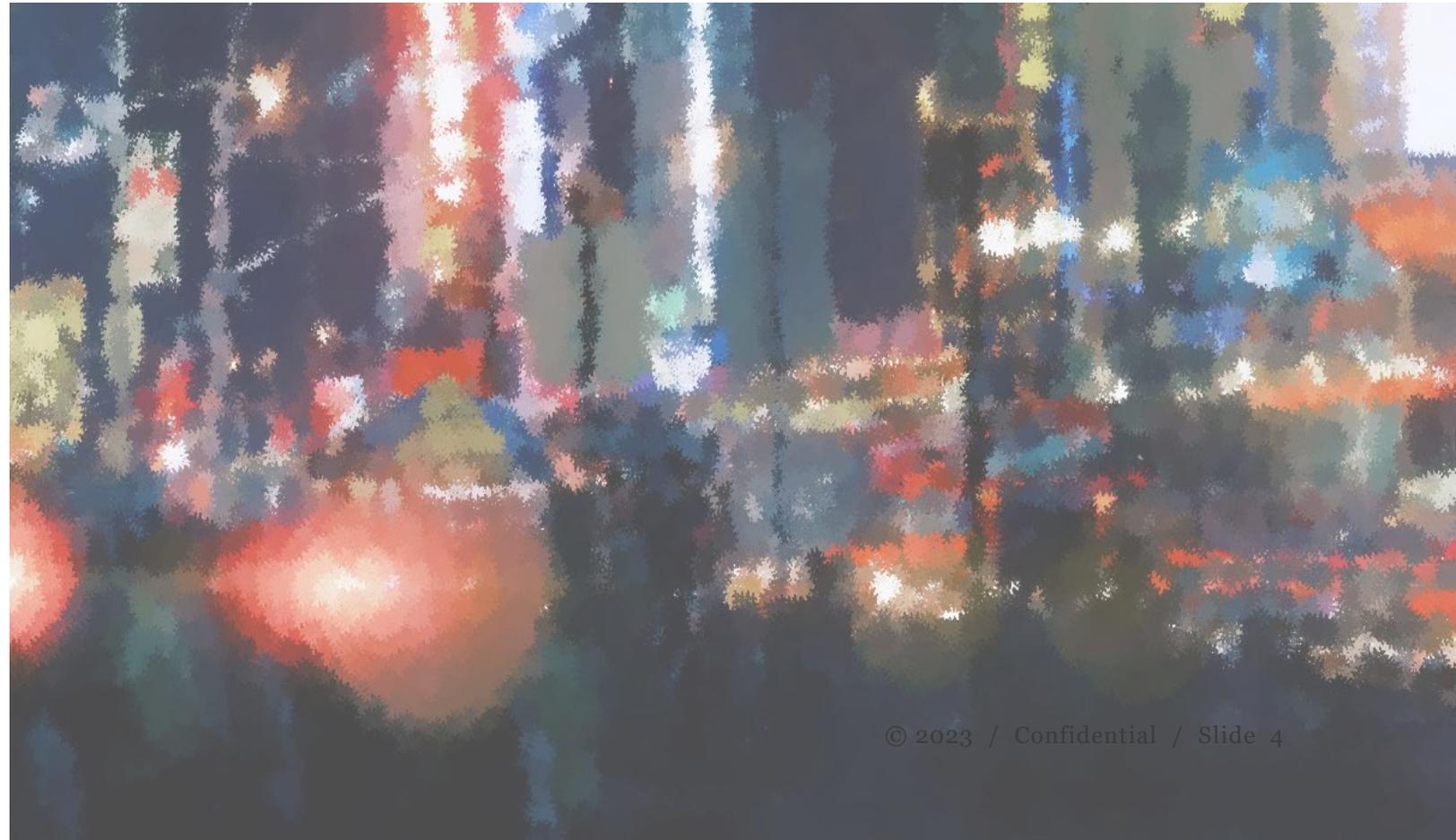
# What is Artificial Intelligence?

