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Fair Use and Generative AI

What the *Meta* and *Anthropic* Decisions Mean for Your Business

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Overview

Generative AI Training Overview

Legal Principles and Decisions

Negotiating AI Contracts

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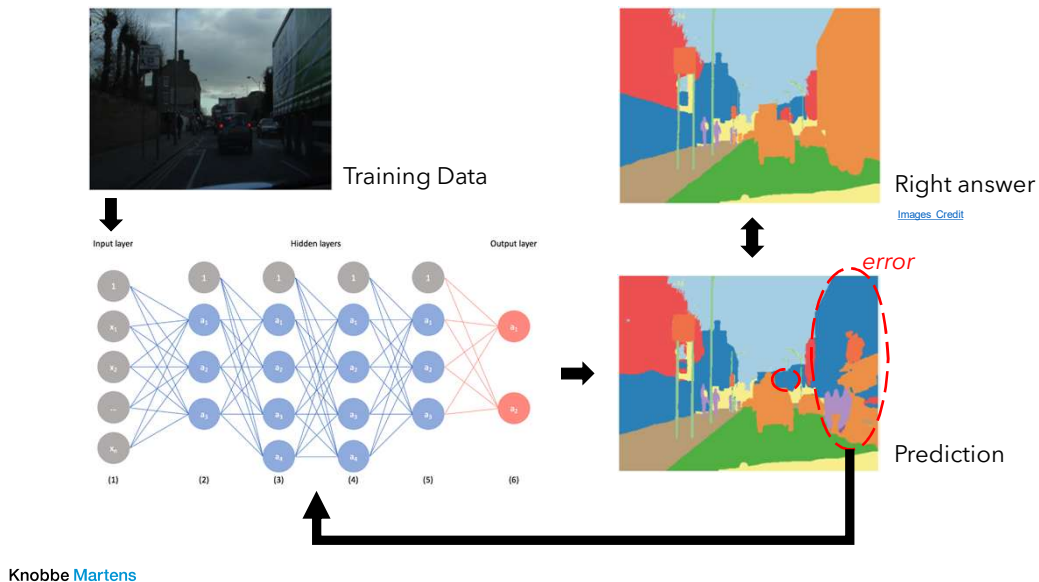
Generative AI Training Overview

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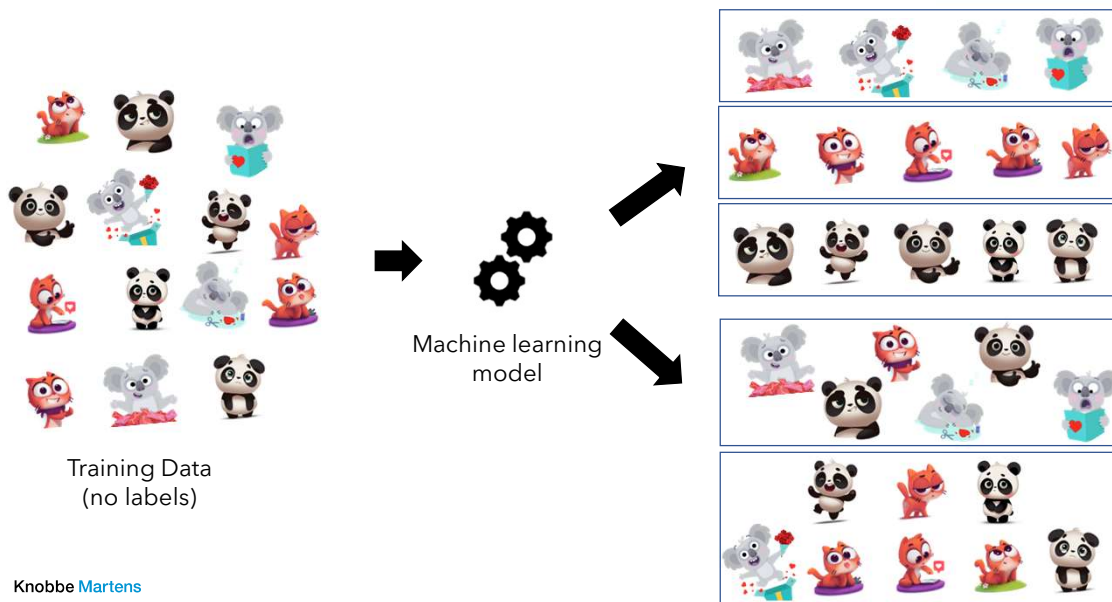
Supervised Learning - "Let me teach you"



