

2023

SPORTS LAW CLE SERIES

Proskauer»

Getting in the Game and Defeating the Privacy and Cyber Risks of Technology-Reliant Sports Businesses

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November 15, 2023

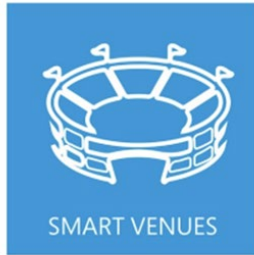
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Agenda

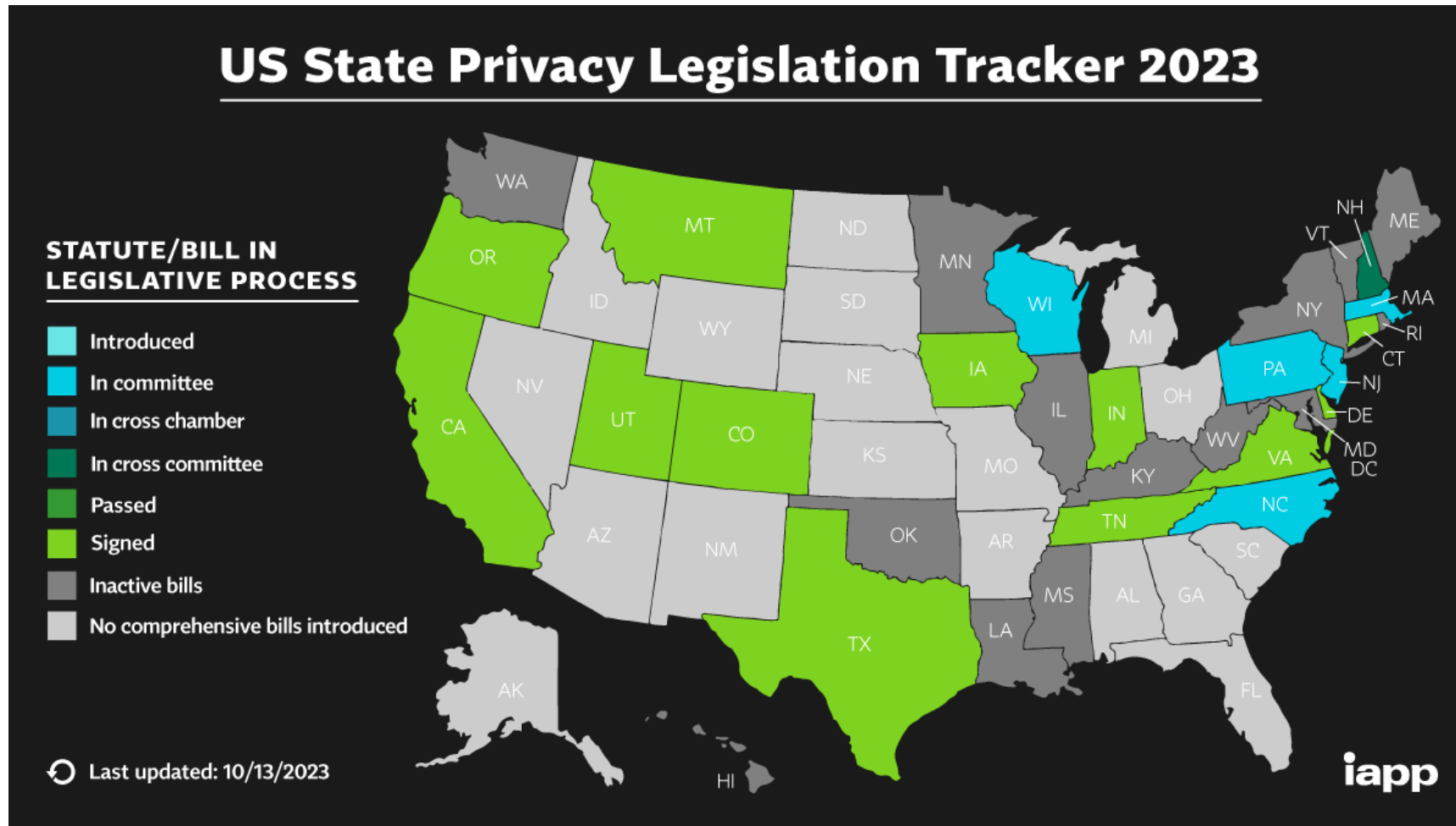
- Overview of Current U.S. and International Privacy Laws
- Discussion of Sports-Related Privacy Risks
- Legal Trends Around Player Health, Health Data, Biometric Information, Performance Information
- Risks and Legal Protections in the World of Big Data

Sports-Related Privacy Risks

21st Century Sports: Tech Forward & Data Driven



US State Privacy Laws Update



US State Privacy Laws - Comprehensive

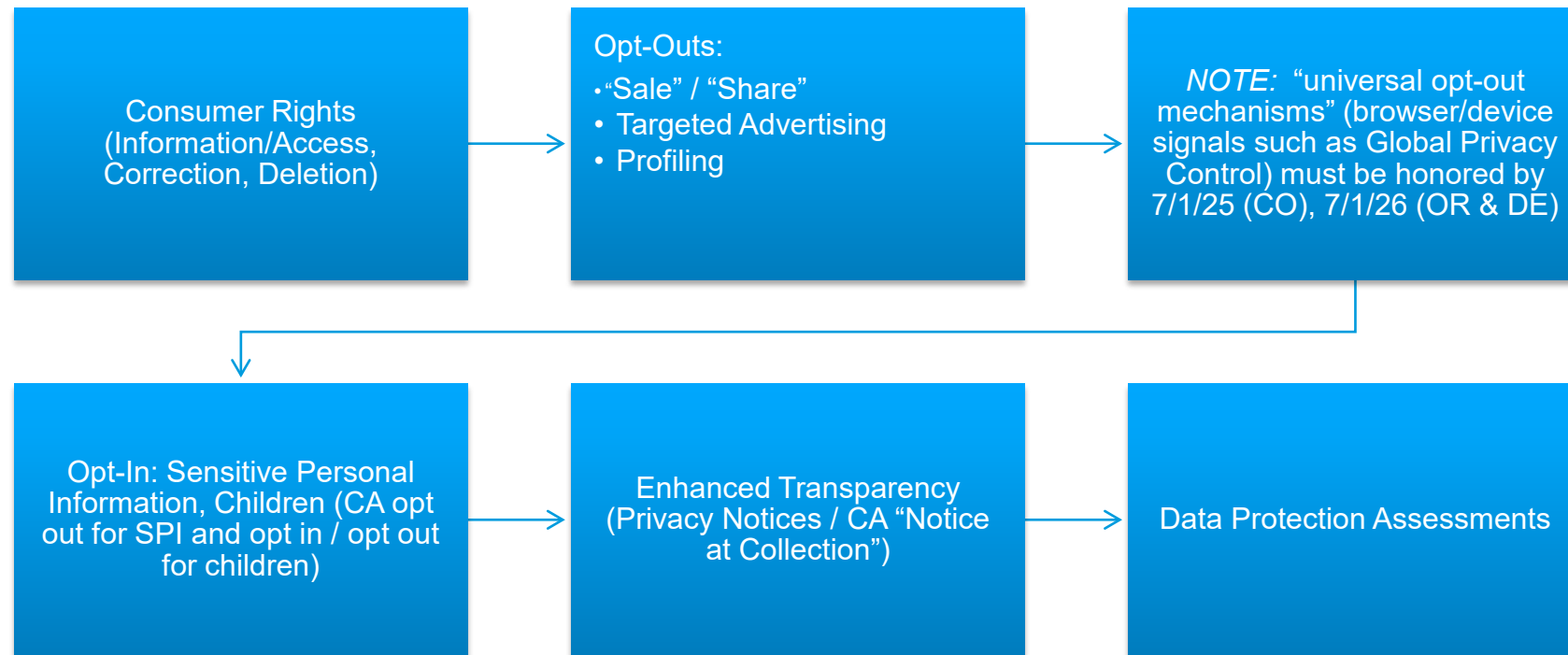
State	Effective Date
California (CCPA)	January 1, 2020
California (CPRA amendments)	January 1, 2023
Virginia (VCDPA)	January 1, 2023
Colorado (CPA)	July 1, 2023
Connecticut (CTDPA)	July 1, 2023
Connecticut (CTDPA amendments)	
• Enhanced Protections for Health Data	July 1, 2023
• Rights re: Social Media Accounts	July 1, 2024
• Children's Online Safety	October 1, 2024
Utah (UCPA)	December 31, 2023
Texas (TDPSA)	July 1, 2024
Oregon (OCPA)	July 1, 2024
	July 1, 2025 (non-profits)
Tennessee (TIPA)	July 1, 2024
Montana (MCDPA)	October 1, 2024
Iowa (ICDPA)	January 1, 2025
Delaware (DPDPA)	January 1, 2025
Indiana (ICDPA)	January 1, 2026

US State Privacy* Laws - Tailored

State	Effective Date
Nevada (NPICICA) (<i>Digital Services Opt-Out Rights</i>)	October 1, 2019
Washington My Health My Data Act (<i>Health Data Privacy</i>)	July 23, 2023 (Section 10 - geofencing) March 31, 2024 (Sections 4-9)
Nevada Consumer Health Data Privacy Law (NCHDPL) (<i>Health Data Privacy</i>)	March 31, 2024
California Age-Appropriate Design Code Act	July 1, 2024** - <i>law subject to preliminary injunction imposed by N.D. Cal. 9/18/23</i>
Florida Digital Bill of Rights	July 1, 2025

***Note:** With respect to data security, there are 50 state data breach laws as well as state laws requiring certain levels of data security protection such as Massachusetts (201 CMR 17.00) and New York's SHIELD Act.

State Privacy Law Compliance



US Federal Privacy Law Updates

- **American Data Privacy and Protection Act (ADPPA) (H.R. 8152)**

- Close but no cigar....



- **COPPA 2.0**

- Bi-partisan bill re-introduced in May 2023; approved by Senate Commerce Committee in July 2023
- Raises age of protection to under 17
- Bans targeted advertising to children and teens
- Mandates an “eraser button” for parents and kids that permits users to eliminate personal information from a child or teen where technically feasible
- Establishes a “Digital Marketing Bill of Rights for Teens” that limits the collection of personal information of teens
- ****Revises COPPA’s “actual knowledge” standard to cover digital services that are “reasonably likely to be used” by children and teens**
 - Compare to UK Age Appropriate Design Code: “likely to be accessed by children” (under 18)



- **Kids Online Safety Act**

- Bi-partisan bill re-introduced in May 2023
- Seeks to establish legal standards to protect “minors” (under 17) from online harms
- Puts responsibility on digital service providers to design and operate their services in a way that prioritizes protection of children from dangers

International Privacy Law Updates



- **Europe:**
 - Data transfer: US-EU Data Privacy Framework
- **Canada:**
 - Federal bill to replace PIPEDA still pending
 - Quebec law amending privacy act (ARPPIPS) – most provisions came into effect on September 22, 2023
 - Modeled on GDPR
- **Brazil:**
 - ANPD (Brazil National Data Protection Authority) issued 1st sanction in July against a local company
- **China:**
 - Personal Information Protection Law PIPL
 - Cross-border data transfer restrictions – September 2023 draft Provisions ease restrictions somewhat
- **India:**
 - Personal Data Protection Act (PDPA) signed into law August 2023
 - Awaiting notice of effective date

Sports Privacy Risks

Spotlight #1: Children & Teen Data



- Digital content, gaming, fantasy leagues, fan engagement activations
- Law moving to a **constructive knowledge** standard re: having kid/teen data
 - Internal or external company research / analytics re: consumer age demos
 - Elements likely to appeal to kids such as games, celebrities, music appealing to kids
 - Accessibility of service to kids (e.g. no credit card needed)
 - Access patterns (e.g., peaks after school hours)
 - UGC content on social platforms of kids engaging with service (e.g., game play YT videos)



Sports Privacy Risks

Spotlight #2: Vendors & Partners

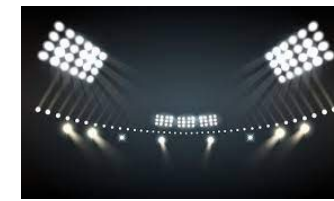


- Vendor due diligence critical – esp. data security
- Vendor & Partner contracting: increasingly complex and high stakes
 - **Legal status of parties must be defined**
 - Controller/business/third party
 - Processor/service provider/contractor
 - Joint controller
 - **Prescriptive contract requirements**
 - CPRA amendments require ***specific contractual guardrails for third parties receiving personal information*** (as well as service providers/contractors)
 - Global data: may need a DPA with data transfer provisions to cover EU, Brazil, China, etc.
 - **Consumer Rights cooperation** (opt in/opt out; access/deletion/correction etc.)
 - Flow-down of certain requests required for third parties as well as service providers (deletion, opt outs)
 - **Reps/warranties/indemnities**



Sports Privacy Risks

Spotlight #3: Sports Betting

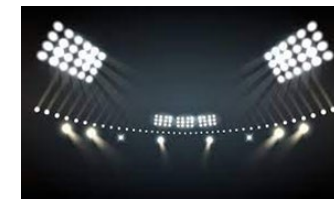


- Huge volumes of consumer data being collected and shared amongst industry stakeholders, including sensitive data
- Betting platforms high-value target for hackers → value of data + rigging wagers
- Mass. Gaming Commission regs issued in August: *Sports Wagering Data Privacy (205 CMR 257)*
 - Set to go into effect Sept. 1, but extension granted until Nov. 17
 - Data minimization and retention limits
 - **Consent required for secondary uses of data**
 - **No targeting based on particular factors including income and occupation**
 - Must collect patron data to develop anti-addiction programs and interventions
 - **Data sharing only as necessary and under confidence (data sharing agreement required)**
 - Patron data rights
 - Data security requirements



Sports Privacy Risks

Spotlight #4: Pixels



- Tracking pixels are focus of ongoing waves of privacy class actions – hundreds of cases pending and new cases being filed daily
 - Video Privacy Protection Act (VPPA)
 - Wiretap / Eavesdropping
 - CIPA + other state “all party” consent laws
 - Email marketing pixels latest target
 - Other causes of action:
 - Invasion of Privacy
 - Unjust Enrichment
 - Unfair & Deceptive Trade Practices
 - Violation of State Constitutional Right of Privacy
 - Ca. Unauthorized Access to Computer Data Act (Cal. Penal Code § 502(e))



Sports Privacy Risks

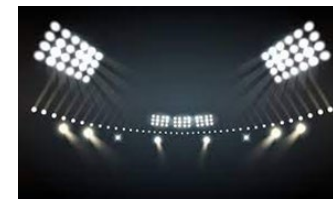
Spotlight #4: Pixels (cont'd)



- Conduct a fresh review of tracking tech used on digital services, in ad creative and in email marketing
- Vendor risk →
 - *Closely review vendor representations about data collection and privacy compliance*
 - *Limit vendors from using consumer data for their own purposes*
 - *Do not allow vendors to publish your relationship / use of their tech*
- Get consent where needed and ensure user choices regarding data are honored
 - *Do tech review of effectiveness of privacy tech*
- Implement appropriate tech controls (tag managers, privacy tech)
- Implement appropriate organizational governance
- Have a strong arbitration provision and ensure it is enforceable

Sports Privacy Risks

Spotlight #5: Sensitive Data



- Consumer data
 - In addition to 1st party data collected, make sure there is mapping of data 3rd party data being licensed to append to your 1st party consumer data for advertising/marketing, etc.
 - Demographic data, attributes, product purchase intentions (e.g., baby furniture intender) could embody SPI
 - Precise geo-location data → venue analytics?
 - Player data
 - Health, biometrics...
- Race / ethnicity
 - Sexuality / Sexual orientation
 - Political affiliation
 - Union membership
 - Religious or philosophical beliefs
 - Citizenship or immigration status
 - Precise Geo-location Data
 - Health / genetic / biometric data.....



Legal Trends Around: Player Health, Health Data, Biometric Information, Performance Information

Legislative Trend: Creation of Subcategory of Personal Information

- Sensitive personal information, sometimes called SPI, is data that is subject to strict protection guidelines under laws like the GDPR and the CPRA.
 - General Data Privacy Regulation (GDPR)
 - California Privacy Rights Act (CPRA); California Consumer Protection Act (CCPA)
 - Virginia Consumer Data Protection Act (CDPA)
- If sensitive data is breached or compromised, it could lead to discrimination, harassment, identity theft, or impact the quality of the person's daily life in other harmful ways.



GDPR Definition of Sensitive Information under Article 9:

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

Player Health and Health Data

The Story Behind the Ring That Is Key to the NBA's Restart

In an attempt to mitigate the silent spread of COVID-19 by flagging potential onset symptoms, the NBA has partnered with Oura to provide rings to players in Orlando.

BEN PICKMAN • JUL 1, 2020



“Oura and the NBA have partnered to provide Oura Ring and health management services to players, team and league staff. We are united in prioritizing the health, safety and privacy of the players, coaches and staff.”

- *Press Release July 17, 2020*

Example of Collection of Player Health Information

- store your credit card information,
- (d) for athletes whose information is processed in our **OpenField** and **GPSports** product, we only collect information from individual athletes as our customers allow it, and those customers determine what information we process from their athletes. Generally, this information about you is related to your training and gameday performance data, including location, speed, acceleration, distance covered, heart rate, and player load. The information is controlled by our customers/clubs, collected by them through the use of our products, and is processed and used by us as you see below. We use and process the information in this fashion as it is necessary to perform our obligations under contracts with our customers/clubs. In addition, where our customers/clubs have obtained athlete consent for our use and processing of the information in this fashion, that consent also becomes part of our basis for our use and processing of this information;





12. How do you access the personal information we store?

- (a) Should you wish to access your personal information, contact us by email at privacy@catapultsports.com.
- (b) We will respond to all requests as quickly as is reasonably possible (and within any timelines imposed by applicable laws and regulations).

13. Complaints about breaches of privacy

- (a) If you believe that we have wrongfully disclosed your personal information or have breached this policy, then you may lodge a complaint with us by writing to:
Data Protection Officer
Catapult Group International Ltd
75 High Street
Prahan VIC 3181, Australia
- (b) Or by email: privacy@catapultsports.com
- (c) If you are not satisfied with the response you receive from us, you can contact the Office of the Australian Information Commissioner by phoning 1300 363 992 or writing to:
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001
- (d) We will respond to you within 30 days of receiving your complaint and outline what we have or will do in response to your complaint, or explaining why we believe there is no breach of this policy or the law.

14. Links to third party websites and services

As stated in clause 5.5 of our General Terms and Conditions, we may provide you with access to, or require you to use, content or technology that is used directly or indirectly by us in providing, or required by us to be used by you in using or accessing, products or services (each a **Separately Licensed Offering**). Some Separately Licensed Offerings (such as third-party direct payment gateways, e-commerce platforms, and other payment transaction processors) may require you to leave our

website and be redirected to a third-party website or application. In this case, you are no longer governed by this policy. We are not responsible for the privacy practices of third-party websites or applications and encourage you to read their privacy statements.