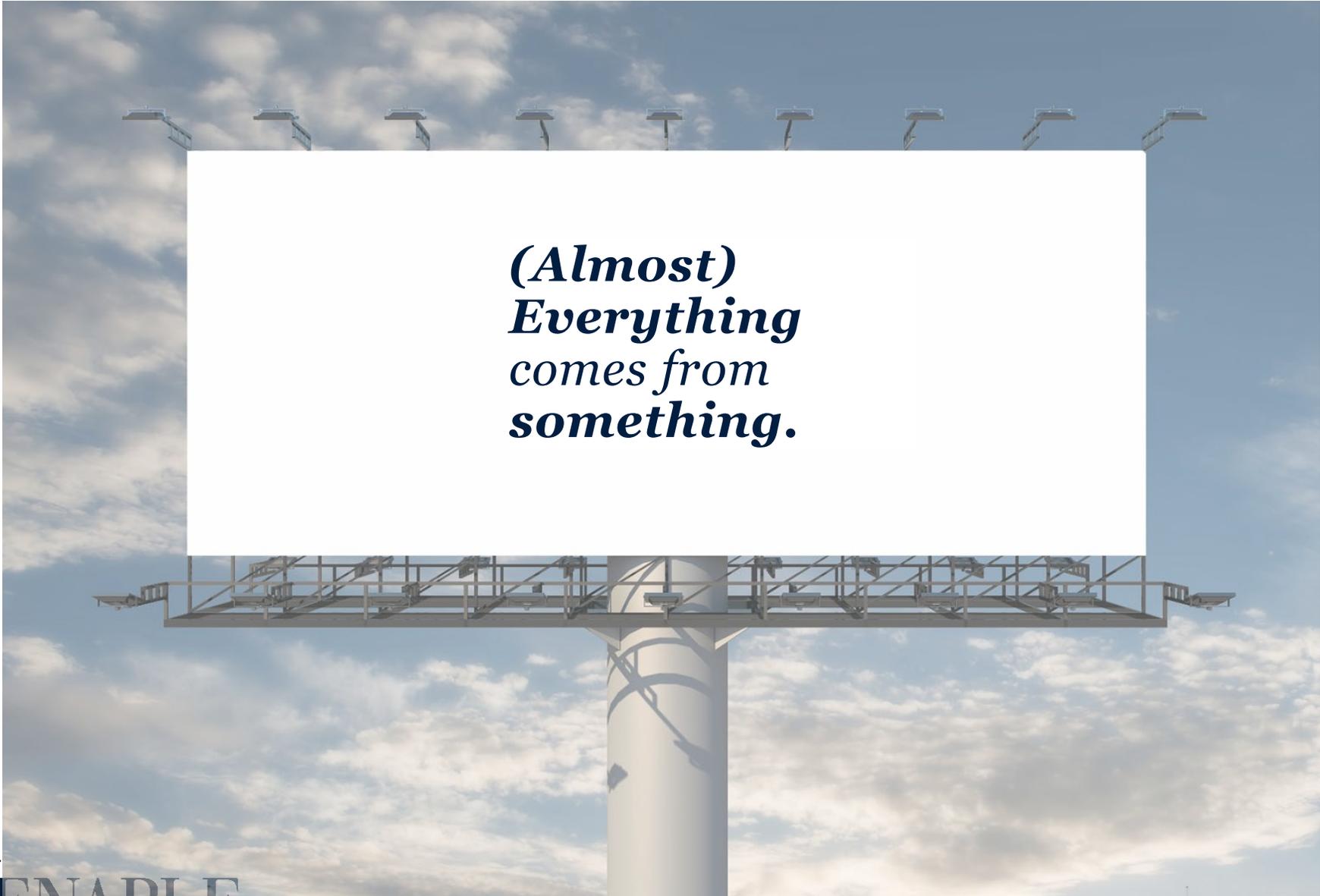
*Artificial Intelligence (AI) (n.): Generally, a type of software that is trained to perform particular tasks, such as drawing conclusions, identifying patterns, and making judgments. Includes image recognition, voice assistance, speech-to-text and language translation, and chatbots.*

# Artificial Intelligence and the Advertising Industry

Developing technology is making it easier to create content faster, including advertisements.

