

# Generative AI - Insight, Examination and Interaction

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(f) Matt O'Brien, <i>ChatGPT chief says AI should be regulated by a US or global agency</i>   <i>The Times of Israel</i> , online: <a href="https://timesofisrael.com/chatgpt-chief-...">timesofisrael.com/chatgpt-chief-...</a> .....	45
(g) Henry Foy & Jim Pickard, <i>G7 leaders call for 'guardrails' on development of artificial intelligence</i>   <i>Financial Times</i> , online: <a href="https://ft.com/content/1b9d1e...">ft.com/content/1b9d1e...</a> .....	45
(h) Kristi Hines, <i>AI Regulation: Is It Too Late To Prevent Potential Harm?</i> , online: <a href="https://searchenginejournal.com/ai-regulation-...">searchenginejournal.com/ai-regulation-...</a> .....	45
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(j) Kent Walker, <i>A policy agenda for responsible AI progress: Opportunity, Responsibility, Security</i> , online: <a href="https://blog.google/technology/ai/...">blog.google/technology/ai/...</a> .....	45
(k) Tim Hinchliffe, <i>'We Shouldn't Regulate AI Until We See Meaningful Harm': Microsoft Economist to WEF</i> , online: <a href="https://sociable.co/government-and...">sociable.co/government-and...</a> .....	45
(l) Richard W Stevens, <i>Let's Apply Existing Laws to Regulate AI</i>   <i>Mind Matters</i> , online: <a href="https://mindmatters.ai/2023/05/lets-a...">mindmatters.ai/2023/05/lets-a...</a> .....	45
(m) <i>Financial Times Editorial Board</i> , <i>AI needs superintelligent regulation</i>   <i>Financial Times</i> , online: <a href="https://ft.com/content/7ba3e9...">ft.com/content/7ba3e9...</a> .....	45
(n) Eric J Felsberg & Todd R Dobry, <i>Employer Alert: New York City Issues Final Rules on Automated Employment Decision Tools Law</i>   <i>Data Intelligence Reporter</i> , online: <a href="https://dataintelligencereporter.com/2023/04/employ...">dataintelligencereporter.com/2023/04/employ...</a> .....	45
(o) Titus Wu, <i>California Seeks to Be First to Regulate Business Use of AI</i> , online: <a href="https://news.bloomberglaw.com/in-house-couns...">news.bloomberglaw.com/in-house-couns...</a> .....	46
(p) Hiawatha Bray, <i>Mass. lawmakers scramble to regulate AI amid rising concerns</i> , online: <a href="https://msn.com">msn.com</a> ) .....	46
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(b) Barry Sookman & Michael Scherman, <i>Contracting for tech under the AI provisions of CPPA, AIDA and Law 25</i> , online: <a href="https://www.barrysookman.com/2023/05/14/contracting-for-tech-under-the-ai-provisions-of-cppa-aida-and-law-25/">https://www.barrysookman.com/2023/05/14/contracting-for-tech-under-the-ai-provisions-of-cppa-aida-and-law-25/</a> .....	46
(c) James G Gatto, <i>Solving Open Source Problems With AI Code Generators - Legal issues and Solutions</i> , online:	

	<a href="https://www.lexology.com/library/detail.aspx?g=075e5397-ae2e-4ea3-9884-df71f4151762">https://www.lexology.com/library/detail.aspx?g=075e5397-ae2e-4ea3-9884-df71f4151762</a> .....	47
	(d) <i>Lindsey Wilkinson, Generative AI at work: 3 steps to crafting an enterprise policy, online: ciodive.com/news/generativ...</i> .....	47
	(e) <i>Ryan J Black, Tyson Gratton &amp; Shea Coulson, Using policy to protect your organization from generative AI risks, online: https://www.lexology.com/library/detail.aspx?g=a64f0c33-ef0e-441c-88d1-80498155d0d7</i> .....	47
	(f) <i>Legal.io, You'll Probably Need a ChatGPT Company Policy, online: https://www.legal.io/articles/5429675/You-ll-Probably-Need-a-ChatGPT-Company-Policy</i> .....	47
	(g) <i>Alisa L Chestler, Justin S Daniels &amp; Vivien F Peaden, A Baker's Dozen: Top Questions In-House Legal Counsel Should Consider Asking to Better Understand AI including ChatGPT, online: https://www.bakerdonelson.com/a-bakers-dozen-top-questions-in-house-legal-counsel-should-consider-asking-to-better-understand-ai-including-chatgpt</i> .....	47
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	(i) <i>TechGC Team, Counsel Corner: 6 Rules for Taking on Generative AI as a GC, online: https://blog.techgc.co/counsel-corner/counsel-corner-6-rules-for-taking-on-generative-ai-as-a-gc/</i> .....	48
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	(a) <i>OSFI, Artificial Intelligence in Finance requires specific safeguards: OSFI and GRI report - Explainability among key principles for gaining confidence in AI, online: osfi-bsif.gc.ca/Eng/osfi-bsif/</i> .....	48
	(b) <i>John Salmon, Leopold von Gerlach &amp; Daniel Lee, AI regulation in financial services in the EU and the UK: Governance and risk-management, online: engage.hoganlovells.com/knowledgeservi</i> .....	49
9.	Common law and statutory protection for publicity rights .....	49
	(a) <i>Sharoni S Finkelstein &amp; Alexandra L Kolsky, Artificial Intelligence Wants Your Name, Image and Likeness – Especially If You're a Celebrity, online: venerable.com/insights/publi</i> .....	49
	(b) <i>Zach Glasser, AI Face-Swap App Spawns New Class Action   Inside Class Actions, online: insideclassactions.com/2023/05/04/ai-</i> .....	50

## I. WHAT IS GENERATIVE AI

### 1. Working definition

- (a) *U.S. Copyright Office, Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, online: [U.S. Copyright Office Guidance](#).*

“One such recent development is the use of sophisticated artificial intelligence (“AI”) technologies capable of producing expressive material. These technologies “train” on vast quantities of preexisting human authored works and use inferences from that training to generate new content. Some systems operate in response to a user’s textual instruction, called a “prompt.” The resulting output may be textual, visual, or audio, and is determined by the AI based on its design and the material it has been trained on.”

- (b) *E.U., Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, online: [EU AI Act \(draft Compromise Amendments\) May 9, 2023](#)*

“Providers of foundation models used in AI systems specifically intended to generate, with varying levels of autonomy, content such as complex text, images, audio, or video (“generative AI”).”

- (c) *U.K. Government, A pro-innovation approach to AI regulation, online: [GOV.UK \(www.gov.uk\)](#)*

“Foundation model: a type of AI model that is trained on a vast quantity of data and is adaptable for use on a wide range of tasks. Foundation models can be used as a base for building more specific AI models.”

“Large language models (LLMs) are a type of foundation model. The potential of LLMs goes beyond reproducing or translating natural language: LLMs also have the power to write software, generate stories through films and virtual reality, and more.”

“Text-to-image generators: Adaptivity: Uses large amounts of online content to learn how to create rich, highly specific images on the basis of a short text prompt.

Autonomy: Based on text input, these systems generate images that mimic the qualities of human-created art, with no ongoing oversight from the user.”

## II. Generative AI challenges – Intellectual Property - copyright

### 1. Music

- (a) *David Israelite & Mitch Glazier, Will AI Value Human Creators? Now's the Time to Decide the Future of Our Culture (Guest Column), online: [billboard.com/pro/ai-senate-...](https://www.billboard.com/pro/ai-senate-...)*

The internet is already awash in unlicensed and unethical “style” and “soundlike” tools that rip off the writing, voice, likeness and style of professional artists and songwriters without authorization or permission. Powerful new engines like OpenAI’s ChatGPT and Jukebox, Google’s MusicLM and Microsoft’s AI-powered Bing have been trained on vast troves of musical compositions, lyrics, and sound recordings — as well as every other type of data and information available on the internet — without even the most basic transparency or disclosure, let alone consent from the creators whose work is being used. Songwriters, recording artists, and musicians today are literally being forced to compete against AI programs trained on copies of their own compositions and recordings...

The moral invasion of AI engines that steal the core of a professional performer’s identity — the product of a lifetime’s hard work and dedication — without permission or pay cannot be tolerated.”

- (b) *IFPI, Securing growth across the music ecosystem online: <https://www.ifpi.org/ifpi-priorities/creating-a-fair-environment-for-music/>*

“AI is not and will never be a substitute for human artistry, nor should developers of AI models be allowed to use artists’ recordings without authorisations, whether to train their models or to generate new content.”

### 2. Art

- (a) *CAIR, AI Open Letter regarding generative AI, online: [artisticinquiry.org/ai-open-letter...](https://www.artisticinquiry.org/ai-open-letter...)*

“AI-art generators are trained on enormous datasets, containing millions upon millions of copyrighted images, harvested without their creator’s knowledge, let alone compensation or consent. This is effectively the greatest art heist in history. Perpetrated by respectable-seeming corporate entities backed by Silicon Valley venture capital. It’s daylight robbery.

“Generative AI art is vampirical, feasting on past generations of artwork even as it sucks the lifeblood from living artists. Over time, this will impoverish our visual culture. Consumers will be trained to accept this art-looking art, but the ingenuity, the personal vision, the individual sensibility, the humanity will be missing.”

“This is also an economic choice for society. While illustrators’ careers are set to be decimated by generative-AI art, the companies developing the technology are making

fortunes. Silicon Valley is betting against the wages of living, breathing artists through its investment in AI.”

(b) *Andersen v. Stability AI Ltd., 3:23-cv-00201*

“50. This class action against Defendants concerns a DeviantArt software product called DreamUp, a Midjourney software product, and a Stability software product called DreamStudio, all of which are AI-Image Products and, upon information and belief, built on a Stability Software Library called Stable Diffusion.”

“5. These resulting derived images compete in the marketplace with the original images. Until now, when a purchaser seeks a new image “in the style” of a given artist, they must pay to commission or license an original image from that artist. Now, those purchasers can use the artist’s works contained in Stable Diffusion along with the artist’s name to generate new works in the artist’s style without compensating the artist at all. As used herein, the phrase “in the style of,” refers to a work that others would accept as a work created by that artist whose “style” was called upon, not the general category of work, such as fantasy or impressionism. Only a very small number of incredibly talented artists are capable of this same feat for a single other artist (i.e., reproducing art that is convincingly in that artist’s style), let alone for countless other artists. AI Image Products do so with ease by violating the rights of millions of artists.”

Direct Copyright Infringement

- Whether Defendants violated the copyrights of Plaintiffs and the Class when they downloaded and stored copies of the Works.
- Whether Defendants violated the copyrights of Plaintiffs and the Class when they used copies of the Works to train AI Image Products.

Vicarious Copyright Infringement

- Whether Defendants vicariously violated the copyrights of Plaintiffs and the Class when third parties used Defendants’ products to create Fakes, as defined herein.

DMCA Violations

- Whether Defendants violated the DMCA by removing copyright management information (“CMI”) from the Works and/or causing their respective AI Image Products to omit CMI from their output images.

Right of Publicity Violations

- Whether Defendants violated Plaintiffs’ and the Class’s rights of publicity when they designed their AI Image Products to respond to prompts requesting output images “in the style” of specific individuals, namely Plaintiffs and the Class.

Unlawful-Competition

- Whether Defendants’ AI Image Products are being used by Defendants to engage in Unfair Competition under the Lanham Act and/or California law...

Anticipated Defenses

- Whether any affirmative defense excuses Defendants’ conduct, including but not limited to whether some or all of Defendants’ conduct is allowed under the Fair Use Doctrine.

