World Wild West: Intellectual Property Challenges with Generative AI

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Agenda

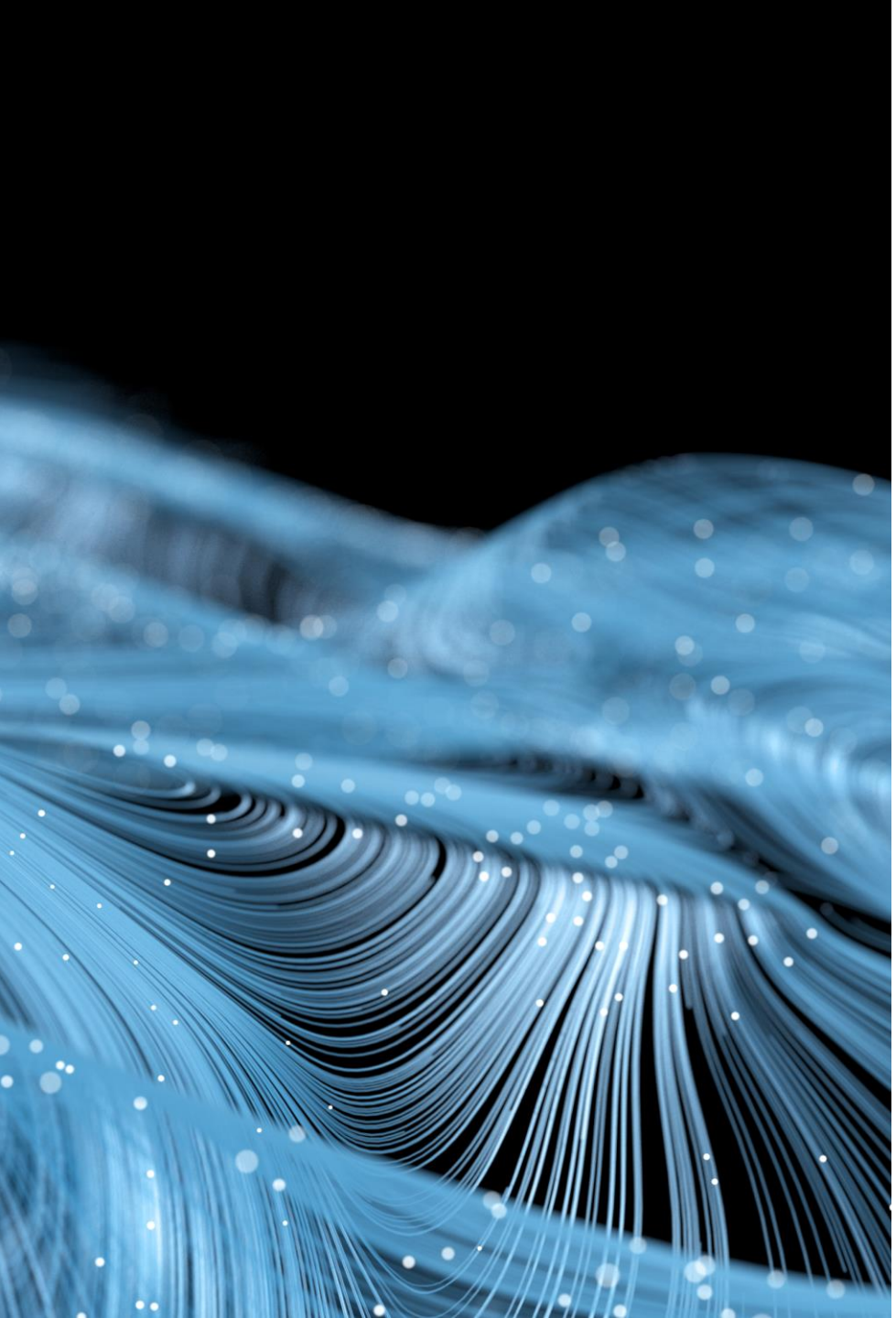
- Understanding Artificial Intelligence Technologies and Generative AI
- Potential Intellectual Property Issues Arising from AI
- Relevant Cases
- Looking Forward

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Understanding Artificial Intelligence Technologies and Generative AI