- Efficiency
- Speed
- Easy Information
- On-Trend





***(Almost)  
Everything  
comes from  
something.***

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# Key Terminology

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- **“Generative” AI**: A computer’s ability to use algorithms and training data to “generate” new content in response to user prompts
- **AI Model**: A program that relies on data training and analysis to trace and identify patterns, and make other determinations
- **AI Platform**: The program or application that hosts the AI model technology, and generates output to the user
- **Input(s)**: The content a user submits to the AI platform
- **Output(s)**: The content the user receives from the AI platform
- **Scraping**: Pulling information from one website or platform and placing it into another website or platform in a new format
- **Training Data**: The data, often scraped from online sources, which informs an AI platform as it analyzes input and generates output

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# Part I: “The Input”

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- Data and privacy considerations
- Submission of content
- Applicable laws and regulations

# Data and Privacy Considerations

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Scraping for AI Training



Submission of Data or  
Confidential Information as Input

# Data and Privacy Considerations – Scraping for AI Training

**“Scraping”**: the act of pulling data from one website and placing it into another website in a new format; scraped information may include generated data (such as behavioral “cookie” type data, or information entered by the user (inputs))

- U.S. law does not clarify whether copying material for algorithm training purposes requires permission of the content owner, but it is possible that an AI platform or a user could be liable for infringement. Counterargument is “fair use”
- May present Computer Fraud and Abuse Act, copyright infringement, breach of contract, breach of privacy, or other legal concerns for the person responsible for the data scraping
- Entity responsible for data scraping should also consider domestic and international statutes, such as the California Consumer Privacy Act and the General Data Protection Regulation, as “scraping” could violate these statutes if the scraping involves certain personal information or is not stored or deleted accordingly

# Data and Privacy Considerations – Submission of Data or Confidential Information as Input

Submitting certain information to an AI platform may present privacy risks.

- Compromised trade secret status
- Attorney-client privilege
- Breaches of contract
- Violation of applicable privacy laws



# Submission of Content

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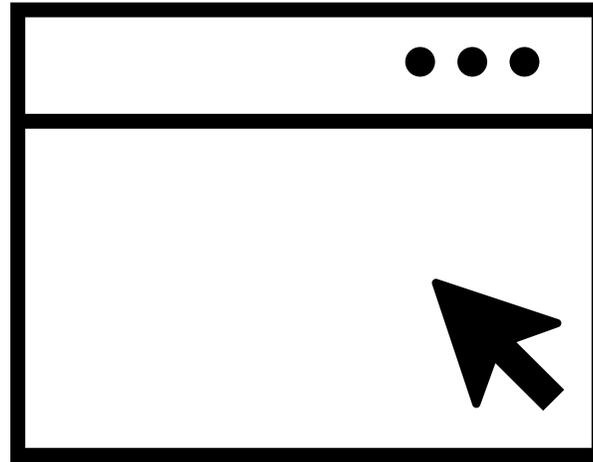