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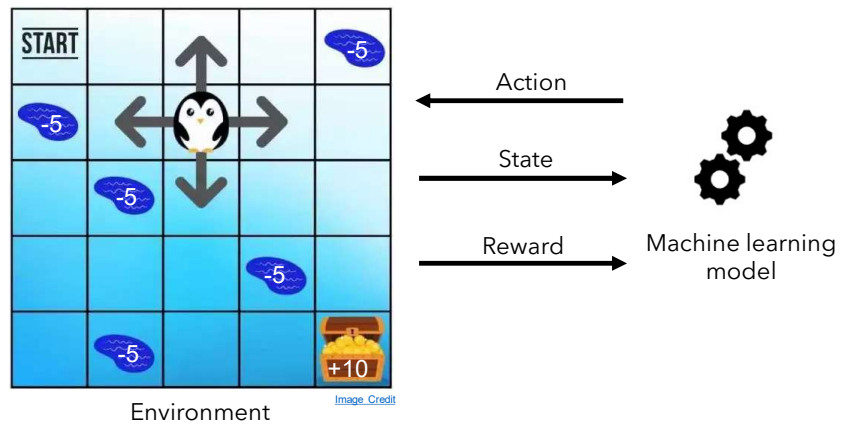
Unsupervised Learning - "Figure it out yourself"



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Reinforcement Learning - "Experiential Learning"



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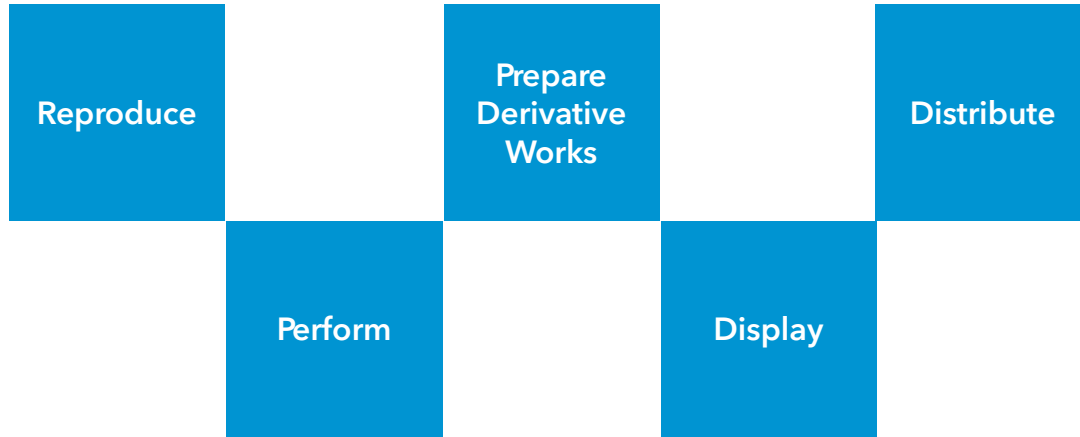
Legal Principles and Decisions

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Copyright



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Fair Use

- 1 Purpose and character of the use
- 2 Nature of the copyrighted work
- 3 Amount and substantiality of the portion used
- 4 Effect on potential market or value

