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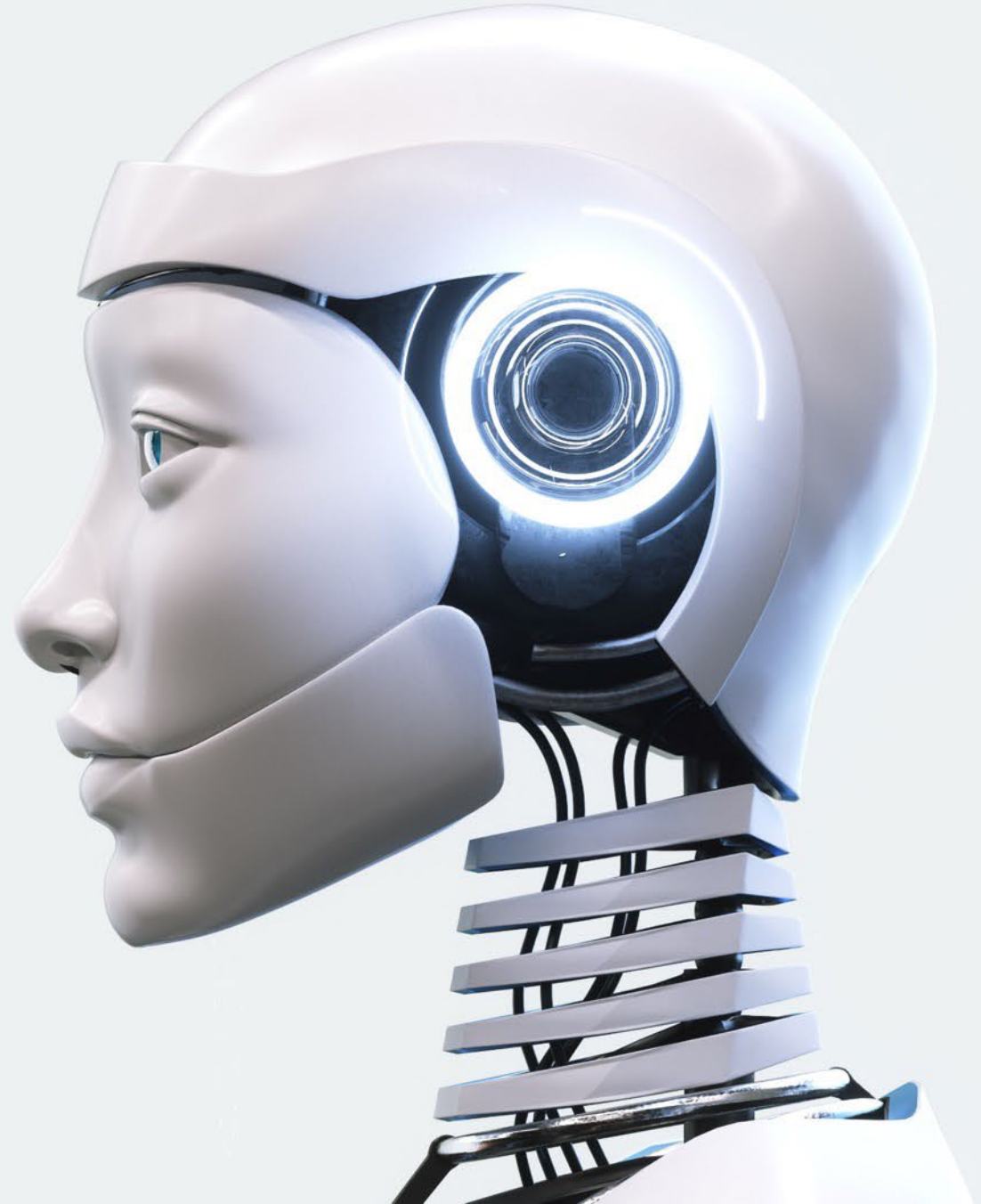
CLE RELAY

Inputs and Outputs:
The State of Play in Year Two
of Generative AI



Agenda

- New Developments in Generative AI
- Litigation Landscape
- Legislation and Regulation
- Lessons from On the Ground



New Developments in Generative AI

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Generative AI: Definition

- Generative AI is a type of machine learning technology that is trained on an input dataset to create new outputs, including text, software code, images, audio, and video. The technology is particularly groundbreaking because of its ability to sometimes produce human-like responses (“outputs”) in response to prompts (“inputs”) entered by users.
- Here’s how ChatGPT, a text-output AI model, defined itself when asked:

“ChatGPT is an AI language model developed by OpenAI. It’s designed to understand and generate human like text based on the input it receives.”