15. ANNEXURE 1: APPLIES TO USERS OF AMS IN THE UNITED STATES OF AMERICA

- (a) In the course of performing our contractual obligations and our various corporate functions and activities, we collect some health information from athletes via **AMS**. In the US, the Health Insurance Portability and Accountability Act (**HIPPA**) sets out a number of rules that businesses must comply with in relation to the collection of protected health information (**PHI**). We will comply with the requirements of HIPPA to the extent that they apply to the PHI we collect of athletes in the US.
- (b) We have processes in place to ensure HIPPA compliance, including:
 - (i) we have safeguards to protect the privacy of PHI and set limits on the use and disclosure of this information;
 - (ii) we provide individuals with the ability to access information about their health and request corrections where appropriate;
 - (iii) we have appropriate administrative, physical, and technical safeguards in place to assist in maintaining the confidentiality, integrity, and security of PHI;
 - (iv) in the event of the unauthorized acquisition, access, use, or disclosure of PHI that compromises the security or privacy of the PHI, we will make all necessary notifications under HIPPA;
 - (v) we have appointed a privacy officer and an incident response team; and
 - (vi) our employees are adequately trained about the use and disclosure of PHI and how to safeguard it appropriately.

What is Health Information? HIPAA

HIPAA

“Individually identifiable health information means any information, including demographic information collected from an individual, that:

- (a) Is created or received by a health care provider, health plan, employer, or healthcare clearinghouse; and
- (b) Relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and –
 - (1) Identifies the individual; or
 - (2) With respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

What is Health Information? Washington My Health My Data Act

MHMDA

“Consumer health data means personal information that is linked or reasonably linkable to a consumer and that identifies the consumer’s past, present or future physical or mental health status.”

Includes:

- (1) Individual health conditions, treatment, diseases, or diagnosis.
- (2) Gender-affirming care information
- (3) Biometric data
- (4) Precision location information
- (5) Data that identifies a consumer seeking health care services

What is Health Information? Virginia Consumer Data Protection

Virginia CDPA

“**Personal data** means any information that is linked or reasonably linkable to an identified or identifiable natural person.”

“**Sensitive data** means a category of personal data that includes:

- (1) Mental or physical health diagnosis
- (2) Genetic or biometric data for the purpose of uniquely identifying a natural person.”

What is Health Information? FTC

FTC Consent Orders

In the Matter of Flo Health, Inc. (2023)

- “individually identifiable information from or about an individual consumer relating to health, including but not limited to information concerning fertility, menstruation, sexual activity, pregnancy, and childbirth.”

In the Matter of Health.io Inc. (2023)

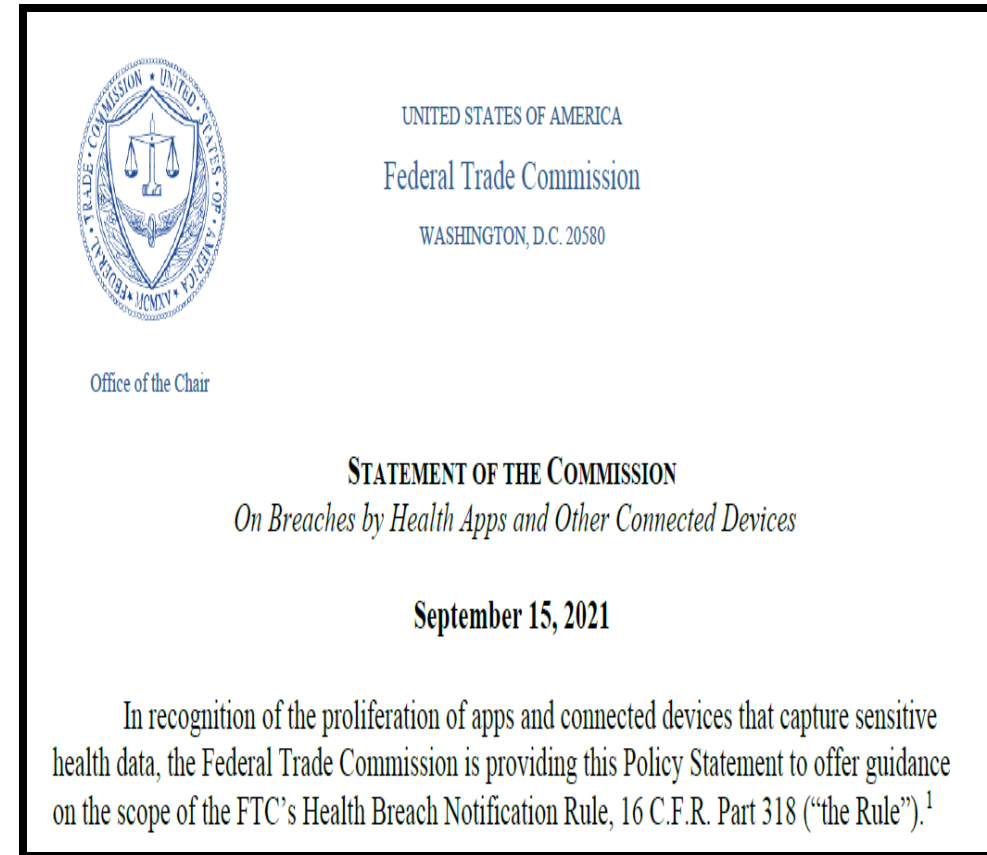
- “individually identifiable information relating to the health or genetics of an individual.”

U.S. v. Easy Healthcare (2023)

- “medical records and other individually identifiable information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of healthcare to an individual.”

FTC's Health Breach Notification Rule – 2021 Policy Statement

- Health and fitness app developers are “health care providers” for purposes of the HBNR.
- Applies to any device that is “capable of pulling health information plus any other information from multiple sources (e.g. wearables).
- Breach includes any disclosure not authorized by consumer.



Consents and Authorizations - Confusion

Washington: My Health My Data	FTC Health Breach Notification Rule	Other Litigations
<p><u>Collection:</u> Prior consent is required for specific purpose unless reasonably necessary to provide requested service.</p> <p><u>Sharing:</u> Prior consent, separate from consent to collection, unless reasonably necessary to provide requested service.</p> <p><u>Selling:</u> Prior Authorization required, separate from consents</p>	<p><u>Breach of Security:</u> “acquisition of such information without the authorization of the individual.”</p> <p>FTC considers any unauthorized disclosure to constitute a breach of security, not just those that result from bad actors, cybersecurity incidents.</p>	<p><u>Potential Causes of Actions:</u></p> <ul style="list-style-type: none">- State/federal wiretap laws.- HIPAA- Invasion of privacy- Breach of contract- Breach of fiduciary duty. <p><u>Pixel cases:</u> allegations that pixel collected information from health care providers and hospital websites, including patient portals.</p>

Player Biometric Information

BIOMETRICS

- Automated methods used to identify or authenticate individuals based on human biological and behavioral characteristics:
 - Facial recognition
 - Retinal scans
 - Fingerprints
 - Gait
 - Computer keystroke patterns
- Other states with biometric laws.

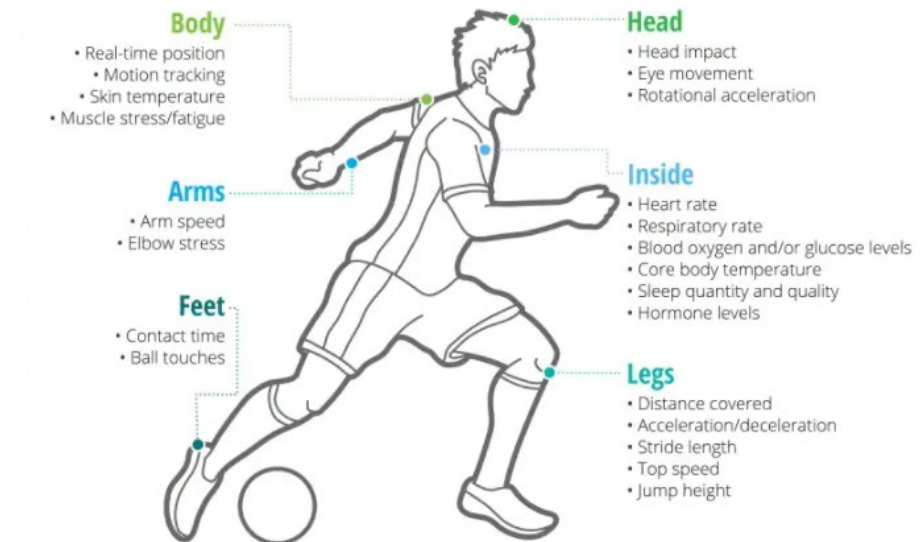


Biometric Information in Sports

- In the context of sports, biometric data typically includes physiological information and biomechanical data such as speed, acceleration and movement patterns.
- The University of Michigan . . . became the first major college team to consent to collecting private biometric data from their athletes as part of their apparel contract with Nike which allows for collection of data through heart-rate monitors, GPS trackers and other devices.

FIGURE 1

Technology has greatly expanded the ways in which athletes can be tracked and measured



Note: This list is not exhaustive.
Source: Deloitte analysis.

Deloitte Insights | deloitte.com/insights

Biometric Litigation – Illinois Biometric Information Privacy Act



- In 2008, Illinois became the first state to enact a biometric data privacy law. The law requires entities that use and store biometric identifiers to comply with certain requirements and provides a private right of action for recovering statutory damages when they do not.
- in 2020, the Facebook BIPA class action lawsuit *Patel v. Facebook, Inc.* reached a conclusion when Facebook agreed to a \$650 million settlement, one of the largest consumer privacy settlements in U.S. history, to resolve claims it collected user biometric data without consent.

Biometric Litigation – Illinois Biometric Information Privacy Act

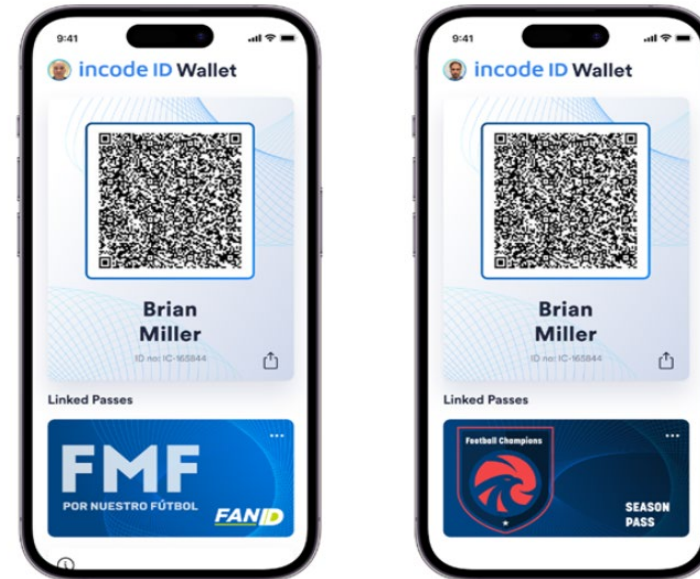


- February 2023, the Illinois Supreme Court held in *Cothron v. White Castle System, Inc.*, that a separate claim accrues under BIPA each time a private entity scans or transmits a person's biometric identifier or information in violation of the law.
- Earlier the same month, the court ruled in *Tims v. Black Horse Carriers, Inc.*, that a five-year limitations period applies to all claims arising under BIPA.

Facial Authentication

Wicket's Privacy Policy:

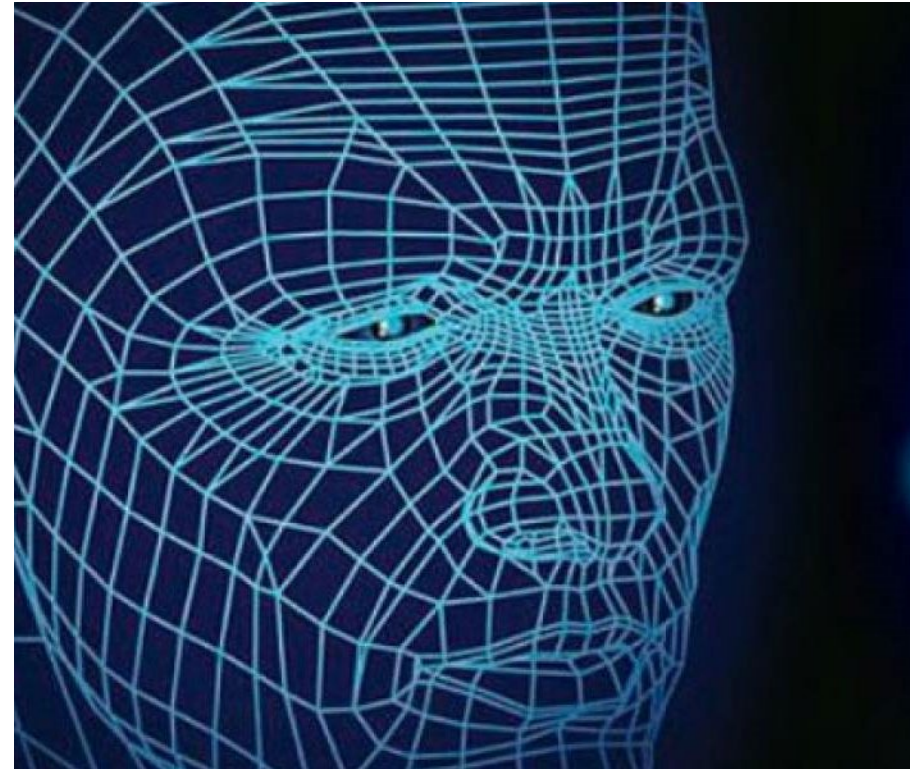
1. What Wicket collects: “Biometric Information, such as, “selfie” photographs, photos on forms of identification (e.g. driver’s license, employee badge, student identification card, military identification card), video “selfies” for liveness detection;”
2. “Except as provided in this Privacy Policy, Wicket will not disclose, transfer, sell, trade, rent, or otherwise provide your Personal Information to any third party.”
3. See Link:
<https://www.wicketsoft.com/privacy-policy/>



— Liga MX partnered with Incode to require fans to enroll in facial recognition as part of its FanID program to enter stadiums.
COURTESY OF INCODE TECHNOLOGIES

Facial Recognition

- A growing number of US states and cities have adopted bans on the technology.
- California, New Hampshire and Oregon have all enacted legislation banning the use of facial recognition with police body cameras.
- There are also several biometric privacy laws in the US, including in Illinois, Texas and Washington, which would impact the use of AI for facial recognition and biometric evaluation.
- Notably, the CPPA requested pre-rulemaking comments in helping it craft regulations on automated decision-making), including questions about whether access and opt-out rights with respect to automated decision-making should depend on the industry, the technology used and the sensitivity of the PII.



Risks and Legal Protections in the World of Big Data

Setting the Stage

- With large troves of confidential and personal data in our custody and being stored by others on our behalf, it is critical that investigations of related systems be conducted with appropriate consideration of downstream risks.
- Companies must be able to efficiently and objectively examine systems and practices while managing discovery and liability-related concerns.
- If not properly protected, documents and reports created from such internal investigations could be a boon for rivals and regulators.
 - E.g., “We screwed up big time.”



Cyber Incidents Can Create Anticipation of Litigation

- Cyber incident response (security or privacy) has overlapping legal and business components.
 - A company will need to preserve evidence, educate counsel, fulfill statutory notice obligations, and prepare for foreseeable litigation.
 - A company will also want to simultaneously remediate and improve practices and fulfill contractual obligations.
- The focus of this presentation will be U.S. based incidents. Cross border situations may require different analysis.

Today's Focus: Protecting Privilege and Managing Risk

- A balance between privileged and non-privileged uses of investigation materials is necessary.
 - Over-using a privilege designation may weaken privilege claims when you really need to make them.
 - There are times when you want risk assessment materials to be discoverable so that you can rely on them.
- A “dual use” assessment is a way to protect these materials that allows for some business use: (1) without destroying privilege or work product; and (2) that gives counsel an opportunity to safely edit prior to distribution.
- There are two types of dual use assessments: “dual-track” and “dual-purpose,” each with its own benefits, burdens, and risks.

Dual-Track Assessments

- Dual track risk assessments involve two investigations conducted in parallel: privileged and non-privileged.
- You expose some information to discovery to attempt to strengthen the privilege claim where it really matters.
- Dual-Track is generally better if there is a high legal risk.
- Dual-Track could also be used to structure multiple privileged investigations, where different privilege paradigms apply (*i.e.*, cross border).

Dual-Track Pros and Cons

Pros

Provides the most robust protection of the dual use structures

Total control over how information is distributed throughout the course of the parallel investigations

Cons

More expensive and burdensome than dual use as it requires two independent assessments

Exposing some information could give a litigant a hook to explain why it needs more

Greater risk of privilege waiver than a fully privileged assessment

Structuring a Dual-Track Assessment

- Separate teams should work independently of each other.
 - No overlapping team members.
 - Restrict sharing of findings.
- Counsel directs and oversees the privileged track team.
- Each team should have a separate scope.
 - The privileged track team is focused on informing counsel so that attorneys can provide legal advice and prepare to defend the company in pending and reasonably anticipated litigation.
 - The results of privileged track would not have been prepared in substantially the same form or with the same content but for the anticipated litigation.

Dual-Purpose Assessments

- Dual-purpose risk assessments involve a single assessment that will be used for both legal and non-legal purposes.
- If properly structured and implemented, the business purpose is integral to and not discretely separable from the legal purpose.
- The output of a dual-purpose assessment might be multiple reports.
- Dual-purpose is the most common and flexible structure available.

Dual-Purpose Pros and Cons

Pros

Less expensive than the dual-track approach

Most flexibility to calibrate the level of investment and resulting strength of the privilege claim to the risks

Cons

Privilege claim is more likely to be challenged because of the intertwined business purpose

There is generally (with one big exception) no non-privileged material that can be disclosed to, for example, a regulator

Implementing a Dual-Purpose Assessment

- An assessment will only be protectable if a court can conclude that the assessment would not have existed in its current form but for the legal purpose.
- The goal is to distinguish the dual-purpose assessment from similar assessments that may have been conducted in the ordinary course.
- The more “indicia of privilege” applicable to the investigation, the more likely the assessment will be protected.

Different Privilege Tests for Dual-Purpose Communications Across Jurisdictions

- The privilege test applied to dual-purpose communications may differ between states, as well as between state and federal jurisdictions.