3. Photos

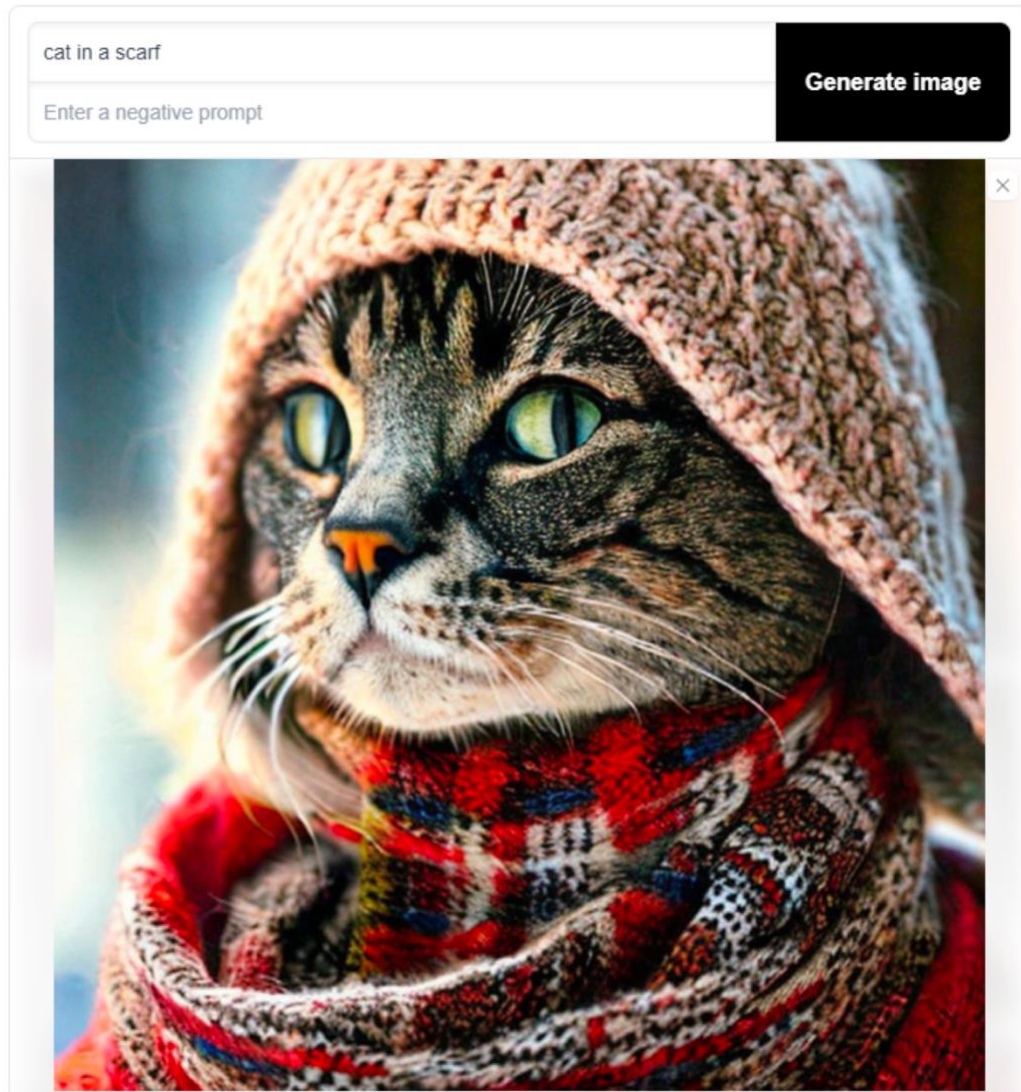
(a) *Getty Images (US), Inc. v. Stability AI, Inc., 1:23-cv-00135*

“This case arises from Stability AI’s brazen infringement of Getty Images’ intellectual property on a staggering scale. Upon information and belief, Stability AI has copied more than 12 million photographs from Getty Images’ collection, along with the associated captions and metadata, without permission from or compensation to Getty Images, as part of its efforts to build a competing business.”

### **Stable Diffusion 2.1 Demo**

Stable Diffusion 2.1 is the latest text-to-image model from StabilityAI. [Access Stable Diffusion 1 Space here](#)

For faster generation and API access you can try [DreamStudio Beta](#).





50. To be clear, the image above is not a photograph of an actual cat wearing an actual scarf. It is a computer-synthesized image that resembles a cat wearing a scarf. Upon information and belief, Stability AI was able to generate the image above because it used enough images of real cats paired with rich text captions and images of real scarves with rich text captions to train Stable Diffusion that the model can generate this type of output. Stable Diffusion is able to combine what it has learned to generate this artificial image, but only because it was trained on proprietary content belonging to Getty Images and others.”

“52. In many cases, and as discussed further below, the output delivered by StabilityAI includes a modified version of a Getty Images watermark”.



“59. Making matters worse, Stability AI has caused the Stable Diffusion model to incorporate a modified version of the Getty Images’ watermark to bizarre or grotesque synthetic imagery that tarnishes Getty Images’ hard-earned reputation, such as the image below:



4. Software

(a) *DOE 1 et al v. GitHub, Inc. et al 4:2022cv06823*

“Plaintiffs are software developers who challenge Defendants’ development and operation of Copilot and Codex, two artificial intelligence-based coding tools.”

“In June 2021, GitHub and OpenAI released Copilot, an AI-based program that can “assist software coders by providing or filling in blocks of code using AI.” *Id.* ¶ 8. In August 2021, OpenAI released Codex, an AI-based program “which converts natural language into code and is integrated into Copilot.” *Id.* ¶ 9. Codex is integrated into Copilot: “GitHub Copilot uses the OpenAI Codex to suggest code and entire functions in real-time, right from your editor.” *Id.* ¶ 47 (quoting GitHub website). GitHub users pay \$10 per month or \$100 per year for access to Copilot. *Id.* ¶ 8.

Codex and Copilot employ machine learning, “a subset of AI in which the behavior of the program is derived from studying a corpus of material called training data.” *Id.* ¶ 2. Using this data, “through a complex probabilistic process, [these programs] predict what the most likely solution to a given prompt a user would input is.” *Id.* ¶ 79. Codex and Copilot were trained on “billions of lines” of publicly available code, including code from public GitHub repositories.”

“Plaintiffs filed multiple cases against Defendants, which were subsequently consolidated. ECF No. 47. Plaintiffs, on behalf of themselves and two putative classes,<sup>4</sup> plead twelve counts against Defendants: (1) violation of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§ 1201-05; (2) common law breach of open-source licenses; (3) common law tortious interference in a contractual relationship; (4) common law fraud; (5) false designation of origin in violation of the Lanham Act, 15 U.S.C. § 1125; (6) unjust enrichment in violation of Cal. Bus. & Prof. Code §§ 17200, et seq., and the common law; (7) unfair competition in violation of the Lanham Act, 15 U.S.C. § 1125; Cal. Bus. & Prof. Code §§ 17200, et seq., and the common law; (8) breach of contract for violation of the GitHub Privacy Policy and Terms of Service; (9) violation of the California Consumer Privacy Act (“CCPA”); (10) common law negligence; (11) common law civil conspiracy; and (12) declaratory relief under 28 U.S.C. § 2201(a) and Cal. Code Civ. Proc. § 1060.”

## 5. Authors

- (a) *Mandalit del Barco “Striking movie and TV writers worry that they will be replaced by AI” online: <https://www.npr.org/2023/05/18/1176806824/striking-movie-and-tv-writers-worry-that-they-will-be-replaced-by-ai>.*

“DEL BARCO: The Writers Guild of America, which called for the strike, says writers want more regulation of AI. For example, bans on studios using it to write or rewrite things like stories, treatments and screenplays or even write the source material that human writers would adapt for the screen. They also don't want the writers' work to be used to train AI. Meanwhile, the studios, represented by the Alliance of Motion Picture and Television Producers, say that the use of AI raises hard, important, creative and legal questions for everyone, and that it requires more discussion. They also point out that the current agreement already defines writers as people, so AI generated material wouldn't be eligible for writing credits. During a recent earnings call, Disney CEO Bob Iger told investors that AI development presents opportunities and benefits to the company.”

## 6. Human Artistry Campaign

- (a) *Core Principles for Artificial Intelligence Applications online: <https://www.humanartistrycampaign.com/>*

“Creative works shape our identity, values, and worldview. And there are fundamental elements of our culture that are uniquely human. Only humans are capable of communicating the endless intricacies, nuances, and complications of the human

condition through art - whether it be music, performance, writing, or any other form of creativity.

Developments in artificial intelligence are exciting and could advance the world farther than we ever thought possible. But AI can never replace human expression and artistry.

As new technologies emerge and enter such central aspects of our existence, it must be done responsibly and with respect for the irreplaceable artists, performers, and creatives who have shaped our history and will chart the next chapters of human experience.”

### **III. Does Generative AI infringe copyright?**

#### **1. Infringement causes of action**

##### **(a) Reproduction for training purposes**

###### **(i) *Field v. Google, Inc.*, 77 U.S.P.Q.2d 1738 (D. Nev. 2006)**

Distribution of copies of works from an archived cache maintained by a content aggregator may be regarded as implicitly licensed if the originating site at which the work is posted does not use a “no archive” meta-tag to signify no permission to cache the work. Not infringement to distribute 51 works originally published on private website from an archived cache.

To the extent that Google itself copied or distributed the plaintiff's copyright works by allowing access to them through its cached links, Google engaged in a fair use of those works.

###### **(ii) *Parker v. Google, Inc.*, 78 U.S.P.Q.2d 1212 (E.D. Penn. 2006)**

Google's automatic archiving of USENET postings and excerpting of websites in its results to users' search queries do not include the necessary volitional elements to constitute directly copyright infringement.

###### **(iii) *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361 (N.D.Cal.1995)**

###### **(iv) *National Rugby League Investments Pty Ltd. v. Singtel Optus Ltd.*, [2012] FCAFC 59 (27 April 2012)**

###### **(v) *Record TV PTE LTD. v. Mediacorp. TV Singapore PTE LTD.*, [2011] 1 SLR 830**

(b) Outputs - reproductions or derivative works

(i) Scope of copyright protection

A. *Cinar Corporation v. Robinson*, 2013 SCC 73, *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2001] 1 All E.R. 700 (H.L.), *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2nd Cir. 1930).

Copyright protects authors against both literal and non-literal copying, so long as the copied material forms a substantial part of the work infringed. The part which is regarded as substantial can, for example, be a feature or combination of features of the work, abstracted from it rather than forming a discrete part.

If there has been copying, the question of whether the copying is substantial or not depends more on the quality rather than on the quantity of what has been taken.

A reviewing court is required to engage “in a qualitative and holistic assessment of the similarities between the works”.

The copying which is relevant is the copying, not of the idea, but of the expression of the idea.

B. *Cinar Corporation v. Robinson*, 2013 SCC 73

For expert evidence to be admitted at trial, it must (a) be relevant; (b) be necessary to assist the trier of fact...

However, the question always remains whether a substantial part of the plaintiff’s work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of “someone reasonably versed in the relevant art or technology”: *Vaver*, at p. 187.

To take an example, two pieces of classical music may, to the untrained ear, sound different, perhaps because they are played on different instruments, or at different tempos. An expert musician, however, might see similarities suggesting a substantial part has been copied — the same key signature, the same arrangement of the notes in recurring passages, or a recurrent and unusual harmonic chord. It will be for the judge to determine whether the similarities establish copying of a substantial part, to be sure. But in making that determination, the judge may need to consider not only how the work sounds to the lay person in the intended audience, but also structural similarities that only an expert can detect...

Finally, the works at issue had both patent and latent similarities. Or, as Dr. Perraton explained it, they shared “perceptible” and “intelligible” similarities. “Perceptible” similarities are those that can be directly observed, whereas “intelligible” similarities —

such as atmosphere, dynamics, motifs, and structure — affect a viewer’s experience of the work indirectly. Expert evidence was necessary to assist the trial judge in distilling and comparing the “intelligible” aspects of the works at issue, which he would not otherwise appreciate. Consequently, the trial judge did not err in admitting the expert evidence of Dr. Perraton.”

(ii) Reproducing “style”

A. *Rains v. Molea, 2013 ONSC 5016*

“[40] Rains cannot establish infringement by relying on his use of the noted unoriginal, commonplace, historical painting techniques. This would be akin to Shakespeare relying on his use of iambic pentameter in his writing or Drake relying on his use of 16 bars to a verse in his music. Commonly used techniques must remain available to all artists creating literary, dramatic, musical, and artistic works. If the compilation of these techniques is original, as defined above, the work enjoys copyright protection. If, after disregarding the commonplace techniques, there remain sufficient similarities between one work and a preceding original, substantial copying will likely be established. Because Rains relies on unoriginal elements, other than shape, to demonstrate similarity, these elements do not establish substantial copying.”

[43] Rains asserts that Molea’s 17 comparison works are each standalone colourable imitations of Rains’ comparable works. He submits that the fundamental factual question to be resolved is whether Molea’s infringing work comes so near to Rains’ work so as to give every person seeing the infringing work the idea created by the original: See *King Features Syndicate, Inc., v. Lechter*, 1950 CanLII 638 (CA EXC), [1950] Ex. C.R. 297, 12 C.P.R. 60, at para. 19. To this end, Rains points to Mr. Alan Loch’s (“Loch”) testimony that multiple clients entered the Loch Gallery and mistook Molea’s work for Rains’ work. Rains also points to an email from Ms. Nicole Potvin to Molea in June 2004 wherein she indicates that, as a lay person although a gallery owner, she mistook Rains’ work for Molea’s work. These examples far from satisfy the “every person” test as articulated by the Exchequer Court.

[44] Moreover, in my view it would be unwise to establish confusion as the test for colourable imitation of an artistic work. This test by its very nature lends itself to the subjective nuances of comparison by laypeople, those who enjoy an interest in art, and those who study art history and methods.

(iii) *U.S. Copyright Act Section 102(b) (and Art. 9.2 TRIPs) (merger, scenes a faire)*

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

A. *Lotus Development Corp. v. Paperback Software International*, 15 U.S.P.Q.2d 1577 (D. Mass. 1990); *Lotus Development Corp. v. Borland International Inc.*, 34 U.S.P.Q.2d 1014 (1st Cir. 1995); *Computer Associates International Inc. v. Altai Inc.*, 23 U.S.P.Q.2d

*1241 (2nd Cir. 1992); Delrina Corp. v. Tiolet Systems Inc. (2002), 17 C.P.R. (4th) 289 (Ont. C.A)*

The expression adopted by a computer programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.

(iv) *Derivative works*

A. *U.S. Copyright Act*

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

B. *Sookman, Computer, Internet, Electronic Commerce Act*

“To qualify as a derivative work, the work must exist in a concrete or permanent form and must substantially incorporate protected material from the preexisting work. In addition, the work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from preexisting work has been taken without the consent of a copyright proprietor of such preexisting work. See, *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998) (Manufacturer and distributor of “Duke Nukem 3D” computer game. Established likelihood of success that second game which contained new levels to be used in playing “Duke Nukem” was an infringing derivative work as the new levels assumed concrete or permanent form in the games' MAP files and the second game incorporated “Duke Nukem” manufacturers' protected expression.), *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992) (Game Genie device did not create infringing derivative work because it did not incorporate any part of Nintendo's protected work in some concrete or permanent form).”