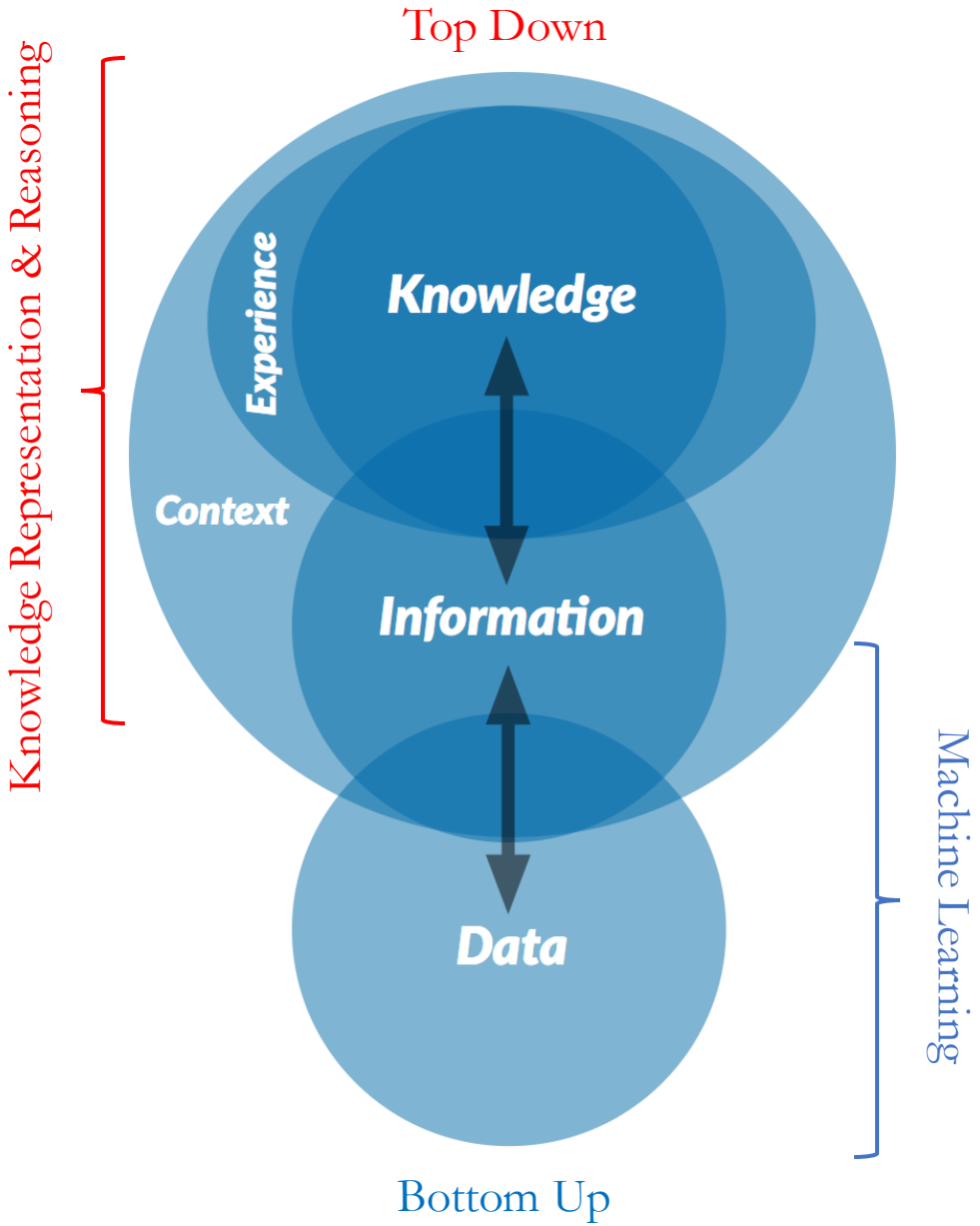
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What is Artificial Intelligence?

- Artificial intelligence, often referred to as AI, is defined by NIST as "a branch of computer science devoted to developing data processing systems that performs functions normally associated with human intelligence, such as reasoning, learning, and self-improvement."

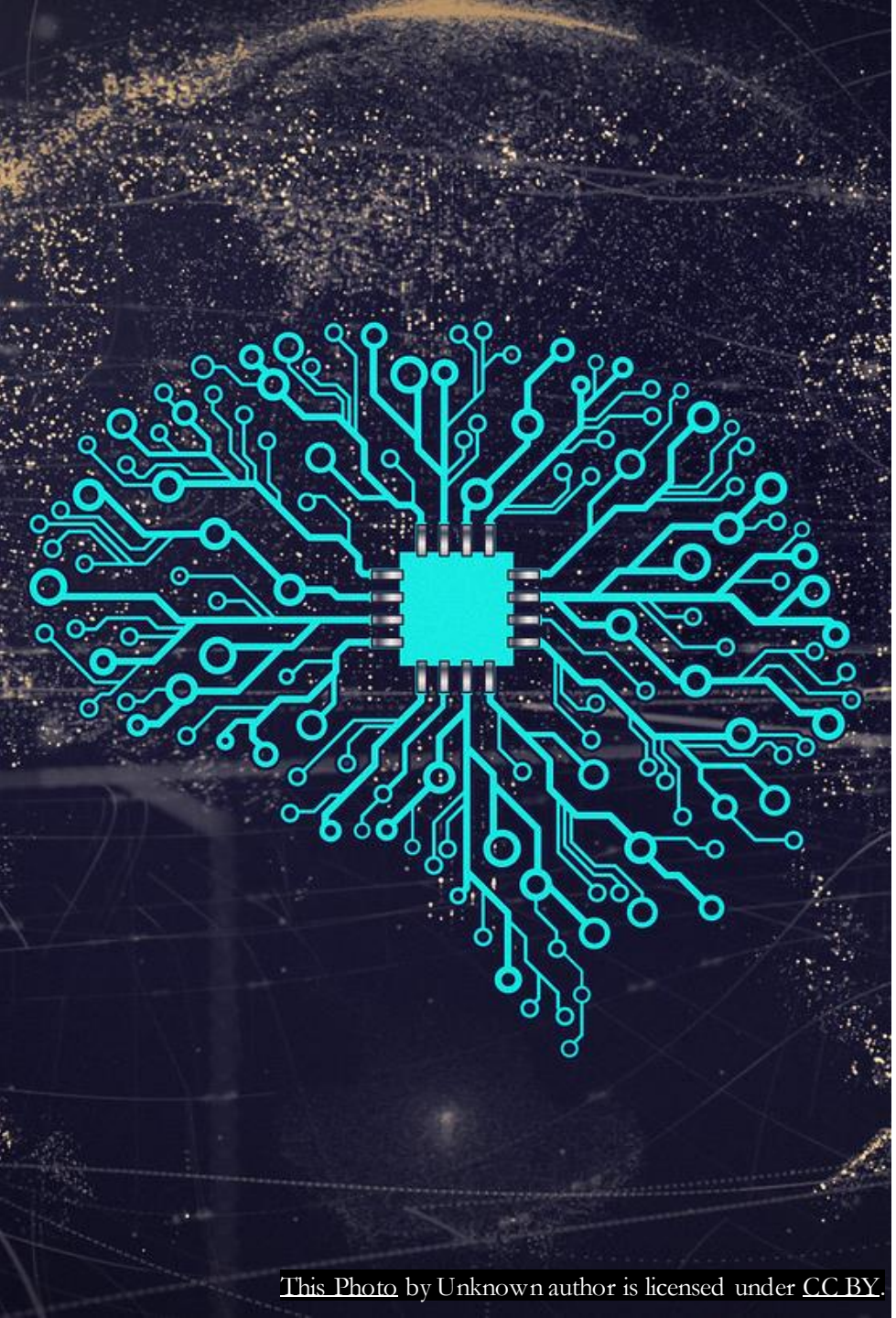
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Two Primary Reasoning Types

- Deductive Logical Inference
  - Uses facts, rules, descriptions, or properties to arrive at an explainable conclusion.
- Inductive Statistical Inference
  - Uses patterns to arrive at a conclusion.
  - Note: With inductive inference, the conclusion is only probable and can suffer from being 'black box'.

