Risk and Reward: Navigating AI Compliance and Risk Allocation in Advertising

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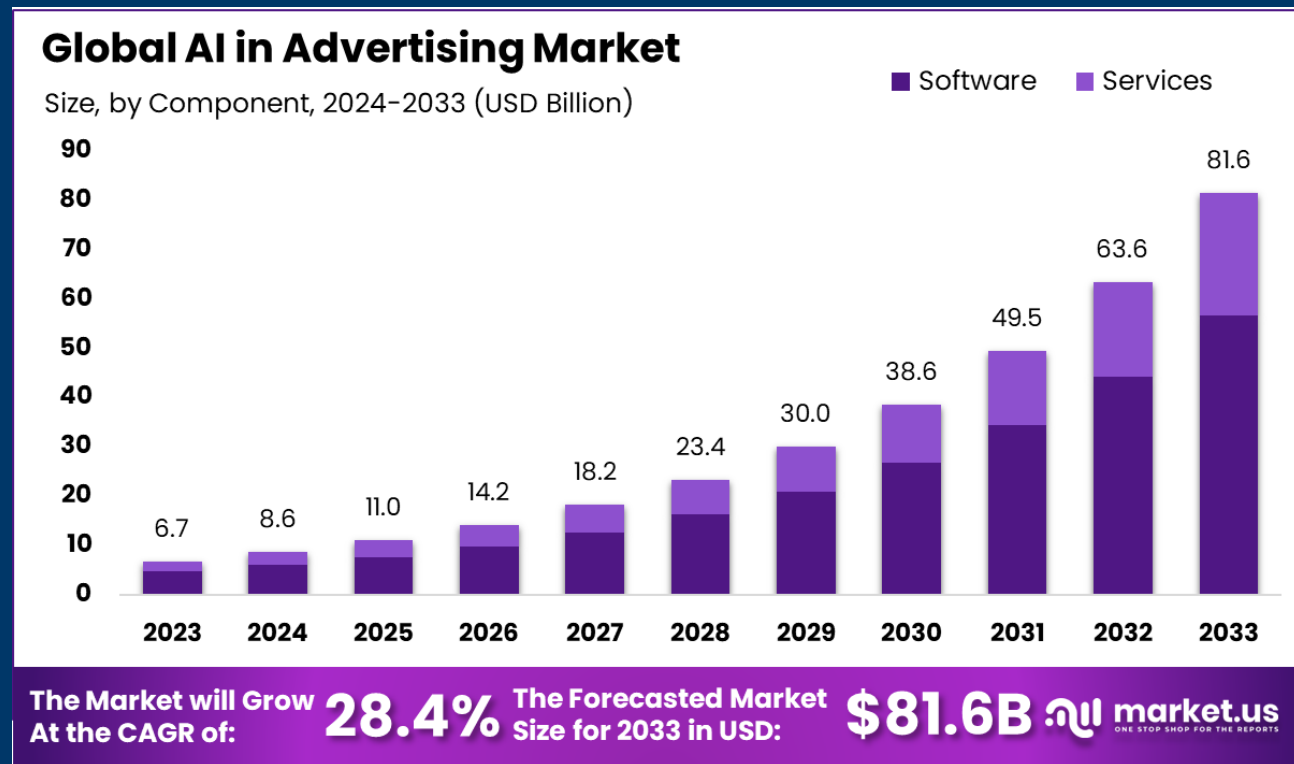Omnicom Media Group

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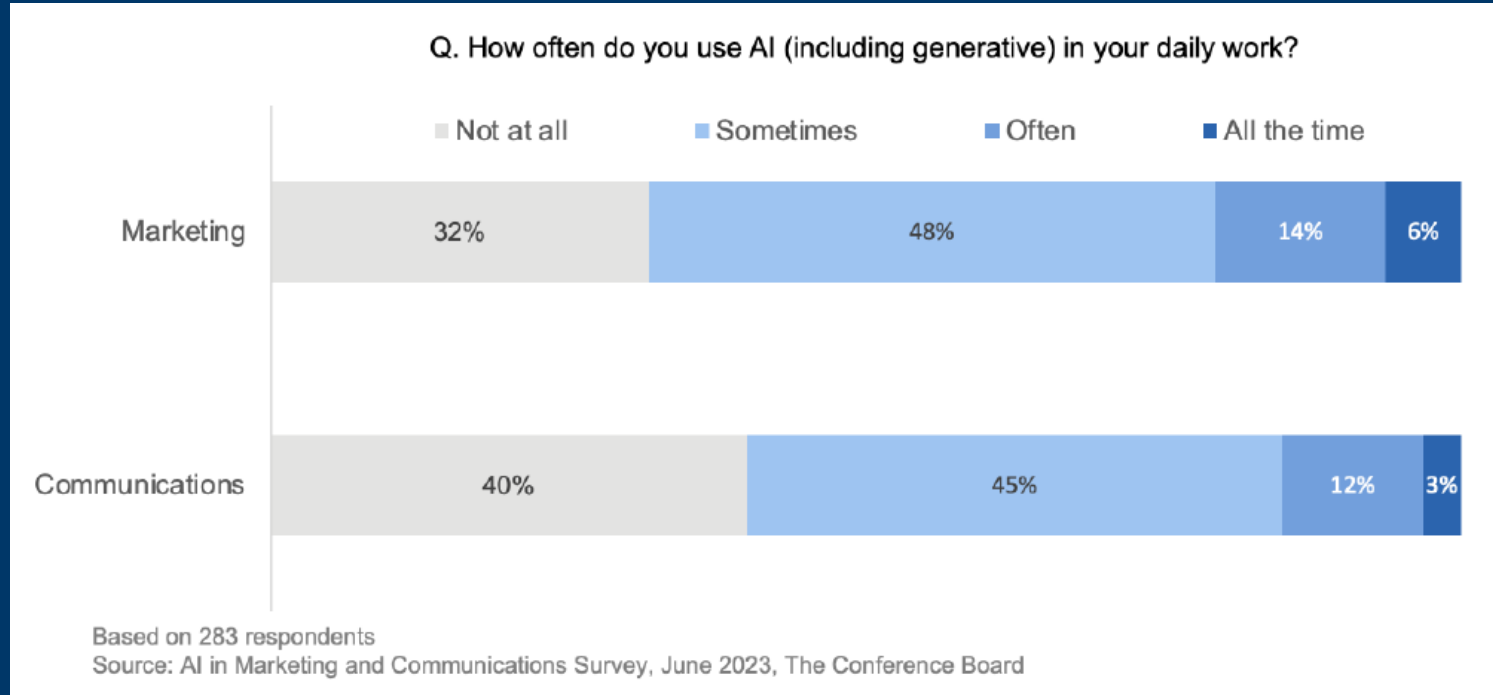
The Use of AI in Advertising has Exploded