2. TPMs and Rights Management

(a) WIPO Copyright Treaty (See also WPPT, USMCA)

Article 12 Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

### **3. Accessorial and secondary copyright infringement**

- (i) Contributory infringement
- (ii) Vicarious liability
- (iii) Authorization
- (iv) Aid and abet
- (v) Induce infringement
- (vi) Similar secondary liability theories xxx

### **4. Moral rights infringement**

#### **(a) Article 6b is of the Berne Convention**

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation...

#### **(b) WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO**

“BC-6bis.2. The “right of paternity” is the right of the author “to claim authorship” of the work. Usually, the author “claims” authorship in his work by indicating on the copies, or in connection with any non-copy-related use, of his work, that he is the author. On the basis of the “right of paternity,” he has the right to insist that he be identified in this way (as much as it is practicable and in a way that is reasonable under the given circumstances). The author, however, is equally free to make available his work anonymously or to use a pseudonym.”

“BC-6bis.5. At the 1948 Brussels revision conference, it was clarified that the protection of honor and reputation should extend not only to the honor and reputation of the author as an author (in close relationship with the quality of his work as such) but also to his honor and reputation as a human being (which may concern also such aspects as the context – for example, a politically charged context – in which the work is used). It was



emphasized that one of the reasons for the inclusion of the new phrase at that conference was to underline this element. The statement adopted by the conference about this read as follows: “The author will have the right to bring action against any acts prejudicial to his honor and reputation, and the discussion revealed that the author has to be protected not only in his capacity as a writer, but also in the role he plays on the literary stage: it is for that reason that you have added that he could object to any derogatory action, that being understood to mean any action that would be liable to harm the person through distortion of his work.”

#### IV. Defenses to copyright infringement

##### 1. Fair use

###### (a) *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* 598 U.S. \_\_\_\_ (2023)

“But an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner’s exclusive right to create derivative works. To preserve that right, the degree of transformation required to make “transformative” use of an original must go beyond that required to qualify as a derivative.”

“In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.”

“In this case, however, Goldsmith’s original photograph of Prince, and AWF’s copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature. AWF has offered no other persuasive justification for its unauthorized use of the photograph. Therefore, the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” §107(1), weighs in Goldsmith’s favor.”

##### 2. Fair Dealing

###### (a) *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32, 2021

- Fair dealing is a user right.
- Fair dealing for research is given a large and liberal interpretation and include research for commercial purposes.

- In assessing whether a purpose is allowable, the perspective should be not on the defendants' purpose, but rather on the ultimate users of the fair dealing.
- Fairness is assessed from the perspective of both the alleged infringer and the uses of individuals.
- Large-scale organized dealings are not “inherently unfair”.

**3. Text and data mining exceptions**

**(a)** *Matthew Stratton, Deputy General Counsel, Association of American Publishers, April 14, 2023 “Copyright Framework for TDM: A Jurisdictional Approach”*

## Overview of Selected TDM Exceptions



	Lawfully-accessed content	Purpose Limitations	Limitations on Users	Permitted to share training data	Rightsholder Opt-Out	Other
<a href="#">EU Art. 3</a>	Yes	Scientific research	Research orgs and cultural heritage insts	No	No	Note 1
<a href="#">EU Art. 4</a>	Yes	No	No	No	Yes/Note 2	
<a href="#">Japan</a>	No	Note 3	No	Yes	No	Note 4
<a href="#">Singapore</a>	Note 5	No	No	Limited/Note 6	No	
<a href="#">Switzerland</a>	Yes	Scientific research	Note 7	No	No	
<a href="#">UK</a>	Yes	Research for non-comm. purpose	Note 7	No	No	

NOTES

- 1 Content must be stored securely. Rightsholders may take necessary measures to ensure security and integrity of their networks and databases.
- 2 The exception does not apply if rightsholders expressly reserve their rights in an appropriate manner, such as machine-readable means in the case of content made publicly available online. W3C has issued a final community [report](#) (non-normative) proposing a web protocol for reservation of rights.
- 3 Applies to TDM and other cases where the exploitation is “not for enjoying . . . the ideas or emotions expressed in the work.”
- 4 Exception “does not apply if the exploitation unreasonably prejudice the interests of the copyright owner in light of the natures and purposes of the work, as well as the circumstances of such exploitation.”
- 5 Requires lawful access but may use infringing copies if unaware
- 6 User cannot share copies with others, except for verifying the results of the computational data analysis or for collaborative research or study relating to the purpose of such analysis.
- 7 The purpose limitation implies that non-commercial users in particular are beneficiaries.

**(b)** *Osborne Clarke, Generative AI: what could the future hold for IP and training data in the UK?, online: [osborneclarke.com/insights/gener...](https://osborneclarke.com/insights/gener...)*

“The UK's present copyright and database, right exceptions are narrow limited to research purposes, and cannot be relied upon if there is a commercial purpose for the activities.

“Any significant legislative expansion of the TDM exception appears to have been dropped for the time being.”

**(c)** Temporary reproductions

**(i)** *E.U., Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the*

information society, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>

- (ii) *Infopaq International A/S v. Danske Dagblades Forening*, [2010] FSR 20; *Football Association Premier League Ltd v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, [2012] 1 CMLR 29, *Infopaq International A/S v. Danske Dagblades Forening*, [2012] EUECJ C-302/10, *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Ors* [2013] UKSC 18 (17 April 2013).

The making of the temporary copy must have no “independent economic significance”. This does not mean that it must have no commercial value. It may well have. What it means is that it must have no independent commercial value, i.e. no value additional to that which is derived from the mere act of digitally transmitting or viewing the material.

- (iii) *Section 30.71 of the Copyright Modernization Act*

30.71 It is not an infringement of copyright to make a reproduction of a work or other subject-matter if

- (a) the reproduction forms an essential part of a technological process;
- (b) the reproduction's only purpose is to facilitate a use that is not an infringement of copyright; and
- (c) the reproduction exists only for the duration of the technological process.

#### 4. Other possible defenses to copyright infringement by generative AI

- (a) Generative AI and neutral intermediary (passive, instrumental, and automated)

- (i) *Article. 8, WIPO Copyright Treaty, 1996*,

- (ii) *Clause 42, EU E-Commerce Directive*.

- (iii) *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers, 2004 SCC 45*

- (iv) *Crookes v. Newton, 2011 SCC 47*

- (b) Safe harbours e.g. search engines, hosting, service provider/ISP
- 5. Generative AI and jurisdictional issues
  - (a) Personal jurisdiction over defendant
  - (b) Scope and extra-territorial application of copyright laws to foreign acts
    - (i) *EU/UK*
      - A. *Tunein Inc v Warner Music UK Ltd & Anor [2021] EWCA Civ 441 (26 March 2021)*
      - (ii) United States
        - A. *National Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10 (2nd Cir. 2000), Los Angeles News Service v. Conus Communications Co., 969 F.Supp. 579 (C.D. Cal. 1997), National Football League v. TVRadioNow Corp., 53 U.S.P.Q. 2d 1831 (W.D. Pa. 2000), Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F. 3d 904 (D.C. Cir. 2018), Columbia Pictures Industries, Inc. v. Fung, (C.D. Cal. December 21, 2009)*
        - (iii) Canada
          - A. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers, 2004 SCC 45*
  - V. **Copyright protection for computer aided and computer generated works and other related matter**
    - 1. Computer assisted/aided works
      - (a) *Midway Mfg. Co. v. Artic International Inc., 547 F.Supp. 999 (N.D. Ill. 1982), affirmed 704 F.2d 1009 (7th Cir. 1983).*

Video game protected by copyright. “Would anyone suggest that the owner of the copyright in the word processing program which was used in writing this book is the owner of the copyright in it?”
      - (b) *Oakcraft Homes Inc. v. Ecklund, [2013] O.J. No. 3215 (Ont. S.C.J.)*

House plans were created in part by using computer-aided design tools.
      - (c) *Geophysical Service Incorporated v. Encana Corporation. 2016 ABQB 230, affirmed 2017 ABCA 125*

Seismic data protected by copyright.

- (d) *Express Newspapers Plc v. Liverpool Daily Post & Echo Plc*, [1985] 3 All E.R. 680 (Ch.D.).

Grids and letter sequences generated by a computer program used by the plaintiff were subject to copyright protection. "The computer was no more than the tool by which the varying grids of 5-letter sequences were produced to the instructions, via the computer programs".

## 2. Computer Generated Works – Commonwealth Countries

- (a) *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2012 FCA 226. Program features that were developed using MS Access Wizard were not original or protectable.

- (b) *Sookman Computer Internet e-Commerce Law*

"The determination as to whether a person is an author of a work created using a computer program will be a factual one. If the person controlling the program can be seen as directing or fashioning the material form of the work, it will likely be protected as a computer-assisted work. But, if the person does not contribute sufficient independent intellectual effort to satisfy the Act's requirement for originality, the individual using the program would likely not be considered its author."

- *Telstra Corporation Limited v. Phone Directories Company Pty Ltd.*, [2010] FCAFC 149 (15 December 2010)
- *Acohs Pty Ltd v. Ucorp Pty Ltd.*, [2010] FCA 577 (10 June 2010)
- *IceTV Pty Ltd. v. Nine Network Australia Pty Ltd.*, [2009] HCA 14.

- (c) *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] SGCA 37

"79 Here, the collection of the horse-racing data, such as the horses' and jockeys' names, as well as their track work records, and the organisation and selection of such data were either computerised, or done by separate people. However, each individual's responsibility and contribution (which has not been particularised) was, based on the evidence before us, insufficient to render the individual an author, or joint author of the Tables...

81 Not infrequently, in cases involving a high degree of automation, there will be no original work produced for the simple reason that there are no identifiable human authors. This may well be the reason why the Respondent was unable to identify any particular individual or individuals or a specific group of people as being the human authors of the Tables. However, whatever the case may be, it is clear that copyright cannot subsist without a human author, and the Respondent is unable to even begin to satisfactorily identify any author, let alone, authors. It remains unclear who was responsible for the compilations. Even assuming *arguendo* that the Respondent's employees had some authorship role in the compilations, the evidence did not satisfactorily establish when copyright protection attached.

82 In the circumstances, without the identification of a human author from whom the work originates, there can be no “original work” capable of copyright protection. We therefore find that the Respondent’s claim that copyright subsists in the Tables that were “authored” by it fails.

(d) Camlin Pvt. Ltd. vs National Pencil Industries on 7 November, 1985, AIR 1986 Delhi 444

(25) As have observed above, the cartons/boxes in question which have been filed along with the plaint, appear to be mechanically reproduced ones. Because it is mechanically reproduced, I am of the view that it cannot be said that any skill or "labor has been expended upon the allegedly artistic carton which has been filed in Court, as the same has been produced by mechanical actions of a printing machine, and not by skill and labor having been expended upon them by any natural person. It is only natural persons who are, because of expenditure of their personal skill and labor upon any work, entitled to protection under the Copyright Law. [1924 Privy Council 75; 1960 (13 Madras Law Journal 53(2)).

(54) I am of the view that there is no precedent binding on me to hold that a mechanically reproduced printed carton is capable of being subject matter of copyright. In the instant case, what has been produced in Court is only a mechanically reproduced printed card board carton and I find that copyright does not subsist therein. In my view, copyright does not subsist therein for the reason that it is impossible to determine who is the "author" of the mechanically reproduced printed carton. Copyright is conferred only upon "authors" or those who are natural persons from whom the work, least originated or the authors may be legal persons to whom copyright has been assigned in accordance with law, by the authors from whom the work had originated (55) In the circumstances, I hold that plaintiff can not claim any copyright in any carton that has been mechanically reproduced by a printing process as the work cannot be said to have originated from the author. I am of the view that a machine cannot be "author" of an artistic work, nor can it have copyright therein.

3. Computer Generated Works – United States (Pre-AI generated cases)

(a) *Ross, Brobins & Oehmke PC v. Lexis/Nexis*. 73 U.S.P.Q. 2d 2005.

Whether dialog boxes of automated forms created using an automated program called HotDocs were protected by copyright. The court accepted that a work created using a program or authoring tool could be the subject of copyright protection. In this case, however, the dialog box automation program exhibited too little originality to create a copyrightable interest.

(b) *Southco, Inc. v. Cambridge Corp.*, 390 F. 3d 276 (3rd Cir. 2004).

U.S. Court declining to protect a listing of parts where the part numbers were generated using a predetermined and prescribed set of rules which precluded any originality by the persons who use the system.

- (c) *Reareden LLC v. The Walt Disney Company*, 293 F.Supp. 963 (N.D. Cal. 2018).

For a work not to be protectable, the computer program contribution must do the "lion's share of the work" and in particular, involve "the lion share of the creativity" in creating the outputs.

4. Computer Generated Works – United States (Generative AI cases – where to draw the line)

- (a) U.S. Copyright refusal to register "A Recent Entrance to Paradise" applied for by Steven Thaler



"The author of the Work was identified as the "Creativity Machine," with Thaler listed as the claimant alongside a transfer statement: "ownership of the machine." In his application, Thaler left a note for the Office stating that the Work "was autonomously created by a computer algorithm running on a machine" and he was "seeking to register this computer-generated work as a work-for-hire to the owner of the Creativity Machine."

"Courts interpreting the *Copyright Act*, including the Supreme Court, have uniformly limited copyright protection to creations of human authors.."