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Machine Learning and Deep Learning

- AI is in large part based on machine learning and deep learning technologies.
- Machine learning
  - Uses structured and labelled data and algorithms "to imitate the way that humans learn, gradually improving its accuracy." *IBM
- Deep learning
  - Is a subset of machine learning.
  - It has the ability to process unstructured data and "automates feature extraction, removing some of the dependency on human experts" by identifying the key features that distinguish elements from each other. *IBM
  - It is a neural network with 3 or more layers.

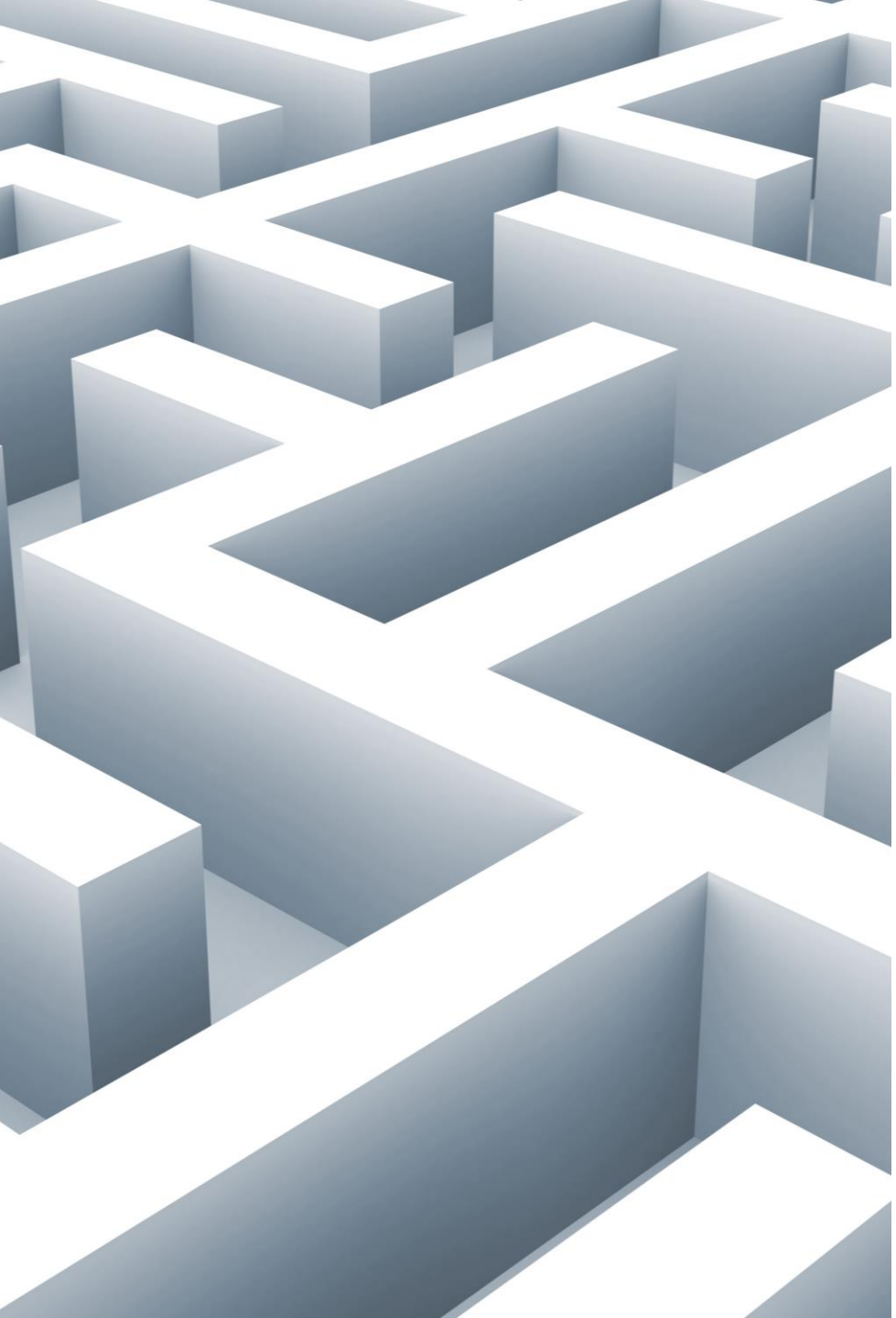
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Generative Artificial Intelligence

- In the past year, the interest in artificial intelligence has risen dramatically.
- While artificial intelligence was already present across many industries and supporting daily life, such as spam filters on emails or FaceID, the type of AI that is causing the most discussion and disruption today is generative AI.
- Generative AI is a type of AI capable of generating text, images, or other media in response to prompts.
- This AI model uses training data to identify patterns and structures to produce new data with similar characteristics.

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Chat GPT: Pandora's Box?

- In late 2022, OpenAI released the first widely available AI chatbot.
- Fastest growing user base in history
  - It reached 1 million users within 5 days, and
  - 100 million users in two months.
- Microsoft will be investing $10 billion into OpenAI and has already introduced beta versions of its browser, Bing, integrated with ChatGPT technology.

