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# Identifying and Managing Risk Posed by Chat AI in Licensing Arrangements

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Machine learning and artificial intelligence (collectively “AI”) continue to become more widely available and accepted while generating significant media coverage. AI applications and tools are increasingly being used by companies as a regular and routine part of their business to perform a variety of functions from customer service chat bots to generating written content. The most prominent AI development in the past year has been the introduction and broad acceptance of Chat AI applications. Chat AI applications mimic human interaction and companies are beginning to experiment with new and creative ways to utilize them. The utilization of Chat AI applications will continue to grow as companies identify ways to use them to increase production and reduce costs.

## Chat AI Defined

Often referred to as large language models or generative AI, Chat AI is a software application designed to generate content that appears human-created by learning the patterns and structures of language from large pools of data on which the application is “trained.” Chat AI applications utilize user prompts to generate a response using natural language that sounds remarkably conversational, which can cause

users to feel as if they are having a conversation or “chat” with the software application. Chat AI applications are designed to produce responses that include content that is contextually relevant to the user’s prompt and can produce content that includes articles, artwork, fictional stories, music and poetry. The unique element that Chat AI users find compelling is Chat AI’s ability to generate content that is responsive and conversational while imitating human-like interaction, which makes it potentially useful for a wide range of business functions.

Developers are also developing AI tools and applications to address specific business needs to perform specialized functions like human resources functions or legal research. While those tools and applications may also deploy machine learning or artificial intelligence and may provide responses that are similar to Chat AI, this article addresses generalized Chat AI only and is not intended to discuss AI applications and tools designed to perform specific functions or satisfy specific business needs.

## Current Usage of Generative AI Applications

Chat AI began receiving wide public recognition in 2022 with the public release of ChatGPT by OpenAI. Most of the major software companies have released some version of a public-facing Chat AI application since that initial release. The public adoption of Chat AI has witnessed a remarkable surge and has the potential to fundamentally transform the way individuals and businesses engage with this type of technology. With its contextually coherent responses, Chat AI has found widespread application in a number of industries including creative fields. In particular, Chat AI has demonstrated utility in idea generation and content creation in ways that have empowered creators to develop novel concepts and generate new content at a rapid pace. This likely includes utilization in the development, iteration and generation of licensed products and content in ways that requires vigilance among current and potential licensees.

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## Potential Issues and Concerns

Chat AI will have a wide array of potential applications and business stakeholders will discover a variety of novel ways to use it. It will also pose a variety of concerns and create potential issues and risks when it comes to licensed products or content developed in whole or part using Chat AI. The risks discussed below represent several of the most immediate concerns posed by Chat AI but is not a comprehensive or exclusive list and there will be other risks and concerns depending on users' specific circumstances. Companies can, however, begin to harness the benefits of AI while at the same time mitigating the risks and concerns by beginning to consider these issues and addressing them proactively.

### Training Data IP Infringement

Developers often cull the training data for Chat AI from a wide range of sources, many of which are Internet-based. Some Chat AI developers have been accused of simply scraping data from a huge number of websites without permission or authorization to use as their training data. There's a possibility, if not a likelihood, that a portion of the training data used to train Chat AI will include copyrighted or proprietary content and other intellectual property (collectively "IP") which may lead to claims of IP infringement for accessing and using data in ways that were not anticipated or explicitly permitted.

Comedian and author Sarah Silverman joined two other authors in filing a copyright infringement lawsuit in July 2023 against OpenAI. The lawsuit, the second copyright infringement against OpenAI, alleges that OpenAI violated the authors' copyrights in their written works by using those works as part of ChatGPT's training data without the authors' authorization or permission.

We do not yet know how the lawsuit will be resolved nor do we know the impact that the ultimate resolution will have on content generated by ChatGPT and other Chat AI applications. Because of that, it is important to understand whether a licensor is using a Chat AI application in the development of licensed products or content that may have been trained on IP in ways that may violate the rights of IP owners. This will enable licensees to fully understand and appreciate the risks of potential IP infringement, and manage those risks, in the license agreement.

### Content Generation Plagiarism

While Chat AI applications are designed to generate entirely new content, it is possible for the content generated by Chat AI to be remarkably similar to, if

not identical to, its training data. It would be considered plagiarism and a potential IP infringement if content that is too similar to existing content is subsequently published or used in commerce, regardless of the source of the content or how it was produced. This would be the case even if the Chat AI application created the content autonomously and without human assistance or intervention.

This may be of particular concern in AI-generated images in which Chat AI creates a new image based on the numerous existing images on which it has been trained. The same concerns lie in Chat AI-generated music which is iterative of the music on which the Chat AI has been trained. Because Chat AI uses training data composed of existing images or music to create new content, there is a significant risk that a new image or music generated by a Chat AI application may so closely resemble an already existing image or piece of music that it results in an IP infringement action if published or used in commerce.