(b) Zarya of the Dawn (Registration # VAu001480196)



“The letter describes Ms. Kashtanova’s creation of the Work, including specific information about her use of Midjourney. Mr. Lindberg argues that the Work’s registration should not be cancelled because (1) Ms. Kashtanova authored every aspect of the work, with Midjourney serving merely as an assistive tool, and, (2) alternatively, portions of the work are registrable because the text was authored by Ms. Kashtanova and the Work is a copyrightable compilation due to her creative selection, coordination, and arrangement of the text and images.”

“The Office agrees that the text of the Work is protected by copyright.”

“The Office also agrees that the selection and arrangement of the images and text in the Work are protectable as a compilation.”

“Rather than a tool that Ms. Kashtanova controlled and guided to reach her desired image, Midjourney generates images in an unpredictable way.” A person who provides text prompts to Midjourney does not “actually form” the generated images and is not the “master mind” behind them. Instead, as explained above, Midjourney begins the image generation process with a field of visual “noise,” which is refined based on tokens created from user prompts that relate to Midjourney’s training database. The information in the prompt may “influence” generated image, but prompt text does not dictate a specific result. See Prompts, MIDJOURNEY, <https://docs.midjourney.com/docs/prompts> (explaining that short text prompts cause “each word [to have] a more powerful influence” and that images including in a prompt may “influence the style and content of the finished result”). Because of the significant distance between what a user may direct Midjourney to create and the visual material Midjourney actually produces, Midjourney users lack sufficient control over generated images to be treated as the “master mind” behind them. The fact that Midjourney’s specific output cannot be predicted by users makes Midjourney different for copyright purposes than other tools used by artists.”



“Nor does the Office agree that Ms. Kashtanova’s use of textual prompts permits copyright protection of resulting images because the images are the visual representation of “creative, human-authored prompts.”<sup>16</sup> Id. at 10. Because Midjourney starts with randomly generated noise that evolves into a final image, there is no guarantee that a particular prompt will... “Instead, prompts function closer to suggestions than orders, similar to the situation of a client who hires an artist to create an image with general directions as to its contents.”

- (c) *U.S. Copyright Office, Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, online: [U.S. Copyright Office Guidance](#)

“In the Office’s view, it is well established that copyright can protect only material that is the product of human creativity.”

“It begins by asking “whether the ‘work’ is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship 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.” In the case of works containing AI-generated material, the Office will consider whether the AI contributions are the result of “mechanical reproduction” or instead of an author’s “own original mental conception, to which [the author] gave visible form.” The answer will depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work. This is necessarily a case-by-case inquiry.

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. For example, when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the “traditional elements of authorship” are determined and executed by the technology—not the human user. Based on the Office’s understanding of the generative AI technologies currently available, users do not exercise ultimate creative control over how such systems interpret prompts and generate material. Instead, these prompts function more like instructions to a commissioned artist they identify what the prompter wishes to have depicted, but the machine determines how those instructions are implemented in its output. For example, if a user instructs a text generating technology to “write a poem about copyright law in the style of William Shakespeare,” she can expect the system to generate text that is recognizable as a poem, mentions copyright, and resembles Shakespeare’s style. But the technology will decide the rhyming pattern, the words in each line, and the structure of the text. When an AI technology determines the expressive elements of its output, the generated material is not the product of human authorship... In each case, what matters is the extent to which the human had creative control over the work’s expression and “actually formed” the traditional elements of authorship.”

5. Neighboring rights protection

(a) Originality requirement for “related rights” such as sound recordings/phonograms

(i) *WIPO, Guide to the Copyright and Related Rights Treaties Administered by WIPO, online: [https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf)*

1. The broadest and most up-to-date definition of “producer of a phonogram” is offered in Article 2(d) of the WPPT, under which it “means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.” The definition is up to date since it also extends to electronically (digitally) generated sounds. Its broader nature follows not only from this but as well – and even more – from the broader nature of the definition of “phonogram” in Article 2(a) of the WPPT (also extending to audiovisual fixations other than those which are original and thus qualify as audiovisual works).
2. The Rome Convention (Article 3(c)) defines the term as “the person who, or the legal entity which, first fixes the sounds of a performance or other sounds.” (Under Article 3(b) of the Rome Convention, however, “phonograms” are exclusively aural fixations of sounds.)

(b) *Human Artistry Campaign, Core Principles for Artificial Intelligence Applications online: <https://www.humanartistrycampaign.com/>*

5. COPYRIGHT SHOULD ONLY PROTECT THE UNIQUE VALUE OF HUMAN INTELLECTUAL CREATIVITY

Copyright protection exists to help incentivize and reward human creativity, skill, labor, and judgment -not output solely created and generated by machines. Human creators, whether they use traditional tools or express their creativity using computers, are the foundation of the creative industries and we must ensure that human creators are paid for their work.

(c) Neighboring rights protection for computer generated works

(i) *U.K. Copyright, Designs and Patents Act, 1988*

CDPA, s 178 “computer generated”, in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work.

9(3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

- A. *Nova Productions Limited v. Mazooma Games Ltd.*, [2006] E.W.H.C. (Ch) (20 January 2006), affirmed [2007] EWCA Civ 219
- B. *Lionel Bently (University of Cambridge), The UK’s Provisions on Computer-Generated Works: A Solution for AI Creations?*, online: <https://europeancopyrightsocietydotorg.files.wordpress.com/2018/06/lionel-the-uk-provisions-on-computer-generated-works.pdf>

## Comparative Use of CGW-concept

	Definition	Authorship	Term	Moral Rights
United Kingdom	s. 178	s. 9(3)	s. 12(7)	s. 78(2), s. 81(2)
Hong Kong Copyright Ordinance	s 198	s. 11(3)	s 17(6) (50 years from making)	s 91(2)(c), 93(2)
India Copyright Act 1957	-	s 2(d)(vi)		
Ireland : Copyright and Related Rights Act 2000	s 2 (slightly different)	s 21(f)	s 30 (70 years from making available)	
New Zealand: Copyright Act 1994	s 2(1)	s 5(2)	s 22(2) (50 years from making)	s 97(2)(c) and s 100(2)(b)
South Africa: Copyright Act 1978 [added by s. 1 (d) of Act 125 of 1992.]	-	S 1(h)		

## VI. Protection for AI generated inventions

### (a) *Thaler v Vidal* 43 F.4th 1207 (2022)

“This case presents the question of who, or what, can be an inventor. Specifically, we are asked to decide if an artificial intelligence (AI) software system can be listed as the inventor on a patent application. At first, it might seem that resolving this issue would involve an abstract inquiry into the nature of invention or the rights, if any, of AI systems. In fact, however, we do not need to ponder these metaphysical matters. Instead, our task begins — and ends — with consideration of the applicable definition in the relevant statute.”

“The sole issue on appeal is whether an AI software system can be an “inventor” under the Patent Act. In resolving disputes of statutory interpretation, we “begin[] with the statutory text, and end[] there as well if the text is unambiguous.” *BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004). Here, there is no ambiguity: the Patent Act requires that inventors must be natural persons; that is, human beings.”

“Section 271, in setting out what constitutes infringement, repeatedly uses “whoever” to include corporations and other non-human entities. That non-humans may infringe patents does not tell us anything about whether non-humans may also be inventors of patents.”

*Thaler v Vidal* 43 F.4th 1207 (2022)

“Section 271, in setting out what constitutes infringement, repeatedly uses “whoever” to include corporations and other non-human entities. That non-humans may infringe patents does not tell us anything about whether non-humans may also be inventors of patents.”

(b) *Christine M Morgan, USPTO is holding public listening sessions on AI inventorship for patents, online: reedsmith.com/en/perspective...*

(c) J 0008/20 (Designation of inventor/DABUS) of 21.12.2021

“4.3.1 The main request is not allowable because the designation of the inventor does not comply with Article 81, first sentence, EPC. Under the EPC the designated inventor has to be a person with legal capacity. This is not merely an assumption on which the EPC was drafted. It is the ordinary meaning of the term inventor (see, for instance, Oxford Dictionary of English: "a person who invented a particular process or device or who invents things as an occupation"; Collins Dictionary of the English language: "a person who invents, esp. as a profession").”

4.3.9 In summary, the main request does not comply with the EPC, because a machine is not an inventor within the meaning of the EPC. For this reason alone it is not allowable. There was no need to consider the requirements set out in Article 81, second sentence, EPC.

(d) *Thaler v Comptroller General of Patents Trade Marks And Designs* [2021] EWCA Civ 1374 (21 September 2021) Per Arnold JA.

“In my judgment it is clear that, upon a systematic interpretation of the 1977 Act, only a person can be an "inventor". The starting point is section 130(1) which provides that "'inventor' has the meaning assigned to it by section 7 above". Section 7(3) provides that "'inventor' in relation to an invention means the actual deviser of the invention". A dictionary definition of "deviser" is "a person who devises; a contriver, a planner, an inventor" (*Shorter Oxford English Dictionary*, 5th edition, Oxford University Press, 2002). Section 7(2) provides that a patent may be granted (a) "primarily to the inventor or joint inventors", (b) "to any person or persons who ...", (c) "the successor or successors in title of any person or persons mentioned in paragraph (a) or (b) above", but "to no other person". As Lord Hoffmann explained in *Yeda Research and Development Company Ltd v. Rhone-Poulenc Rorer International Holdings* [2007] UKHL 43, [2007] Bus LR 1796 at [20], this is "an exhaustive code". It is clear from this code that category (a) must consist of a person or persons, just as much as categories (b) and (c) do. Section 7(4) creates a presumption that "a person who makes an application for a patent shall be taken to be the person who is entitled under subsection (2) above to be granted a patent".

Again, it is plain that only a person can be entitled under section 7(2), and thus only a person can fall within paragraph (a).”

“Yet further support for this interpretation is provided by the following parts of section 13:

"(1) The inventor or joint inventors of an invention shall have a right to be mentioned as such in any patent granted for the invention and shall also have a right to be so mentioned if possible in any published application for a patent for the invention ....”

“Subsection (1), which gives effect to Article 4<sup>ter</sup> of the Paris Convention for the Protection of Intellectual Property 1883 (Stockholm Act 1967), confers a "right" upon "the inventor or joint inventors". The right is a species of moral right (more specifically, it is, in the jargon of moral rights, a "paternity" right, that is to say, a right to be identified as the creator of something). Only persons can have rights, and in particular moral rights, and it follows that inventors must be persons.”

“Professor Abbott argued that, even if there was no general rule that information produced by a machine was the property of the owner of the machine, nevertheless the owner of the machine owned an invention created by the machine. This is really an argument about what the law should be, rather than about the present state of the law. As matters stand, it seems to me that the argument faces two obstacles. The first is that it pre-supposes that a machine can be an inventor for the purposes of the 1977 Act. The second is that I cannot see any basis in current law for a person to have a legal right to stand in the place of a machine with respect to the right to apply for a patent, because that pre-supposes that the machine would otherwise have that right, but as noted above machines do not have rights. A point which underlies both these obstacles is that modern patent law is almost entirely a creature of statute.

In my judgment there is no rule of law that a new intangible produced by existing tangible property is the property of the owner of the tangible property, as Dr Thaler contends, and certainly no rule that the property contemplated by section 7(2)(b) in an invention created by a machine is owned by the owner of the machine. Accordingly, the hearing officer and the judge were correct to hold that Dr Thaler is not entitled to apply for patents in respect of the inventions given the premise that DABUS made the inventions.”

(See also opinions of Birss JA, and Laing JA)

(e) *Commissioner of Patents v Thaler* - [2022] FCAFC 62

“it is plain from these cases that the law relating to the entitlement of a person to the grant of a patent is premised upon an invention for the purposes of the Patents Act arising from the mind of a natural person or persons. Those who contribute to, or supply, the inventive concept are entitled to the grant. The grant of a patent for an invention rewards their ingenuity.”

Of course, the development of patent law since 1624 has not until now been confronted with the question of whether or not an inventor may be other than a natural person. However, as noted, the law to which we have referred has proceeded on the assumption that only a natural person could be an inventor. That assumption found expression in the different context considered by the High Court in *D'Arcy* where the majority (French CJ, Kiefel, Bell and Keane JJ) said of claims 1-3 in the patent then in suit at [6]:

The references to “human action” were deliberate. They pick up the requirement set out in *National Resource Development Corporation v Commissioner of Patents* [1959] HCA 67; 102 CLR 252 that a manner of new manufacture bring about an artificially created state of affairs: at 276-277 (Dixon CJ, Kitto and Windeyer JJ). The assumption in both cases was that human agency was required in the development of the invention in suit. That approach accords with the legislative history to which we have referred, namely that the origin of entitlement to the grant of a patent lies in human endeavour, which is rewarded by the grant of a limited term monopoly.

Two further matters warrant observation.

First, in filing the application, Dr Thaler no doubt intended to provoke debate as to the role that artificial intelligence may take within the scheme of the *Patents Act* and *Regulations*. Such debate is important and worthwhile. However, in the present case it clouded consideration of the prosaic question before the primary judge, which concerned the proper construction of s 15 and reg 3.2C(2)(aa). In our view, there are many propositions that arise for consideration in the context of artificial intelligence and inventions. They include whether, as a matter of policy, a person who is an inventor should be redefined to include an artificial intelligence. If so, to whom should a patent be granted in respect of its output? The options include one or more of: the owner of the machine upon which the artificial intelligence software runs, the developer of the artificial intelligence software, the owner of the copyright in its source code, the person who inputs the data used by the artificial intelligence to develop its output, and no doubt others. If an artificial intelligence is capable of being recognised as an inventor, should the standard of inventive step be recalibrated such that it is no longer judged by reference to the knowledge and thought processes of the hypothetical un inventive skilled worker in the field? If so, how? What continuing role might the ground of revocation for false suggestion or misrepresentation have, in circumstances where the inventor is a machine?