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Potential Intellectual Property Issues Arising From AI

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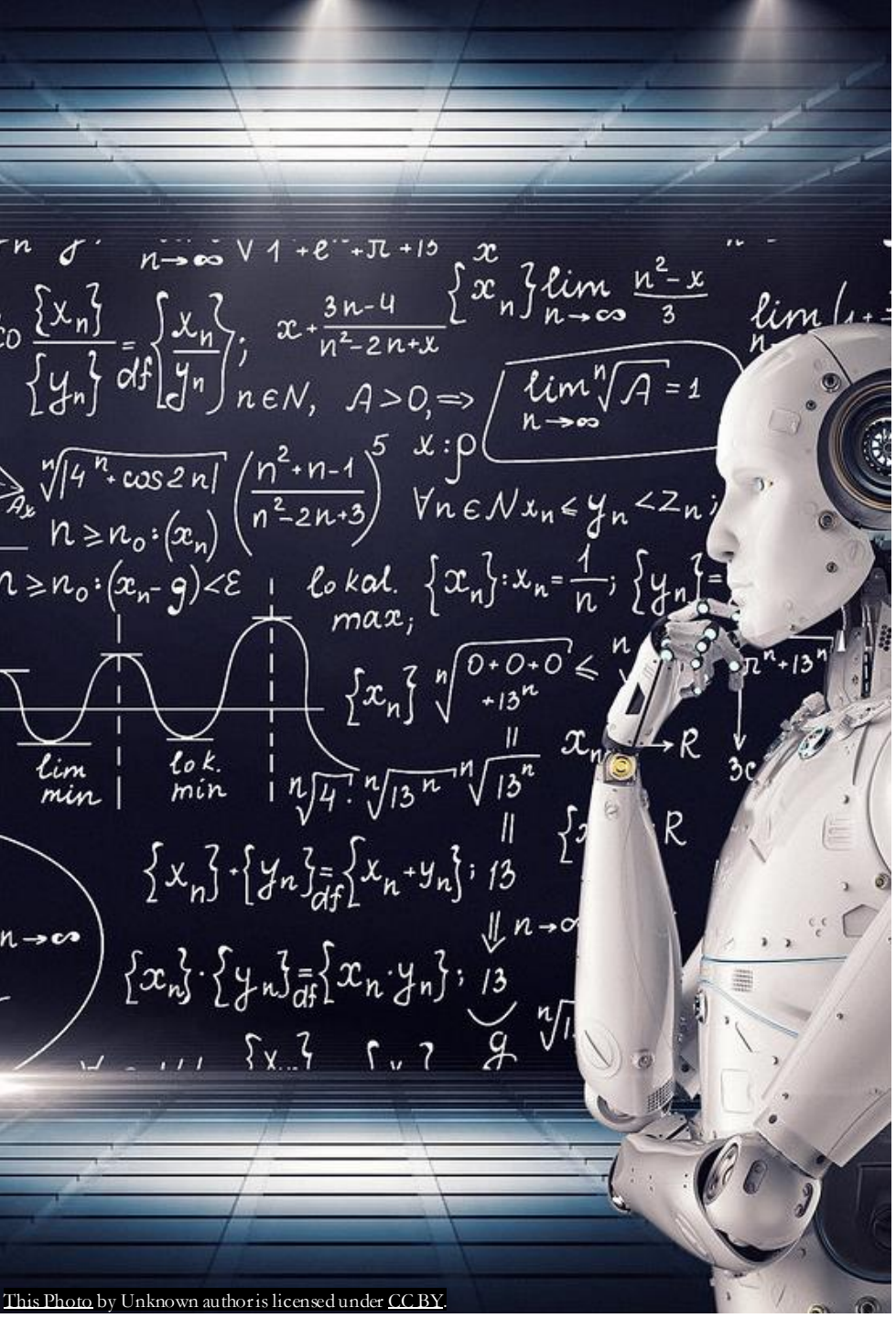
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Potential for Intellectual Property Violations

- AI is trained from existing sources of data or texts, among others, creating the risk of plagiarizing existing sources.
- The USPTO has indicated that "while an AI machine cannot currently own intellectual property rights, it may be able to infringe others' rights."

**USPTO Public Views on Artificial Intelligence and Intellectual Property Policy*

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Intellectual Property Questions that Arise from the Use of AI

- Who owns the content produced by AI?
  - The makers of the AI platform?
  - Those prompting generative AI to produce the result in question?
- How should intellectual property laws apply?
- Can AI-generated work be copyrighted or patented?
- Can creators of artistic works ban their work from being input into AI databases?
- What are the boundaries of fair use in this developing AI landscape?

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Copyright

- Protects the interests of those who create "original works of authorship," including literary, dramatic, musical, artistic, and certain other works.
- 17 U.S.C. § 106: The Act grants certain exclusive rights to copyright owners with respect to their copyrighted works, including:
  - Reproduction rights
  - Distribution rights
  - The right to prepare derivative works based on the copyrighted work

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Copyright Management Information

- 17 U.S.C. § 1202: X
  - (a) "False Copyright Management Information.—No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—" provide, distribute, or import CMI that is false.
  - (b) "Removal or Alteration of Copyright Management Information.—No person shall, without the authority of the copyright owner or the law—"
    - Intentionally remove or alter any CMI
    - Distribute or import for distribution CMI knowing that the CMI has been removed or altered.
    - Distribute, import for distribution, or perform copies of works knowing that the CMI has been removed or altered.