- According to a Market.us report, global investment in AI for advertising grew from $6.7B in 2023 to $8.6B in 2024 and is estimated to reach $81.6B in 2033

Global AI in Advertising Market

Size, by Component, 2024–2033 (USD Billion)

Legend: ■ Software ■ Services

Year	Value
2023	6.7
2024	8.6
2025	11.0
2026	14.2
2027	18.2
2028	23.4
2029	30.0
2030	38.6
2031	49.5
2032	63.6
2033	81.6

The Market will Grow At the CAGR of: **28.4%** The Forecasted Market Size for 2033 in USD: **$81.6B** market.us ONE STOP SHOP FOR THE REPORTS

The Use of AI in Advertising has Exploded

- 87% of Advertisers have used AI or experimented with AI tools and that 68% of marketers are using AI in their daily works.

Q. How often do you use AI (including generative) in your daily work?

| ■ Not at all | ■ Sometimes | ■ Often | ■ All the time |

	Not at all	Sometimes	Often	All the time
Marketing	32%	48%	14%	6%
Communications	40%	45%	12%	3%

Based on 283 respondents
Source: AI in Marketing and Communications Survey, June 2023, The Conference Board

Benefits of AI for Advertising

Generative AI for Creative

Efficiencies

Produce high-quality content, such as text, images, and videos quickly and at scale.

Automate content creation and editing processes to lower production costs

Personalized Experiences

Tailor content to individual consumer preferences to increase engagement and conversion