Those questions and many more require consideration. Having regard to the agreed facts in the present case, it would appear that this should be attended to with some urgency. However, the Court must be cautious about approaching the task of statutory construction by reference to what it might regard as desirable policy, imputing that policy to the legislation, and then characterising that as the purpose of the legislation: *Deal* at [37]; *Miller v Miller* [2011] HCA 9; 242 CLR 446 at [29] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). It would appear that this was the approach favoured by the primary judge.

“However, the characterisation of a person as an inventor is a question of law. The question of whether the application the subject of this appeal has a human inventor has

not been explored in this litigation and remains undecided. Had this question been explored, it may have been necessary to consider what significance should be attributed to various matters including the (agreed) facts that Dr Thaler is the owner of the copyright in the DABUS source code and the computer on which DABUS operates, and that he is also responsible for the maintenance and running costs.”

## VII. Regulation of Privacy and use of Personal Data for Generative AI systems

(a) Compliance with general data protection laws regarding processing of personal data

(i) *Natasha Lomas, Italy gives OpenAI initial to-do list for lifting ChatGPT suspension order, online: [techcrunch.com/2023/04/12/cha...](https://techcrunch.com/2023/04/12/cha...)*

“Italy’s data protection watchdog has laid out what OpenAI needs to do for it to lift an order against ChatGPT issued at the end of last month — when it said it suspected the AI chatbot service was in breach of the EU’s General Data Protection Regulation (GDPR) and ordered the U.S.-based company to stop processing locals’ data.”

“The short version of the regulator’s new compliance demand is this: OpenAI will have to get transparent and publish an information notice detailing its data processing; it must immediately adopt age gating to prevent minors from accessing the tech and move to more robust age verification measures; it needs to clarify the legal basis it’s claiming for processing people’s data for training its AI (and cannot rely on performance of a contract — meaning it has to choose between consent or legitimate interests); it also has to provide ways for users (and non-users) to exercise rights over their personal data, including asking for corrections of disinformation generated about them by ChatGPT (or else have their data deleted); it must also provide users with an ability to object to OpenAI’s processing of their data for training its algorithms; and it must conduct a local awareness campaign to inform Italians that its processing their information to train its AIs.”

(ii) *Kelvin Chan OpenAI: ChatGPT back in Italy after meeting watchdog demands online: <https://apnews.com/article/chatgpt-openai-data-privacy-italy-b9ab3d12f2b2cfe493237fd2b9675e21>*

“ChatGPT’s maker said Friday that the artificial intelligence chatbot is available again in Italy after the company met the demands of regulators who temporarily blocked it over privacy concerns.

OpenAI said it fulfilled a raft of conditions that the Italian data protection authority wanted satisfied by an April 30 deadline to have the ban on the AI software lifted.”

“The measures include adding information on its website about how it collects and uses data that trains the algorithms powering ChatGPT, providing EU users with a new form for objecting to having their data used for training, and adding a tool to verify users’ ages when signing up.”

“The Garante said in a statement that it “welcomes the measures OpenAI implemented” and urged the company to comply with two other demands for an age-verification system and a publicity campaign informing Italians about the backstory and their right to opt out of data processing.”

- (iii) *OPC to investigate ChatGPT jointly with provincial privacy authorities, online:*  
[https://www.priv.gc.ca/en/opc-news/news-and-announcements/2023/an\\_230525-2/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2023/an_230525-2/)

“The privacy authorities for Canada, Québec, British Columbia and Alberta will jointly investigate the company behind artificial intelligence-powered chatbot ChatGPT.”

“The privacy authorities will investigate whether OpenAI:

- o has obtained valid and meaningful consent for the collection, use and disclosure of the personal information of individuals based in Canada via ChatGPT;
- o has respected its obligations with respect to openness and transparency, access, accuracy, and accountability; and
- o has collected, used and/or disclosed personal information for purposes that a reasonable person would consider appropriate, reasonable or legitimate in the circumstances, and whether this collection is limited to information that is necessary for these purposes.”

- (iv) *Reference re Subsection 18.3(1) of the Federal Courts Act, 2021 FC 723*

“Does Google, in the operation of its search engine service, collect, use or disclose personal information in the course of commercial activities within the meaning of paragraph 4(1)(a) of PIPEDA when it indexes web pages and presents search results in response to searches of an individual’s name?”

The Court’s answer is: Yes”

“Is the operation of Google’s search engine service excluded from the application of Part 1 of PIPEDA by virtue of paragraph 4(2)(c) of PIPEDA because it involves the collection, use or disclosure of personal information for journalistic, artistic or literary purposes and for no other purpose?”

The Court’s answer is: No”

“However, this does not determine the outcome of the complainant’s complaint, the power of the Commissioner to recommend deindexing, the constitutionality of PIPEDA, or any other non-reference question that is better left to the Commissioner’s proceedings.”



- (b) Transparency and explainability under privacy laws and AI laws
- (i) *Barry Sookman, CPPA: problems and criticisms – automated decision making, online: <https://www.barrysookman.com/2022/12/18/cppa-problems-and-criticisms-automated-decision-making/>*
- (ii) *Barry Sookman, AIDA’s regulation of AI in Canada: questions, criticisms and recommendations, online: <https://www.barrysookman.com/2023/01/30/aidas-regulation-of-ai-in-canada-questions-criticisms-and-recommendations/>*

## VIII. Regulation of Generative AI

### 1. Concerns animating regulation of generative AI

- (a) *U.K. Government, A pro-innovation approach to AI regulation, online: [GOV.UK \(www.gov.uk\)](https://www.gov.uk)*

“We are mindful of the rapid technological change in the development of foundation models such as LLMs and the new opportunities that they bring to applications including search engines, medical devices, and financial and legal services. However, LLMs also have limitations, for example, the models are not trained on a sense of truth, so they can reproduce inconsistent or false outputs that seem highly credible. Because they can be adapted to a wide variety of tasks downstream within an AI supply chain, any improvements or defects in a foundation model could quickly affect all adapted products.”

“Risks to human rights

Generative AI is used to generate deepfake pornographic video content, potentially damaging the reputation, relationships and dignity of the subject.

Risks to safety

An AI assistant based on LLM technology recommends a dangerous activity that it has found on the internet, without understanding or communicating the context of the website where the activity was described. The user undertakes this activity causing physical harm.

Risks to fairness

An AI tool assessing credit-worthiness of loan applicants is trained on incomplete or biased data, leading the company to offer loans to individuals on different terms based on characteristics like race or gender.

Risks to privacy and agency

Connected devices in the home may constantly gather data, including conversations, potentially creating a near-complete portrait of an individual’s home life. Privacy risks are compounded the more parties can access this data.

## Risks to societal wellbeing

Disinformation generated and propagated by AI could undermine access to reliable information and trust in democratic institutions and processes.

## Risks to security

AI tools can be used to automate, accelerate and magnify the impact of highly targeted cyber attacks, increasing the severity of the threat from malicious actors. The emergence of LLMs enables hackers with little technical knowledge or skill to generate phishing campaigns with malware delivery capabilities.

2. EU AI Act (AIA) regulation of generative AI in the EU
3. *E.U., Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, online: [EU AI Act \(draft Compromise Amendments\) May 9, 2023](#)*

Recital 60h “As foundation models are a new and fast-evolving development in the field of artificial intelligence, it is appropriate for the Commission and the AI Office to monitor and periodically assess the legislative and governance framework of such models and in particular of generative AI systems based on such models, which raise significant questions related to the generation of content in breach of Union law, copyright rules, and potential misuse.

## Article 28(b)

1. A provider of a foundation model shall, prior to making it available on the market or putting it into service, ensure that it is compliant with the requirements set out in this Article, regardless of whether it is provided as a standalone model or embedded in an AI system or a product, or provided under free and open source licences, as a service, as well as other distribution channels.
2. For the purpose of paragraph 1, the provider of a foundation model shall:
  - (a) demonstrate through appropriate design, testing and analysis that the identification, the reduction and mitigation of reasonably foreseeable risks to health, safety, fundamental rights, the environment and democracy and the rule of law prior and throughout development with appropriate methods such as with the involvement of independent experts, as well as the documentation of remaining non-mitigable risks after development;
  - (b) process and incorporate only datasets that are subject to appropriate data governance measures for foundation models, in particular measures to examine the suitability of the data sources and possible biases and appropriate mitigation;

c) design and develop the foundation model in order to achieve throughout its lifecycle appropriate levels of performance, predictability, interpretability, corrigibility, safety and cybersecurity assessed through appropriate methods such as model evaluation with the involvement of independent experts, documented analysis, and extensive testing during conceptualisation, design, and development;...

When fulfilling those requirements, the generally acknowledged state of the art shall be taken into account, including as reflected in relevant harmonised standards or common specifications, as well as the latest assessment and measurement methods, reflected notably in benchmarking guidance and capabilities referred to in Article 58a (new)....

4. Providers of foundation models used in AI systems specifically intended to generate, with varying levels of autonomy, content such as complex text, images, audio, or video (“generative AI”) and providers who specialise a foundation model into a generative AI system, shall in addition:

a) comply with the transparency obligations outlined in Article 52 (1),

b) train, and where applicable, design and develop the foundation model in such a way as to ensure adequate safeguards against the generation of content in breach of Union law in line with the generally acknowledged state of the art, and without prejudice to fundamental rights, including the freedom of expression, 41

c) without prejudice to national or Union legislation on copyright, document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law.

4. Regulation of generative AI in the U.K.

5. *U.K. Government, A pro-innovation approach to AI regulation, online: A pro-innovation approach to AI regulation - GOV.UK (www.gov.uk)*

“Under the UK’s pro-innovation AI regulatory framework, regulators may decide to issue specific guidance and requirements for LLM developers and deployers to address risks and implement the cross-cutting principles. This could include guidance on appropriate transparency measures to inform users when AI is being used and the data used to train the model.

The wide-reaching impact of LLMs through the AI supply chain – together with their general purpose and potential wide ranging application – means they are unlikely to be directly ‘caught’ within the remit of any single regulator. This makes effective governance and supply chain risk-management challenging where LLMs are involved. The AI regulatory framework’s monitoring and evaluation function will therefore need to assess the impacts of LLMs. The cross-cutting accountability and governance principle will encourage regulators and businesses to find ways to demonstrate accountability and good governance in responsible LLM development and use.

At this point it would be premature to take specific regulatory action in response to foundation models including LLMs. To do so would risk stifling innovation, preventing AI adoption, and distorting the UK's thriving AI ecosystem.”

## 6. Regulation of generative AI in the United States

- (a) *Barry Sookman, AIDA's regulation of AI in Canada: questions, criticisms and recommendations, online: <https://www.barrysookman.com/2023/01/30/aidas-regulation-of-ai-in-canada-questions-criticisms-and-recommendations/>*

“So far, there is no comprehensive federal laws in the U.S. that specifically regulates AI systems. The U.S. approach to AI regulation of AI is characterized by the idea that companies, in general, must remain in control of industrial development and governance-related criteria. This has led, so far, to the U.S. federal government opting for a relatively hands-off approach to governing AI to create an environment free of burdensome regulation. The U.S. government has repeatedly stated that burdensome rules and state regulations often are considered barriers to innovation. To a large degree, the U.S. has gone the route of voluntary guidelines, with the White House *Blueprint For An AI Bill of Rights.*”

- (b) *Makena Kelly, White House rolls out plan to promote ethical AI, online: [theverge.com/2023/5/4/23710...](https://theverge.com/2023/5/4/23710...)*

“Federal regulators and Congress have announced a fresh focus on AI over the last few weeks. In April, the Federal Trade Commission, Consumer Federal Protection Bureau, Justice Department, and Employment Opportunity Commission issued a joint warning arguing that they already had authority to go after companies whose AI products harm users.”

## 7. Regulation of generative AI in Canada

AIDA Will regulate “high-impact” systems to be defined in regulations. These could include Generative AI systems.

- (a) *Government of Canada, The Artificial Intelligence and Data Act (AIDA) – Companion document, online: [\(ISED\)](#)*

“...certain AI systems perform generally applicable functions – such as text, audio or video generation – and can be used in a variety of different contexts. As end users of general-purpose systems have limited influence over how such systems function, developers of general-purpose systems would need to ensure that risks related to bias or harmful content are documented and addressed.”

- (b) *Howard Solomon, Canadian experts urge Parliament to pass AI law fast | IT World Canada News, online: [itworldcanada.com/article/canadi...](https://itworldcanada.com/article/canadi...)*

“In January, Toronto privacy lawyer Barry Sookman of the McCarthy Tetrault law firm wrote this detailed analysis of AIDA with a long list of suggested changes.

Sookman is not the only expert with concerns. “The AIDA is deeply flawed, and the lack of [public] consultation is profoundly disturbing,” wrote University of Ottawa law professor Teresa Scassa, who is Canada research chair in information law, in a post last month...