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Generative AI Context



Acquisition



Training



Output



RAG,
Grounding

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Bartz v. Anthropic PBC



Copyright holders: three authors



Accused infringer: Anthropic, via its Claude models



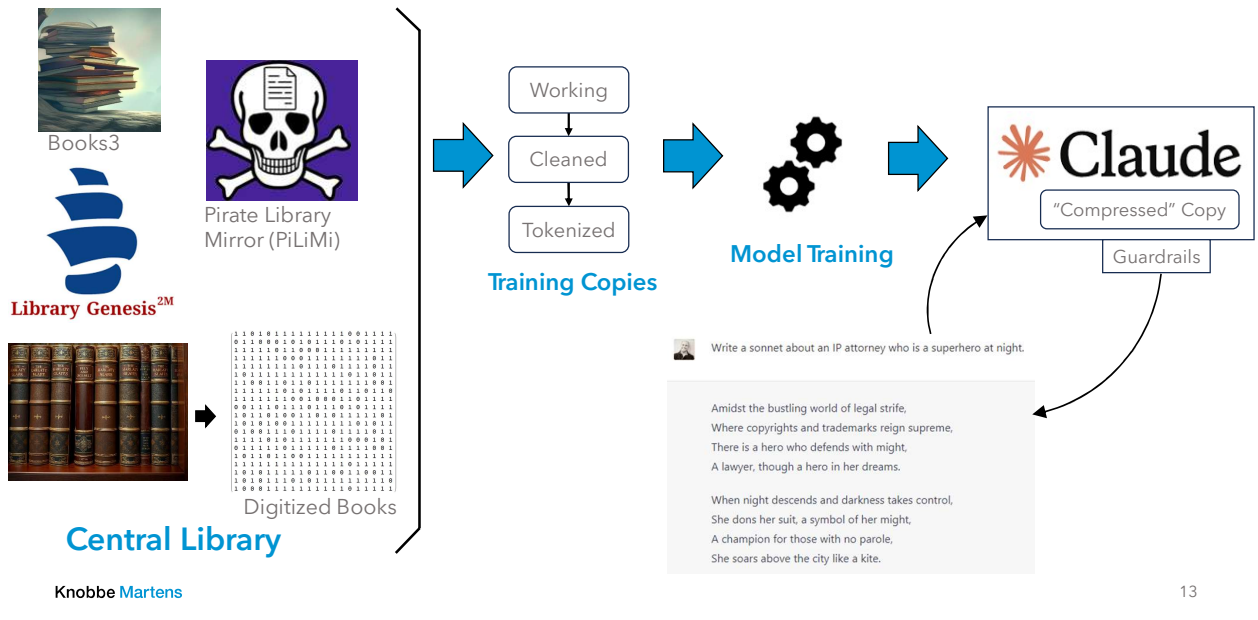
Court: N.D. Cal., Judge Alsup

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Anthropic: Public Use of Model



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Anthropic Court's Analysis - "Training" Copies

Factor 1

Purpose and character of use

"Quintessentially transformative"

Factor 2

Nature of copy-righted work

"All of Authors's books...contained expressive elements"

Factor 3

Amount and substantiality

"Reasonabl[y] necessary to the transformative use"

No allegation of infringing output

Factor 4

Market effects

Market for licensing training data "is not one the Copyright Act entitles Authors to exploit"

The Act does not seek "to protect authors against competition"

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Anthropic Court's Analysis – Digitized Library Copies

Factor 1

Purpose and character of use

Format change, from print to digital “was transformative”

Factor 2

Nature of copy-righted work

“All of Authors’ books...contained expressive elements”

Factor 3

Amount and substantiality

Amount copied was reasonable for the use

“source copy was destroyed”

Factor 4

Market effects

Neutral “format change”

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Anthropic Court's Analysis – Pirated Library Copies

Factor 1

Purpose and character of use

“Piracy of otherwise available copies is inherently, irredeemably infringing even if the pirated copies are immediately used for the transformative use and immediately discarded”

Factor 2

Nature of copy-righted work

“All of Authors’s books...contained expressive elements”

Factor 3

Amount and substantiality

“Almost any unauthorized copying would have been too much. Anthropic copied millions of books in toto.”

Factor 4

Market effects

Copies “obtained from pirated sources plainly displaced demand for Authors’ books – copy for copy”

NOT FAIR USE

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Kadrey v. Meta Platforms



Copyright holders: thirteen authors



Accused infringer: Meta, via its Llama models



Court: N.D. Cal., Judge Chhabria

Meta Decision: Meta needed books to train Llama



Initially, Meta collected data from websites like Wikipedia or crawlers like Common Crawl

Meta Decision: Meta needed books to train Llama



Initially, Meta collected data from websites like Wikipedia or crawlers like Common Crawl



But then decided it was "really important for us to get books data ASAP"; "discussed spending up to \$100 million on licensing"