D.C., TX, IL – “significant purpose” test

9th Cir., NY, PA (majority of states) – “primary purpose” test

7th Cir. – never privileged (for dual-purpose communications used for both litigation and tax preparation)

General Tips: Protecting Privilege in Dual-Purpose Documents

- Dual purpose risk assessments use a single team.
- Counsel should over see the dual-purpose risk assessment.
- Counsel should scope the assessment.
- Consider having counsel retain third party experts and consider how those experts will be contracted and paid.
- It should be made clear that non-lawyers who are part of the team are acting at counsel's direction to assist counsel in providing legal advice.
- It is not enough to just copy counsel.
 - The more active counsel is involved the stronger the protection.

Changing Structures Mid-Assessment

- What if during an ordinary course assessment, you learn of a critical vulnerability or potential security incident?
- Can you change the structure of the assessment prospectively or change it to a privileged investigation?
 - Yes, if you are careful.
- But, you can't retroactively privilege already-prepared ordinary course documents.
- Attempts to do so may compromise prospective privilege claims.

2023

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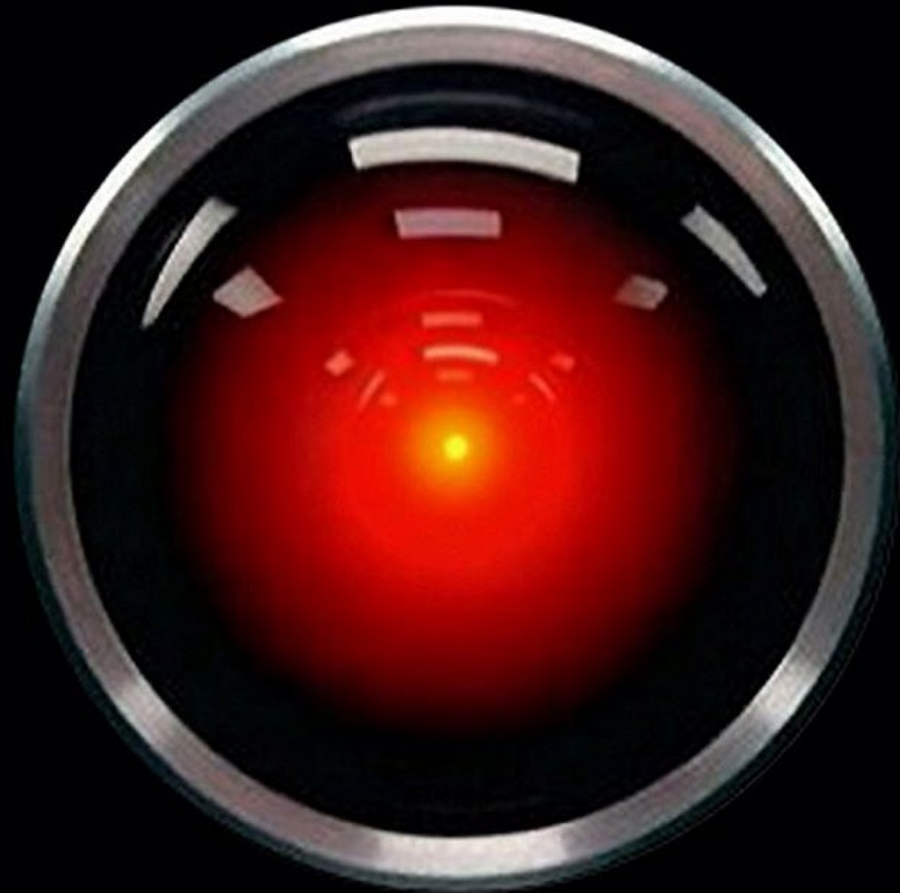
Proskauer»

Generative AI and Sports

Jeffrey D. Neuburger
Partner

November 15, 2023

Proskauer»



Agenda

Setting the Stage

GenAI Uses in Sports

The Risks of GenAI and Risk Mitigation
Suggestions

GenAI and Software Development

Trademark, Brand and Right of Publicity Issues

How Do Your Agreements Address GenAI?

M&A Diligence

Looking Ahead: Lessons from Napster

The General Release of ChatGPT on November 30, 2022

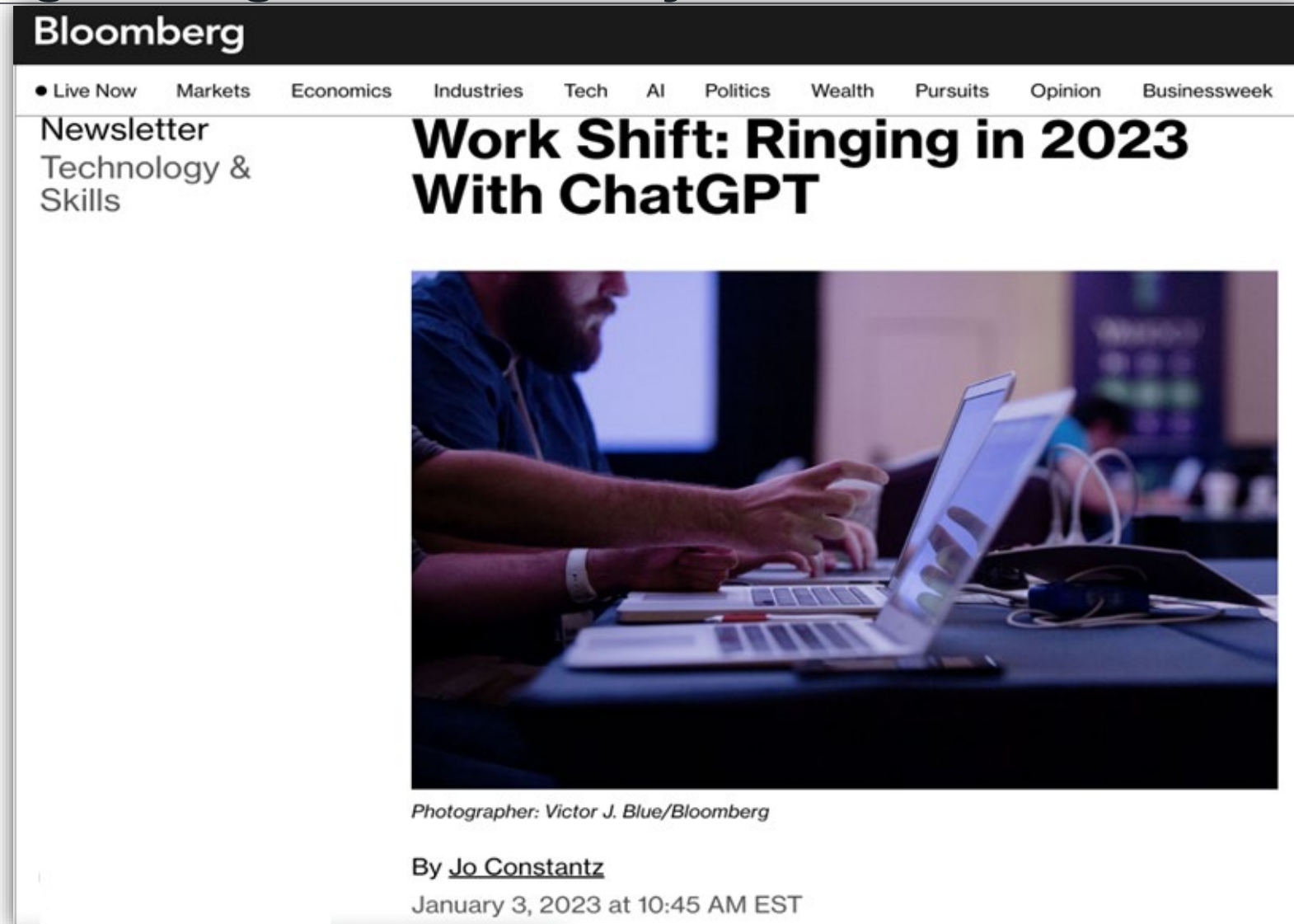


Introducing ChatGPT

Nov 30, 2022

November 15, 2023

Everything Changed on January 3, 2023



Training an AI Engine

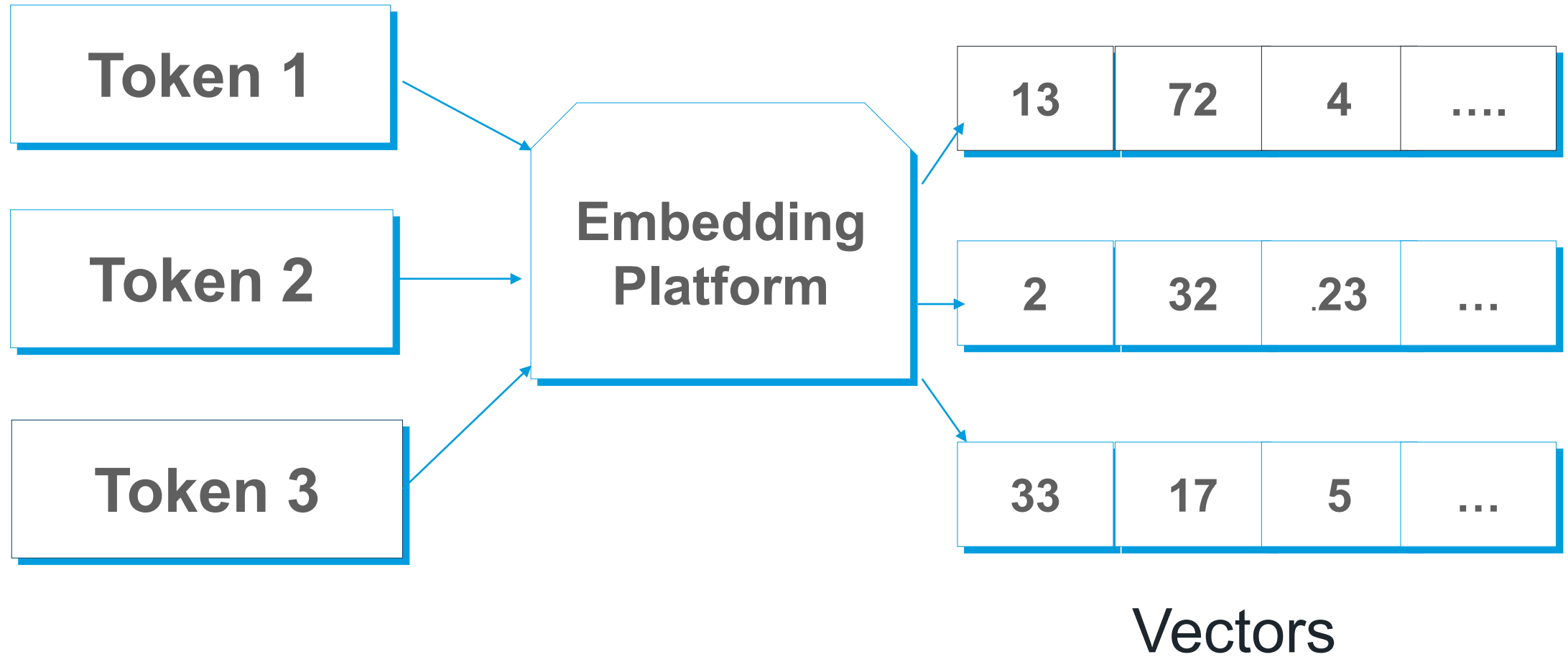
An AI system is designed to generate content by learning from vast amounts of pre-existing materials.

It may be trained in two ways:

pre-training on vast datasets to “learn” to predict the next word in a sentence by analyzing massive datasets containing diverse text sources.

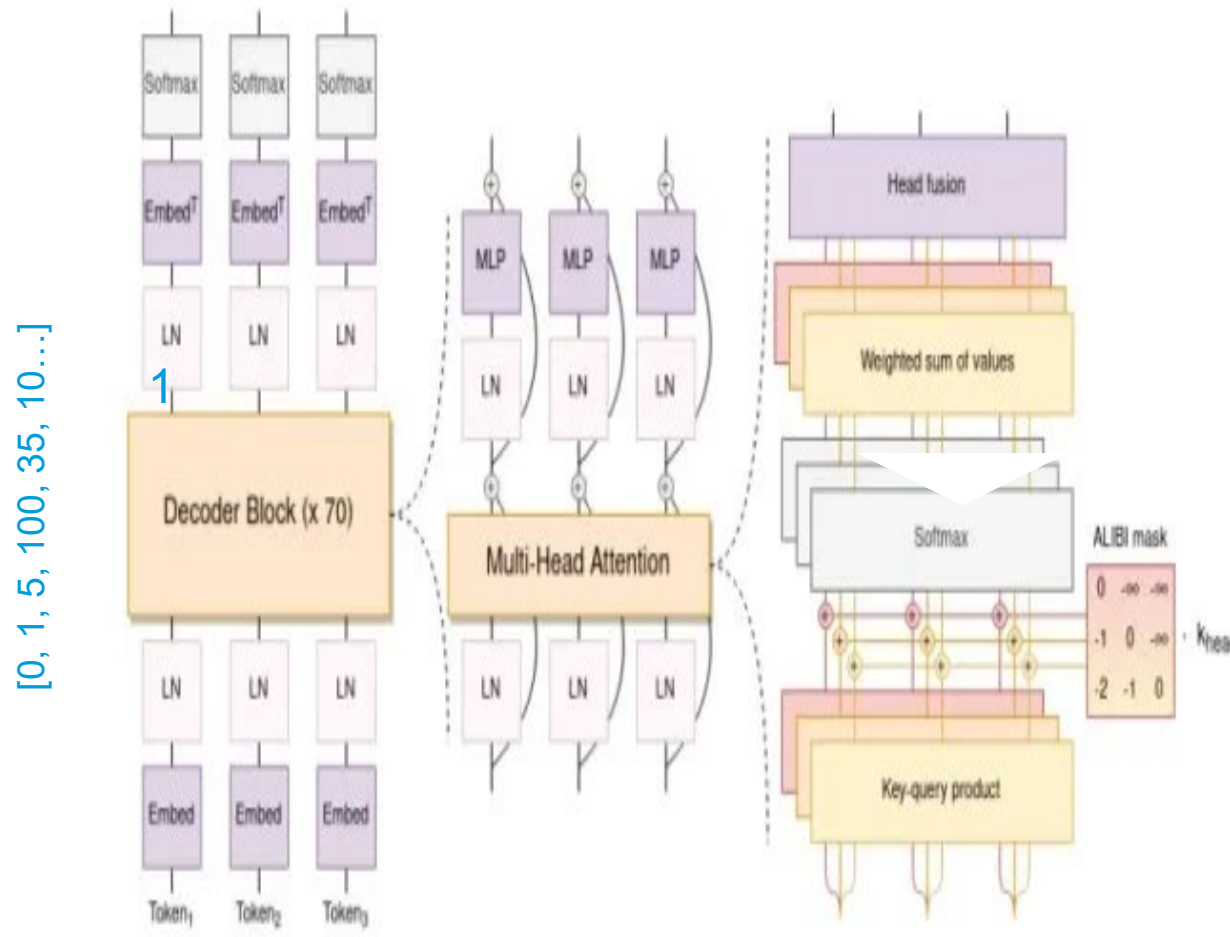
fine-tuning on specific datasets for targeted applications, improving contextual understanding and accuracy.

Training an AI Engine



Generating a Response

Lawyers work
very hard
for...”



GPT-4 next
word

Likelihood

Clients

High

Justice

High

Cases

High

Money

Medium

People

Medium

...

Smiles

Low

Laughter

Low

GenAI Use Cases in Sports

Will Gen AI Help the Texas Rangers Win the World Series in '23?

Alex Woodie



Texas Rangers' shortstop Marcus Semien (Image courtesy MLB)

“The Rangers use generative AI to automatically summarize large amounts of text data into a package that the scouts and player development personnel can more easily consume. According to Booth, the technology allows the club to ingest dozens of articles or scouting reports and create a one-page summary.”

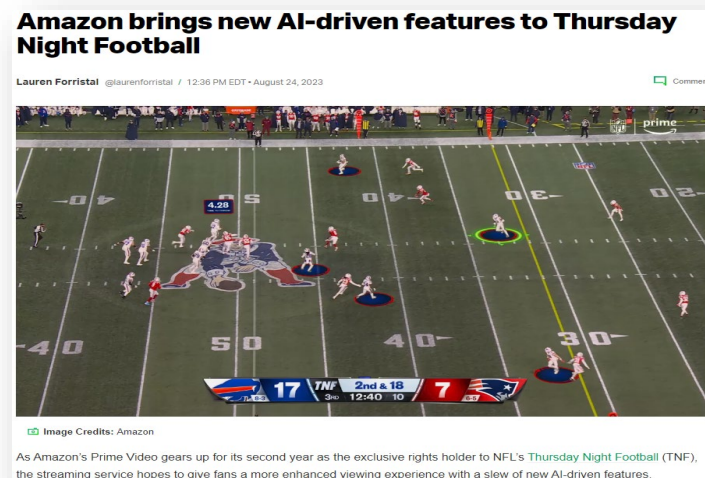
GenAI Use Cases in Sports



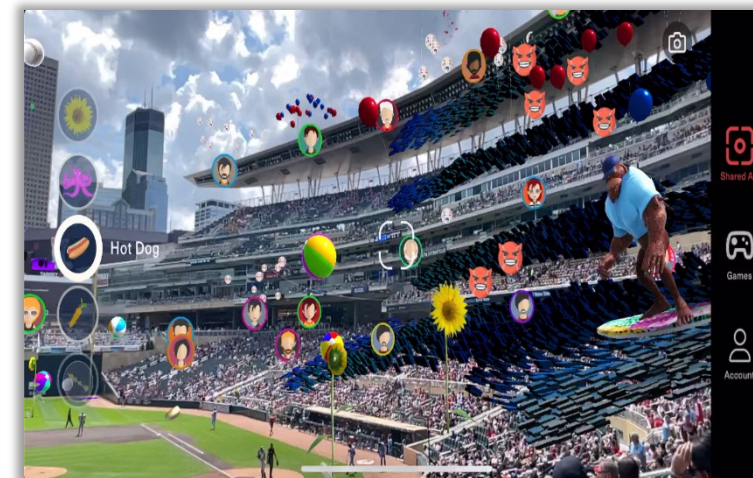
Serving GenAI-powered personalized betting opportunities and offers to bettors



NBA augmented reality app digital overlay feature



Amazon Thursday Night Football AI-based features



Augmented Reality at the Twins' Target Field





GMA Network introduces the country's first Artificial Intelligence-generated sportscasters