“Also in response to the call from Canadian experts, University of Ottawa internet law professor Michael Geist called for the government to start with a fresh sheet of paper. “AIDA may be well-meaning and the issue of AI regulation critically important,” he wrote today in a blog, “but the bill is limited in principles and severely lacking in detail, leaving virtually all of the heavy lifting to a regulation-making process that will take years to unfold. While no one should doubt the importance of AI regulation, Canadians deserve better than virtue signalling on the issue with a bill that never received a full public consultation.””

- (c) *Barry Sookman, AIDA’s regulation of AI in Canada: questions, criticisms and recommendations, online: <https://www.barrysookman.com/2023/01/30/aidas-regulation-of-ai-in-canada-questions-criticisms-and-recommendations/>*
- (d) *Barry Sookman, AIDA Companion Document: overview and questions, online: <https://www.barrysookman.com/2023/04/10/aida-companion-document-overview-and-questions/>*

## 8. Regulation of generative AI in India

- (a) *Web Desk | Organiser, India planning to regulate AI platforms like ChatGPT: IT minister Ashwini Vaishnaw, online: [organiser.org/2023/05/18/174...](https://www.organiser.org/2023/05/18/174...)*

## IX. Governance and risk management

### 1. Organizational use of and policies for responsible AI

- (a) *Niraj Bhargava & Mardi Witzel, Generative AI Is Here to Stay: Its Users Should Be Accountable First - Centre for International Governance Innovation, online: [cigionline.org/articles/gener...](https://www.cigionline.org/articles/gener...)*

“In the new world of general-purpose AI, including generative AI, surely a key responsibility for governance should fall on the enterprise that is proposing to do something with an AI system. Clearly, that organization should evaluate whether the benefits justify the risks and potential negative impacts, in the context of a specific use case. And they should be accountable, whether to boards or shareholders, for those decisions.”

- (b) *Linden A Hoffman, Employers and Artificial Intelligence: What Should We Know?, online: [bakersterchi.com/employers-and-...](https://www.bakersterchi.com/employers-and-...)*

“As the world of artificial intelligence and Chat GPT grows, it is important that employers be aware of the risks associated both with using these tools in employment decisions, and letting employees use these tools on the job. Technologies like Chat GPT

are impressively powerful and can greatly improve the efficiency of companies and employees alike. Although the opportunities for artificial intelligence use are seemingly limitless, employers must pause to consider how to safeguard their use of AI.”

- (c) *Katherine Hamilton, Amazon Launches AI Platform Aimed At Corporate Customers—Joining Google And Microsoft In AI Race online:*  
<https://www.forbes.com/sites/katherinehamilton/2023/04/13/amazon-launches-ai-platform-aimed-at-corporate-customers-joining-google-and-microsoft-in-ai-race/?sh=2caa1d3d483d>

“Clients will be able to customize the Titan models to their own data and needs, but the information they input doesn’t train the Titan models, so all data remains secured from other customers and competitors, CNBC reported.”

## 2. Contracting for generative AI

- (a) *Victoria Lee & Mark Lehberg, Before creating or acquiring a technology solution that is generated by AI, consider your contract terms, online: dlapiper.com/en-ro/insights...*

“As businesses consider the risks and benefits of using generative AI tools, approaches to these risks and benefits will differ depending on who you are. Perhaps you are a vendor of a technology solution that was developed, in whole or in part, with the help of a generative AI tool; perhaps you are the customer that is purchasing or acquiring rights to that technology solution.”

- (b) *Barry Sookman & Michael Scherman, Contracting for tech under the AI provisions of CPPA, AIDA and Law 25, online:*  
<https://www.barrysookman.com/2023/05/14/contracting-for-tech-under-the-ai-provisions-of-cppa-aida-and-law-25/>

## X. Liability issues and generative AI

### 1. Aiding and abetting an illegal or tortious act

- (a) *Twitter, Inc v Tamneh* 598 U.S. \_\_\_\_ (2023)

Facebook, Twitter, Google not liable for aiding an abetting ISIS terrorist attacks.

“The mere creation of those platforms, however, is not culpable. To be sure, it might be that bad actors like ISIS are able to use platforms like defendants’ for illegal—and sometimes terrible—ends. But the same could be said of cell phones, email, or the internet generally. Yet, we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large. Nor do we think that such providers would normally be described as aiding and abetting, for example, illegal drug deals brokered over cell phones—even if the provider’s conference-call or video-call features made the sale easier.”

“To be sure, plaintiffs assert that defendants’ “recommendation” algorithms go beyond passive aid and constitute active, substantial assistance. We disagree. By plaintiffs’ own telling, their claim is based on defendants’ “provision of the infrastructure which provides material support to ISIS.” App. 53. Viewed properly, defendants’ “recommendation” algorithms are merely part of that infrastructure. All the content on their platforms is filtered through these algorithms, which allegedly sort the content by information and inputs provided by users and found in the content itself. As presented here, the algorithms appear agnostic as to the nature of the content, matching any content (including ISIS’ content) with any user who is more likely to view that content. The fact that these algorithms matched some ISIS content with some users thus does not convert defendants’ passive assistance into active abetting. Once the platform and sorting-tool algorithms were up and running, defendants at most allegedly stood back and watched; they are not alleged to have taken any further action with respect to ISIS.”

“To be sure, we cannot rule out the possibility that some set of allegations involving aid to a known terrorist group would justify holding a secondary defendant liable for all of the group’s actions or perhaps some definable subset of terrorist acts. There may be, for example, situations where the provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods to a terrorist group could constitute aiding and abetting a foreseeable terror attack. Cf. *Direct Sales Co. v. United States*, 319 U. S. 703, 707, 711–712, 714–715 (1943) (registered morphine distributor could be liable as a coconspirator of an illicit operation to which it mailed morphine far in excess of normal amounts). Or, if a platform consciously and selectively chose to promote content provided by a particular terrorist group, perhaps it could be said to have culpably assisted the terrorist group. Cf. *Passaic Daily News v. Blair*, 63 N. J. 474, 487–488, 308 A. 2d 649, 656 (1973) (publishing employment advertisements that discriminate on the basis of sex could aid and abet the discrimination).”

“The fact that some bad actors took advantage of these platforms is insufficient to state a claim that defendants knowingly gave substantial assistance and thereby aided and abetted those wrongdoers’ acts. And that is particularly true because a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings.”

“Taken as a whole, the Ninth Circuit’s analytic approach thus elided the fundamental question of aiding-and abetting liability: Did defendants consciously, voluntarily, and culpably participate in or support the relevant wrongdoing? As we have explained above, the answer in this case is no. Plaintiffs allege only that defendants supplied generally available virtual platforms that ISIS made use of, and that defendants failed to stop ISIS despite knowing it was using those platforms. Given the lack of nexus between that assistance and the Reina attack, the lack of any defendant intending to assist ISIS, and the lack of any sort of affirmative and culpable misconduct that would aid ISIS, plaintiffs’ claims fall far short of plausibly alleging that defendants aided and abetted the Reina attack.”

- (b) *Gonzalez et al v Google LLC*, 598 U.S. \_\_\_\_ (2023)
- 2. Does s230 of CDA apply in U.S.?
- 3. *Directive 2000/31/EC 1 (the “e-Commerce Directive”) and Digital Services Act SEC(2020) 432*
- 4. Defamation liability
- (a) *A.B. c. Google*, 2023 QCCS 1167
- (b) *DUFFY v GOOGLE LLC [2023] SASC 13 (3 February 2023)*
- (c) *Google LLC v Defteros [2022] HCA 27*,
- 5. Common law liability



## **XI. Appendix - Additional resources and topics on legal issues and generative AI**

### **1. More on generative challenges to copyright authors/owners**

- (a) *Tim Ingham, Universal Music Group: Yes, ripping off Drake's voice for that AI track was against the law, online: [musicbusinessworldwide.com/universal-musi...](https://musicbusinessworldwide.com/universal-musi...)*

“Yesterday (April 26), the – ahem – ‘artist’ known as ‘ghostwriter’ returned to TikTok with yet another track featuring AI-copied voices of famous people.

Now, this ‘ghostwriter’ isn’t the same ‘ghostwriter’ whose now-infamous *Heart On My Sleeve* track, featuring a cloned-Drake vocal, caused a global kerfuffle in the music biz last week.

“The result of both ‘ghostwriter’ endeavors, though, is much the same: A fake superstar duet – this time of Bad Bunny and Rihanna – created via AI-rip-off vocals, accompanied by a berk bobbing around on camera, face covered by his nan’s net curtains.”

- (b) *Osborne Clark, Generative AI: what could the future hold for IP and training data in the UK?, online: [osborneclarke.com/insights/gener...](https://osborneclarke.com/insights/gener...)*

“Meanwhile, litigation has been commenced in England and Wales (and elsewhere) by Getty Images against the creator of a free image-generating AI tool.

Getty, a provider of digital media including images, has banned AI-generated images from being made available through its platform. However, it offers licensing agreements so that its content can be used for AI training.

- (c) *Ghostwriter in the Machine: Copyright Implications for AI-Generated Imitations* [iptechblog.com/2023/05/ghostw...](https://iptechblog.com/2023/05/ghostw...)
- (d) *AI Drake just set an impossible legal trap for Google* [theverge.com/2023/4/19/2368...](https://theverge.com/2023/4/19/2368...)
- (e) *The Summer of "Deep Drakes": How Generative AI Is Creating New Music and Copyright Issues* [hkllaw.com/en/insights/pu...](https://hkllaw.com/en/insights/pu...)
- (f) *AI-Generated Music: The Biggest Impact on the Music Industry Since Napster?* [ipandmedialaw.fkks.com/post/102iddr/a...](https://ipandmedialaw.fkks.com/post/102iddr/a...)
- (g) *Artificial Intelligence and Copyrights – Dilemmas for Both Infringement and Creation* [vorys.com/pu](https://vorys.com/pu)
- (h) *New Tools, Old Rules: Is The Music Industry Ready To Take On AI? | Copyright Lately* [copyrightlately.com/ai-generated-m...](https://copyrightlately.com/ai-generated-m...)
- (i) *Suzi Morales, The AI Revolution Is Upon Us, Whether or Not Copyright Laws Are Ready, online: observer.com/2023/03/the-ai...*

In February, Getty Images filed a lawsuit in federal court in Delaware that illustrates potential IP challenges both with copyrighted source materials and AI-generated output. The company sued Stability AI for copyright infringement and other claims for copying millions of photos from Getty's database and creating images derived from Getty's copyrighted works.

- (j) *Stuart D Levi, Shannon N Morgan & MacKinzie M Neal, US Copyright Office Guidance on Royalty Eligibility of Musical Works Generated Using AI | Insights, online: [skadden.com/insights/publi...](https://skadden.com/insights/publi...)*

“The MLC Letter acknowledges that the use of AI is not itself fatal to copyright protection since that protection could still be available where a human selected or arranged AI-generated material in a sufficiently creative way such that “the resulting work as a whole constitutes an original work of authorship” or where a human modified AI-generated work to a sufficient degree to meet the standard for copyright protection. Applying these exceptions to the world of music creation, the MLC Letter notes that “there is no dispute” that the use of tools by humans such as “digital audio workstations, sequencers, and arpeggiators” does not necessarily render a work to be unprotectable from a copyright perspective, provided that the final work “is the product of human authorship.”

In the MLC Letter, the Copyright Office states that where circumstances reasonably indicate that a musical work registered in the collective's database lacks the human authorship necessary to qualify for copyright protection, the collective may investigate the work's copyrightability and refrain from issuing any associated royalties pending the investigation. Interestingly, the Copyright Office cites as such circumstances not only instances where a songwriter acknowledges the AI-generation, but also where

songwriters claimed that they created “an extraordinary number of musical works in an unusually short time period.”

## 2. IP Protection and other issues for other computer-generated types of IP

- (a) Are there originality requirements for trade-marks, trade-secret/confidential information, industrial designs, plant breeders rights, integrated circuit topographies?
- (b) Implications for IP rights premised on novelty, being “new”, distinctiveness, with AI generated “prior art”.
- (c) *Australian Government, Generative AI and the IP rights, online: [Aus Gov - Generative AI](#)*

## 3. Perspectives on feasibility and challenges on regulation of generative AI

- (a) *Niraj Bhargava & Mardi Witzel, Generative AI Is Here to Stay: Its Users Should Be Accountable First - Centre for International Governance Innovation, online: [cigionline.org/articles/gener...](#)*

“Does generative artificial intelligence (AI) pose a threat to society and humanity? In the wake of ChatGPT’s stunning release, many have been asking this question. On March 22, led by the [Future of Life Institute](#) (FLI), a group of prominent tech leaders and researchers called for a temporary pause in the development of all systems more powerful than GPT-4 (“Generative Pre-Trainer Transformer-4”).

The open letter — signed by billionaire tech innovators Elon Musk and Steve Wozniak, among thousands of others — cites an absence of careful planning and management. “Recent months have seen AI labs locked in an out-of-control race to develop and deploy ever more powerful digital minds that no one — not even their creators — can understand, predict, or reliably control,” the letter states.

But this argument misses a critical point — the genie is already out of the bottle. ChatGPT is estimated to have reached 100 million monthly active users as of January 2023. And its website already generates one billion visits per month. Beyond its record-breaking status as the fastest-growing consumer application in history, OpenAI’s ChatGPT has transformed the AI landscape. That can’t be undone.”