Inputs and IP



Right of publicity concerns

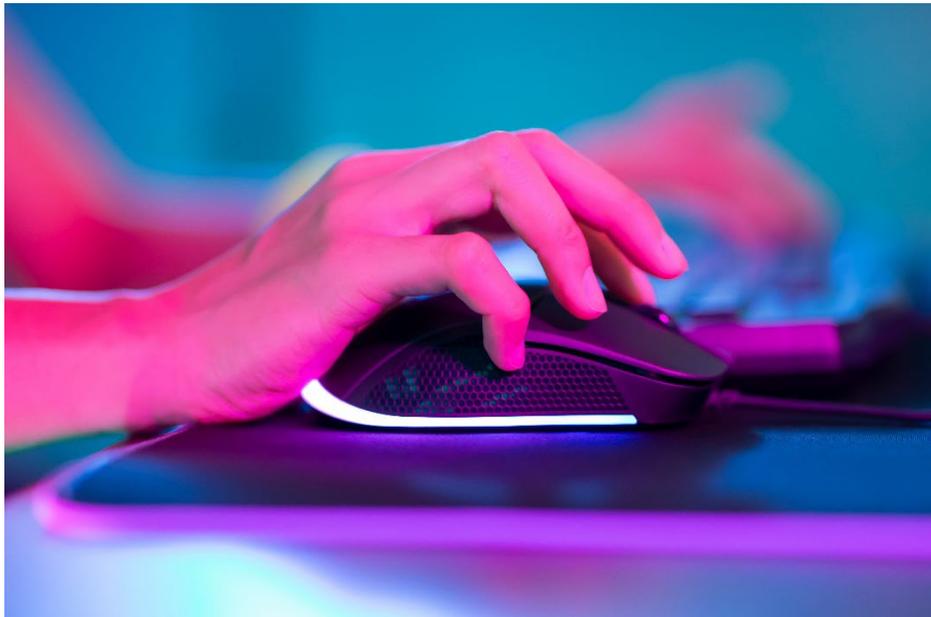
# Submission of Content – Inputs and IP



- Submitted input may inform future output. So, submitting the company's intellectual property to the AI platform opens the risk that the IP is used to inform output for a different user

## Submission of Content – Inputs and IP (cont'd)

- Submitted input may infringe the copyright of the owner of the original content (e.g., submitting a poem, seeking to receive output “in the style of” the poem. Arguably, the output is a derivative work of the original poem.)



# Submission of Content – Right of Publicity Concerns

- Potential right of publicity concerns
- AI has made it easier for users to mimic human appearances and voices in content



# Applicable Laws and Regulations

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Guidance, Policies, and Proposals

# Applicable Laws and Regulations

- The Biden administration, the Copyright Office, the FTC, and other government agencies have published written guidance on practically and safely using artificial intelligence, and on predictions for possible problems AI will present in the coming years.
  - National Institute of Standards and Technology (NIST): Has released the AI Risk Management Framework, which suggests a strategy for organizations to mitigate risk of AI use
  - Copyright Office: Has released registration guidance for works containing AI-generated content
  - Federal Trade Commission: FTC chair has warned of AI's privacy, antitrust, and misinformation risks
  - Consumer privacy law developments may also govern collection of personal information for AI uses – in particular, those laws that permit customers to opt out of or be notified of “automated decision making” uses

## Applicable Laws and Regulations (cont'd)

(Proposed) New  
York 2023 Bill  
Text NY A.B.  
216

(Proposed) New  
York 2023 Bill  
Text NY S.B.  
6859

(Proposed)  
“REAL” Political  
Advertisements  
Act 118 S. 1596

General Data  
Protection  
Regulation  
(GDPR)

California  
Consumer  
Privacy Act  
(CCPA/CRPA)

2021 EU  
Artificial  
Intelligence Act

State Consumer  
Privacy Laws  
(various)

Computer  
Fraud and  
Abuse Act

Other U.S.  
federal and state  
laws

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## Part II: “The Output”