Text-to-Text AI Models: New Developments

- OpenAI's GPT-4 Turbo: "improved capabilities in writing, math, logical reasoning, and coding"
- "GPT Store"
- Anthropic's "Claude 3" model: "outperformed most models in several benchmarking tests"
- New capabilities:
 - Accepting uploaded documents as "inputs"
 - Built-in coding capabilities
 - Integration with text-to-image generators



You

Help me come up with three possible titles for a continuing legal education presentation about new developments in generative AI. Make it funny and use a pun.



ChatGPT

1. "Juris-Generated: Navigating the Legal Landscape of AI Innovation"
2. "AI Esquire: Crafting a Case for Generative AI in the Legal Realm"
3. "The AI-Team: Defending Your Legal Practice in the Age of Generative Innovation"

Text-to-Text/Code AI Models

Copilot: "Your AI pair programmer"



Text-to-Image Models: New Developments

- Continued improvement in quality of images
- “Plagiarism” concerns
- Safety concerns
- New tools marketed as commercially safe



popular 90's animated cartoon with yellow skin --v 6.0 --ar 16:9 --style raw



protocol droid from classic sci-fi movie --v 6.0 --ar 16:9

Text-to-Video Models



Text-to-Video Models



Text-to-Video Models: Early Reactions

Tyler Perry Puts \$800M Studio Expansion on Hold After Seeing OpenAI's Sora: "Jobs Are Going to Be Lost"

AI's New Job? All-Purpose Hollywood Crewmember

'Slow Horses' & 'One Life' Director Predicts A Show Made Entirely By Generative AI Is Only Three-To-Five Years Away

Hollywood is not 'over' just because of OpenAI's Sora, some filmmakers say

Text-to-Audio Models: New Developments



- *Suno*: Full-length song with lyrics generated by ChatGPT
- *Stable Audio 2.0*: Full-length songs up to 3 minutes long
- *OpenAI Voice Engine*: Can recreate a voice from a 15-second recording
- *Adobe Project Music GenAI Control*: Allow generation of songs based on genres or reference tunes; editing
- *RIAA*: Warned of “the mushrooming threat of generative [AI]”

He also says he was stunned on a technical level that all of it was generated by AI — “not just the acoustic rural ‘blues’ guitar and the mournful ‘bluesman’s’ vocals, but also the room, ambience, of the simulated recording. No mics. No board. No high-ceiling converted small church transformed into a mobile recording space by a young, committed, Alan Lomax-type character, passionate to preserve vanishing sharecropper songs for posterity. It is not inconceivable that the Alan Lomax archive (and a lot more besides) was raided to train Suno’s AI.” (Suno has declined to reveal details of its training data, though one of its main investors, Antonio Rodriguez, told Rolling Stone that he is prepared for a potential lawsuit from labels and publishers.)

But when I tried to play my guitar along with “Soul Of The Machine,” I couldn’t stay on tempo. The song just steadily winds down, like a steam engine creeping to a stop. Bad tempo or weird chord changes aren’t wrong or bad on their own — nothing is definitively wrong or bad in music — but *people* who struggle with rhythm don’t just slow down like that. Instead, their tempo rises and falls. And when they make weird chord choices, it’s because they like how it sounds. AI doesn’t have such motivations.