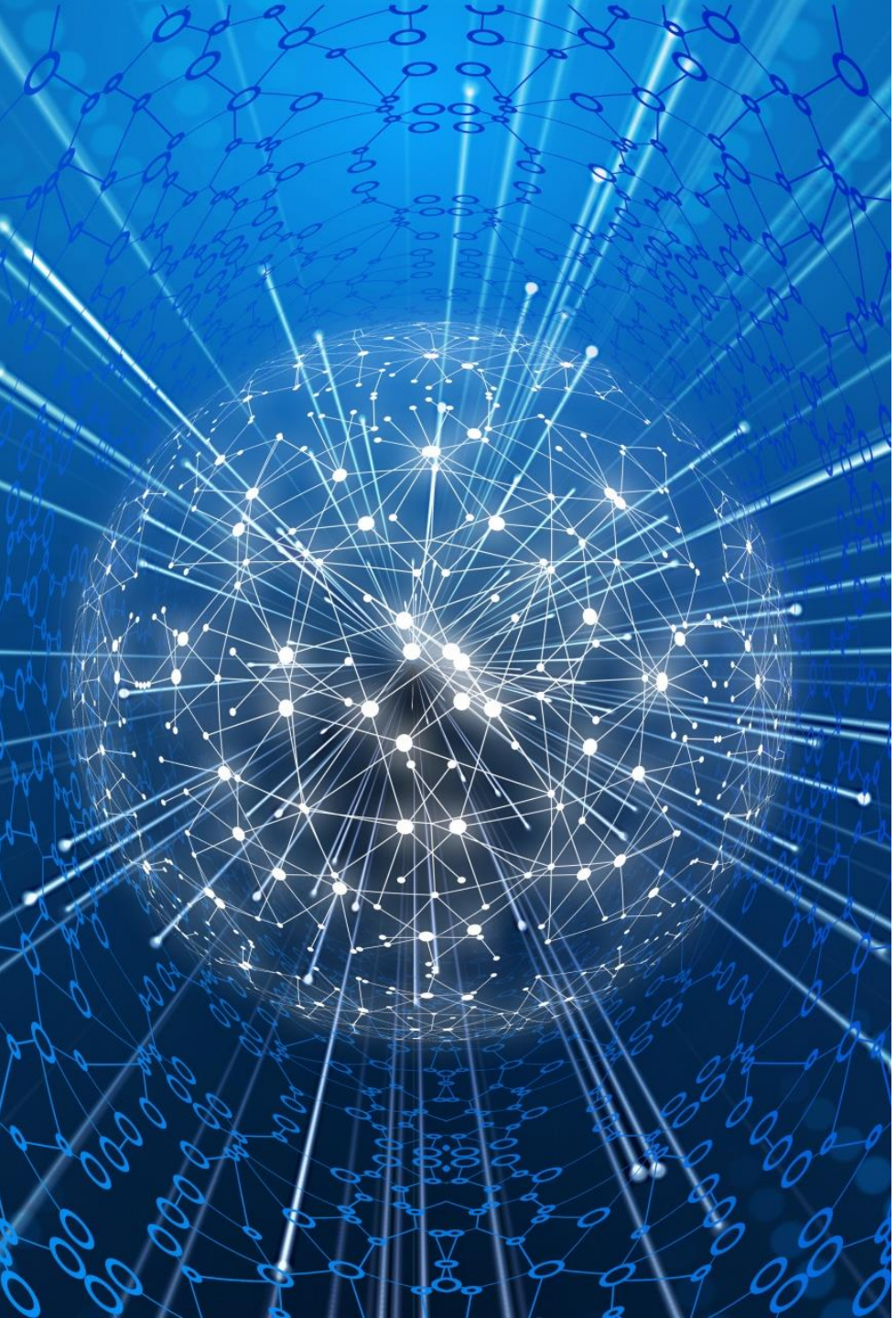
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Fair Use Claims

- 17 U.S.C. § 107: The Four Factor Test for Fair Use includes:
  - The purpose of the use.
  - The nature of the material being copied.
  - How much is being copied.
  - The effect of the use on the market for or value of the copyright work.
- How does fair use apply to AI use and AI-generated content?

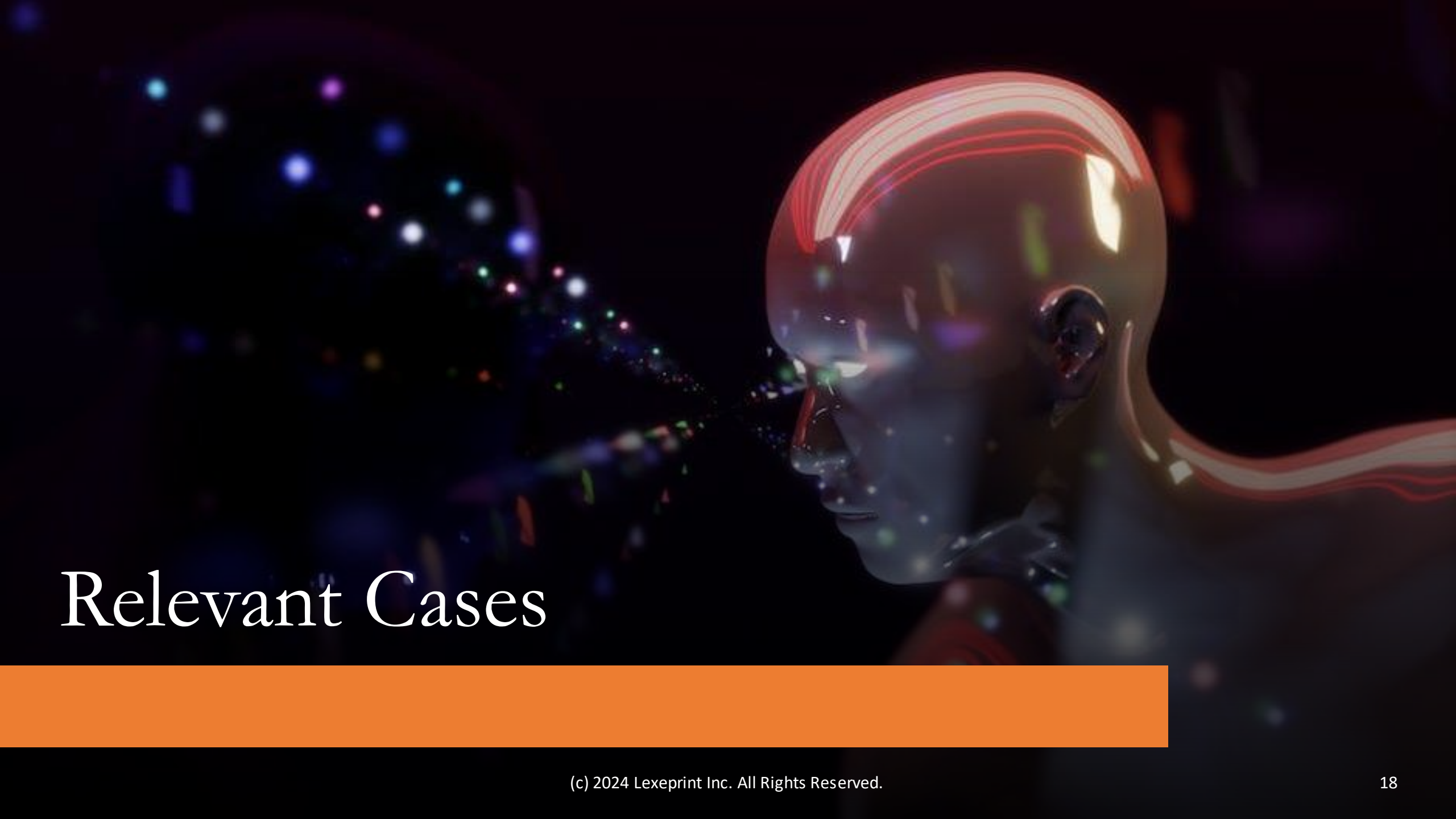
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Complications with Patents

