

Generative AI and ChatGPT: Practices, Policies and Pitfalls

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Issues:

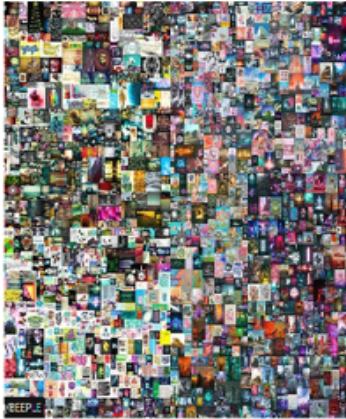
1. You cannot lawfully own or monetize the output of an AI. The output is not your work of authorship under copyright law. *See* Exhibit One; *see also* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (March 16, 2023); *Thaler v. Perlmutter*, 1:22-cv-01564 BAH (August 18, 2023).
2. You cannot warrant the accuracy (defamation?) or noninfringement of the output of an AI.
3. The output may infringe someone else's copyrights or trademarks or patents and you will get sued and have no indemnification (OpenAI does not indemnify you). Sarah Silverman, et al. Jonathan?
4. Copyright owners and patent holders have no recourse against infringing, illegal AI output since the law has not yet caught up to create a remedy.
5. If I sell my company or seek an investment round, I cannot assert or warrant during due diligence or in the final contracts that I own any IP created by an AI.
6. You similarly cannot make any warranties of title if you license the output to a third-party. You are thus immediately in breach of contract if you are or become a party to such agreements. E.g., Amazon and KDP self-pub "AI Books."
7. The notion of "licensing" AI output is a fiction because a license inherently contemplates I can sue an infringer for using my stuff without that license, and here no such right exists. If you sell or license content authored by an AI it is a fiction that you are "licensing" it.
8. I cannot patent inventions thought of by an AI unless my prompt somehow rises to the strict level of inventorship. *See Thaler v. Vidal*, No. 21-2347 (Fed. Cir. 2022); cert denied, April 24, 2023.
9. I cannot register copyrights in content authored by an AI because I am not the author, and the AI cannot register its own copyrights because it lacks personhood. *See Thaler v. Perlmutter, supra; Fourth Estate Public Benefit Corp. v. Wall-Street.com*, 586 U.S. ____ (2019).
10. Are your contractors using ChatGPT? Of course they are.

11. There's probably no insurance coverage for content written by an AI. There's either an express exclusion, or the policy does not cover 'non-employees.'
12. FTC disclaimers and disclosures coming? False advertising?
13. Legislation to watch: EEOC; EU AI Act; Algorithmic Accountability Act of 2022; NYC law regarding use of AI in hiring decisions
14. Bias introduced by coders of neural nets and "feeders" of data sets
15. Prompt violates an NDA?
16. Prompt violates patent one-year on-sale bar? Foreign implications (no grace period)?
17. Usage or prompt violates attorney-client privilege?
18. Employee policies in place and enforced?
19. Privacy issues? CCPA and GDPR (privacy rights to the underlying data used to train the LLM)
20. robots.txt file:
User-agent: GPTBot
Disallow: /

BEST PRACTICES

1. AI Usage and Bias Policy for Employees and Contractors
2. Fix NDAs, IP Assignments and Independent Contractor Agreements
3. Review outbound licenses for warranties of title
4. Review insurance policies for exclusions and AI
5. Be extra careful in due diligence, as both buyer and seller
6. How much of your revenue forecasts rely on AI?
7. Brad's Best Use Case for AI:
 - a. Buy a server
 - b. Airgap it
 - c. Load on a clean instance of the AI software
 - d. Train the LLM using ONLY content to which you demonstrably have all rights
 - e. Treat the AI like a summer intern.

EXHIBIT ONE



The Work



Beeple the Author

`ipfs://ipfs/QmPAg1mjxcEQPpqsl0EcauVedaeMH81WXDPvPx3VC5zUz`

The NFT



The Copyright

17 U.S.C. Section 202



Sufficiently
creative =
copyrightable



Insufficiently
creative =
noncopyrightable

Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)