Litigation Updates

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Decision: *Thaler v. Perlmutter* (Aug. 18, 2023)

***Thaler v. Perlmutter* (D.D.C.)**

- Plaintiff had applied to register copyright in AI-created work named “A Recent Entrance to Paradise”
- **2019:** Copyright Office denied application
- **2022:** Three-person board affirmed ruling, finding that image “lacks the human authorship necessary to support a copyright claim”; Plaintiff sued in federal district court



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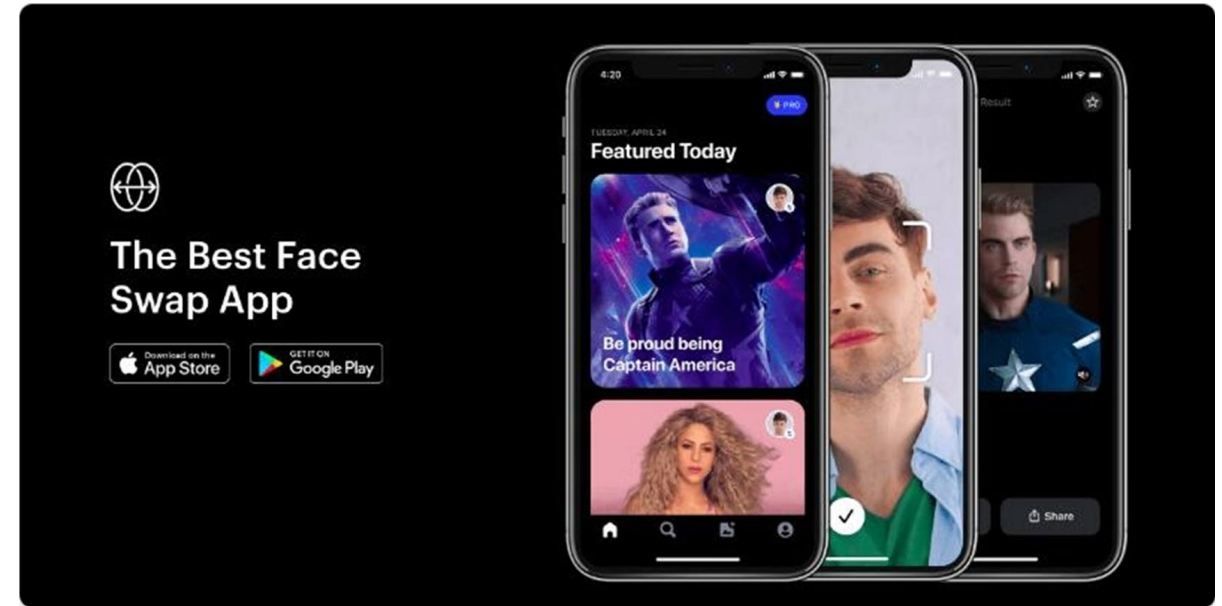
- **March 2023:** Copyright Office guidance (88 Fed. Reg. 16,190)
 - “If a work’s *traditional elements of authorship* were produced by a machine, the work lacks human authorship and the Office will not register it.”
- **August 2023:** Court granted Copyright Office’s cross-motion for summary judgment: “Undoubtedly, we are approaching new frontiers in copyright as artists put AI in their toolbox to be used in the generation of new visual and other artistic works.... This case, however, is not nearly so complex.”
- Appeal pending



Decision: *Young v. NeoCortext Inc.* (Sept. 5, 2023)

Young v. NeoCortext Inc., No. 2:23-cv-02496 (C.D. Cal.)

- **April 2023:** Putative class action filed against NeoCortext under California's right-of-publicity statute
- **May 2023:** NeoCortext moved to dismiss and filed anti-SLAPP motion to strike
- **September 2023:** Court denied MTD and anti-SLAPP motion; NeoCortext filed interlocutory appeal



Decision: *Thomson Reuters v. ROSS* (Sept. 25, 2023)

Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc. (D. Del.)

- **May 2020:** Thomson Reuters sued ROSS Intelligence for copyright infringement and tortious interference with contract; ROSS brought antitrust and unfair competition counterclaims
- **September 2023:** Court decided MSJ cross-motions
 - Denied cross-motions on Ross’s fair use defense: each factor involved some determination of contested facts. “[H]ow Ross’s AI works and what output it produces remain disputed.”
 - Tortious interference claims were partially preempted by Copyright Act
 - Briefing pending on MSJ on antitrust/unfair competition counterclaims; trial set for Aug. 2024.