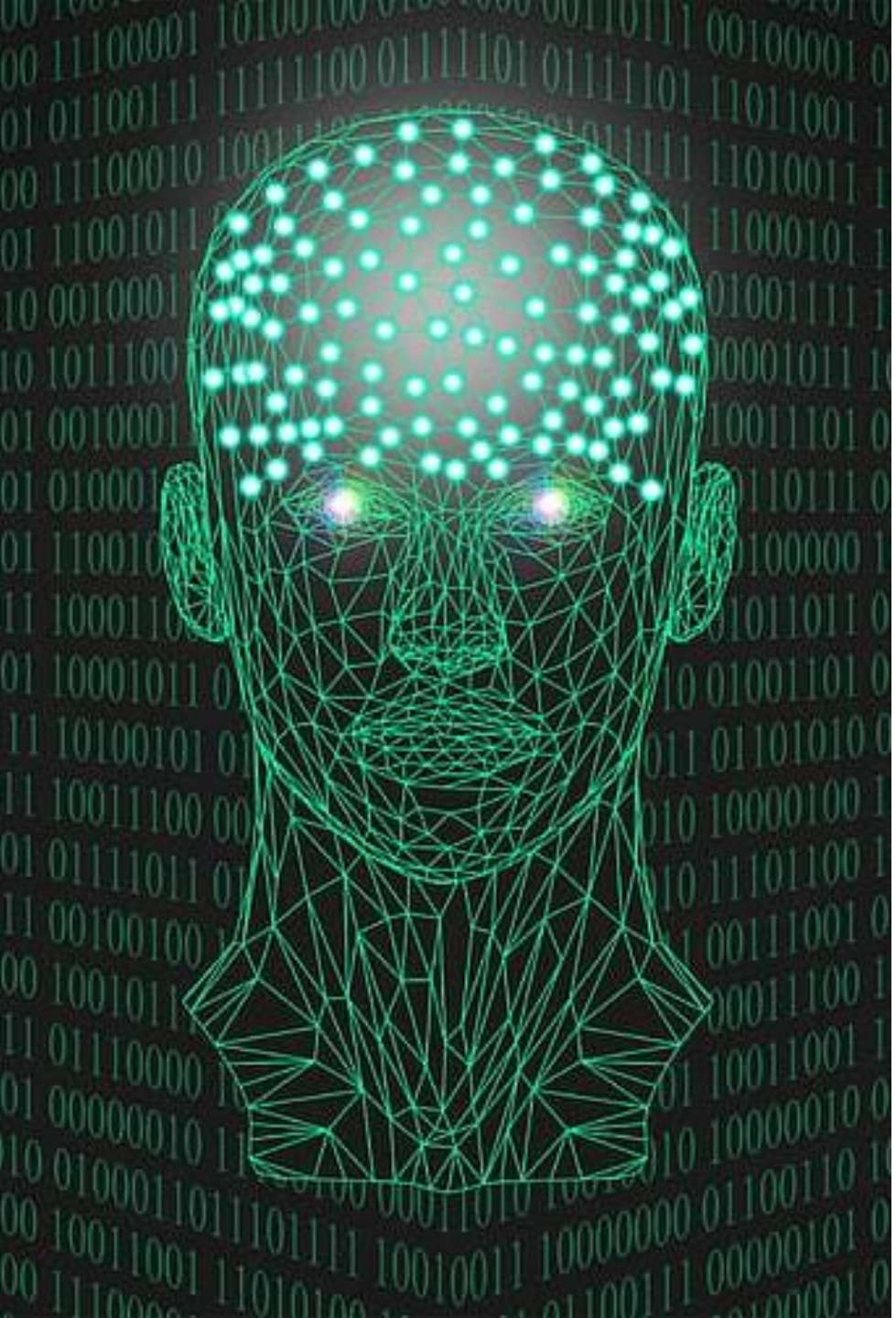
- Prominent AI-patenting sectors include:
  - Transportation
  - Computers and Personal Devices
  - Healthcare and Medicine
  - Telecommunications
- Patentability is harder to prove if AI involved, but a ruling for AI-as-Inventor may benefit healthcare companies that use technology to develop new treatments.