Adapt content in real time to user interactions

Boost Creativity

Quickly generate new ideas to inspire creative process

Experiment with different formats and styles with minimal effort

Benefits of AI for Advertising

Predictive AI **for** Media Buying

|	
Ad Targeting	Identify and send ads to the customers who are most likely to respond positively to the ad
Customer Insights	Gain insights on how consumers interact with an ad to better understand the target audience and refine marketing strategy
Optimize Ad Spend	By predicting which ads perform best, advertisers can allocate their budget more efficiently and optimize ROI
Real-Time Adjustments	Change campaign strategy in real time based on performance to optimize the performance of the ads
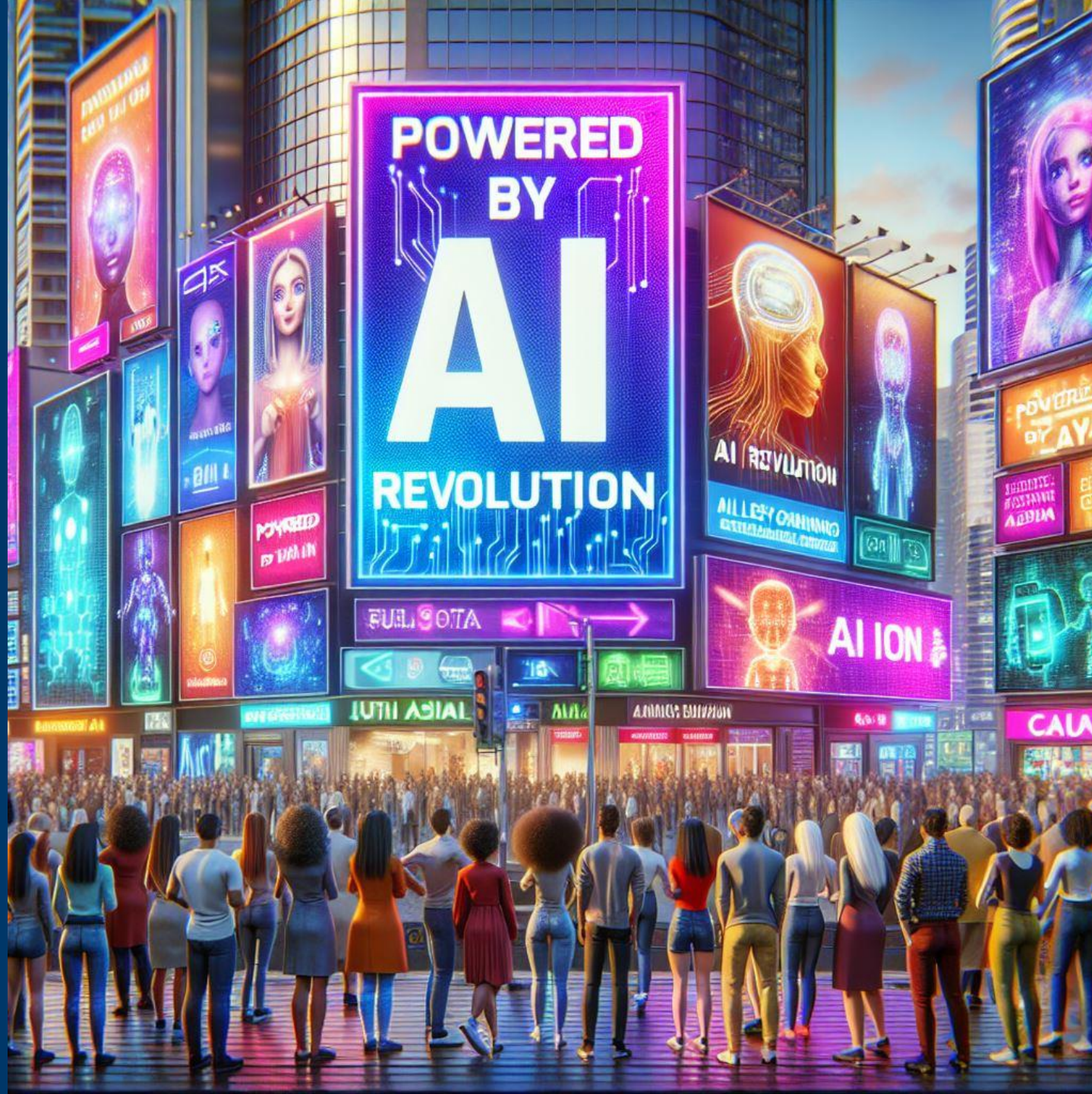
AI is revolutionizing Advertising and how brands interact with their audience. But with great power comes great responsibility.