- (b) *Darrell M West, Senate hearing highlights AI harms and need for tougher regulation, online: [brookings.edu/blog/techtank/...](#)*

“Yesterday’s testimony by Open AI’s CEO Sam Altman at the Senate Judiciary Subcommittee on Privacy, Technology, and the Law shows the importance of generative artificial intelligence (AI) and the sensitivity surrounding its development. Along with tools launched by other firms, ChatGPT has democratized technology by bringing tremendous computing power to search, data analysis, video and audio generation, software development, and many other areas. Generative AI has the power to alter how

people find information, generate new audio and videos, create new products, and respond in real time to emerging events.

At the same time, though, several issues have emerged that concern consumers, academic experts, and policymakers. Among the worrisome problems include harmful content, disinformation, political favoritism, racial bias, a lack of transparency, workforce impact, and intellectual property theft. Altman's testimony, along with that of IBM Vice President Christina Montgomery and New York University Professor Gary Marcus, provided a chance to explain generative AI and gave legislators an opportunity to express their reservations about its impact on society, the economy, and elections."

- (c) *Casey Fiesler, AI has social consequences, but who pays the price? Tech companies' problem with 'ethical debt', online: [theconversation.com/ai-has-social-...](https://theconversation.com/ai-has-social-...)*

"As public concern about the ethical and social implications of artificial intelligence keeps growing, it might seem like it's time to slow down. But inside tech companies themselves, the sentiment is quite the opposite. As Big Tech's AI race heats up, it would be an "absolutely fatal error in this moment to worry about things that can be fixed later," a Microsoft executive wrote in an internal email about generative AI, as The New York Times reported.

In other words, it's time to "move fast and break things," to quote Mark Zuckerberg's old motto. Of course, when you break things, you might have to fix them later – at a cost.

In software development, the term "technical debt" refers to the implied cost of making future fixes as a consequence of choosing faster, less careful solutions now. Rushing to market can mean releasing software that isn't ready, knowing that once it does hit the market, you'll find out what the bugs are and can hopefully fix them then."

- (d) *Tim Juvshik, AI exemplifies the 'free rider' problem – here's why that points to regulation, online: [theconversation.com/ai-exemplifies...](https://theconversation.com/ai-exemplifies...)*

"As a philosopher who studies technology ethics, I've noticed that AI research exemplifies the "free rider problem." I'd argue that this should guide how societies respond to its risks – and that good intentions won't be enough.

Free riding is a common consequence of what philosophers call "collective action problems." These are situations in which, as a group, everyone would benefit from a particular action, but as individuals, each member would benefit from not doing it."

"Similarly, the free-rider problem grounds arguments to regulate AI development. In fact, climate change is a particularly close parallel, since neither the risks posed by AI nor greenhouse gas emissions are restricted to a program's country of origin.

Moreover, the race to develop more advanced AI is an international one. Even if the U.S. introduced federal regulation of AI research and development, China and Japan could ride free and continue their own domestic AI programs.

Effective regulation and enforcement of AI would require global collective action and cooperation, just as with climate change. In the U.S., strict enforcement would require federal oversight of research and the ability to impose hefty fines or shut down noncompliant AI experiments to ensure responsible development – whether that be through regulatory oversight boards, whistleblower protections or, in extreme cases, laboratory or research lockdowns and criminal charges.”

- (e) *Krishna Ravi Srinivas, Two reasons AI is hard to regulate: the pacing problem and the Collingridge dilemma, online: [thehindu.com/sci-tech/scien...](http://thehindu.com/sci-tech/scien...)*

“Such a problem in regulation will persist because it is rooted in two issues at the heart of the governance of all emerging technologies, from synthetic biology to cryptocurrencies, and both defy easy solutions. They are the pacing problem and the Collingridge dilemma”.

Pacing problem: “The scope, adoption, and diffusion of technology advances rapidly whereas laws and regulations are framed and enacted at a slower pace, and typically play catch-up. The application of a technology is also universal whereas regulation is specific to countries.”

“In 1980, David Collingridge introduced a concept in his book *The Social Control of Technology* known today as the Collingridge dilemma. The dilemma is that regulating a technology in the initial stages of its adoption, when its potential dangers aren’t evident, is easy but becomes harder by the time these dangers have been identified.

*“Early regulation is also likely to be too restrictive for further development and adoption while regulation at a more mature stage could be restricted in its efficacy and its ability to prevent accidents.”* David Collingridge

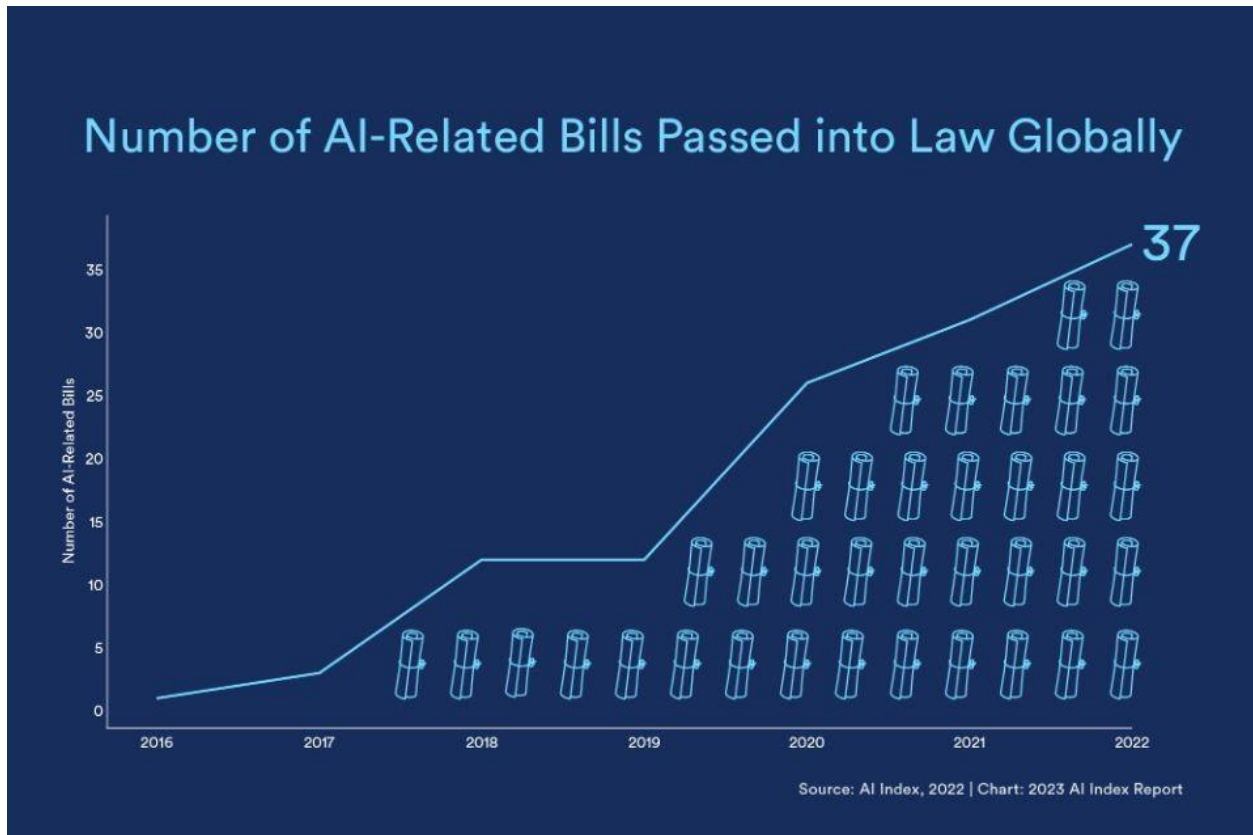
- (f) *Kent Walker, A policy agenda for responsible AI progress: Opportunity, Responsibility, Security, online: [blog.google/technology/ai/...](http://blog.google/technology/ai/...)*

“What it will take to get this right: The first step is to put technical and commercial guardrails in place to prevent malicious use of AI and to work collectively to address bad actors, while maximizing the potential benefits of AI. For example, governments should explore next-generation trade control policies for specific applications of AI-powered software that are deemed security risks, and on specific entities that provide support to AI-related research and development in ways that could threaten global security. Governments, academia, civil society, and companies also need a better understanding of the implications of increasingly powerful AI systems, and how we can align sophisticated and complex AI with human values. At the end of the day, security is a team sport and progress in this space will require cooperation in the form of joint research, adoption of best-in-class data governance, public-private forums to share information on AI security vulnerabilities, and more.”

4. Different approaches to regulating AI

- (a) *Cathy Li, Global push to regulate artificial intelligence: AI news | World Economic Forum, online: [weforum.org/agenda/2023/05/...](https://www.weforum.org/agenda/2023/05/)*

“Research shows that efforts to regulate AI appear to be gathering pace. Stanford University's 2023 AI Index shows 37 AI-related bills were passed into law globally in 2022. The US led the push for regulation, passing nine laws, followed by Spain with five and the Philippines with four.



Legislative bodies in 127 countries passed AI-related laws in 2022.

*Image: Stanford University 2023 AI Index*

- (b) *Insights IAS, “Risk-based” regulation for artificial intelligence (AI), online: [insightsonindia.com/2023/05/02/ris...](https://insightsonindia.com/2023/05/02/ris...)*

Country	Initiative
G7	The EU’s “risk-based” regulation of AI refers to the proposed AI Act that seeks to regulate artificial intelligence tools based on their level of risk. The act categorizes AI systems into four categories: <ul style="list-style-type: none"><li>· Unacceptable risk (e.g., in case of critical infrastructure)</li></ul>

	<ul style="list-style-type: none"> <li>· high risk</li> <li>· limited risk</li> <li>· minimal risk (e.g., spam filters, word processing)</li> </ul> <p>The level of risk determines the degree of regulatory scrutiny and compliance requirements that the AI system would be subject to.</p>
EU	The proposed AI Act segregates artificial intelligence by use-case scenarios based broadly on the degree of invasiveness and risk. The AI Act is due next year.
Italy	Became the first major Western country to ban Open AI's ChatGPT out of concerns over privacy.
UK	Adopts a 'light-touch' approach that aims to foster innovation in the AI industry.
Japan	Takes an accommodative approach to AI developers.
China	Drafted a 20-point draft to regulate generative AI services that are likely to be enforced later this year.
India	ICMR releases guidelines for artificial intelligence use in the health sector; Niti Aayog's National Strategy for Artificial Intelligence and the Responsible AI for All report. India is not considering any law to regulate AI currently. India's AI penetration factor at 3.09, the highest among all G20, OECD countries
US	Blueprint for an AI Bill of Rights that proposed a nonbinding roadmap for the responsible use of AI. The Blueprint spelt out five core principles to govern the effective development of AI systems.

(c) G7 Hiroshima Leaders' Communiqué, May 20, 2023

“We are determined to work together and with others to: advance international discussions on inclusive artificial intelligence (AI) governance and interoperability to achieve our common vision and goal of trustworthy AI, in line with our shared democratic values.”

## 5. More on EU AIA

- (a) *Cybil Roehrenbeck, Technology policy's next big challenge: Divergent approaches to regulating AI, online: [engage.hoganlovells.com/knowledgeservi...](https://engage.hoganlovells.com/knowledgeservi...)*
- (b) *Hadrien Pouget, Europe's AI Act Worries Washington, online: [cepa.org/article/europe...](https://cepa.org/article/europe...)*
- (c) *Natasha Lomas, EU lawmakers back transparency and safety rules for generative AI, online: [techcrunch.com/2023/05/11/eu-...](https://techcrunch.com/2023/05/11/eu-...)*
- (d) *Supantha Mukherjee, Foo Yun Chee & Martin Coulter, EU proposes new copyright rules for generative AI, online: [reuters.com/technology/eu-...](https://reuters.com/technology/eu-...)*
- (e) *Lutz Riede et al., Has copyright caught up with the AI Act?, online: [technologyquotient.freshfields.com/post/102iewc/h...](https://technologyquotient.freshfields.com/post/102iewc/h...)*

## 6. More on regulation of AI in the U.S.

- (a) *Maria Nava, Federal Agencies Release Joint Statement on AI, online: [advertisinglaw.fkks.com/post/102idks/f...](https://advertisinglaw.fkks.com/post/102idks/f...)*

Earlier today, the Federal Trade Commission (“FTC”), the Department of Justice Civil Rights Division (“DOJ”), the Consumer Financial Protection Bureau (“CFPB”), and the Equal Employment Opportunity Commission (“EEOC”) released a joint statement regarding the agencies’ commitments to the core principles of fairness, quality, and justice, pledge to “vigorously” protect individual’s rights, and authority to regulate the use of automated systems and artificial intelligence (“AI”).

The statement summarizes the ways in which these agencies have already started to regulate the use of automated systems and AI to prevent its harmful use:

- **FTC:** In 2022, the FTC issued a report evaluating the use and impact of AI in combatting online harm, including concerns that AI can be inaccurate, biased, and discriminatory by design. The FTC has warned that AI with discriminatory impact or the advertising of AI using unsubstantiated claims could be a violation of the FTC Act. The FTC has also reached settlement with companies requiring the destruction of algorithms allegedly trained on improperly collected data.
- **DOJ:** In 2023, the DOJ filed a statement of interest in federal court explaining that the Fair Housing Act applies to algorithm-based tenant screening services.
- **CFPB:** In 2022, the CFPB published a circular confirming that federal consumer financial laws and requirements, including laws regarding credit decisions, apply regardless of the technology used to make the decisions.
- **EEOC:** In 2022, the EEOC issued a technical assistance document explaining how the Americans with Disabilities Act applies to AI when it is used to make employment-related decisions about applicants and employees.