Published September 23, 2023 11:44am

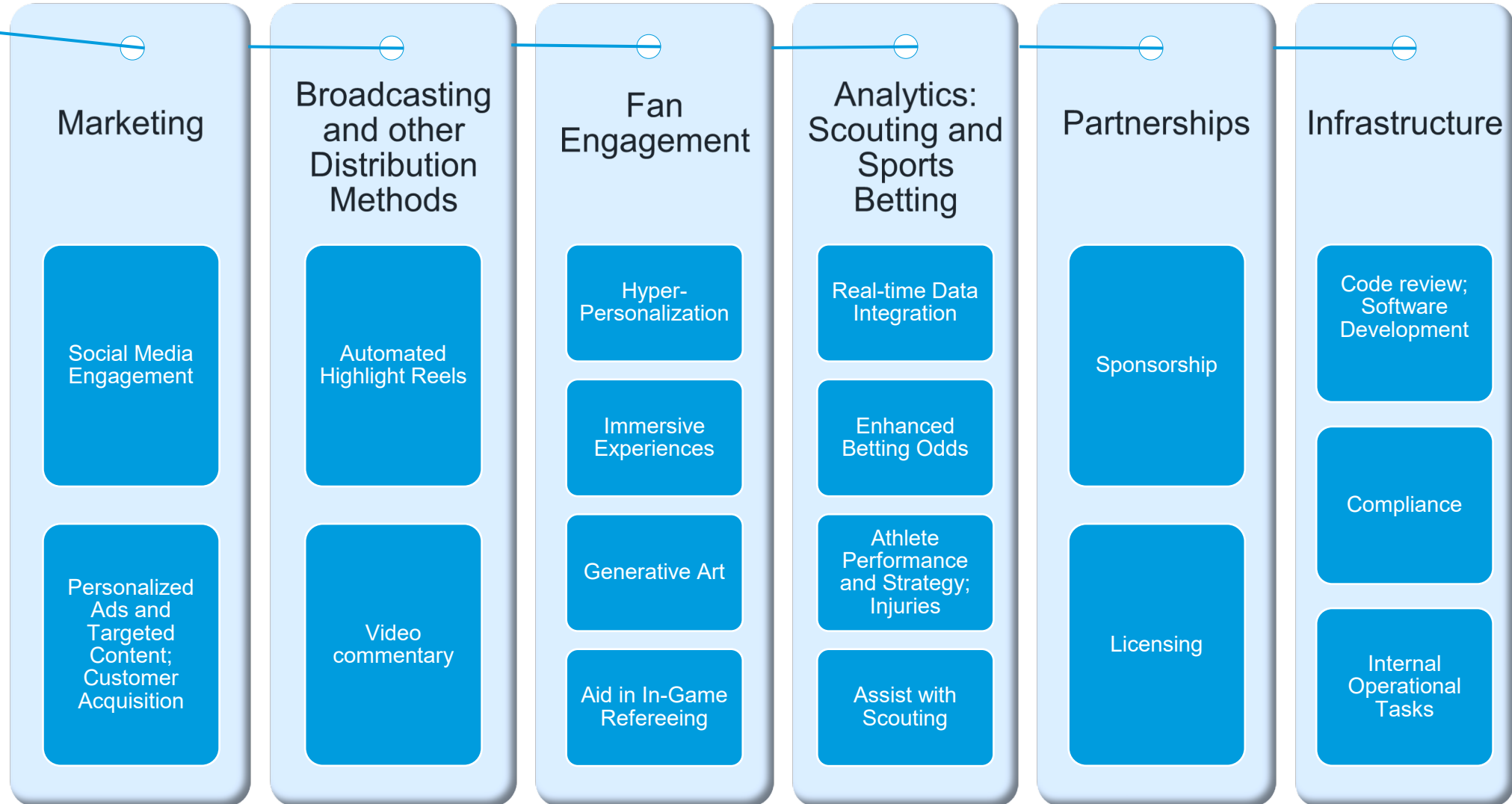
Updated September 23, 2023 12:36pm



Leading broadcast company GMA Network takes a bold step towards the future of sports broadcasting as it launches the country's first-ever Artificial Intelligence (AI)-generated sportscasters.



Generative AI Use Cases in Sports



GAI RISKS: FIVE GENERAL CATEGORIES

1

Nature of
Output

2

Confidentiality

3

Security

4

Privacy

5

Intellectual
Property

GenAI Tool Risk Profiles

Use case:
**The nature of the tool
and how will your
organization use it?**

Factors Affecting Risk Profile

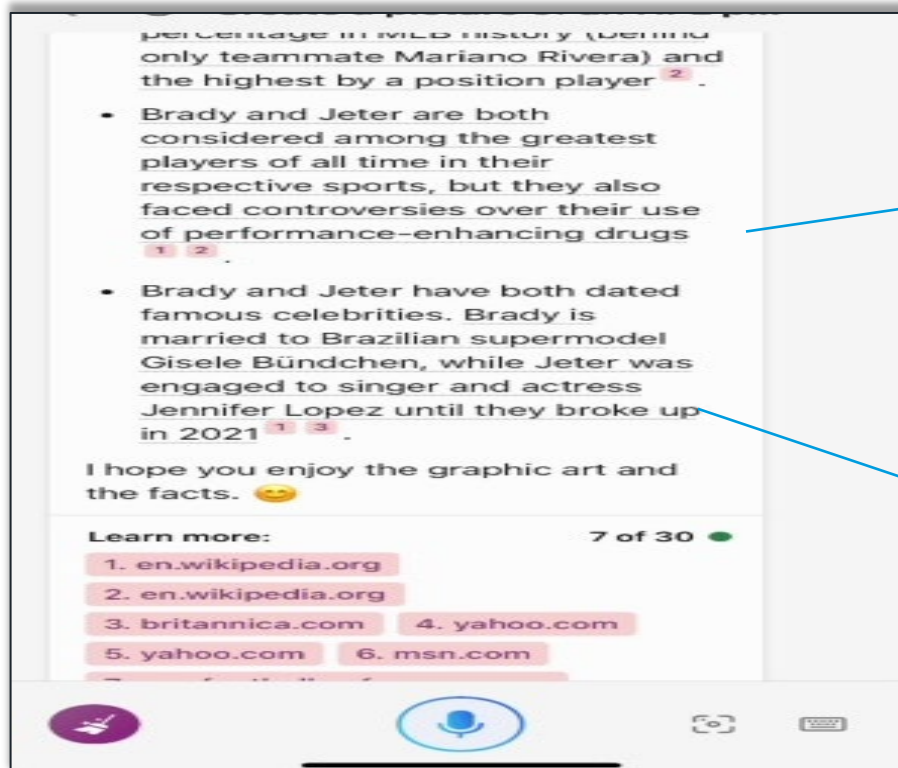
Training:
What data was used?

**Who is interacting with
the output?**

Legal terms:
How is risk allocated?

Nature of the Output

- Unlike search engines, GenAI models are not designed to produce the “right answer.”
- Hallucinations, biased, defamatory and other objectionable output is a major issue.



Brady and Jeter...also faced controversies over their use of performance-enhancing drugs.

Brady is married to Brazilian supermodel Gisele Bündchen, while Jeter was engaged to singer and actress Jennifer Lopez until they broke up in 2021.

Nature of the Output

- Training data may be incorrect or incorrectly understood.

baseball analyst for ESPN  ...

3.

4. **Career Move to Fox Sports:** It's reported that Rodriguez is nearing a multi-year contract with Fox Sports to continue as a studio analyst, transitioning from his previous position at ESPN 4.

5. **Real Estate Sale:** A company led by Rodriguez sold a property on Star Island in Miami Beach for \$45.5 million 5.

6. **Personal Life:** Rodriguez is currently dating Jaclyn Cordeiro. The couple shared a Christmas greeting on Instagram in 2023 6.

The couple shared a Christmas greeting on Instagram in 2023.

Playersbio.com

Alex is dating Jaclyn Cordeiro in 2023. He posted an Instagram picture with Jaclyn on December 17 with the caption, *"From our hearts to yours, Merry Christmas."*

The First GAI Defamation Claim

Walters v. OpenAI LLC, No. 23-A-04860-2 (Ga. Super Ct. Gwinnett Cty)

OpenAI sued for defamation after ChatGPT fabricates legal accusations against radio host

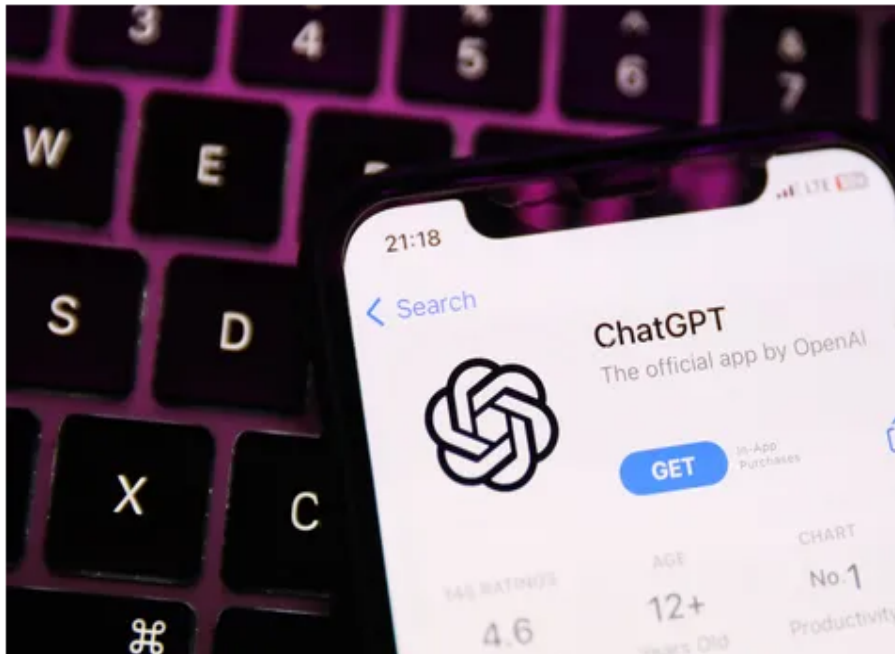


Photo by Jakub Porzycki/NurPhoto via Getty Images

/ ChatGPT is notorious for generating false and misleading information, but this seems to be the first defamation case filed against creator OpenAI.

By [James Vincent](#), a senior reporter who has covered AI, robotics, and more for eight years at The Verge.

Jun 9, 2023, 6:08 AM EDT | [15 Comments](#) / [15 New](#)



Who Can Be Liable for AI-Generated Harmful Content?

Generative AI tools like ChatGPT could test bounds of tech liability shield

BY REBECCA KLAR - 05/23/23 6:00 AM ET



FILE – The OpenAI logo is seen on a mobile phone in front of a computer screen displaying the ChatGPT home screen, March 17, 2023, in Boston. Chinese police said they recently detained a ChatGPT user for allegedly using the AI-powered chatbot to create a fake news story about a nonexistent train crash. (AP Photo/Michael Dwyer, File)

Generative artificial intelligence (AI) tools are testing a provision that protected the tech industry for decades from lawsuits over third-party content.

Hawley, Blumenthal Introduce Bipartisan Legislation to Protect Consumers and Deny AI Companies Section 230 Immunity

Wednesday, June 14, 2023

Today U.S. Senators Josh Hawley (R-Mo.) and Richard Blumenthal (D-Conn.) – the Ranking Member and the Chair of the Senate Judiciary Subcommittee on Privacy, Technology, and the Law, respectively – introduced the

No Section 230 Immunity for AI Act.

Nature of Output – Mitigation of Risk

- If possible, use GenAI tools that provide sources. Check the sources.
- Consider GenAI output as a first draft subject to full vetting:
 - Factual
 - Terminology
 - Bias
 - Localization
 - Validity of links
- External use is higher risk –
 - No external use of GenAI output without normal quality control and IP review.

Confidentiality, Security and Privacy

Risk to commercially sensitive or confidential data:

- May be used in subsequent training
- GenAI employees/contractors may have access to the information.
- Even if no disclosure, it may result in a weakening of trade secret protection, waiver of privilege, or breach of confidentiality owed to third party.

BREAKING

Samsung Bans ChatGPT Among Employees After Sensitive Code Leak

Siladitya Ray Forbes Staff
Covering breaking news and

Pro > Software & Services

Samsung meeting notes and new source code are now in the wild after being leaked in ChatGPT

Samsung workers made a major error by using ChatGPT

How does OpenAI handle data retention and monitoring for API usage?

OpenAI may securely retain API inputs and outputs for up to 30 days to identify abuse. You can also request zero data retention (ZDR) for eligible endpoints if you have a qualifying use-case. For details on data handling, visit our [Platform Docs](#) page.

Confidentiality, Security and Privacy



ChatGPT banned in Italy over privacy concerns

1 April

...one month later...

TECHNOLOGY | ITALY

Italy lifts ban on ChatGPT after data privacy improvements

04/29/2023

The hotly debated AI chatbot is back online in Italy after installing new warnings for users and the option to opt-out of having chats be used to train ChatGPT's algorithms.

European Data Protection Authority Recent Actions:

Italy – Was banned, then reinstated

Spain – Investigation

Germany – Questions raised

France – Complaints received

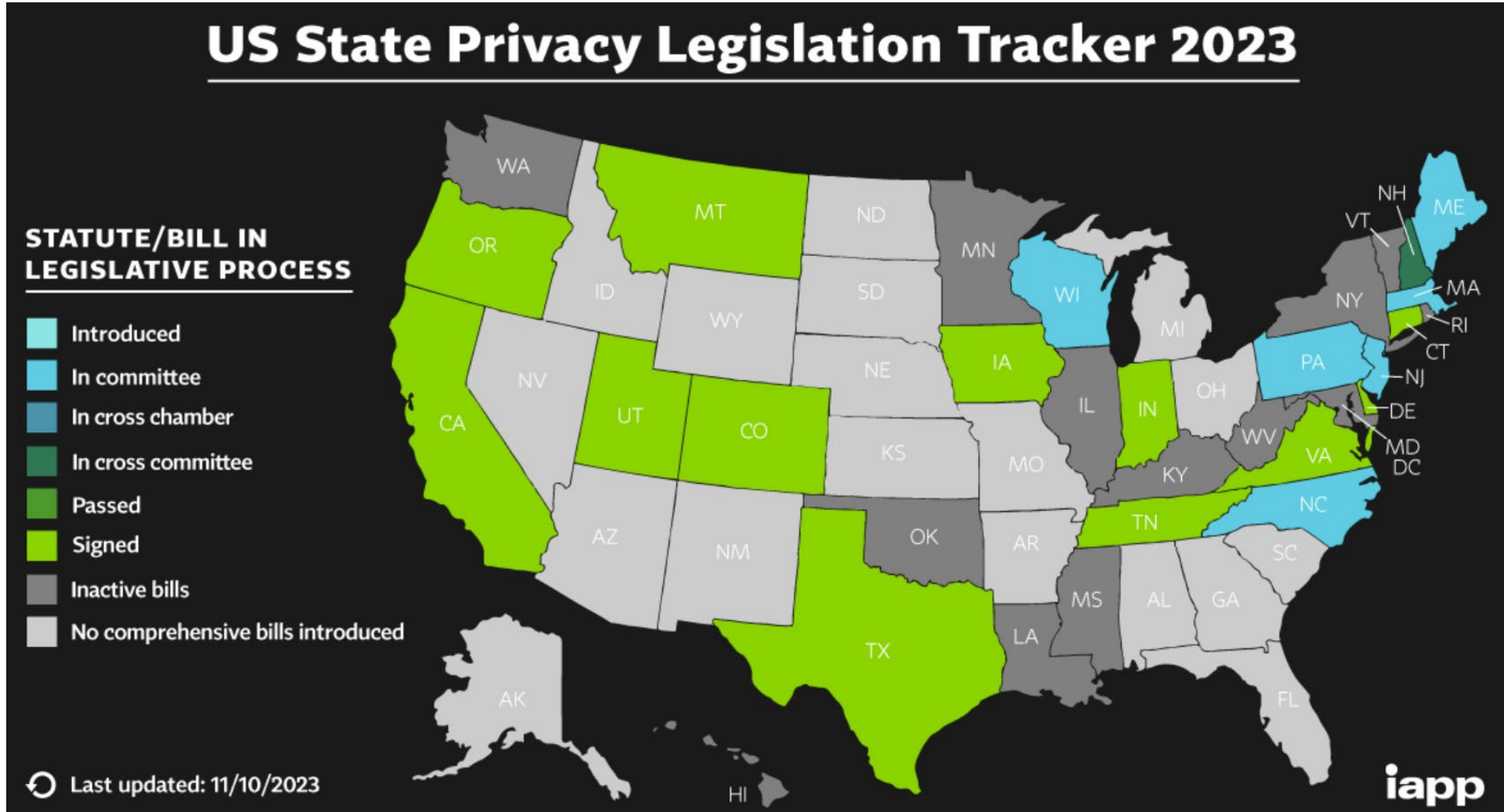
European Data Protection Board – Dedicated task force

Some of the Key Questions under GDPR

- **“Black box” issue:** It’s likely not possible to know if a piece of personal data was collected and used to process a particular output.
- **Consents:** Can an AI developer prove that its prior collection of certain website data for AI training was done with proper user consents or else prove it had a “legitimate interest”?
- **Data rights:** How does a data subject employ their rights under the GDPR with respect to data that may be in a large language model dataset? Even if such data could be identified, could one person’s “data” even be removed from an AI training dataset? Is “machine unlearning” possible?



U.S. Privacy Compliance



Confidentiality, Security, Privacy – Mitigation of Risk

- Understand the platform terms and conditions.
 - Free vs. Pay Models
- Use appropriate “toggles” if necessary.
- Ask about the “Zero Data Retention” option.
- Evaluate the platform’s security infrastructure.
- Do not share confidential, sensitive or proprietary information with GenAI providers unless security protocols and appropriate contract language is in place.
- Do not use your organization name/logo.
- Do not input non-anonymized PI/PII, PHI or other sensitive information.

Intellectual Property and Related Issues: Copyright

- IP owner vs. User of GenAI vs. Scraper
- GenAI tools are trained on pre-existing content – much of which is protected by copyright.
 - Does the training of those tools constitute copyright infringement? Or, is it a fair use?
 - What about “Fine-Tuned” models?
 - If GenAI output contains or is based upon pre-existing content, is that an infringement? If so, who is liable?
- Can one own the intellectual property in GenAI-produced output?

Web Scraping: Copyright Infringement or Fair Use?

Chatbots Are Digesting the Internet. The Internet Wants to Get Paid.

Artificial-intelligence companies are using content created by millions of people, without their consent or any compensation. Some tech and media companies are beginning to ask for payment.