What could possibly go wrong?
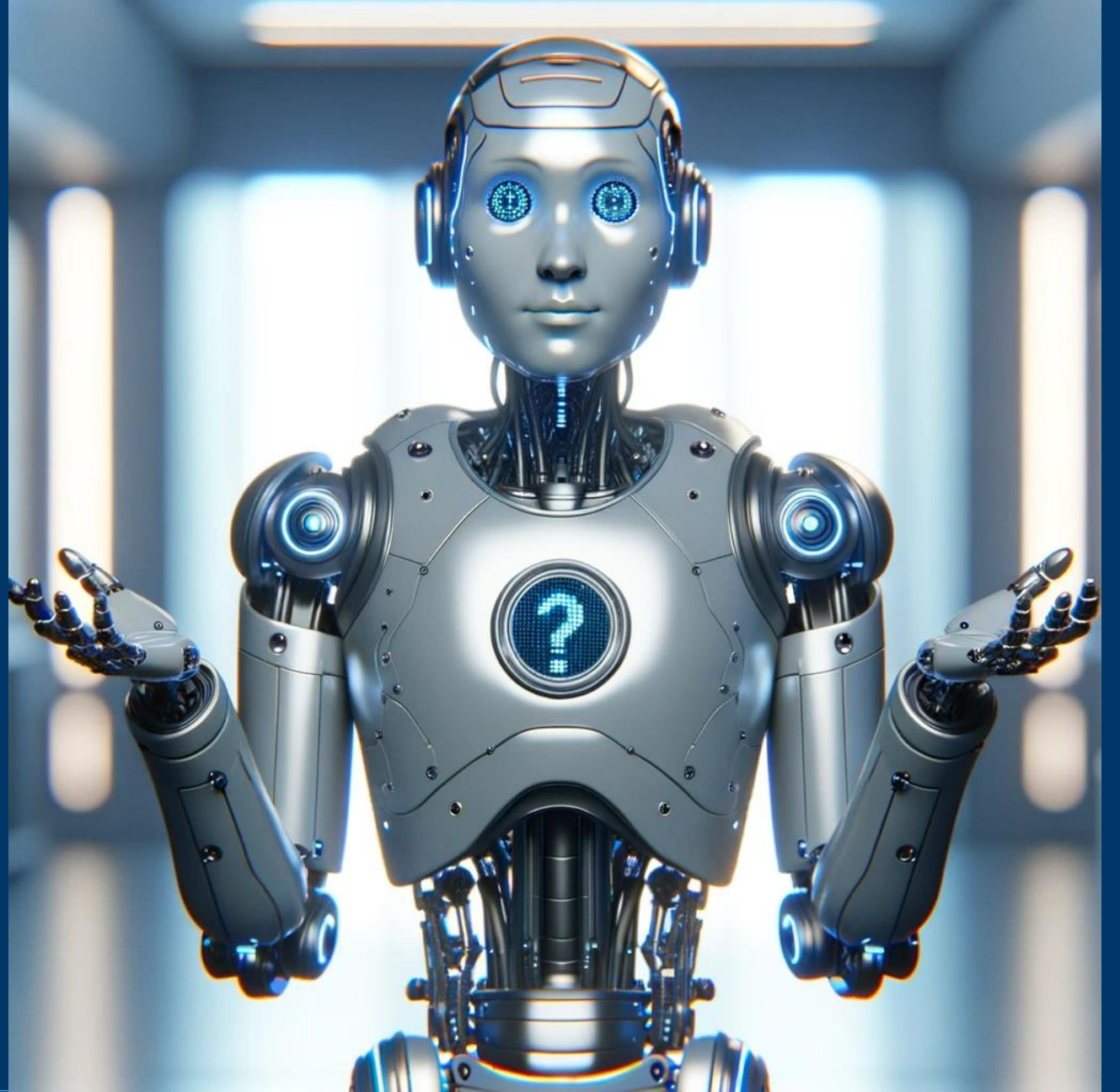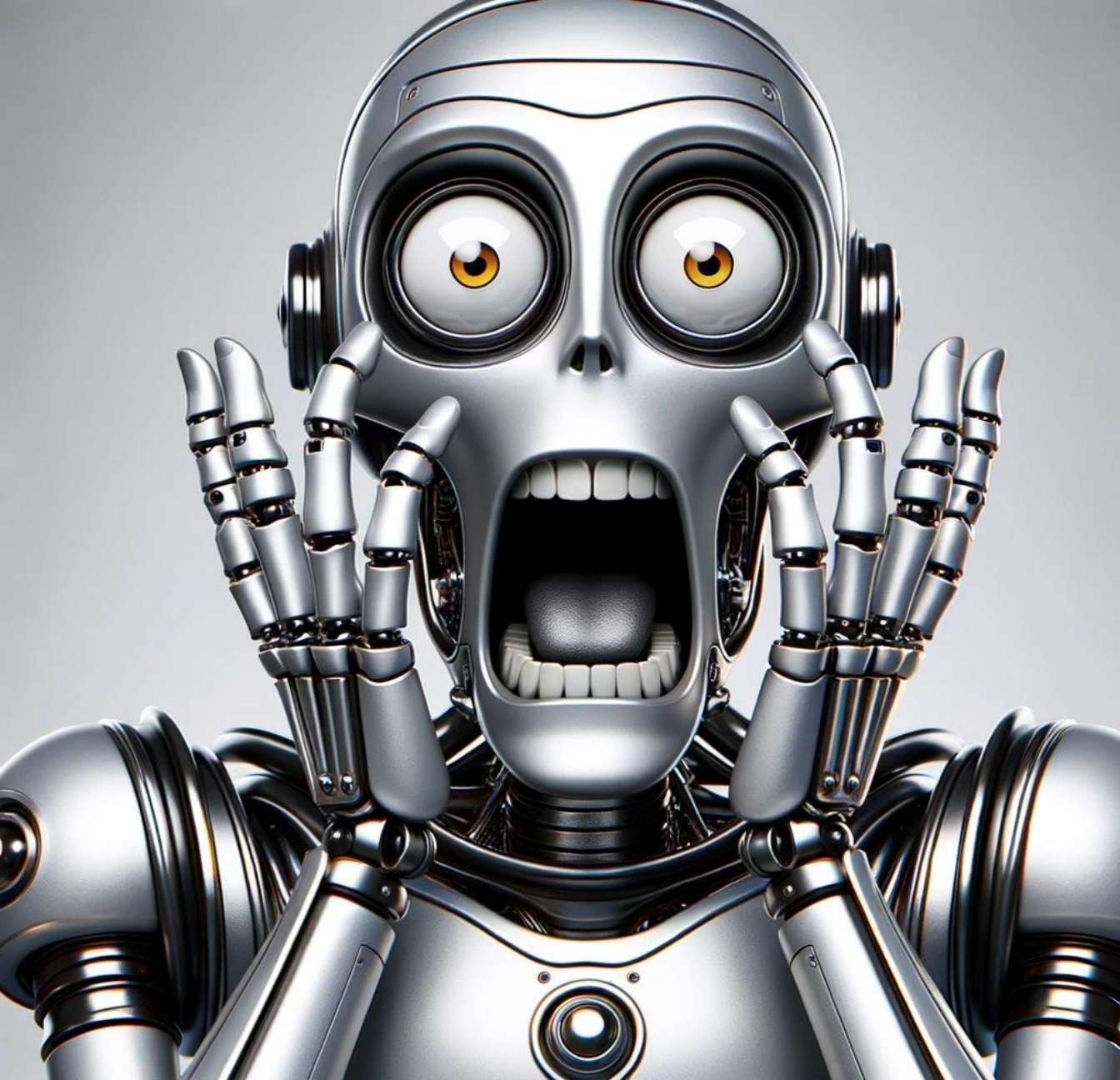
A few things…

Risks of Using AI

- Legal Risks
    - Intellectual Property
        - IP infringement
        - Lack of IP protections of output
    - Rights of Publicity
    - Compliance
        - Changing regulatory landscape
        - New considerations for existing laws
- PR and Brand Risk
    - Bias
    - Branding