Meta Decision: Meta needed books to train Llama



Initially, Meta collected data from websites like Wikipedia or crawlers like Common Crawl



But then decided it was "really important for us to get books data ASAP"; "discussed spending up to \$100 million on licensing"

BitTorrent

Ran into difficulties licensing; decided to abandon licensing efforts and used "shadow libraries" downloaded through BitTorrent

Meta Court's Analysis

Factor 1

Purpose and character of use

"Highly transformative"

Factor 2

Nature of copyrighted work

"Highly expressive works" that copyright seeks to protect

Factor 3

Amount and substantiality

"Reasonably necessary" for Meta to use entire works

Factor 4

Market effects

Whether market for licensing training data "exists or is likely to develop is irrelevant, because this market is not one that the plaintiffs are legally entitled to monopolize"
Insufficient argument and evidence that Llama-generated works have caused or will cause substantial harm to the market for plaintiffs' books



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Some Caveats

The upshot is that in many circumstances it will be illegal to copy copyright-protected works to train generative AI models without permission. Which means that the companies, to avoid liability for copyright infringement, will generally need to pay copyright holders for the right to use their materials.

countless others whose works Meta used to train its models. And, as should now be clear, this ruling does not stand for the proposition that Meta's use of copyrighted materials to train its language models is lawful. It stands only for the proposition that these plaintiffs made the wrong arguments and failed to develop a record in support of the right one.

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Takeaways from *Anthropic* and *Meta*



Held training for generative AI was a “quintessentially” or “highly” transformative use



Held or suggested digitizing or reformatting purchased materials for training purposes is fair use, even without express license to use for AI training



Issued different rulings on pirated material, but each case limited its decision to imply training on pirated material is generally not fair use



Legal landscape is evolving; current fair-use wins for AI companies do not eliminate risk

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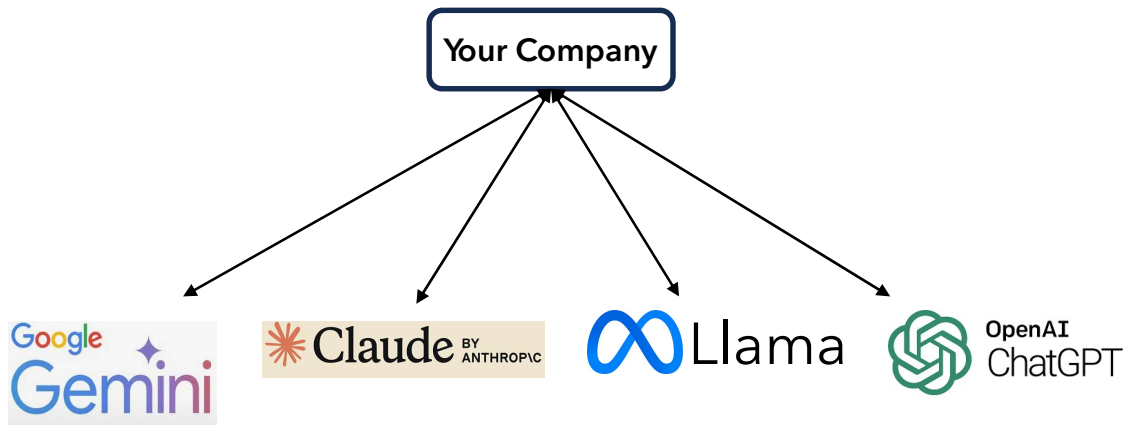
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Licensing with Foundational Model Provider