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Relevant Cases

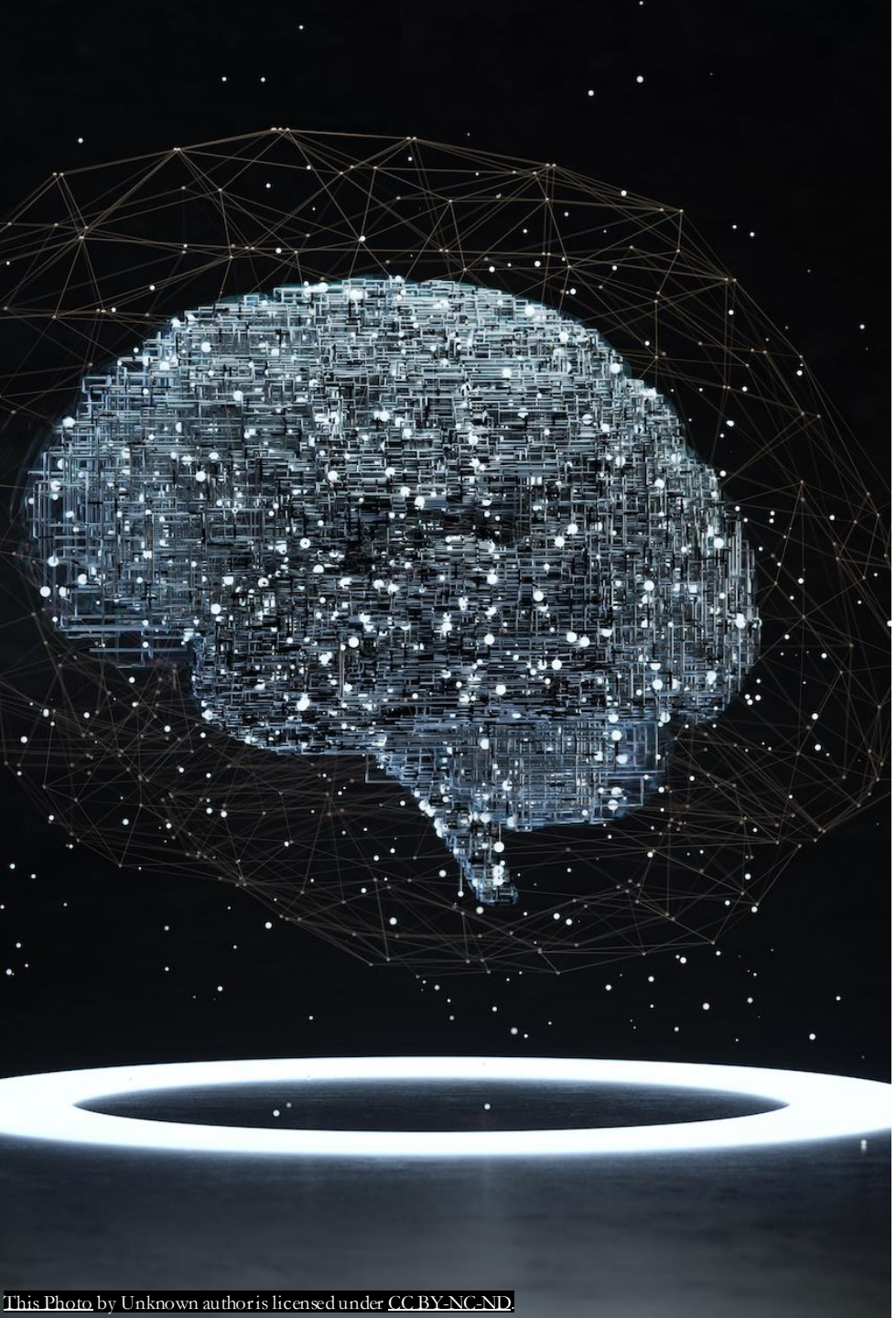
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Thaler v. Vidal, No. 21-2347 (Fed. Cir.) 2022

- **Facts:** Two patent applications that listed AI as the inventor were denied by the USPTO because they lacked a 'valid' inventor.
- **Issue:** Can AI be listed as the inventor on a patent application?
- **Decision**: The Federal Circuit court affirmed the District Court's decision that the AI could not be listed as the inventor of the patents.

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Thaler v. Vidal, No. 21-2347 (Fed. Cir.) 2022

- **Ruling:** The court emphasized that patents must be limited to 'individuals,' citing that "the U.S. Patent Act "limit[s] inventorship to natural persons." It sought to define “individual” and “inventor” to determine the role of AI in patent production.
- **Observations:** As it stands, AI cannot be listed as the inventor for patent applications.

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Andersen et al v. Stability AI Ltd. et al, No. 3:23-cv-00201-WHO (N.D. Cal) 2023

- **Facts:** Three artists, Sarah Andersen, Kelly McKernan, and Karla Ortiz, have filed a class action lawsuit against the AI companies, Stability AI, Midjourney, and Deviant AI. The plaintiffs allege that these AI platforms trained their models using their copyrighted work without consent or compensation.
- They allege:
  - Copyright infringement
  - Vicarious copyright infringement
  - DCMA violations
  - Right of publicity violations
  - Unlawful competition
  - Creation and distribution of wor

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Getty Images (US), Inc. v. Stability AI, Inc., 1:23-cv-00135, (D. Del.) 2023

- **Facts:** Stock photo company Getty Images, filed a lawsuit against Stability AI, alleging that it committed copyright infringement when it copied over 12 million of its copyrighted images and their metadata. Stability AI used these images are part of the datasets used to train AI models.
- **Issues:** Is the use of copyrighted material for AI generation protected by fair use? Is this use of stock photos a violation of copyright and trademark rights?

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Looking Forward



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Looking Forward

- The outcome of these cases is still unclear, yet their result stands to have meaningful consequences on copyright owners and generative AI creators.
- One of the main considerations at stake is the boundaries of what is transformative work and the extent of fair use.
- The decision by the United States Supreme Court in May of 2023 on *The Andy Warhol Foundation v. Goldsmith* ruling against the fair use defense to copyright infringement may inform upcoming decisions on generative AI products.