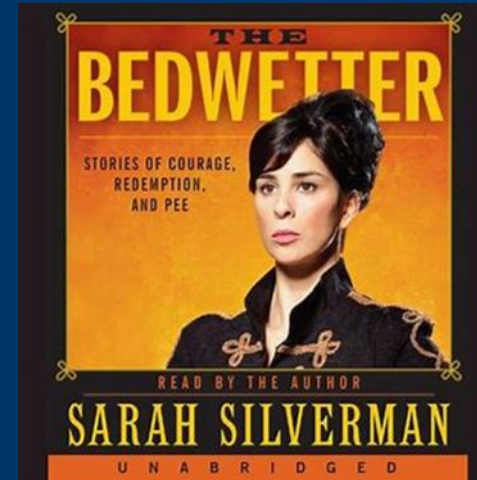# IP infringement: Training, Input, and Output

Anderson v. Stability AI

Getty Images v. Stability AI

An illustration from Getty Images' lawsuit, showing an original photograph and a similar image (complete with Getty Images watermark) generated by Stable Diffusion. Image: Getty Images

Sarah Silverman v. Open AI and Meta

Copyright: AI Output is not protected by Copyright

Right of Publicity: Rights to use Individual's Likeness

Legal Compliance: AI Regulation is Quickly Evolving

Don't Forget Existing Laws!

May 9, 2024 | 4 minutes read

Disclosures Required When Using AI-Generated Actors/Voices

As advertisers and agencies continue to determine how to best use artificial intelligence (AI) to market their products and services, they should consider how to disclose to consumers that the materials they are viewing were generated via AI. Below are some common disclosure questions that have been arising surrounding the use of AI in ads:

Brian Heidelberger
Chair, Advertising, Marketing and Promotions

Ryan Martin
Partner

We are using an AI-generated actor (or voice) in our marketing materials, are there laws that require disclosures for this type of use?

(We'll call this our "core AI question" for purposes of this article.)

The guidelines most applicable to our core AI question are the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 CFR 222) and the FTC Policy Statement on Deception. The Endorsement Guides are based on the basic truth-in-advertising principle that endorsements must be honest and not misleading, which are reflected in two primary requirements: (1) if there's a connection between an endorser and the marketer that a significant minority of consumers wouldn't expect and it would affect how they evaluate the endorsement, that connection should be disclosed clearly and conspicuously, and (2) endorsements must reflect the truthful experiences and opinions of the endorsers.

Google LLC and iHeartMedia, Inc., In the Matter of

Tags: Consumer Protection | Competition | Bureau of Consumer Protection | Advertising and Marketing

Last Updated: February 9, 2023
**Case Status:** Pending

Google LLC, a limited liability company, and iHeartMedia, Inc., a corporation, in the Matter of

FTC Matter/File Number: 2023092

Case Summary

In November 2022, the FTC and seven state attorneys general sued Google LLC and iHeartMedia, Inc. for airing nearly 29,000 deceptive endorsements by radio personalities promoting their use of and experience with Google's Pixel 4 phone in 2019 and 2020. The proposed FTC orders and the state judgments settling the allegations bar Google and iHeartMedia from similar misrepresentations, and the state judgments also require them to pay $9.4 million in penalties.

Bias: AI Generated Barbie Create Culturally Insensitive Images
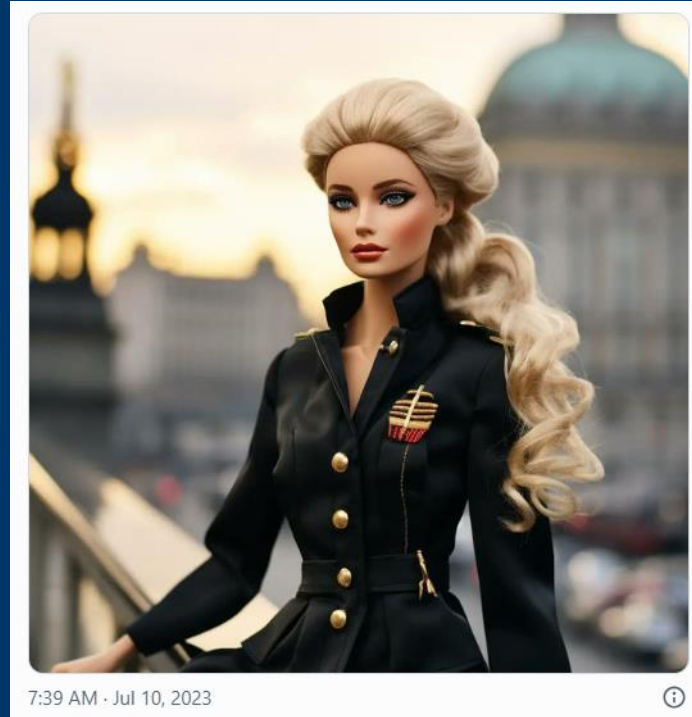
Branding: What message does using AI send and what is the social impact?