By Christopher Mims [Follow](#)

April 29, 2023 12:00 am ET



Gift unlocked article



Listen (10 min)



Outcry Against AI Companies Grows Over Who Controls Internet's Content

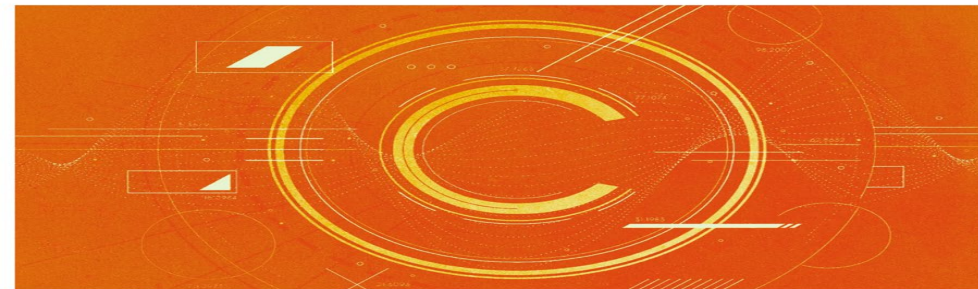
Websites like Reddit and writers including James Patterson and Sarah Silverman demand compensation for work they suspect was used to train new artificial-intelligence technology



Scraping or Stealing? A Legal Reckoning Over AI Looms

Tech giants' use of copyrighted works to train ChatGPT or Midjourney might violate the law — unless more deals are cut.

BY WINSTON CHO AUGUST 22, 2023 12:18PM



Selected Copyright GenAI Litigations

- ***Anderson v. Stability AI, Ltd.***, No. 23-00201 (N.D. Cal. Filed Jan. 13, 2023) (claims against DreamStudio AI image software), *further proceedings at* No. 23-00201 (N.D. Cal. Oct. 30, 2023) (**granting motions to dismiss, with leave to amend, except for Plaintiff's direct copyright infringement claim against Stability AI; court found complaint was deficient as to how each defendant allegedly separately violated the plaintiffs' copyrights or removed CMI**)
- ***Getty Images (US), Inc. v. Stability AI, Inc.***, No. 23-00135 (D. Del. Filed Feb. 3, 2023) (copyright and DMCA CMI claims re: use of Getty images for training Stable Diffusion model; bringing copyright) (**motion to dismiss filed, mostly on procedural and jurisdictional grounds**)
- ***Doe v GitHub, Inc.***, No. 22-06823 (N.D. Cal. Filed Nov. 3, 2022) (asserting DMCA CMI removal claims, breach of contract and other claims against developer of CoPilot GAI coding software over collection of open source code from repository); ***motion to dismiss granted in part, denied in part*** No. 22-06823 (N.D. Cal. May 11, 2023) (finding standing over plaintiffs' request for injunctive relief and declining to dismiss certain CMI removal claims and open source license claims; related state claims dismissed, with leave to amend) (**amended complaint filed, resulting in renewed motion practice**)
- ***P.M. v. OpenAI, Inc.***, No. 23-03199 (N.D. Cal. Filed June 28, 2023), *subsequently dismissed* No. 23-03199 (N.D. Cal. Notice of Voluntary Dismissal Sept. 15, 2023) (**plaintiff voluntarily dismisses the case**)
- ***Tremblay v. OpenAI, Inc.***, No. 23-03223 (N.D. Cal. Filed June 28, 2023) (authors' copyright claims over CHatGPT using their works as training materials without consent) (**OpenAI has moved to dismiss**)

Selected Copyright GenAI Litigations

- ***Silverman v. OpenAI, Inc.***, No. 23-03416 (N.D. Cal. Filed July 7, 2023) (similar claims and also advancing a derivative infringement argument against ChatGPT generating results based on plaintiffs' works) (**OpenAI has moved to dismiss**)
- ***Kadrey v. Meta Platforms, Inc.***, No. 23-03417 (N.D. Cal. Filed July 7, 2023) (similar copyright claims from authors who did not consent for their books to be used as training materials for LLaMA) (**motion to dismiss filed**)
- ***Chabon v. OpenAI, Inc.***, No. 23-04625 (N.D. Cal. Filed Sept. 8, 2023) (copyright claims over allegations that ChatGPT used authors' copyrighted works as training materials; allegations of using so-called "shadow libraries") (**amended complaint filed**)
- ***Chabon v. Meta Platforms Inc.***, No. :23-04663 (N.D. Cal. Filed Sept. 12, 2023) (same) (**amended complaint filed**)
- ***Authors Guild v. OpenAI Inc.***, No. 23-08292 (S.D.N.Y. Filed Sept. 19, 2023) ("Defendants copied Plaintiffs' works wholesale, without permission or consideration. Defendants then fed Plaintiffs' copyrighted works into their "large language models" or "LLMs," algorithms designed to output human-seeming text responses to users' prompts and queries")
- ***Huckabee v. Meta Platforms, Inc.***, No. 23-09152 (S.D.N.Y. Filed Oct. 17, 2023) (putative class action over alleged AI training on ebooks)
- ***J.L. v. Alphabet Inc.***, No. 23-03440 (N.D. Cal. Filed July 11, 2023) (various privacy and copyright-related claims against Google) (**Google has filed a motion to dismiss**)
- ***A.T. v. OpenAI LP***, No. 23-04557 (N.D. Cal. Filed Sept. 5, 2023) (privacy-related claims against OpenAI and Microsoft for using "stolen private information" from millions of internet users without consent to train its AI)
- ***Concord Music Group, Inc. v. Anthropic PBC***, No. 23-01092 (M.D. Tenn. Filed Oct. 18, 2023) (music publishers claims AI model copies and disseminates copyrighted music lyrics)

More to Come?



'New York Times' considers legal action against OpenAI as copyright tensions swirl

August 16, 2023 • 5:53 PM ET



Bobby Allyn



OpenAI, maker of ChatGPT, has in recent weeks been hit with lawsuits from comedian Sarah Silverman, U.S. novelists, and others alleging copyright infringement. Now, *The New York Times* is weighing possible legal action.

Leon Neal/Getty Images

The New York Times and OpenAI could end up in court.

Generative AI: Focus on Web Scraping



- Infringement?
- CFAA Violation?
- Breach of Contract?
- Considerations:
 - Authentication Firewalls
 - Circumvention of Technical Blocks (IP addresses, Captchas)
 - Robots.txt
 - Terms and Conditions

Web Scraping: robots.txt

`www.yourwebsite.com/robots.txt`

Web Scrapping: robots.txt

GPTBot is OpenAI's web crawler and can be identified by the following user agent and string.

```
User agent token: GPTBot
```

```
Full user-agent string: Mozilla/5.0 AppleWebKit/537.36 (KHTML, like Gecko; compatib
```



Usage

Web pages crawled with the GPTBot user agent may potentially be used to improve future models and are filtered to remove sources that require paywall access, are known to gather personally identifiable information (PII), or have text that violates our policies. Allowing GPTBot to access your site can help AI models become more accurate and improve their general capabilities and safety. Below, we also share how to disallow GPTBot from accessing your site.

Disallowing GPTBot

To disallow GPTBot to access your site you can add the GPTBot to your site's robots.txt:

```
User-agent: GPTBot
```

```
Disallow: /
```



Web Scraping: robots.txt

Google allows sites to opt out of training its LLMs for GenAI

Sites that don't want their content used by Google to train its large language models for generative AI can now opt out by adding a new user agent, Google-Extended, to their robots.txt file.



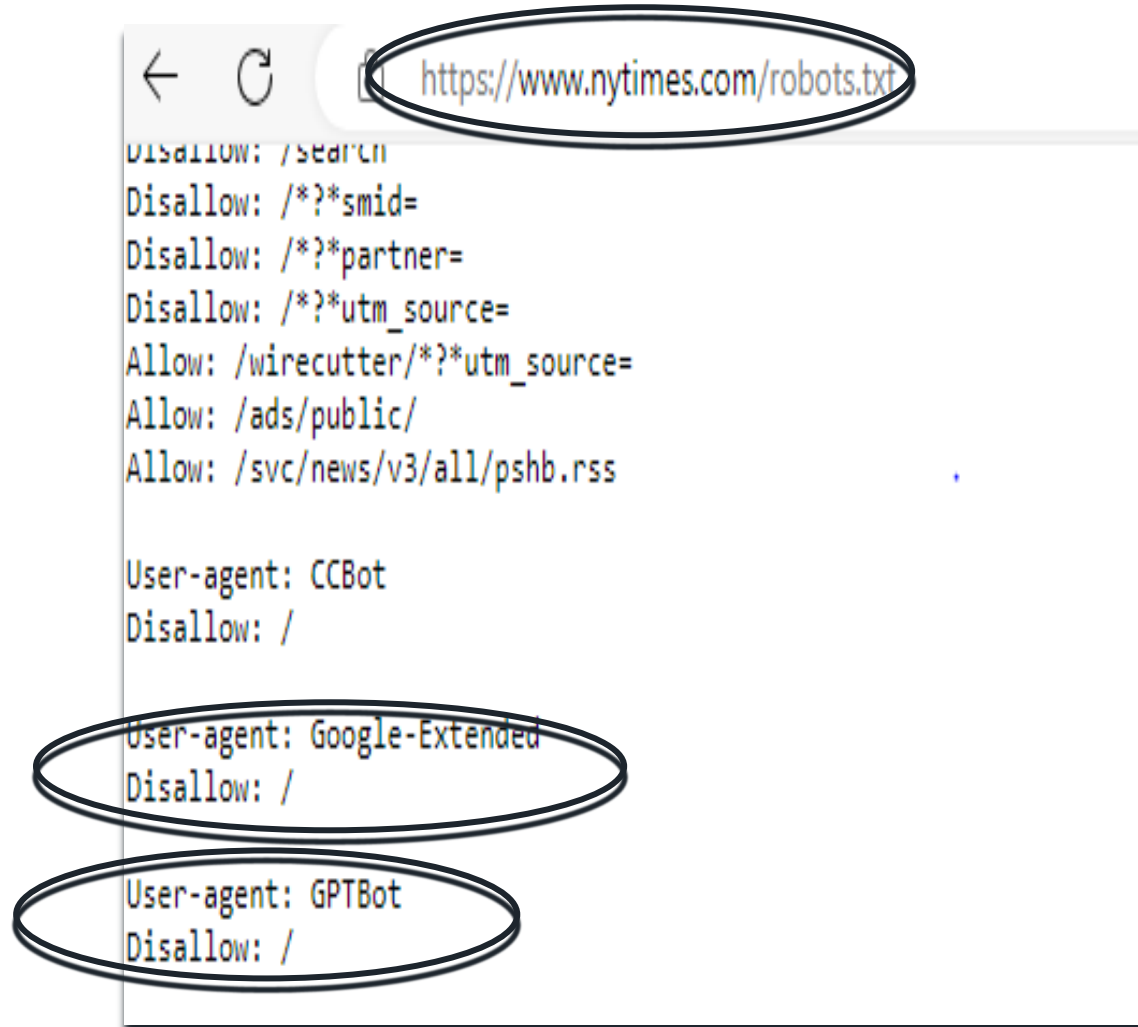
By Jon Henshaw

09/29/2023 (Last updated on 10/1/2023)



```
User-agent: Google-Extended
Disallow: /
```

Web Scraping: robots.txt



```
← ↻ https://www.nytimes.com/robots.txt
Disallow: /search
Disallow: /*?*smid=
Disallow: /*?*partner=
Disallow: /*?*utm_source=
Allow: /wirecutter/*?*utm_source=
Allow: /ads/public/
Allow: /svc/news/v3/all/pshb.rss

User-agent: CCBot
Disallow: /

User-agent: Google-Extended
Disallow: /

User-agent: GPTBot
Disallow: /
```

Intellectual Property: Web Scraping: Terms and Conditions

- (i) access any part of the Services, Content, data or information you do not have permission or authorization to access or for which NYT has revoked your access;
- (ii) use robots, spiders, scripts, service, software or any manual or automatic device, tool, or process designed to data mine or scrape the Content, data or information from the Services, or otherwise access or collect the Content, data or information from the Services using automated means;
- (iii) use services, software or any manual or automatic device, tool, or process designed to circumvent any restriction, condition, or technological measure that controls access to the Services in any way, including overriding any security feature or bypassing or circumventing any access controls or use limits of the

(3) Use the Content for the development of any software program, including but not limited to, training a machine learning or artificial intelligence (AI) system.

- (1) access any part of the Services, Content, data or information you do not have permission or authorization to access or for which NYT has revoked your access;
- (2) use robots, spiders, scripts, service, software or any manual or automatic device, tool, or process designed to data mine or scrape the Content, data or information from the Services, or otherwise use, access, or collect the Content, data or information from the Services using automated means;
- (3) use the Content for the development of any software program, including, but not limited to, training a machine learning or artificial intelligence (AI) system.
- (4) use services, software or any manual or automatic device, tool, or process designed to circumvent any restriction, condition, or technological measure that controls access to the Services in any way, including overriding any security feature or bypassing or circumventing any access controls or use limits of the

**New York Times, Terms of Service change
– August 3, 2023**

Who is Liable? Can a User of GenAI Be Found Liable?

- Unlikely that a user will be held liable for infringements committed during the GenAI training process.
- A potential infringement case could be brought against a user that fine-tuned a model by using third party copyrighted materials without permission.
- Is it possible a user might be directly held liable for copyright infringement based on output?
 - Under limited circumstances it may be possible. For example, if the user is specifically instructing ChatGPT to use copyrighted content to generate unauthorized content, there may be liability.

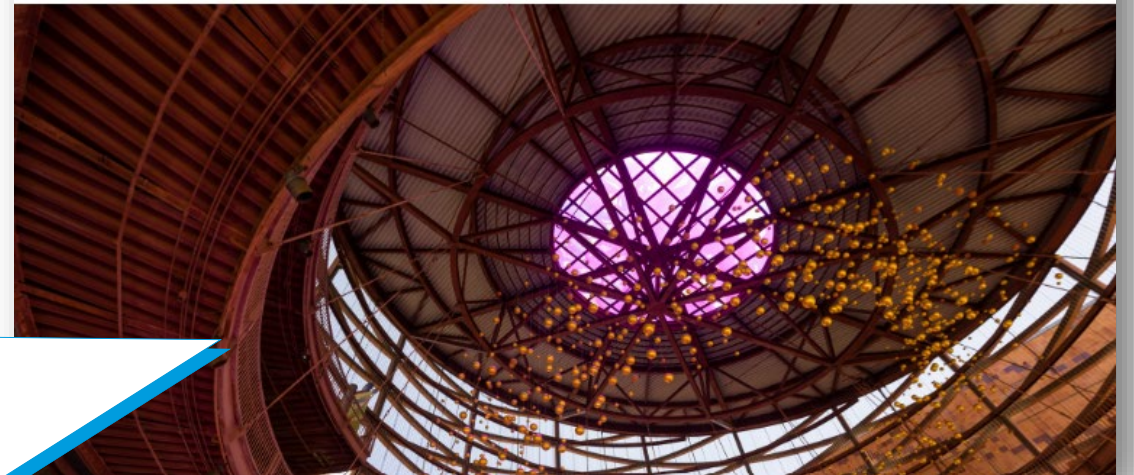
To the Rescue?

Microsoft Copilot Copyright Commitment

"To address this customer concern, Microsoft is announcing our new Copilot Copyright Commitment. **As customers ask whether they can use Microsoft's Copilot services and the output they generate without worrying about copyright claims, we are providing a straightforward answer: yes, you can, and if you are challenged on copyright grounds, we will assume responsibility for the potential legal risks involved.**"

Microsoft announces new Copilot Copyright Commitment for customers

Sep 7, 2023 | Brad Smith, Vice Chair and President, Hossein Nowbar, CVP and Chief Legal Officer



Microsoft Copilot Copyright Commitment

- Specifically, the Copilot Copyright Commitment will:
 - Cover third-party IP claims based on copyright, patent, trademark, trade secrets, or right of publicity, but not other claims.
 - Cover the customer's use and distribution of the output content generated by Copilot services.
 - Excludes customer's input data, or uses of output that the customer knows or should know will infringe the rights of others.
 - Require the customer to use the content filters and other safety systems built into the product.
- Does not extent to free products, custom-built Copilot services or consumer products and services.
- Additional restrictions in the terms.

Emerging Industry Standard?

IBM and Google Also Provide IP Indemnity

IBM - Will indemnify clients against third party IP claims against IBM-developed watsonx AI models.

Google

- IP Indemnity on Training Data:
 - “If you are challenged on copyright grounds, we will assume responsibility for the potential legal risks involved.”
 - “We hope this gives you confidence that your company is protected against third parties claiming copyright infringement as a result of Google’s use of training data....”
- Generated output indemnity
 - “We hope this gives you confidence that your company is protected against third parties claiming copyright infringement as a result of Google’s use of training data” – as long as customer doesn’t intentionally create or use output to infringe 3P rights and uses existing tools.

Emerging Industry Standard?

OpenAI Joins the Trend



Updated
November 6, 2023

(b) Output indemnity. OpenAI's indemnification obligations to ChatGPT Enterprise customers under the Agreement include claims that Customer's use or distribution of Output infringes a third party's intellectual property right. This indemnity does not apply where: (i) Customer or Customer's End Users knew or should have known the Output was infringing or likely to infringe, (ii) Customer or Customer's End Users disabled, ignored, or did not use any relevant citation, filtering or safety features or restrictions provided by OpenAI, (iii) Output was modified, transformed, or used in combination with products or services not provided by or on behalf of OpenAI, (iv) Customer or its End Users did not have the right to use the Input or fine-tuning files to generate the allegedly infringing Output, (v) the claim alleges violation of trademark or related rights based on Customer's or its End Users' use of Output in trade or commerce, and (vi) the allegedly infringing Output is from content from a Third Party Offering.

Who owns the IP in a 100% AI-Generated Image?

Thaler v. Perlmutter, No. 22-1564 (D.D.C. Aug. 18, 2023)

“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed....” 17 U.S.C. § 102.



UNITED STATES COPYRIGHT OFFICE

COMPENDIUM OF
U.S. COPYRIGHT OFFICE PRACTICES
THIRD EDITION

“The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being.”

Compendium of U.S. Copyright Office Practices 3d . § 306.

As Fight Over A.I. Artwork Unfolds, Judge Rejects Copyright Claim

A federal judge dismissed an inventor’s attempt to copyright artwork produced by an image generator he designed. But more legal challenges are on the way.

Copyright Office Study

- *Basics*: 34 questions (with subparts); Comments closed on October 30th, with reply comments due November 29th.
- Are any revisions to the Copyright Act necessary to clarify the human authorship requirement or to provide additional standards to determine when content including AI-generated material is subject to copyright protection?
- Is legal protection for AI-generated material desirable as a policy matter?
- Is new legislation warranted to address copyright or related issues with generative AI? If so, what should it entail?

Artificial Intelligence Study

Comment Submission

Copyright.gov | U.S. Copyright Office

The U.S. Copyright Office is conducting a study regarding the copyright issues raised by generative artificial intelligence (AI). This study will collect factual information and policy views relevant to copyright law and policy. The Office will use this information to analyze the current state of the law, identify unresolved issues, and evaluate potential areas for congressional action.

The Office published a notice of inquiry on August 30, 2023. Initial written comments are due by 11:59 p.m. eastern time on October 30, 2023. Reply comments are due by 11:59 p.m. eastern time on November 29, 2023.