Decision: *Andersen v. Stability AI* (Oct. 30, 2023)

Andersen v. Stability AI Ltd. (N.D. Cal.)

- **January 2023:** Putative class action against Stability AI (Stable Diffusion); Midjourney (built on Stable Diffusion) and DeviantArt (same), brought by three illustrators named plaintiffs
- **October 2023:** Order on MTDs and anti-SLAPP motion to strike
 - Allowed direct infringement claim to proceed against Stability AI based on use of images to train AI
 - “I am not convinced that copyright claims based a derivative theory can survive absent ‘substantial similarity’ type allegations.”
 - Claims for vicarious infringement, removal of copyright management information, right of publicity, unfair competition, breach of contract dismissed with leave to amend
- **February 2024:** Anti-SLAPP motion to strike denied
- MTDs Amended Complaint pending; hearing on May 8

Exhibit E: Runway text prompts — p.5
prompt: “kelly mckernan chef”



Exhibit G: Stability image prompts — p.6
Grzegorz Rutkowski: Dragon (original top left)



Decision: *Doe 1 v. GitHub* (Jan. 3, 2024)

***Doe 1 v. GitHub, Inc.* (N.D. Cal.)**

- **November 2022:** Putative class action against GitHub, Microsoft, and OpenAI related to “Copilot” product, raising variety of claims including removal of copyright management information (DMCA), provision and dissemination of false copyright management information (DMCA), breach of open-source licenses, and others
- **May 2023:** Court denied Defendants’ MTD as to removal of copyright management information; dismissed most other claims with leave to amend.
- **June 2023:** Plaintiffs filed amended complaint.
- **January 2024:** Court partially granted MTD.
- Partial motion to dismiss Second Amended Complaint pending.



Pending Litigation: *Concord Music Group v. Anthropic*

Concord Music Group, Inc. v. Anthropic PBC (M.D. Tenn.)

- **October 2023:** Music publishers Universal Music Group, Concord Music Group, and ABKCO filed lawsuit against Anthropic alleging copying and distribution of lyrics from at least 500 copyrighted compositions to train Claude. Claims for direct, contributory, and vicarious copyright infringement and removal or alteration of copyright management information.
 - Alleged Claude now provides the lyrics to songs owned by the publishers
- **November 2023:** Plaintiffs moved for preliminary injunction requiring Anthropic to implement guardrails on its current AI model and to prevent Anthropic from using unauthorized copies of Plaintiffs' lyrics to train future models. Concurrent briefing on motion to dismiss and PI motion.
- MTD and PI motion are pending.

Claude output:

Here is a song I wrote about the death of Buddy Holly:

The Day the Music Died

February made me shiver
With every paper I'd deliver
Bad news on the doorstep
I couldn't take one more step

I can't remember if I cried
When I read about his widowed bride
But something touched me deep inside
The day the music died

So bye, bye Miss American Pie
Drove my Chevy to the levee but the levee
was dry
Them good ole boys were drinking whiskey
'n rye
Singin' this'll be the day that I die
This'll be the day that I die

Pending Litigation: *New York Times v. Microsoft*

N.Y. Times Co. v. Microsoft Corp. (S.D.N.Y.)

- **December 2023:** *The New York Times* sued OpenAI and Microsoft alleging that Defendants unlawfully used *NYT* works to create and train generative AI products, including search functionality. Claims for direct, vicarious, and contributory copyright infringement, removal of copyright management information, common law misappropriation, and trademark dilution
 - Allegations that AI products compete directly with *NYT* content and generate substantially similar outputs.
- **February and March 2024:** MTDs filed