SAG-AFTRA Waits for Response From AMPTP as
AI and Numerous Other Issues Remain Unresolved

THE Hollywood

POLICY / TECH / LAW

Microsoft, GitHub, and OpenAI ask court to

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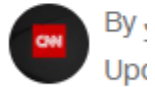
Writers suing OpenAI fire back at

George R. R. Martin, Jodi Picoult and other

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Oct 18, 2023 2:46pm PT

Universal, Concord, ABKCO Sue AI Company
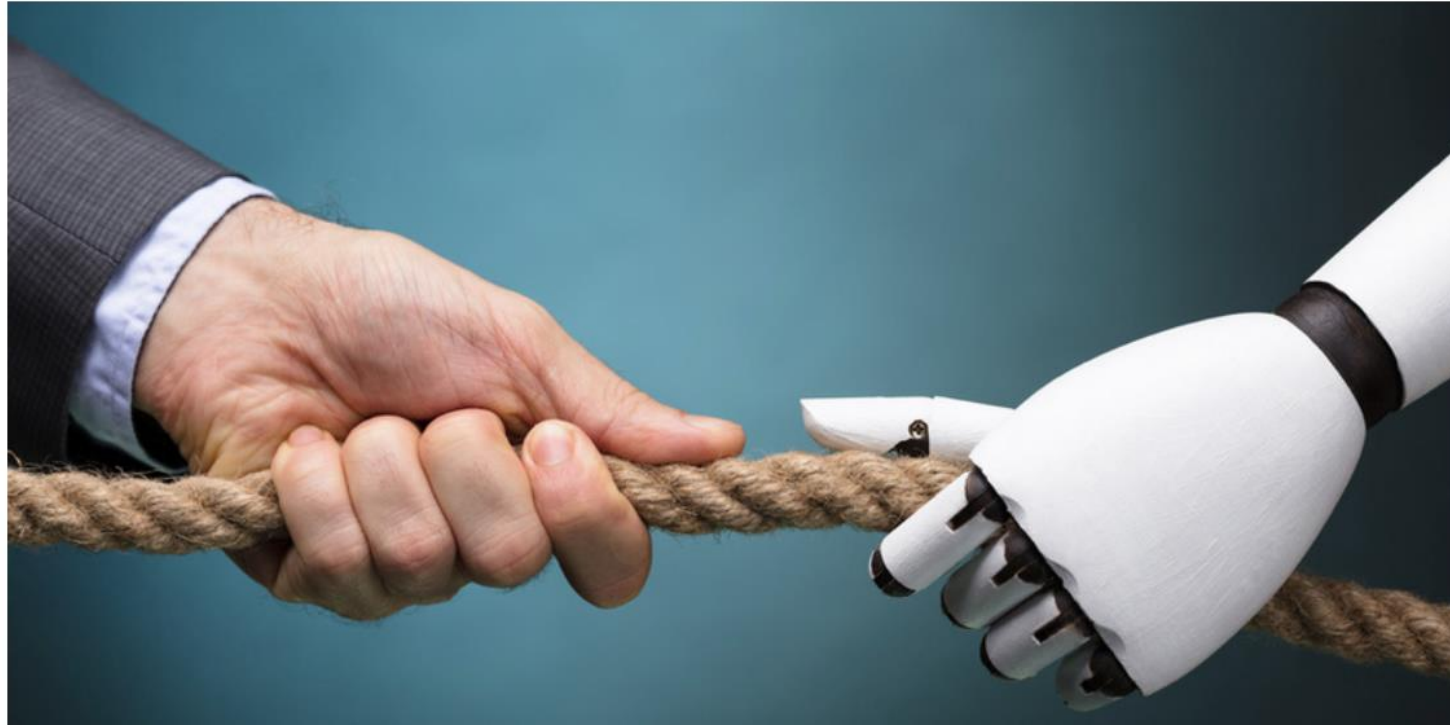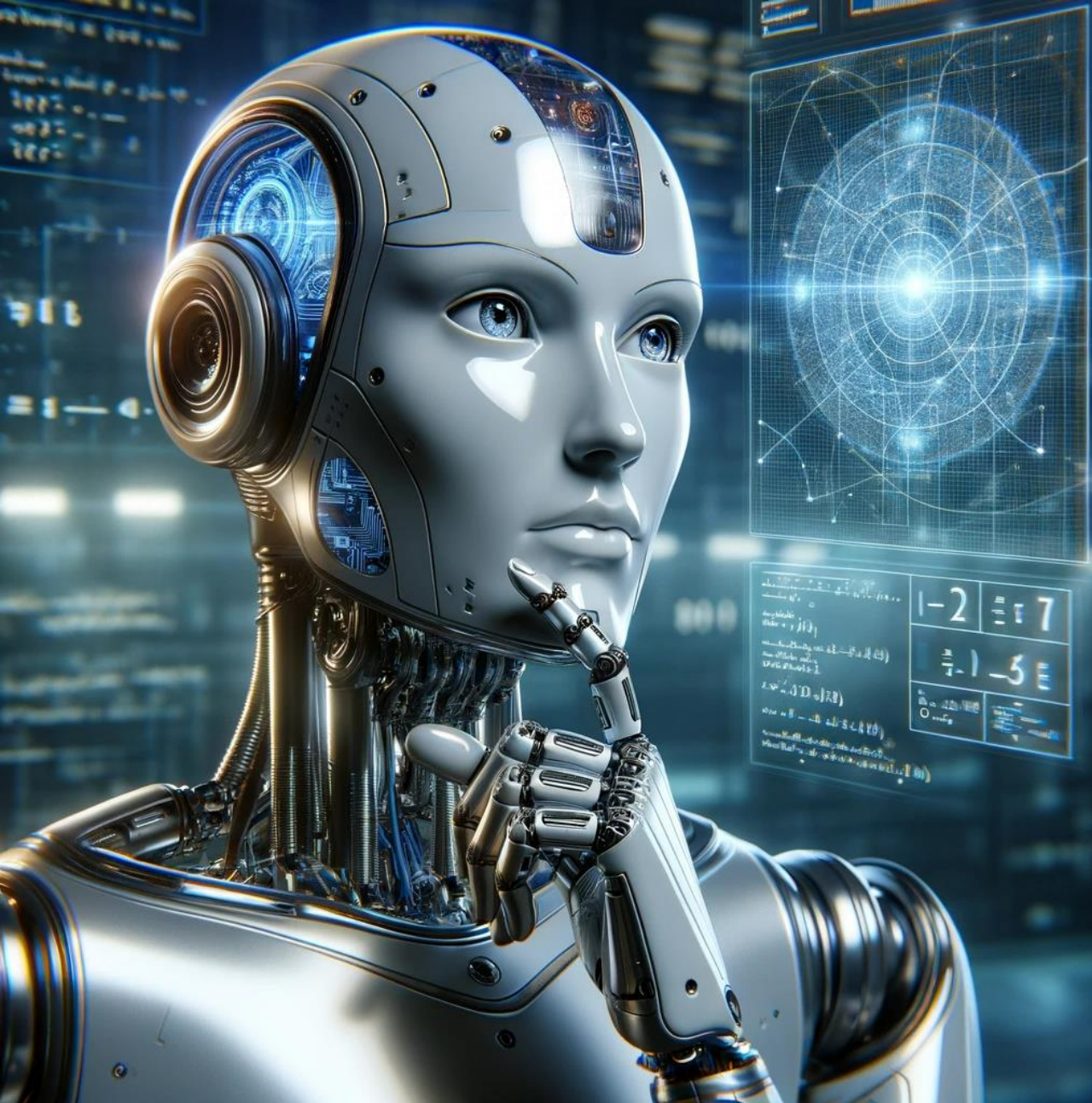**Anthropic for Copyright Violation**