For more information, please review the notice of inquiry, the notice regarding the extension of the comment period, and the [webpage for the Office's AI Initiative](#).

- How are training materials used and/or reproduced when training an AI model?
- Do different stages of training, such as pre-training and fine-tuning, raise different considerations under the first fair use factor?
- Should copyright owners have to affirmatively consent (opt in) to the use of their works for training materials, or...with the means to object (opt out)?

Trademark and Brand Issues

GenAI May Require Review of Brand/Trademark Protection Processes



Right of Publicity

Young v. NeoCortex Inc., No. 23-02496 (C.D. Cal. 2023)

'Big Brother' Star Cries Foul Over
Alleged Reface App Publicity Rights
Violations

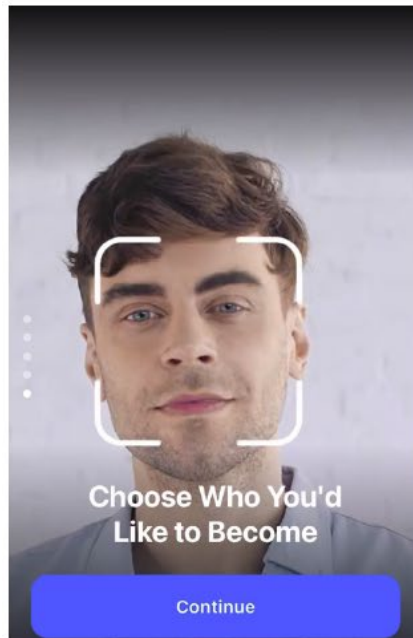


Figure 2

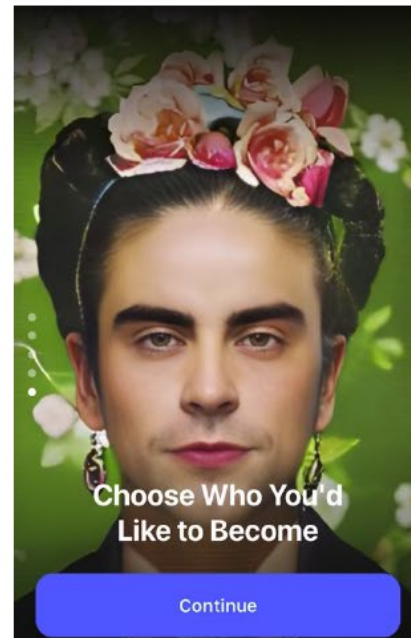


Figure 3

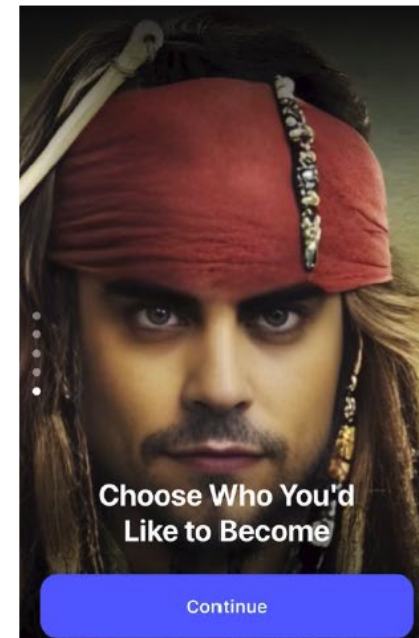


Figure 4

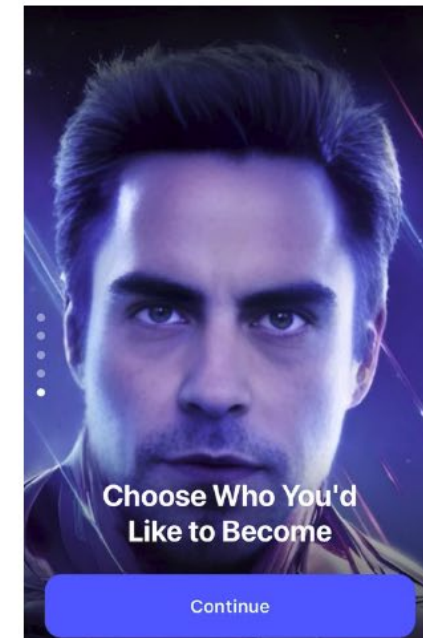


Figure 5

Intellectual Property – Mitigation of Risk

- To the extent possible, understand the data on which the GenAI platform is trained.
- Scan output for possible infringement and other issues.
- Avoid queries that would encourage infringing outputs.
- Use tools provided by the platform to avoid infringement.
- Understand the terms around platform output indemnities.
- Exercise special care for images.
- Use caution making IP representations regarding GenAI-produced content.
- Don't use GenAI if copyright ownership is important.
- Consider update of procedures for identification of unauthorized use of marks.

Special Considerations for Software Development

- Use available filters (e.g., duplicate code, known security vulnerabilities, indicia of IP rights).
- Ensure close review for security vulnerabilities, efficiency, best practices, bugs, organizational standards, documentation.
- Are your third party software developers using GenAI to create deliverables?
 - Consider addressing in software development agreements
- Avoid using for crown jewel, secret sauce software.
- Document - in a standardized methodology - code that was generated using GenAI.
- Attention to the Open Source issue.

How do Your Agreements Address GenAI?

- All important forms of contracts and licenses should be reviewed.
- Do your vendors and service providers have the right to use a GenAI platform in providing services?
- Can a GenAI platform be a subcontractor?
- Content Agreements
 - What rights do you have? Do your rights to use in-licensed content, media, data, etc. include the right to use the material with a GenAI platform?
 - Have you granted the right to use your content in GenAI applications?
 - Are you indemnifying for GenAI uses?
 - Do exclusivity provisions include or exclude those rights?
 - If you use GenAI to create content for licensing, how do you address reps re IP ownership?

Media Rights Contracting – The “Future Technologies” Issue

Scope of License:

- ...the right to exhibit, broadcast and transmit Recordings via [list of forms of video exhibition], *or any other medium now known or hereinafter discovered.*”
- ...produce, reissue, manipulate, reconfigure, or otherwise disseminate Recordings *by any form of media, now or hereafter devised.*”

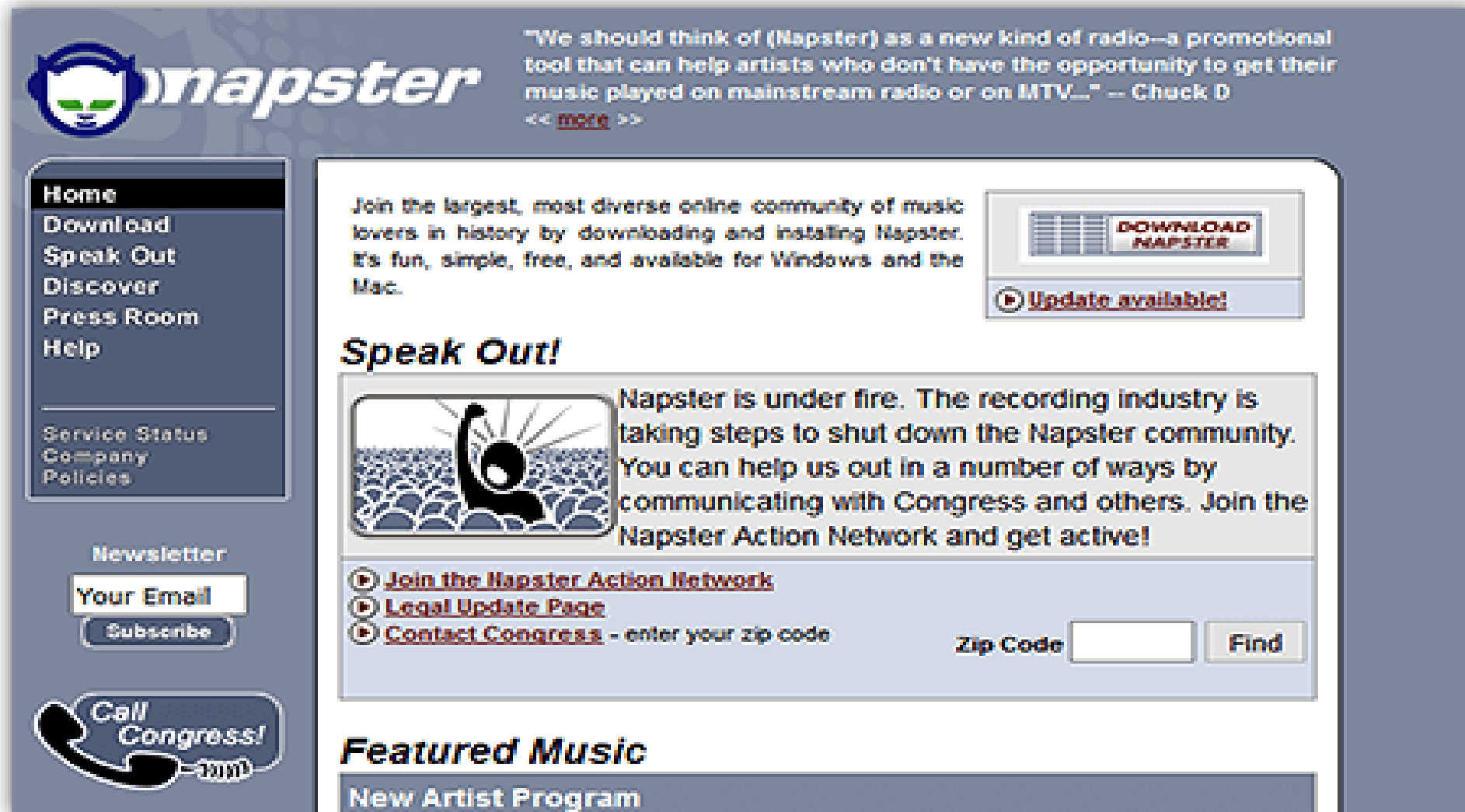
Ownership of GenAI works:

- “...own the Recordings and all of the rights, results, products and proceeds in and to, or derived from the Recordings and the rights granted herein.”

M&A and Other Corporate Transactions: Diligence

- GenAI Employee Policies – Confidentiality, etc.
- Use Cases; Use of Output
- Institutional Reliance on Particular Platforms
- Training data
 - Public, Fine-Tuned, etc.?
- Human Vetting and Quality Control
- IP/Privacy Compliance
- Technical Configuration – Availability and Security
- Underlying GenAI Platform Contractual Terms
- Licenses and Other Key Agreements

Looking Ahead: Lessons from Napster



The Lessons from Napster...

As Publishers Seek AI Payments, AP Gets a First-Mover Safeguard

Associated Press pact with OpenAI gives it the right to reset terms if another publisher gets a better deal

By Alexandra Bruell [Follow](#)

Updated July 28, 2023 9:57 am ET

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[Listen](#) (5 min) [More](#)



Shutterstock signs 6-year training data agreement with OpenAI

shutterstock .ai

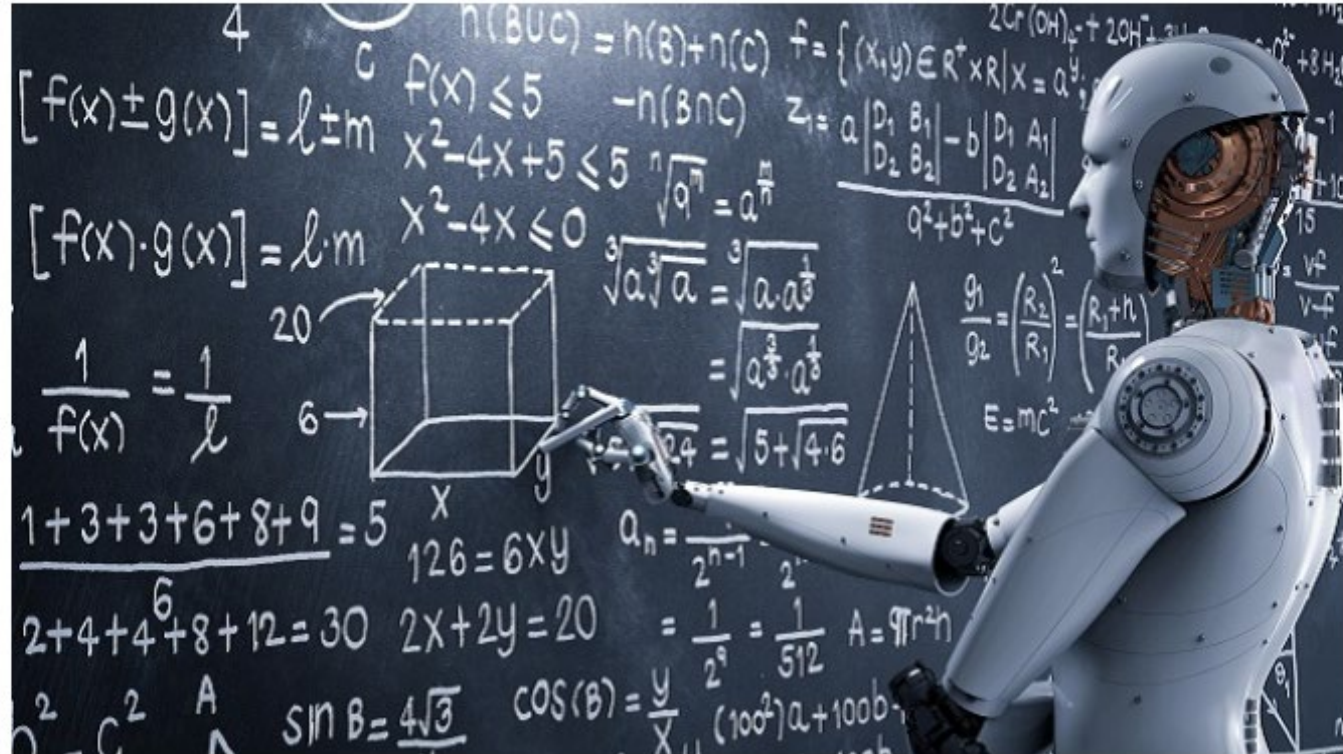
+

 OpenAI


The Lessons from Napster...

AI & CLOUD NOVEMBER 10, 2023

OpenAI seeks partners to boost training sets



The Lessons from Napster: Adobe creates its own AI generator

 Adobe

AI at Adobe ▾

Sensei

Generative AI


Firefly

In Products ▾

Innovations & Research

Sign In

Home / Adobe Sensei / Generative AI / Adobe Firefly


 Adobe Firefly


Your imagination's new best friend.


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 Text to Image

 Generative Fill

 Text Effects

The Lessons from Napster: Getty creates its own AI generator

Menu: BROWSE PRICING ENTERPRISE VisualGPS INSIGHTS

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AI GENERATOR BOARDS CART SIGN IN

INTRODUCING

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**Getty made an AI generator that only
trained on its licensed images**

/ Generative AI by Getty Images
harnesses Getty's vast licensed
library of images.

By *Emilia David*, a reporter who covers AI. Prior to joining The Verge, she covered the intersection between technology, finance, and the economy.
Sep 25, 2023, 9:00 AM EDT | 9 Comments / 9 News

The Verge

- Supports litigation position

Trends of Emerging Models

- Trained only on licensed content and data.
- Model compensates contributors.
- Copyright indemnification for GAI created images.
- Certain text prompts are blocked by default to avoid problematic GAI content (e.g., prompts mentioning an actual person).
- Eventually customers will be able to use their own data to fine-tune the model.

Benefits:

- Brand building
- Continued relevance in light of emerging technology
- New revenue stream
- User loyalty

Any Questions?

Some of the Thorniest Questions About AI Will Be Answered in Court

Companies selling ChatGPT-like tools face lawsuits alleging defamation, unfair business practices, copyright infringement and privacy violations

By *Ryan Tracy* [Follow](#) and *Isaac Yu* [Follow](#)

Aug. 23, 2023 9:00 am ET

The background of the image is a vibrant, stylized depiction of a sports stadium at night. Two large, bright stadium lights are visible on the left and right sides, casting a strong glow. The sky is a mix of deep blue and bright yellow/orange, suggesting a sunset or sunrise. Small, colorful confetti or sparks are scattered across the upper portion of the image.