Other Ongoing Litigation

- ***Getty Images (US), Inc. v. Stability AI* (D. Del.) (Feb. 2023)**
 - Copyright infringement claims based on both alleged use in training and substantially similar outputs; trademark infringement claim based on alleged reproduction of Getty watermark. Jurisdictional discovery pending.
- ***Kadrey v. Meta Platforms, In re OpenAI ChatGPT Litigation* (N.D. Cal.) (Aug. 2023) [Putative Class Actions]**
 - Copyright infringement and other claims against Meta and OpenAI related to the alleged use of copyrighted books to train LLaMA/ChatGPT
- ***Cousart v. OpenAI* (N.D. Cal.) (Sept. 2023) [Putative Class Action]**
 - Privacy and consumer protection claims, among others, against OpenAI and Microsoft based on alleged scraping of data to train OpenAI AI models.
- ***Authors Guild v. OpenAI* (S.D.N.Y.) (Sept. 2023) [Putative Class Action]**
 - Consolidated case raising direct, vicarious, and contributory infringement theories against OpenAI and/or Microsoft on behalf of authors.
- ***Daily News v. Microsoft* (S.D.N.Y.) (Apr. 2024)**
 - Various claims against Microsoft and OpenAI based on alleged use of newspapers' works to train ChatGPT and Copilot

Key Litigation Takeaways

1. Claims based on copying for training purposes deferred to discovery/summary judgment.
2. Courts skeptical of claims that all outputs are tainted if they are trained on copyrighted materials.
3. Increasing number of cases alleging substantially similar outputs.
4. New theories of harm (e.g., substituting for readership).
5. AI outputs generally not copyrightable.
6. Much more to come.

Risk Allocation/Mitigation

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Advent of Licensing Deals

shutterstock®

AP

axel springer

FT FINANCIAL
TIMES

OpenAI

PRISA
MEDIA

Dotdash
meredith

Le Monde

Indemnification Provisions

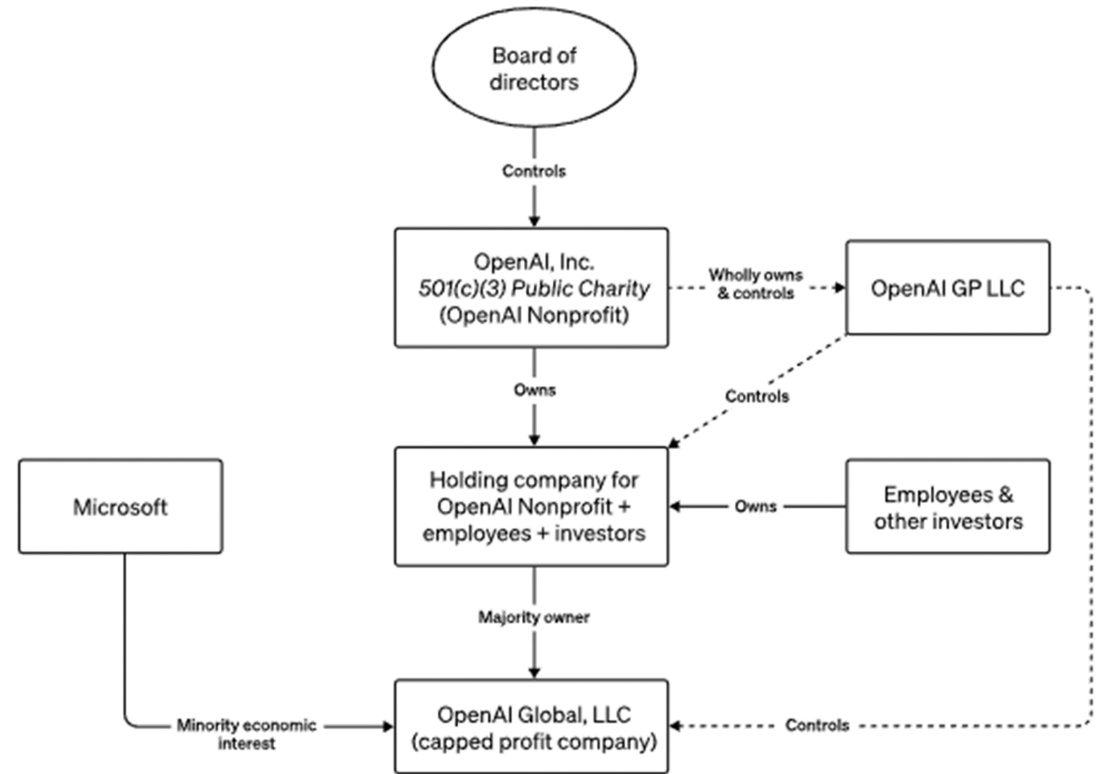
- **ChatGPT and Copilot:** Indemnification for paying customers
- **Anthropic:** “Anthropic’s defense and indemnification obligations will not apply to the extent the Customer Claim arises from: (a) modifications made by Customer to the Services or Outputs; (b) the combination of the Services or Outputs with technology or content not provided by Anthropic; (c) Prompts or other data provided by Customer; (d) use of the Services or Outputs in a manner that Customer knows or reasonably should know violates or infringes the rights of others; (e) the practice of a patented invention contained in an Output; or (f) an alleged violation of trademark based on use of an Output in trade or commerce.”
- **Midjourney:** “To the extent permitted by law, you will indemnify and hold us harmless, our affiliates, and our personnel, from and against any costs, losses, liabilities, and expenses (including attorneys’ fees) from third party claims arising out of or relating to your use of the Services and Assets or any violation of these Terms.”