By Jem Aswad ∨

By
Up

Some Advertisers Reconsidering Use of AI?

Why some brands are putting the brakes on Gen AI

With the hype and excitement of last year's Gen AI boom now dissipating, Campaign explores why some brands and agencies are adopting a pushback stance when it comes to the new technology in a bid to avoid its pitfalls.

How do I use AI in advertising and take advantage of the benefits while managing the risk?

Navigating AI Risks

- AI Policy
  - Establish "Ethical" AI Principles and "Responsible" AI Practices
- Allocating risks between the Advertiser and the Agency
  - Advertiser/Agency MSA
  - AI Vendor Agreements

AI Policy

- What are the use cases for AI in my advertising?
- What uses of AI in advertising are "high risk" and "low risk"?
  - High Risk – Generative AI for creation of new content
    - IP risks, bias, rights of publicity, branding
  - Lower Risk – Predictive AI for media planning and buying
    - Audience bias, privacy
- Assessing vendors
  - Advertiser: What AI is my Agency using in my advertising?
  - Agency and Advertiser: due diligence on AI providers
    - What is their training data? Do you have transparency into the training data?
    - Contractual protections
- What data is being uploaded into AI?
- Oversight and governance

Ethical AI and Responsible AI

- **Ethical AI Principles** – The underlying moral values that should be reflected in the use of AI in advertising.
  - Ensuring fairness and preventing bias in the targeting of advertisements;
  - Being transparent on how AI is used; and
  - Respecting consumer privacy and choice.
- **Responsible AI Practices** – The processes and procedures to ensure that AI is used in advertising in a manner that reflects those moral values.
  - performing due diligence on AI tools used and their data sources, including bias audits;
  - disclosing when content used in an advertisement was created using AI; and
  - disclosing to consumers how their data is used with AI and the ability to opt out.

Allocating Risk: Advertiser/Agency MSA
Top Issues to Consider and Negotiate

No use of AI without Consent	Intellectual Property	Human Oversight
Elimination of Bias	Regulatory Compliance	Liability and Indemnities

No use of AI without Consent

Agency shall not use AI without Advertiser's prior written consent.

- Is a broad prohibition always appropriate?
  - Balance Advertiser's need to know what AI is being used against the operational overhead of obtaining consent.
  - Should the Agency obtain consent for all types of AI?
    - Predictive AI vs Generative AI
  - When should consent be required?
    - Use of AI in "Final Deliverables"
    - Inputting Advertiser Data or Content into AI Tool

Data Ownership and Use

- Ownership of
  - Inputs / Prompts
  - Output
- Permitted use of Advertiser Data
  - Only to provide Services
  - Aggregated Advertiser Data
- Restrictions on use of Advertiser Data
  - Agency
  - AI Vendor
- Rights to the Advertiser Data for use in AI

Human Oversight

Agency must implement an appropriate human oversight over all AI Tools provided or used in connection with the Services.

- What types of AI does the process apply to?
- What oversight is the Agency responsible for and the Advertiser responsible for?
  - Legal review

Elimination of Bias

Agency will implement safeguards and controls designed to ensure the AI Tool used in connection with Services are not trained in a manner that introduces bias in the Output.