- (b) *Hans Christopher Rickhoff et al., Federal AI Developments: Leader Schumer Unveils AI Legislative Framework, Reinroduction of AI for National Security Act and FTC Interest, online: [akingump.com/en/insights/al...](https://www.akingump.com/en/insights/al...)*
- (c) *Jeremy Straub, Schumer's AI regulations would stifle innovation and dampen free expression | The Hill, online: [thehill.com/opinion/techno...](https://www.thehill.com/opinion/techno...)*
- (d) *Brian Fung, US senator introduces bill to create a federal agency to regulate AI, online: [wjcl.com/article/bill-f...](https://www.wjcl.com/article/bill-f...)*
- (e) *Bennet, Welch Reinroduce Landmark Legislation to Establish Federal Commission to Oversee Digital Platforms, online: <https://www.bennet.senate.gov/public/index.cfm/2023/5/bennet-welch-reintroduce-landmark-legislation-to-establish-federal-commission-to-oversee-digital-platforms#:~:text=%E2%80%9CThe%20Digital%20Platform%20Commission%20Act,aaddress%20the%20nation%27s%20digital%20challenges.>*
- “Amid Calls for AI and Social Media Regulation, This First-of-Its-Kind Legislation Would Empower an Expert Federal Agency to Provide Comprehensive Oversight of Digital Platforms”
- (f) *Matt O'Brien, ChatGPT chief says AI should be regulated by a US or global agency | The Times of Israel, online: [timesofisrael.com/chatgpt-chief-...](https://www.timesofisrael.com/chatgpt-chief-...)*
- (g) *Henry Foy & Jim Pickard, G7 leaders call for 'guardrails' on development of artificial intelligence | Financial Times, online: [ft.com/content/1b9d1e...](https://www.ft.com/content/1b9d1e...)*
- (h) *Kristi Hines, AI Regulation: Is It Too Late To Prevent Potential Harm?, online: [searchenginejournal.com/ai-regulation-...](https://www.searchenginejournal.com/ai-regulation-...)*
- (i) *Carl Smith, Generative AI Adds New Dimensions to Election Interference, online: [governing.com/security/gener...](https://www.governing.com/security/gener...)*
- (j) *Kent Walker, A policy agenda for responsible AI progress: Opportunity, Responsibility, Security, online: [blog.google/technology/ai/...](https://blog.google/technology/ai/...)*
- (k) *Tim Hinchliffe, 'We Shouldn't Regulate AI Until We See Meaningful Harm': Microsoft Economist to WEF, online: [sociable.co/government-and...](https://www.sociable.co/government-and...)*
- (l) *Richard W Stevens, Let's Apply Existing Laws to Regulate AI | Mind Matters, online: [mindmatters.ai/2023/05/lets-a...](https://www.mindmatters.ai/2023/05/lets-a...)*
- (m) *Financial Times Editorial Board, AI needs superintelligent regulation | Financial Times, online: [ft.com/content/7ba3e9...](https://www.ft.com/content/7ba3e9...)*
- (n) *Eric J Felsberg & Todd R Dobry, Employer Alert: New York City Issues Final Rules on Automated Employment Decision Tools Law | Data Intelligence Reporter, online: [dataintelligencereporter.com/2023/04/employ...](https://www.dataintelligencereporter.com/2023/04/employ...)*

- (o) *Titus Wu, California Seeks to Be First to Regulate Business Use of AI, online: [news.bloomberglaw.com/in-house-couns...](https://www.bloomberglaw.com/in-house-couns...)*
- (p) *Hiawatha Bray, Mass. lawmakers scramble to regulate AI amid rising concerns, online: [\(msn.com\)](https://www.msn.com)*

7. More on organizational policies for generative AI

- (a) *Jason I Epstein et al., Generative AI: A Roadmap for Use Cases, online: [nelsonmullins.com/idea\\_exchange/...](https://www.nelsonmullins.com/idea_exchange/)*

“Use Case Feasibility/Selection of Generative AI Product: Generative AI task forces or committees can help create use case “criteria” that can be applied to a specific use case and apply it against various generative AI model(s) for (hopefully) the best outcomes. This requires an understanding of the business goals, the various benefits and risks of particular generative AI products as applied against most of the issues in this list. The concept here is similar to what you look at when using open-source software and whether it’s for internal or external use, but with the added concerns of accuracy, confidentiality, security, and other issues related to generative AI. Comparing a use case against the generative AI product capabilities will be key.”

- (b) *Barry Sookman & Michael Scherman, Contracting for tech under the AI provisions of CPPA, AIDA and Law 25, online: <https://www.barrysookman.com/2023/05/14/contracting-for-tech-under-the-ai-provisions-of-cppa-aida-and-law-25/>*

- “The risk-based approach in AIDA, including key definitions and concepts, was designed to reflect and align with evolving international norms in the AI space – including the EU AI Act, the Organization of Economic Co-operation and Development (OECD) AI Principles, and the US National Institute of Standards and Technology (NIST) Risk Management Framework (RMF) – while integrating seamlessly with existing Canadian legal frameworks. For example, the definition of artificial intelligence systems in AIDA aligns with concepts developed through the OECD that are also represented in the EU AI Act. Inter-operability with legal frameworks in other jurisdictions would also be a key consideration in the development of regulations, in order to facilitate Canadian companies' access to international markets.”
- Governance standards (addressed to corporate leaders, admin best practices), e.g., OECD
- Foundational standards (frameworks that can be implemented across all AI use cases e.g., ISO/IEC 22989 (AI concepts and terminology), ISO/IEC 23894 (guidance on AI risk management), OECD’s framework for AI risk classification), ISO/IEC 42001 (management system standard for artificial intelligence, considered for adoption by the EU and UK national standards bodies)
- Technical standards e.g., U.S., NIST, U.K., Standards Hub, Japan, National Institute of Advanced Industrial Science and Technology, EU, Committee for Standardization

(CEN), European Committee for Electrotechnical Standardization (CENELEC) (or CEN-CENELEC) See, Advancing Cooperative AI Governance at the 2023 G7 Summit

- (c) *James G Gatto, Solving Open Source Problems With AI Code Generators - Legal issues and Solutions, online: <https://www.lexology.com/library/detail.aspx?g=075e5397-ae2e-4ea3-9884-df71f4151762>*

“Potential Solutions to Mitigate Open Source Legal Risks with AI Code Generators

- filters to prevent the output of problematic code
- code referencing tools to flag problematic output
- code scanning tools to assist developers with open source compliance.

In apparent recognition of the potential open source legal issues, some of the leading AI code generators have optional features. To mitigate legal risk, some companies are mandating, as part of their AI policies, that employees use these features.”

- (d) *Lindsey Wilkinson, Generative AI at work: 3 steps to crafting an enterprise policy, online: [ciodive.com/news/generativ...](https://ciodive.com/news/generativ...)*
- (e) *Ryan J Black, Tyson Gratton & Shea Coulson, Using policy to protect your organization from generative AI risks, online: <https://www.lexology.com/library/detail.aspx?g=a64f0c33-ef0e-441c-88d1-80498155d0d7>*
- (f) *Legal.io, You'll Probably Need a ChatGPT Company Policy, online: <https://www.legal.io/articles/5429675/You-ll-Probably-Need-a-ChatGPT-Company-Policy>*
- (g) *Alisa L Chestler, Justin S Daniels & Vivien F Peadar, A Baker's Dozen: Top Questions In-House Legal Counsel Should Consider Asking to Better Understand AI including*

*ChatGPT, online: <https://www.bakerdonelson.com/a-bakers-dozen-top-questions-in-house-legal-counsel-should-consider-asking-to-better-understand-ai-including-chatgpt>*

- (h) *Laura Croft, Policies for use of ChatGPT needed in legal workplaces, online: <https://www.lawyrsweekly.com.au/newlaw/36635-policies-for-use-of-chatgpt-needed-in-legal-workplaces>*
- (i) *TechGC Team, Counsel Corner: 6 Rules for Taking on Generative AI as a GC, online: <https://blog.techgc.co/counsel-corner/counsel-corner-6-rules-for-taking-on-generative-ai-as-a-gc/>*
- (j) *Lindsey Wilkinson, Generative AI at work: 3 steps to crafting an enterprise policy, online: <https://www.ciodive.com/news/generative-ai-work-policies/648739/>*

## 8. Dealing with generative AI for financial services

- (a) *OSFI, Artificial Intelligence in Finance requires specific safeguards: OSFI and GRI report - Explainability among key principles for gaining confidence in AI, online: [osfi-bsif.gc.ca/Eng/osfi-bsif/...](https://osfi-bsif.gc.ca/Eng/osfi-bsif/...)*

Toronto, April 17, 2023 — The Office of the Superintendent of Financial Institutions (OSFI) and the Global Risk Institute (GRI) today jointly released a report on the ethical, legal, and financial implications of artificial intelligence (AI) on financial services institutions.

The partnership between OSFI and GRI created the Financial Industry Forum on Artificial Intelligence (FIFAI) which gathered Canada’s financial services experts from industry, government and academia on the application of AI. The rapid growth in digitalization and usage of AI across the financial services industry highlighted how current AI risk management frameworks must adapt to remain relevant, forward-looking, and responsive to industry needs. As the use of AI technologies continues to evolve, the need for guiding principles became apparent. The FIFAI discussions then led to the development of the EDGE principles, Explainability, Data, Governance and Ethics:

- Explainability enables customers and relevant stakeholders to understand how an AI model arrives at its conclusions.
- Data leveraged by AI allows financial institutions to provide targeted and tailored products and services to their customers or stakeholders. It also improves fraud detection, enhances risk analysis and management, boosts operational efficiency, and improves decision making.
- Governance ensures a framework is in place that promotes a culture of responsibility and accountability around the use of AI in an organization.
- Ethics encourages financial institutions to consider the broader societal impacts of their AI systems.

- (b) *John Salmon, Leopold von Gerlach & Daniel Lee, AI regulation in financial services in the EU and the UK: Governance and risk-management, online: [engage.hoganlovells.com/knowledgeservi...](https://engage.hoganlovells.com/knowledgeservi...)*

“As highly regulated entities, financial institutions need to be cognisant of the regulatory framework in the use of AI in their systems and products. This applies not only to how they utilise AI themselves but also to how their vendors employ the technology. It is important to understand the legal requirements for the use of AI extend beyond specific AI law and regulations. They also encompass existing regulations and regulatory guidance applicable to financial institutions, their vendors and the AI supply chain. These legal requirements often apply to financial institutions irrespective of whether they use, develop or procure AI systems. However, the legal landscape governing AI may not well understood by financial institutions and third party service providers. For instance, the Bank of England’s DP5/22 on Artificial Intelligence and Machine Learning clarifies that the approach of UK supervisory authorities primarily revolves around interpreting how the existing regulatory framework in the UK relates to AI. The UK approach aims to address any identified gaps in the regulatory framework while considering the overlaps within the existing sectoral rules, policies and principles within the UK financial services regulatory regime that apply to AI.”

9. Common law and statutory protection for publicity rights

- (a) *Sharoni S Finkelstein & Alexandra L Kolsky, Artificial Intelligence Wants Your Name, Image and Likeness – Especially If You're a Celebrity, online: [venable.com/insights/publi...](https://venable.com/insights/publi...)*

“The right of publicity is the primary tool for celebrity NIL protection. The right of publicity protects against unauthorized commercial exploitation of an individual's persona, from appearance and voice to signature catchphrase. Past right of publicity cases provide some context for how this doctrine could be applied to AI-generated works.”

In the 1980s and 1990s, Bette Midler and Tom Waits, respectively, successfully sued over the use of sound-a-like musicians in commercial ads. These courts, according to Waits's case, recognized the "right of publicity to control the use of [their] identity as embodied in [their] voice." Using the same rationale, deepfake ads and endorsements that use AI-technology to replicate a celebrity's voice or appearance would similarly violate publicity rights.

Those lawsuits are just around the corner. Earlier this year, a finalist on the television show "Big Brother" filed a class action lawsuit against the developer of Reface, a subscription-based mobile application that allows users to "face-swap" with celebrities. Using traditional principles of right of publicity, the plaintiff is seeking accountability for unauthorized commercial uses of his NIL in the AI-technology space.”

- (b) *Zach Glasser, AI Face-Swap App Spawns New Class Action / Inside Class Actions, online: [insideclassactions.com/2023/05/04/ai-...](https://insideclassactions.com/2023/05/04/ai-...)*

“Last month, a new class action lawsuit was filed in California federal district court against the maker of the app “Reface,” which allegedly allows users to swap their face onto that of a celebrity in images and videos. The plaintiff in the case, Kyland Young, was a finalist on the reality TV show *Big Brother*. He alleges that Reface allows users to “become” him and to recreate his scenes from the show with their face in place of his. Young alleges that in doing so, the defendant is commercially exploiting his likeness without his permission in violation of California’s right of publicity statute. Young asserts the claim on behalf of a putative class of “[a]ll California residents whose name, voice, signature, photograph, or likeness was displayed on [the] Reface application . . .” Young does not allege how many likenesses were available for use on Reface, but he does allege they are enough to satisfy Rule 23’s numerosity requirement. *See Young v. NeoCortex, Inc.*, Case No. 2:23-cv-02496 (C.D. Cal.)”