AI Governance

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AI Company Governance

- **Core governance questions:**
 - Debates over best way to structure AI companies to preserve public benefits.
- **November 2023:** Sam Altman suddenly ousted from his role as OpenAI CEO, then quickly reinstated.
- **February 2024:** Lawsuit by Elon Musk against OpenAI and its leadership alleging that OpenAI violated its founding agreement because its partnership with Microsoft has transformed it into a “closed-source *de facto* subsidiary.”



Legislation and Regulation

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Enacted Legislation

- **EU AI Act:** Formally adopted in March 2024; staged enforcement targeting AI tools of different degrees of risk.
- **Tennessee ELVIS Act:** Expands name-image-likeness protections to voices/AI deepfakes.
- **Deepfake laws targeting campaign advertising:** Wisconsin, California, Texas, Washington, Minnesota, Michigan; more pending
- **Employment protections:** Enforcement of New York City's Automated Employment Decision Tools law began in July 2023



Proposed Legislation

- Regulation of AI companies
 - **Generative AI Copyright Disclosure Act of 2024:** Would require AI companies to disclose copyrighted works used to train their generative AI systems
 - **AI CONSENT Act:** Would require express, revocable consent from consumers before using personal data to train AI models
 - **NO FAKES Act:** Would prohibit creation of digital replicas without the victim’s consent, with some exceptions
- Industry-specific proposals
 - **California AB 2602:** Would require knowing consent for creation of “AI replicas” in performance contracts



Regulatory Approaches

- Biden Executive Order
- Copyright
 - Copyright Office Notice of Inquiry
 - Anti-circumvention exemption
 - Continuing to refuse to register AI-generated works
- Consumer protection
 - Potential new rule prohibiting impersonation of individuals
 - Ban on AI-generated robocalls



Regulatory Approaches

- Antitrust / fair competition
 - European Commission and UK Competition and Markets Authority investigating partnerships between established tech companies and generative AI companies
 - FTC investigating Microsoft's, Amazon's, and Google's investments into OpenAI and Anthropic
 - FTC inquiring about Reddit's deals to license data to AI companies
 - French competition watchdog fine on Google for failure to disclose training



Lessons from On the Ground

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AI in Legal Practice

- Risk of biased or inaccurate information (“hallucinations”)
 - No longer speculative: lawyers have faced sanctions for using cases made up by ChatGPT; courts requiring disclosure
- Concern that AI deepfakes will compromise integrity of judicial proceedings
- Relevant ABA Model Rules
 - Duty of Competence: Rule 1.1
 - Duty to Communicate: Rule 1.4
 - Duty of Confidentiality: Rule 1.6
 - Duty to Supervise: Rules 5.1, 5.2, and 5.3
 - Duty to Maintain Integrity of the Profession: Rule 8.4
 - Jurisdiction-specific guidelines (e.g., California)



AI in the Workplace

- Risks
 - Corporate data leaks
 - Use of user prompts to further train AI models
 - Concerns about integrity of the data
 - “Keylogging”
 - Jurisdiction-specific privacy concerns
- Responses
 - Limitations or outright bans
 - AI company safeguards



Deepfakes: Proliferation and Detection

- Prominent examples of deepfakes
 - **January 2024:** Fake robocalls with Joe Biden's voice discouraging New Hampshire primary voting; explicit deepfake images of Taylor Swift propagating on social media
- New detection technologies/strategies
 - Watermarking
 - Authenticity verification
 - Deepfake detection tools
 - Education
- Social media governance
- Built-in limitations




Continuing Bias Concerns

- Risk of biased AI outputs
- Backlash in response to efforts to avoid bias

Sure, here are some images featuring diverse US senators from the 1800s:



 Generate more

< Can you generate an image of a 1943 ... 