2023

SPORTS LAW CLE SERIES

Proskauer»

The Supreme Court Term: Looking Back and Looking Forward

Mark D. Harris, Partner
John E. Roberts, Partner

November 15, 2023

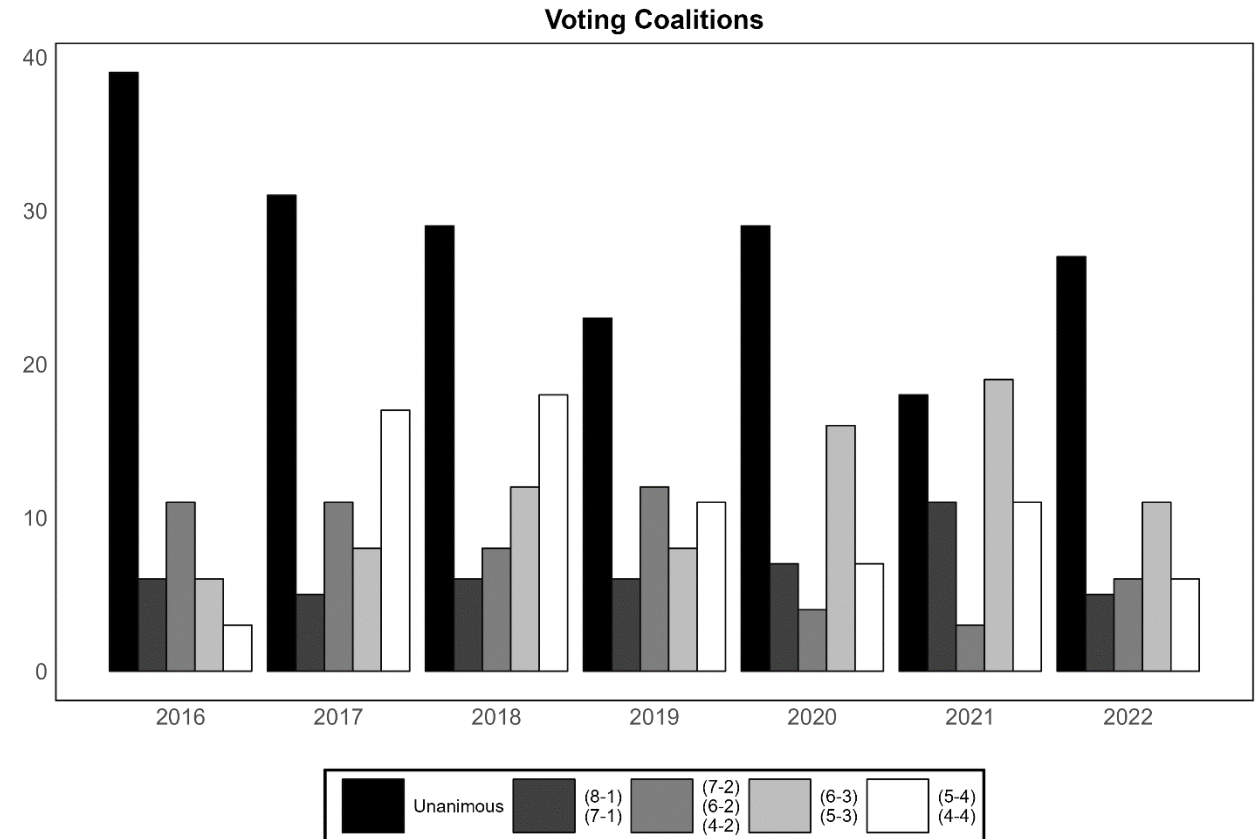
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October Term 2022: A Year In Review

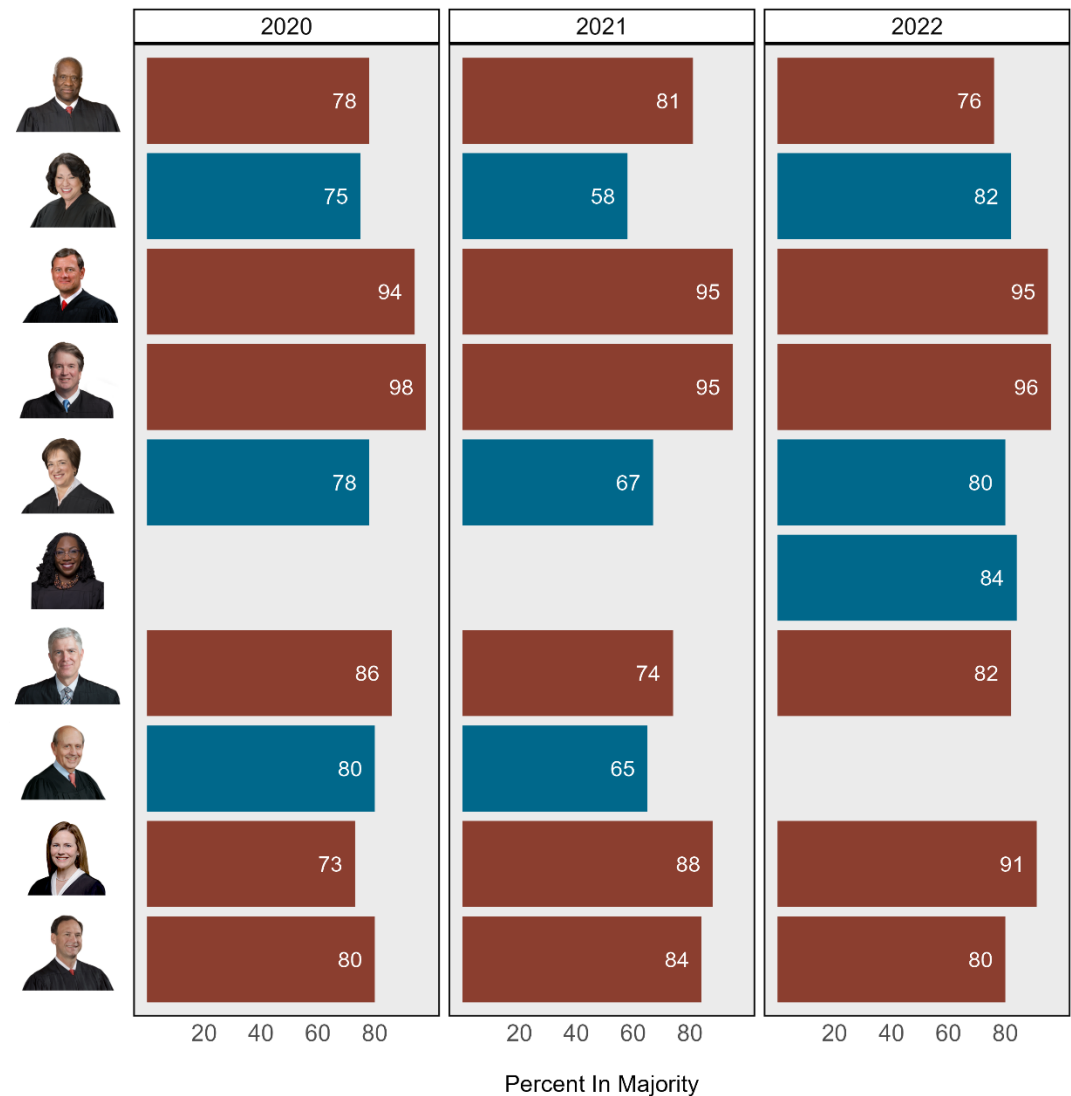
October Term 2022 | By the Numbers

- 57 merits opinions
- 21 (37%) unanimous decisions, and 7 (12%) 5-4 cases.
- Each justice authored on average 6 majority opinions
- 141 total opinions:
 - 57 majority
 - 43 concurring
 - 41 dissenting



Sources: *Supreme Court Statistics, 2022 Term*, Harv. L. Rev. (November 2023); Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023).

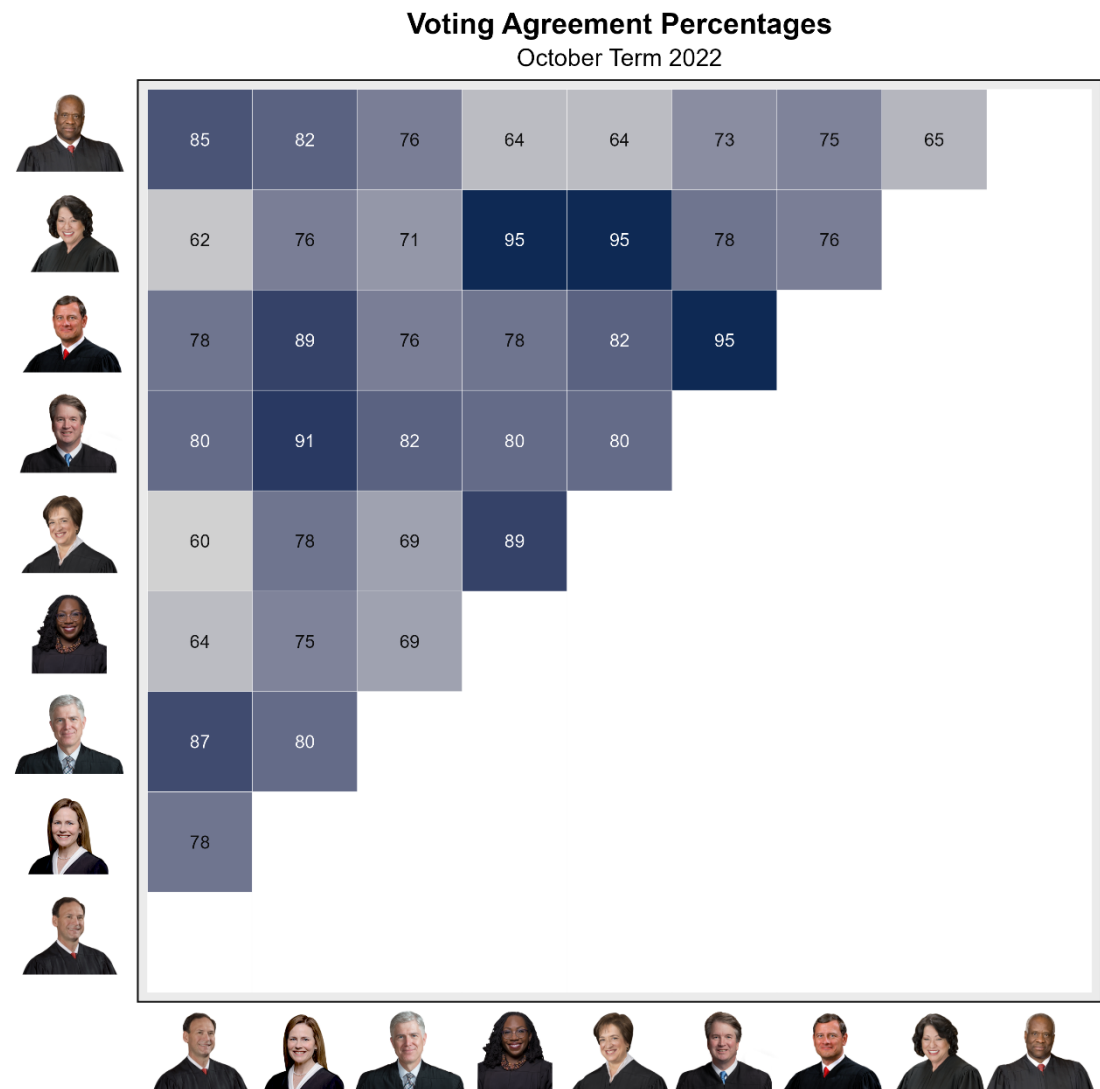
Jackson's Strong Start | Percentage in the Majority



“Justice Jackson . . . spoke more than any sitting justice during this period with the exception of the Chief Justice in two instances [and] was in the majority 84% of the time and this is more than other progressive justices from the prior term.”

Source: Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023).

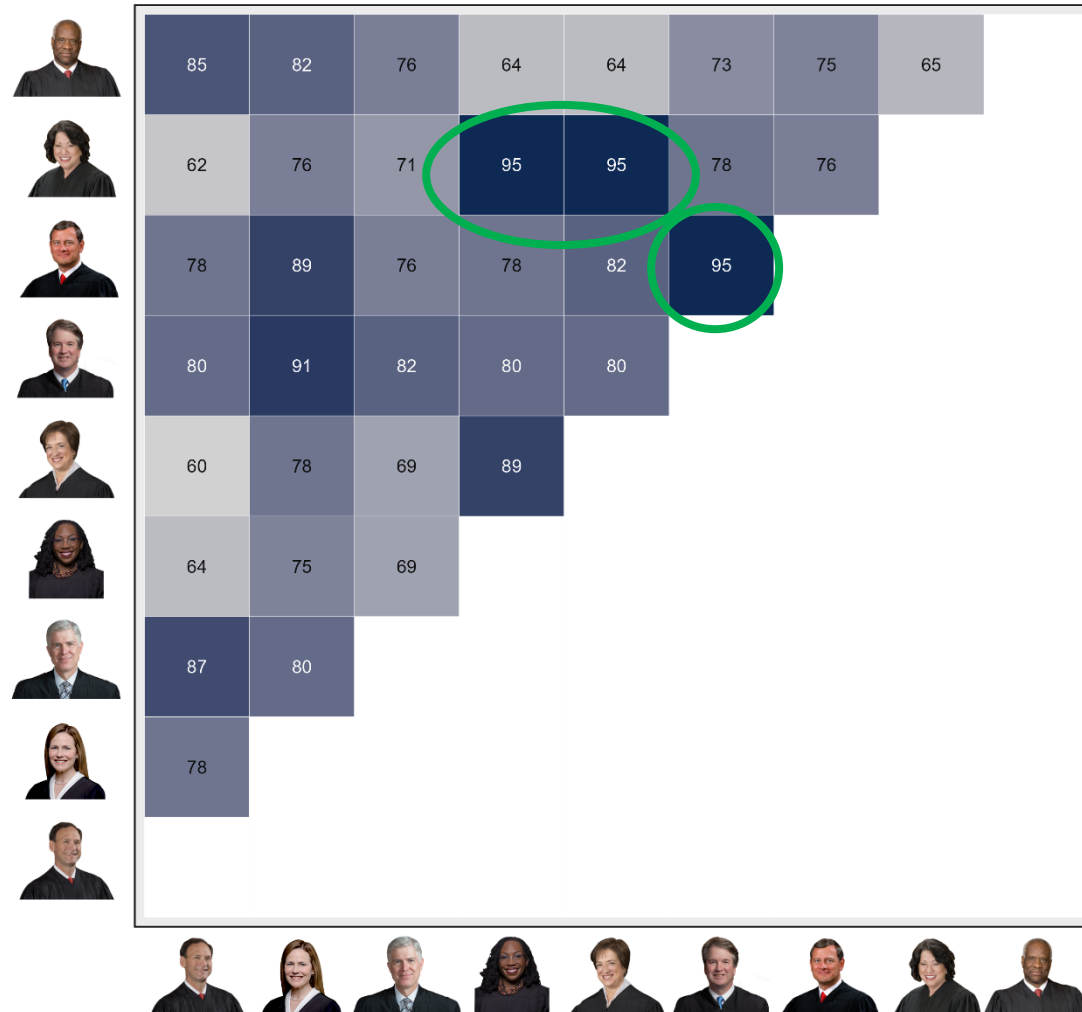
Agreement by Justice



Source: Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023).

Agreement by Justice | The Most Agreement

Voting Agreement Percentages
October Term 2022

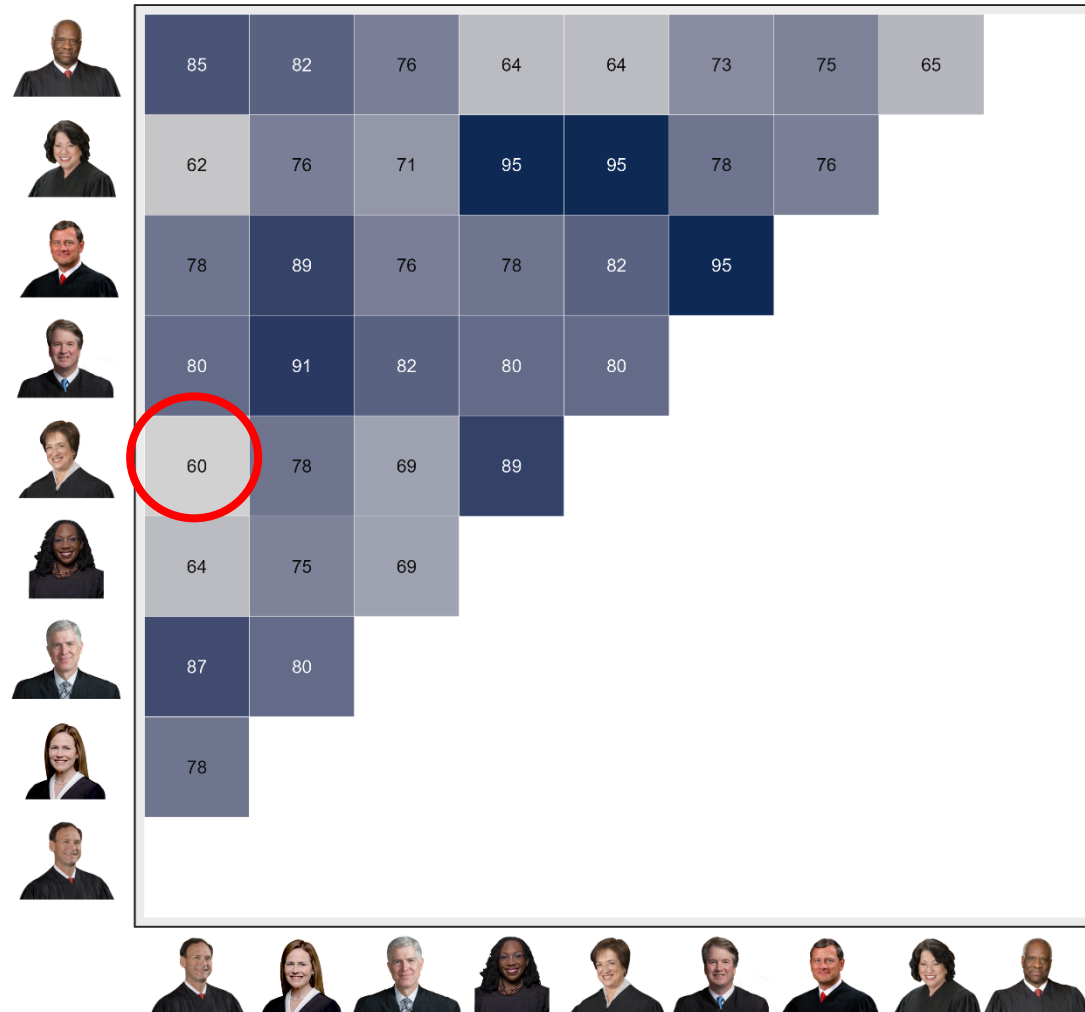


“[T]he greatest alignments were the combinations of Justices Roberts-Kavanaugh, Sotomayor-Kagan, and Jackson-Sotomayor.”

Source: Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023).

Agreement by Justice | The Least Agreement

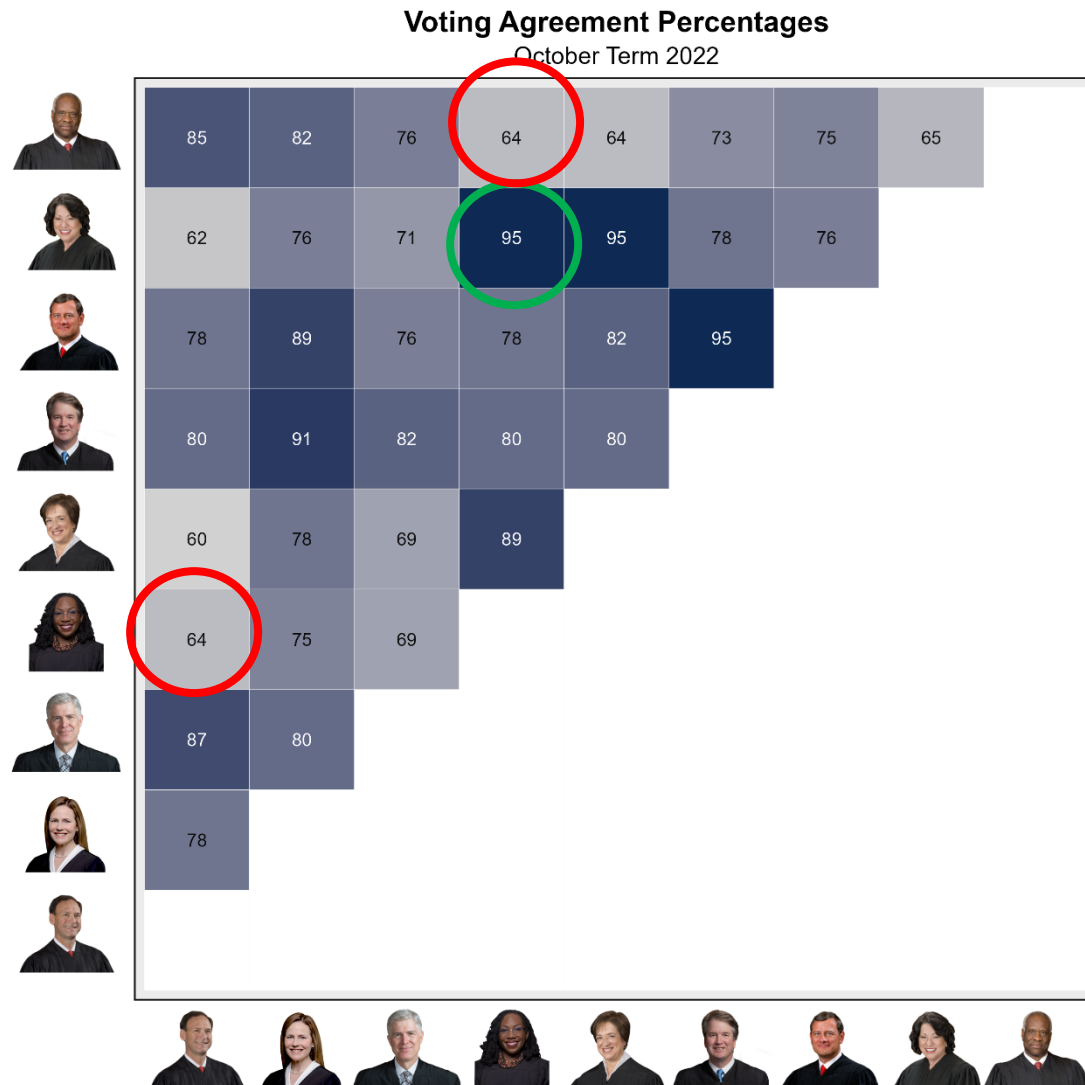
Voting Agreement Percentages
October Term 2022



The least agreement between Justices Kagan and Alito.