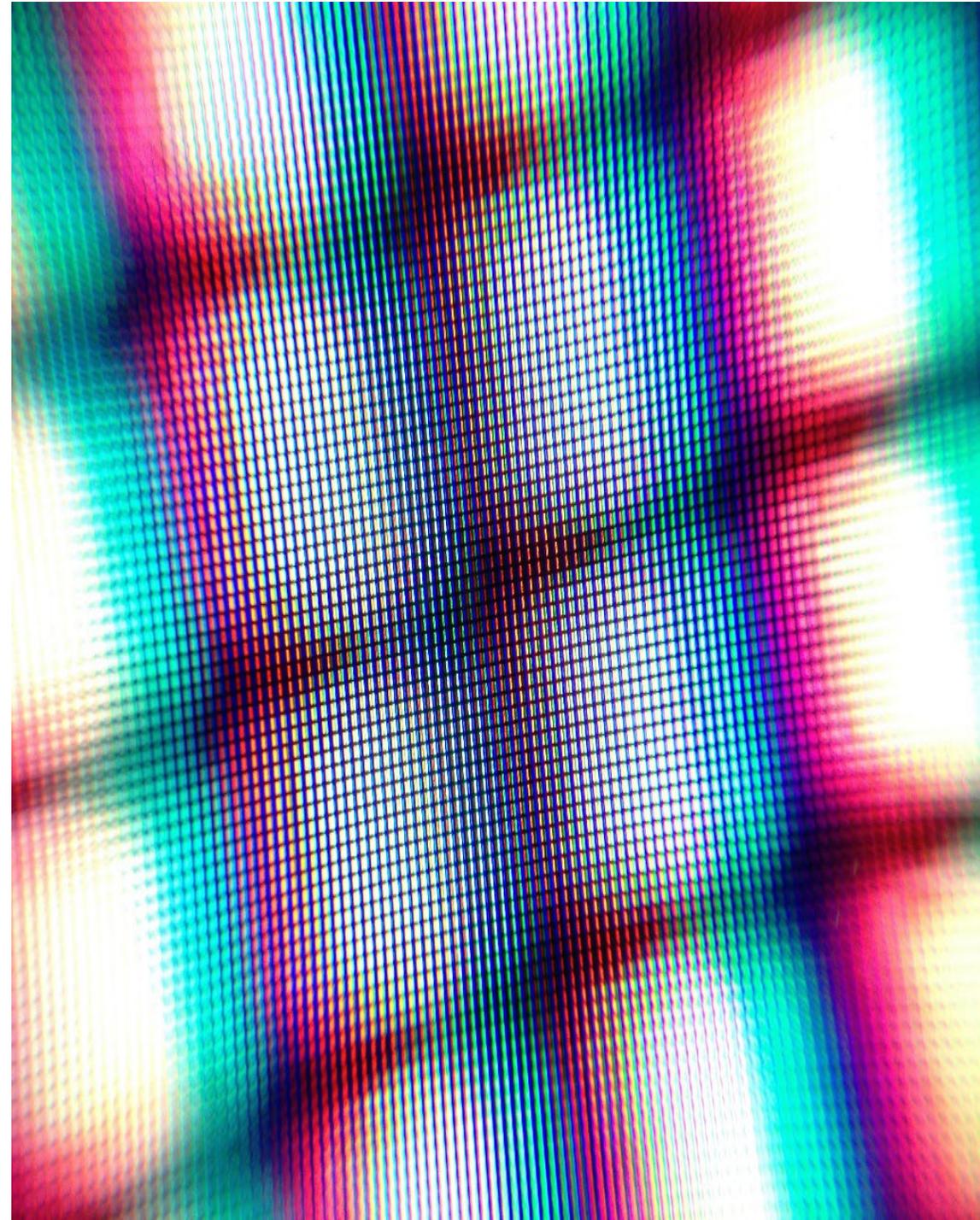
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- Flawed Output
- Copyright Ownership
- Lingering IP Loopholes

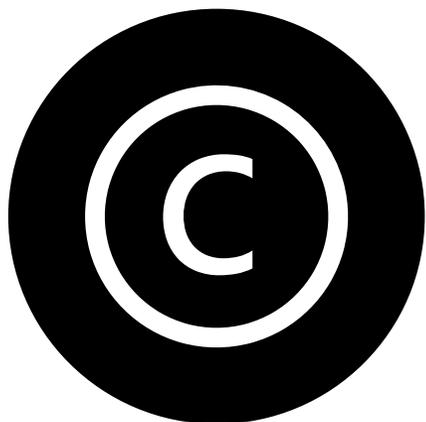
# Flawed Output

**“Hallucination”**: when an AI platform generates false information

- Cannot assume that all information returned as output is accurate
- Output may also be based on outdated information



# Copyright Ownership



- Copyright Office has published guidance on copyrightability of AI-generated works
- Historically, copyrightable works must be the “product of human authorship” or “human creativity”
- If a work includes AI-generated content and human-generated content, the overall work may be copyrightable, whereas the AI-generated content, alone, is not
- Copyright Office is determining ownership of AI-generated works on a case-by-case basis

## Copyright Ownership (cont'd)

- Copyrightability standards for AI-generated works vary by country
- Under the United Kingdom's Copyright Designs and Patents Act of 1988, works created solely by a computer are protectible under copyright for 50 years from the date the work is made. The author of the work is the “person by whom the arrangements necessary for the creation of the work are undertaken.”

# Lingering IP Loopholes

- Causes of action for “stolen” AI-generated works?
- Can a user own output as a “work made for hire”?
- Are outputs derivative works of the works on which the AI model was trained?
- Can the terms of use of the AI platform override U.S. copyright principles?
- Will an AI machine, itself, ever be considered an “author” or “inventor” or receive human-like legal acknowledgment for creative works?