### Inaccuracy of Chat AI-Generated Content

The content generated by Chat AI is frequently wrong. Chat AI applications are designed to provide a response to the prompts entered by users regardless of whether the application actually possesses information to support the response it provides. The content generated by Chat AI may sound reasonable and plausible but the information provided in the response may be completely fabricated. Often described as hallucinations, confabulations or delusions, Chat AI applications are generally designed to prioritize providing a response and will do so even if they do not have actual facts, information or data on which to base the response. This is troublesome and will create potential significant risk if the Chat AI application is prompted to generate content that must be factually accurate like an article, marketing piece, report or white paper. Fabricated responses or hallucinations are also troubling because they can appear to be contextually accurate, authoritative and appropriate so it can be difficult to identify the hallucination from reading the response itself or realize that the response is inaccurate or fabricated.

Additionally, while some Chat AI applications are exposed to new training data following their initial release, others are not and do not include recent information or up-to-date content. Consequently, responses or content produced by Chat AI may be outdated and not include recent news, information or data.

For licensees of products or content generated in whole or part by a Chat AI application, it is important

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to both understand the constraints of the Chat AI used to develop the licensed product or content and to ensure that the licensed product or content is verified for accuracy prior to being used in commerce.

## **Bias in Generated Content**

Another significant concern with Chat AI is the potential for responses to include bias or reflect prejudices. As discussed above, Chat AI applications are trained on large pools of data that is often culled from the Internet and a wide variety of websites. Invariably, some of those websites will include bias or prejudice even though that is not the developers' intent. As a user of Chat AI, it is impossible to know what types of biases or prejudices were included in the data used for training and whether those biases included subtle societal prejudices, outright discrimination or other inflammatory content. While Chat AI may be trained to disregard some of the most obvious and egregious discriminatory content included in its training data, it does not have the cognitive understanding necessary to identify or independently identify more subtle forms of bias or prejudice. As a result, the responses it generates may include such bias or prejudice and it is incumbent on users to be aware of this concern and review all content generated by Chat AI to ensure that any content used commercially does not reflect or include bias or prejudice.

## **Mitigation**

While the issues discussed above cannot be entirely eliminated if a licensor uses Chat AI in the generation of licensed products or content, they can be managed and mitigated. The primary methods of mitigating the risk are to fully understand the licensor's use of Chat AI and managing that risk in the licensing agreement.

## **Transparency**

The first step in mitigating these issues is to engage licensors in a discussion about their use of Chat AI as a part of their routine business operations. Some questions to pose to licensors may include,

1. Does your company using AI in developing licensed products or content and, if so, what specific AI technologies does your company use?
2. Does your company have specific policies, procedures or guidelines for using AI?
3. What level of human oversight or intervention is involved in your company's use of AI?

4. How does your company ensure that AI-generated content does not violate a third party's intellectual property rights?
5. Are the AI applications your company uses regularly updated and retrained to maintain accuracy and relevance?
6. How does your company monitor and address AI bias to avoid discriminatory outcomes in your services?

While these questions may not cover all of the potential issues related to the use of Chat AI, they should be sufficient to open the conversation and begin the discussion between licensees and licensors regarding the use of Chat AI to develop or produce licensed products or content.

## **Licensing Agreements**

Licensing agreements play a pivotal role in delineating the responsibilities, liabilities, and expectations of all parties involved in the licensing arrangement. If the licensee is concerned about or sensitive to the risks posed by using Chat AI in the generation of licensed products or content, the licensing agreement is the appropriate place to address and manage those risks. Licensing agreement terms may range from an outright prohibition on the utilization of Chat AI to specific limitations, restrictions or requirements around the use of Chat AI in the creation of licensed products or content. Additional terms can be included to require the implementation of mechanisms for monitoring and filtering content to mitigate potential intellectual property infringement, validate content accuracy and address other potential issues.

The licensee can also mitigate its risk by specifically addressing the use of the Chat AI and the risks it creates in the indemnification provisions and in carve-outs from any potential limitation on liability within the licensing agreement.

These are just two methods by which a licensee can account for, manage and mitigate the risks posed by a licensor's use of Chat AI in the creation and provision of licensed content and products.

## **Conclusion**

Chat AI is likely here to stay. Developers will continue to refine Chat AI to mitigate the risks discussed above, but it is unlikely that those risks can be eliminated in their entirety. It will remain incumbent on licensees to manage the risk that arise when licensors use of Chat AI by understanding the nature and extent

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of the usage by the licensor and managing the risk through the licensing Agreement.

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