- Consider who provides the training data
  - Agency, Advertiser, or a third party?
- Bias audits
  - Is the Agency able to perform bias audits on the AI Tools?
  - How frequent?
  - Who is responsible for the costs?

Regulatory Compliance

Agency will comply with all Applicable Laws relating to the use of AI Tools in connection with the Services.

- Laws are constantly evolving and differ by jurisdiction.
  - How will the parties address changes in laws?
- Consider what legal compliance responsibilities should be with the Agency and with the Advertiser.
  - Who is the AI deployer? Who is the AI developer?
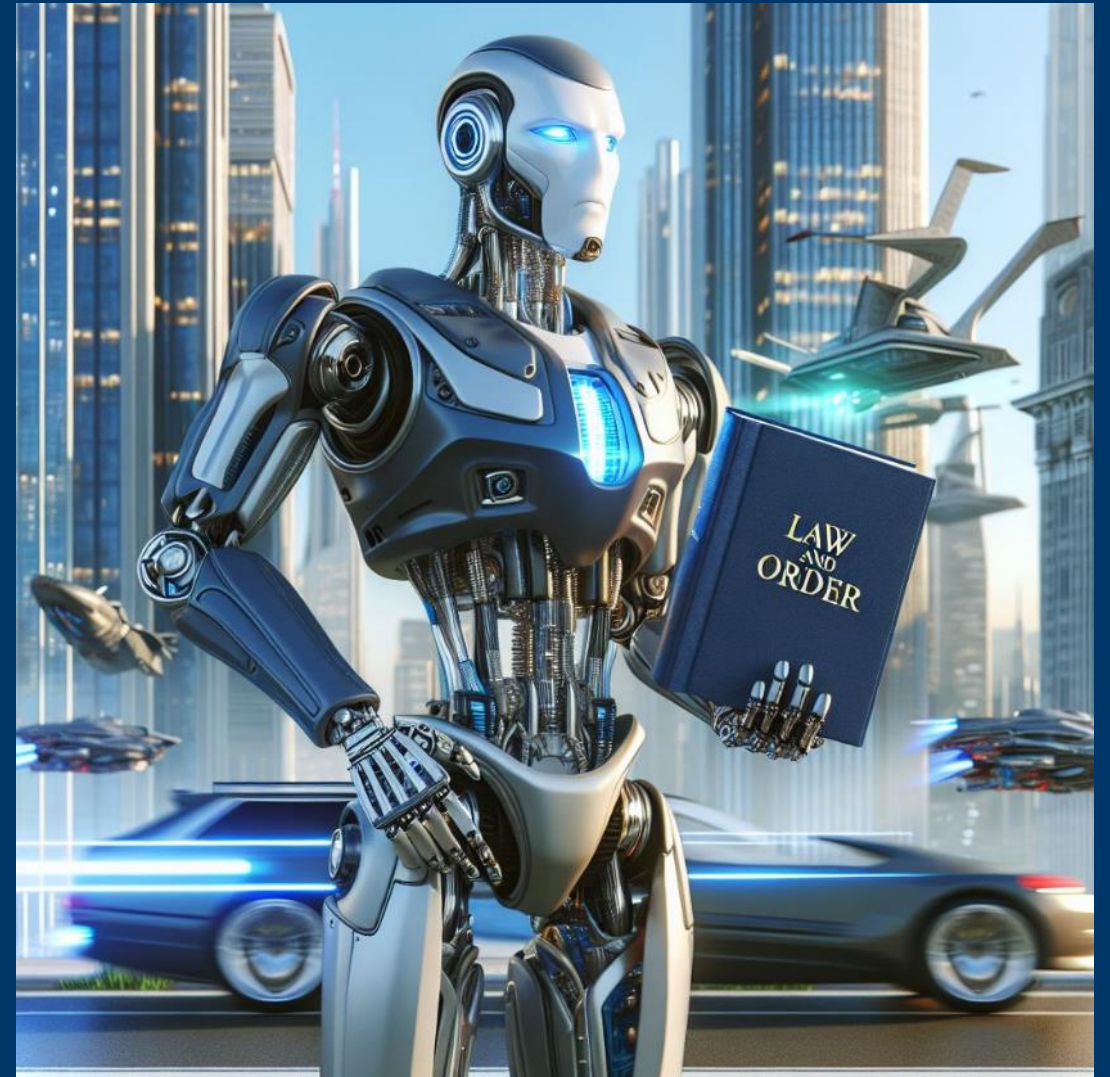
Liability Issues
Agency is liable for any claims or losses arising out of its use of the AI Tools in connection with the Services.

- How should liability be allocated between agency, advertiser, and vendor?

  - Failure to use AI in accordance with the mutually agreed RAI Process

  - Use of the Output contrary to the agreed usage restrictions
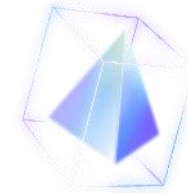
Vetting AI Vendors

What is the vendor's experience and reputation?

What are the potential harms and risk of the AI systems?

What governance controls does the vendor have in place?

What warranties are they willing to offer?

What standards do they adhere to?

What was their system designed for?

What audit rights will they agree to?

What level of explainability will they offer?

Platform's Right to Use Content

- More often than not, the platform can use the content you insert

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Some Platforms Provide Limited Indemnification

Questions?

We're all connected.

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