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Risk for AI Developers

- The legal status of products generated by AI is still in flux today.
- Yet developers and their counsel will benefit from ensuring that data is acquired in compliance with intellectual property laws.
- Features differentiating work generated from copyrighted material may need to be built, or new revenue-sharing systems.

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Risk for Creators

- Creators of written works or visual art face a challenging outlook for the protection of their works, as well as receiving for receiving credit and recognition for their creations
- Creators should avail themselves of the existing intellectual property protections and keep up with evolving judicial decisions.
- Using tools to monitor how and where their work is being used may provide critical support for future litigations.

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Risk for AI Users

- Generative AI users prompt programs to produce works, text or visual, according to their instructions, but do not generally know what elements of the dataset were used to generate the requested outcome.
- Businesses will need to protect themselves from potential infringement from the use of third-party AI by instituting indemnification clauses or disclosures in their agreements.
- The risk will evolve as questions on AI and intellectual property protections begin to be answered.

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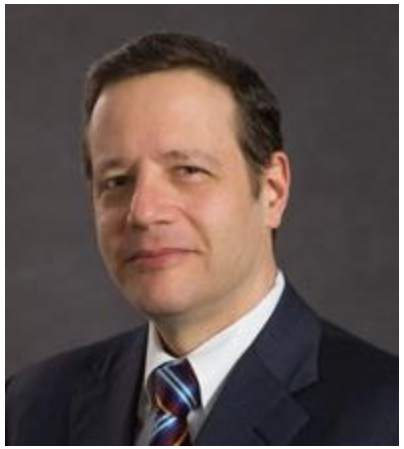


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Yoav M. Griver is a partner in Zeichner Ellman & Krause LLP's litigation group where he focuses on representing clients in complex commercial matters. Prior to joining ZEK, Yoav was Litigation Counsel to Weil, Gotshal & Manges LLP, where he litigated a variety of commercial and intellectual property matters for clients in the banking, credit, transportation, insurance, computer software and electronic industries. Before that, Yoav prosecuted banking conspiracy, stock fraud and other cases on behalf of the Israeli Ministry of Justice where he was a member of the Ministry's Economics Unit.

Yoav's many proud moments as a trial attorney include successfully defending Hitachi America in the longest customs fraud trial in the history of the Court of International Trade; successfully defending MasterCard in a multi-district putative class action against claims that MasterCard was responsible under RICO for internet gambling; recovering a verdict on behalf of a class of minority schoolchildren in a prominent civil rights case; successfully defending GMAC in a class action alleging violations of RICO, the Sherman Act, state and federal credit repair organization statutes, and state UDAP statutes; and successfully defending Tellium Inc. in a protracted case involving allegations of breach of contract, unjust enrichment, and fraud upon the United States Patent and Trademark Office.

Yoav is co-editor and author of the multi-year treatise, Dispute Resolution and e-Discovery, published by Thomson Reuters. He also writes on a wide variety of legal topics for such publications as The Business Lawyer, The Consumer Financial Services Law Report, Law 360, Bloomberg, and the Journal of Proprietary Rights. He received his J.D. with honors, Order of the Coif, from the University of Texas School of Law in 1991, where he was a member of the Texas International Law Journal, and his B.B.A. with honors from the University of Texas in 1988.

Outside the office, Yoav volunteers his time to the Lawyers' Committee for Civil Rights Under Law and the Office of the Appellate Defender. Yoav also is an Adjunct Professor at NYU. Where he teaches courses at NYU on Sports Law and Sports Management.

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Daniel Barsky is an intellectual property attorney in Holland & Knight's Miami office. Mr. Barsky regularly represents clients in intellectual property (IP), information technology (IT) and data-related licensing and transactional matters, including mergers and acquisitions (M&A), private equity transactions, joint ventures, and multilateral and multinational licensing agreements.

Mr. Barsky's clients call upon him to navigate complex transactions involving IP, IT and data assets. He assists and advises clients with navigating the complexities of transactions involving intangible assets such as patents, trademarks, copyrights, trade secrets and data, brand licensing and distribution agreements, blockchain technology such as cryptocurrency and non-fungible tokens (NFTs), software and technology licensing agreements, and transition services agreements.

Post-closing, Mr. Barsky assists clients with the maintenance and enforcement of their IP and IT portfolios with an eye towards leveraging those portfolios to drive revenue and growth. Mr. Barsky oversees, coordinates and maintains multinational trademark portfolios encompassing thousands of marks registered in more than 100 countries, including the monitoring and enforcement of the portfolios, as well as multinational, anti-counterfeiting activities.

In addition to his transactional and counseling work, Mr. Barsky maintains an active, nationwide IP and IT litigation practice and has represented clients in patent infringement, trademark infringement, anti-counterfeiting, unfair competition, copyright infringement and trade secret theft matters, as well as information technology, data privacy, cyberfraud, data breach and hacking matters, and responses thereto.

Mr. Barsky is an active force and thought leader in South Florida's entrepreneurial and startup community. He regularly represents startup and new business ventures and has helped multiple startups develop, protect, grow, monetize and enforce their IP and other business assets. His work with startups and entrepreneurs includes advising on software license agreements, user agreements, privacy policies, brand clearance, brand protection and monetization strategies, blockchain and NFT questions, and IP registration.

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Formerly a computer designer, Ashley is a Data, AI and IP partner at in the Innovation group. Ashley provides intellectual property, data, cyber security, encryption and export control advice with particular emphasis on Artificial Intelligence, payment systems and other highly regulated platforms.

He advises extensively on the impact of intellectual property, privacy and information security law on cloud services, financial technology, telecommunications and international data transfers and has a particular focus on the intersection of competing laws, which can occur in the context of lawful interception of data, corporate investigations, government investigations or international litigation.

Since 2001, Ashley has been recognised annually by the legal directories such as Chambers and Partners Guide to the Legal Profession and the Legal 500 Directory for his expertise in both data and information technology.

Ashley is a Ponemon Institute Fellow. He regularly speaks at industry and academic conferences.

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