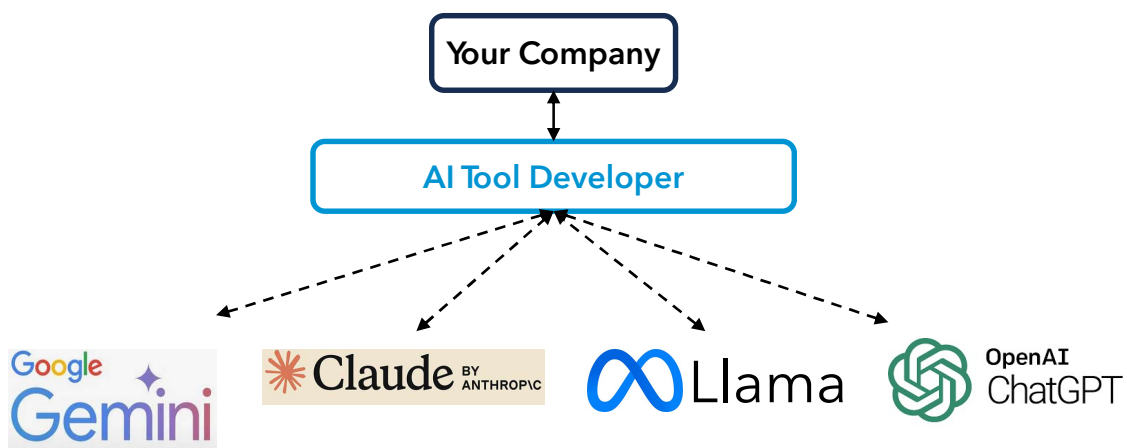


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Licensing with AI Tool Developers



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Important Licensing Issues

ToS versus Custom License

Purchased AI services usually default to a set of click-through Terms of Service, often that are available online

Know the Model

Indemnification

Click-through terms usually favorable to the AI service provider, especially around use of data to train models

Data Protection

Service Deprecation

For some AI tools, click-through is fine. But often it's better to negotiate custom licenses

Important Licensing Issues

ToS versus Custom License

Know the Model

Most AI services rely on an underlying foundational model

Indemnification

Not every service provider will inform you which model they are using, or even when they switch models

Data Protection

Service Deprecation

Different models may subject you to different third-party terms

Important Licensing Issues

ToS versus Custom License

Know the Model

Indemnification

Data Protection

Service Deprecation

IP Indemnification – differentiate between use of the product and use of the outputs

Copyright Assurance – strong enough IP protection?

Mutual Indemnification

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Important Licensing Issues

ToS versus Custom License

Know the Model

Indemnification

Data Protection

Service Deprecation

What rights to your inputted data will the AI Tool have?

Usage Data vs. Customer Data

What about custom models?

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Important Licensing Issues

ToS versus Custom License

Know the Model

Indemnification

Data Protection

Service Deprecation

AI models and services change all the time

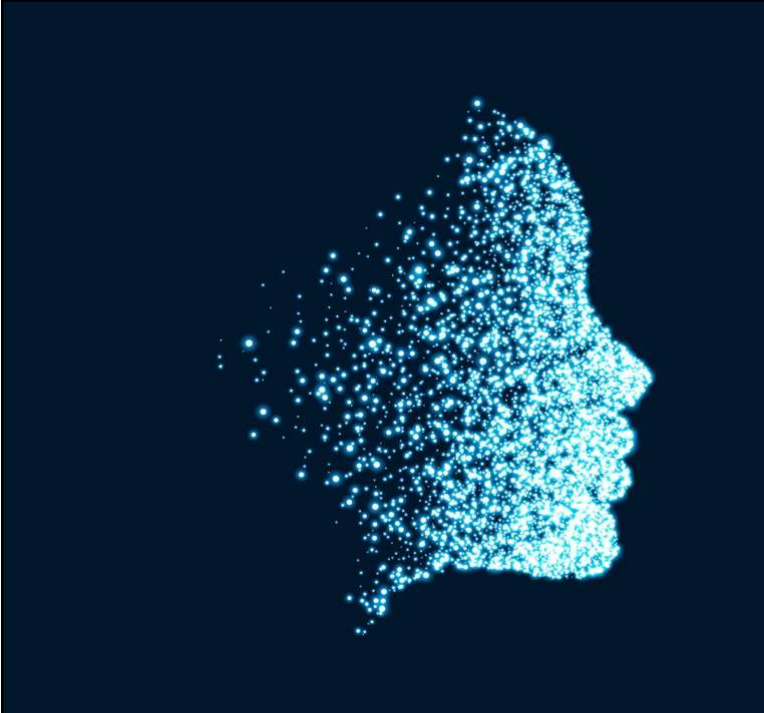
A newer version of the model may not work in the same way as the older version

Think about what rights you have to use a model version and what happens if you lose those rights


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Thank you!



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