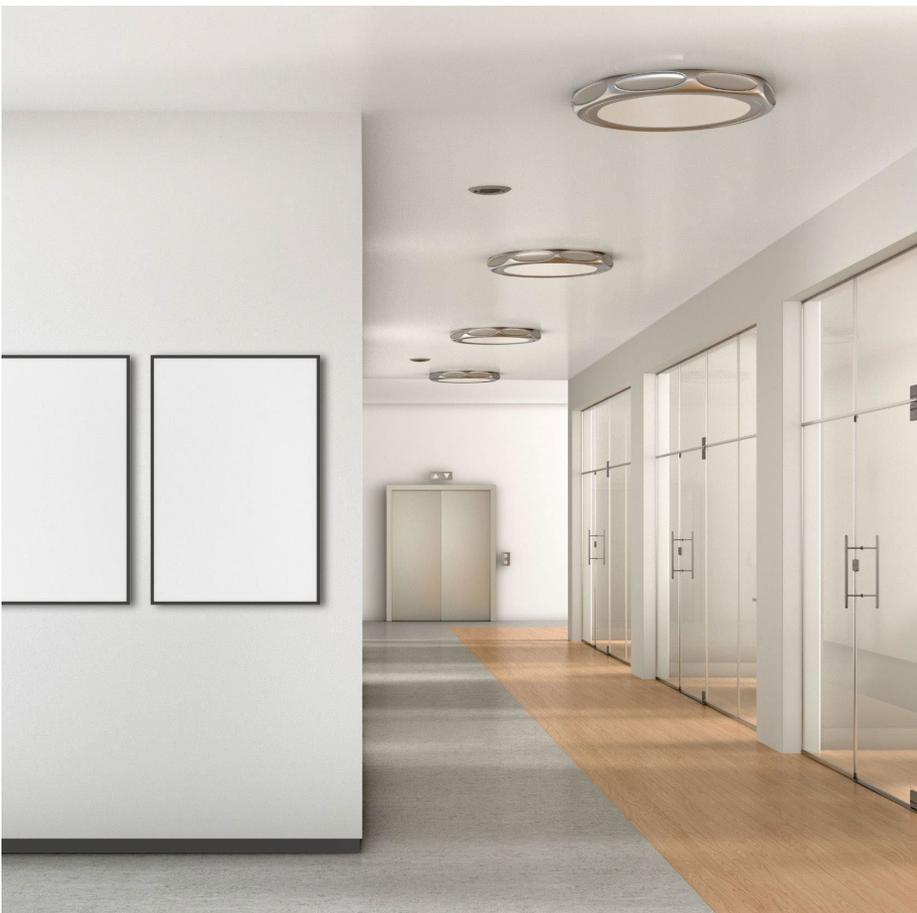


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# Part III: Best Practices

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# Best Practices – General



- Generally, establish policies for AI use by employees
- Stay abreast of data protection laws, and AI-specific legislation developments
- Avoid submitting confidential information or trade secrets to an AI platform
- Review the terms of use/FAQs of the AI platform used by the company to understand the AI platform’s views on ownership and any use restrictions for output
- Review rights associated with any input submitted to an AI platform, and rights that may be associated with any output received, before publishing the output
- “Fact-check” any content generated by AI platforms before publication
- When using artificial intelligence to generate content for another party, disclose that AI has been used in the creation of the content

# Best Practices – Licensing AI Tools

- Most company uses of AI platforms will be subject to a license agreement between the company and the provider of the AI platform
- Company may have negotiating power in dictating the terms of the arrangement



# Best Practices – Licensing AI Tools (cont'd)

Before licensing an AI tool, consider...

- What is the company trying to achieve with the technology?
- What processes will the new technology enable, accelerate, or automate?
- What data sources will need to be integrated, and is that data integration a risk or violation of any confidentiality or contractual obligations?



## Best Practices – Licensing AI Tools (cont'd)

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- How will the licensor ensure privacy and confidentiality of data?
- How is data collected and stored, and what rights will each party have to the data?
- What will happen when the agreement is terminated?
- What will happen when the licensor breaches the agreement?
- What if the AI platform “goes down” unexpectedly?
- Is the licensor’s security adequate for the type of data that is being handled?
- Who is liable for third-party lawsuits?

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***Questions?***

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