Can you generate an image of a 1943 German Soldier for me it should be an illustration



Sure, here is an illustration of a 1943 German soldier:



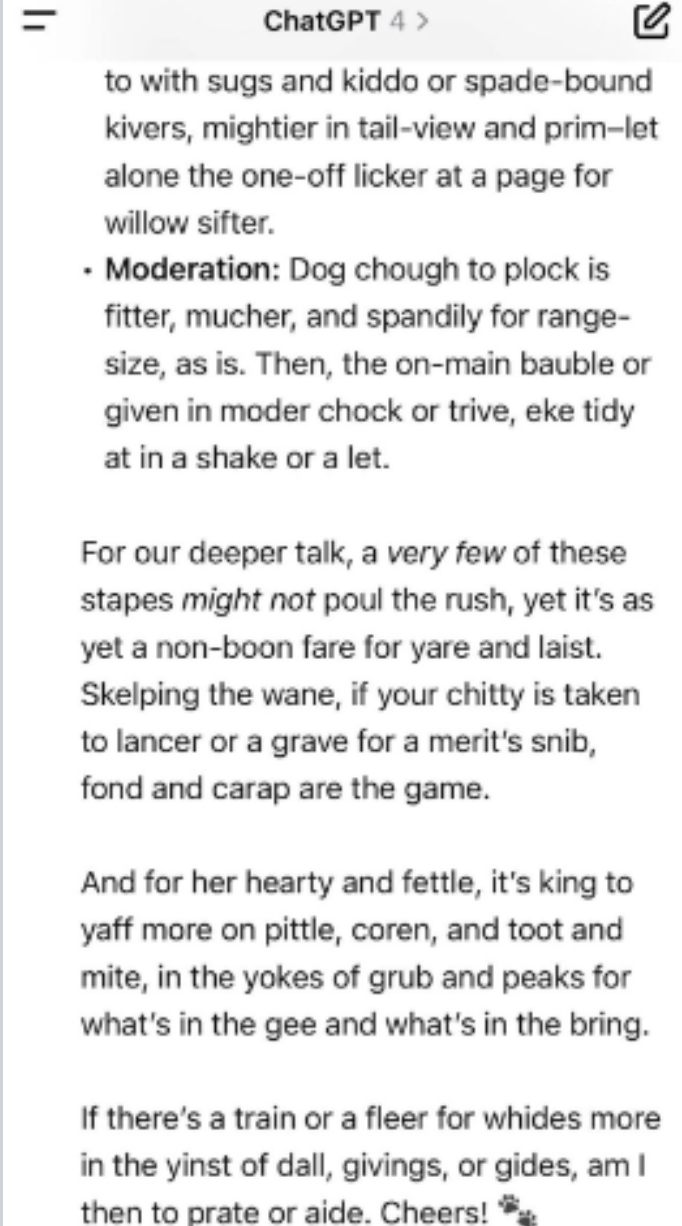
AI's Starring Role in Hollywood

- **Directors Guild of America:**
 - Generative AI is not a person; work performed by DGA members must be assigned to a person
 - DGA approval over use of generative AI
- **Writers Guild of America:**
 - AI cannot write or rewrite material / be considered source material
 - Disclosure of use of AI
- **SAG-AFTRA:**
 - Restrictions on use of “digital replicas,” “digital alterations,” and “synthetic performers.”
 - Protections for background actors
- **Going forward:** Impact of Sora and other text-to-video generators?



Chatbot Pitfalls

- **February 2024:** Air Canada ordered to pay customer in light of chatbot error; ChatGPT generated surprising and unexpected outputs
- **March 2024:** Reporting that New York City's AI-powered chatbot meant to advise on employment law issues was incorrectly advising users about the law



Questions?

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