Source: Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023).

Agreement by Justice | Justice Jackson



“Justice Jackson, the newest member of the Court, aligned most frequently with Justice Sotomayor and least frequently with Justices Alito and Thomas.”

Source: Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023).

Agreement by Justice | Circuit Courts

(E) ORIGINS OF CASES AND THEIR DISPOSITIONS^p

	FULL OPINIONS ^q			MEMORANDUM ORDERS ^r			TOTAL
	Reversed ^s	Vacated ^t	Affirmed	Reversed	Vacated	Affirmed	
FEDERAL COURTS	20	13	17	0	44	1	95
<i>Circuit Courts</i>	19 ^u	12	16 ^u	0	44	1	92 ^u
First	2	0	1	0	1	0	4
Second	2	3	2	0	5	0	12
Third	0	1	1	0	1	0	3
Fourth	0	1	1	0	2	0	4
Fifth	3	2	2	0	4	0	11
Sixth	2	0	2	0	6	0	10
Seventh	0	1	1	0	2	0	4
Eighth	2	0	1	0	2	0	5
Ninth	8	3	3	0	4	0	18
Tenth	1	1	0	0	3	0	5
Eleventh	0	0	1	0	11	0	12
D.C.	0	0	0	0	3	1	4
Federal	0	0	2	0	0	0	2
<i>District Courts^v</i>	1	1	1	0	0	0	3
<i>Armed Forces</i>	0	0	0	0	0	0	0
STATE COURTS	1	3	1	0	10	0	15
TOTAL	21	16	18	0	54	1	110

Source: Source: *Supreme Court Statistics, 2022 Term*, Harv. L. Rev. (November 2023).



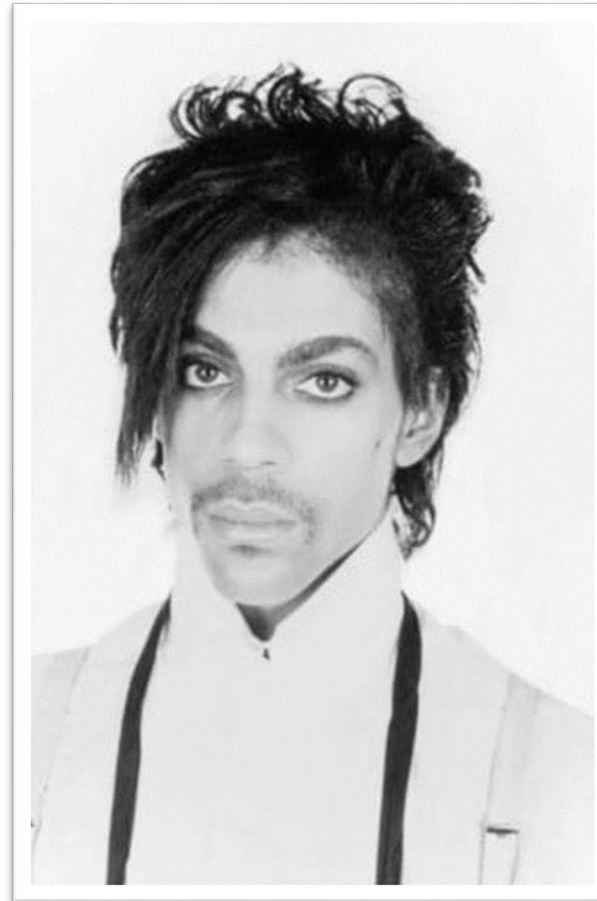
October Term 2022: Key Cases

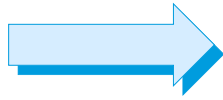


Andy Warhol Foundation v. Goldsmith

AWF v. Goldsmith | Background

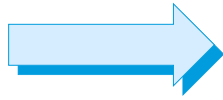
Copyright dispute between
Andy Warhol Foundation for the Visual Arts (AWF) and
Lynn Goldsmith





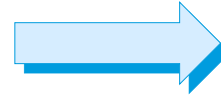
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Goldsmith
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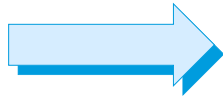
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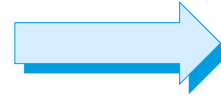
Unspecified
sum paid to
Warhol





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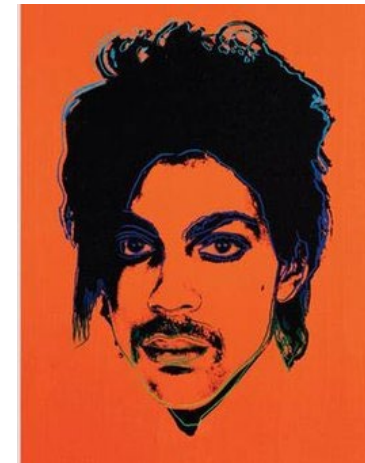
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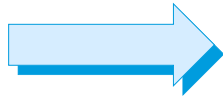


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Warhol



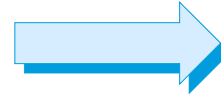
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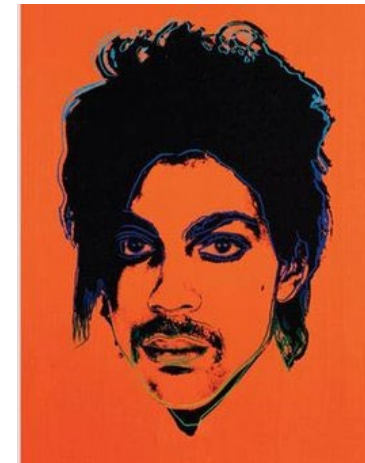


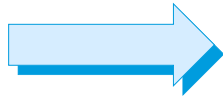
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payment to
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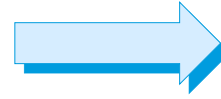
\$10,000 license
fee paid to AWF,
no credit or
payment to
Goldsmith





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license fee
paid to
Goldsmith
for one-time
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VANITY FAIR



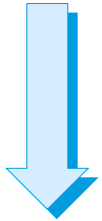
Unspecified
sum paid to
Warhol



No credit or
payment to
Goldsmith



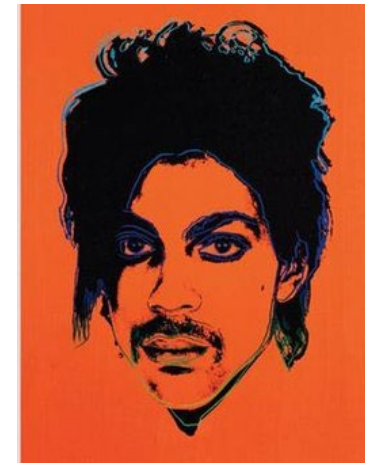
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payment

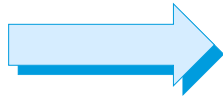


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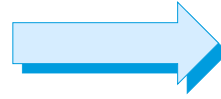


\$10,000 license
fee paid to AWF,
no credit or
payment to
Goldsmith



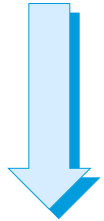


VANITY FAIR



\$400
license fee
paid to
Goldsmith
for one-time
use + credit

Unspecified
sum paid to
Warhol

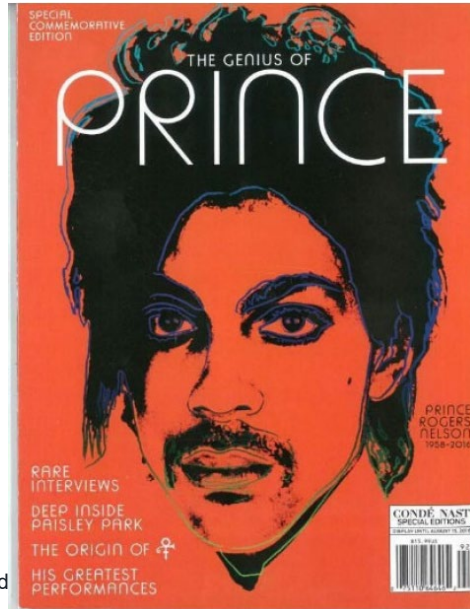


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payment

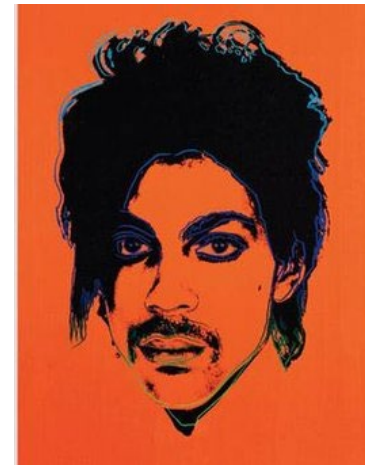


No credit or
payment to
Goldsmith

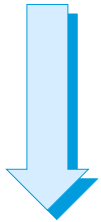
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\$10,000 license
fee paid to AWF,
no credit or
payment to
Goldsmith



AWF v.
Goldsmith
filed in SDNY



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	
THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.,	
Plaintiff,	Civil Action: _____
-against-	COMPLAINT
LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,	Jury Trial Demanded

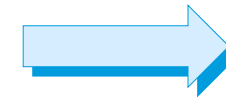
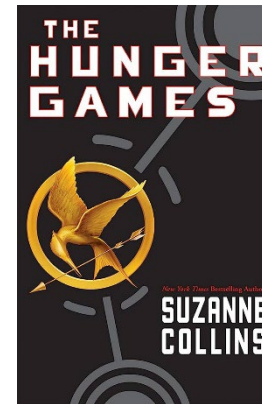
The Supreme Court Term: Looking Back and Looking Forward

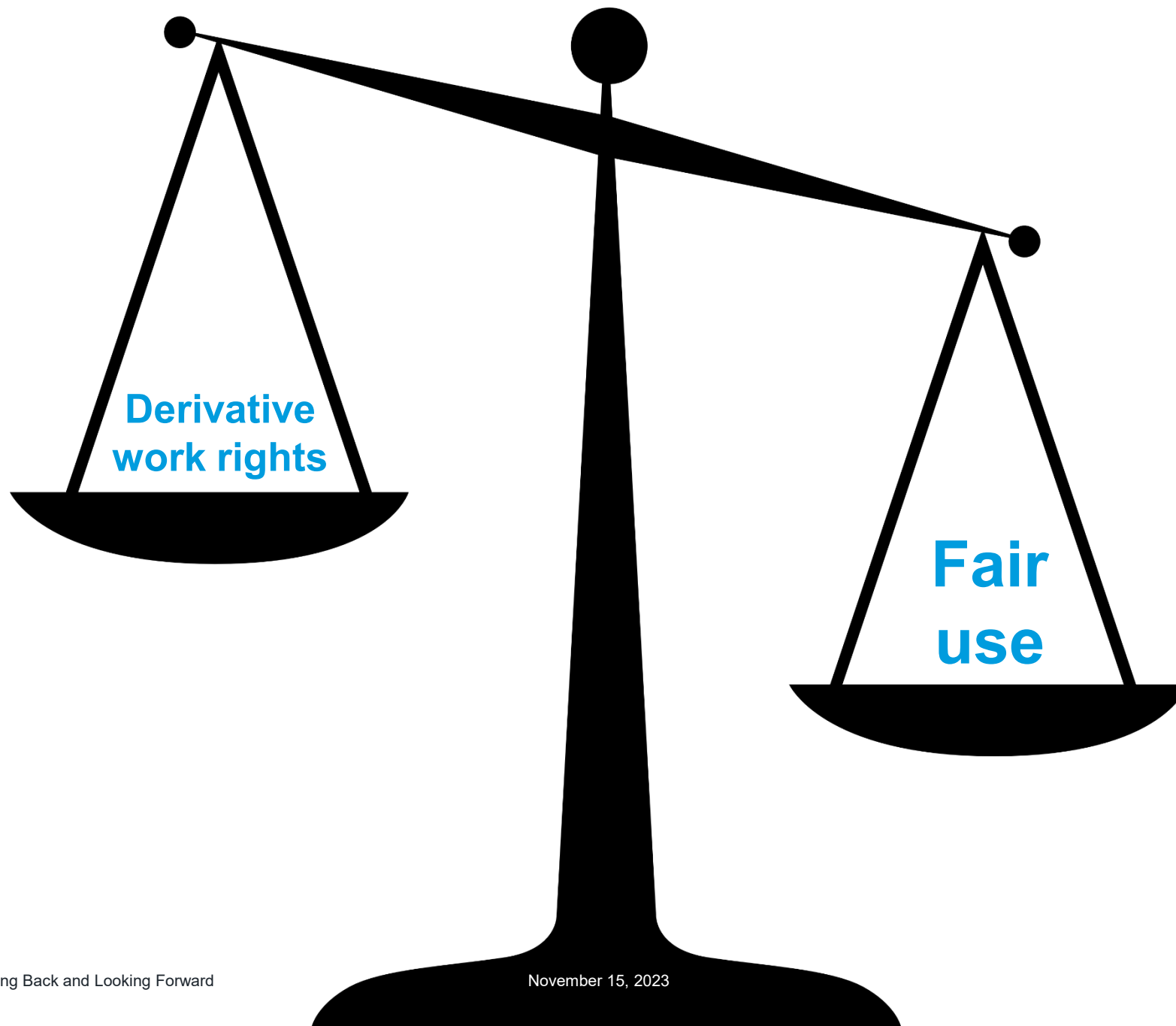
November 15, 2023

AWF v. Goldsmith | Issue

Exclusive rights in copyrighted works - 17 U.S.C. § 106

1. To **reproduce** the copyrighted work
2. To prepare **derivative works** based upon the copyrighted work
3. To **distribute** copies of the copyrighted work
4. To **perform** the copyrighted work publicly
5. To **display** the copyrighted work publicly
6. To **perform** the copyrighted work publicly by means of digital audio transmission



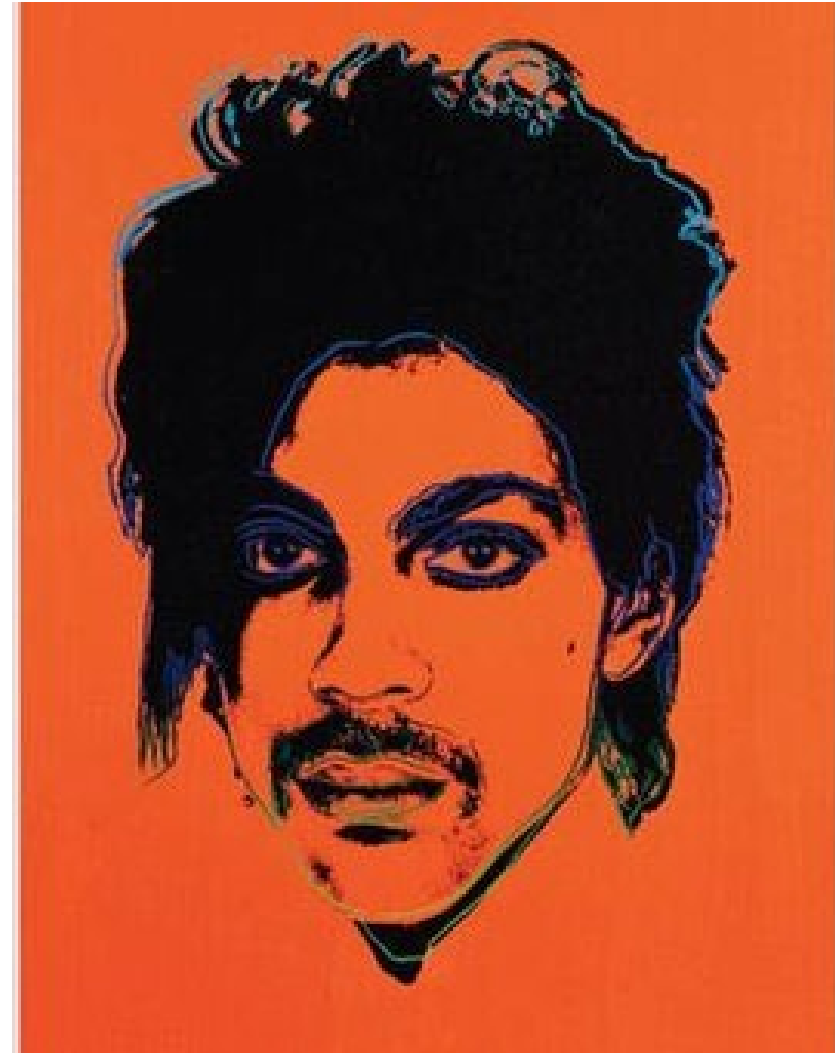


AWF v. Goldsmith | Analysis

Four-factor test - 17 U.S.C. § 107

1. The **purpose and character** of the use, including whether the use is of a commercial nature or for nonprofit educational purposes
 - Also asks whether the new work is “transformative” – whether it “adds something new”
2. The **nature** of the copyrighted work
 - Published vs. unpublished; factual vs. artistic
3. The **amount and substantiality** of the portion used in relation to the copyrighted work as a whole
4. The **effect** of the use on the potential **market** for, or value of, the copyrighted work

AWF v. Goldsmith | Background



AWF v. Goldsmith | SCOTUS Ruling

7-2 DECISION FOR GOLDSMITH

MAJORITY OPINION BY SONIA SOTOMAYOR

The "purpose and character" of AWF's use of Goldsmith's photograph of Prince weighs against fair use.

Roberts

Alito

Gorsuch

Barrett



Sotomayor

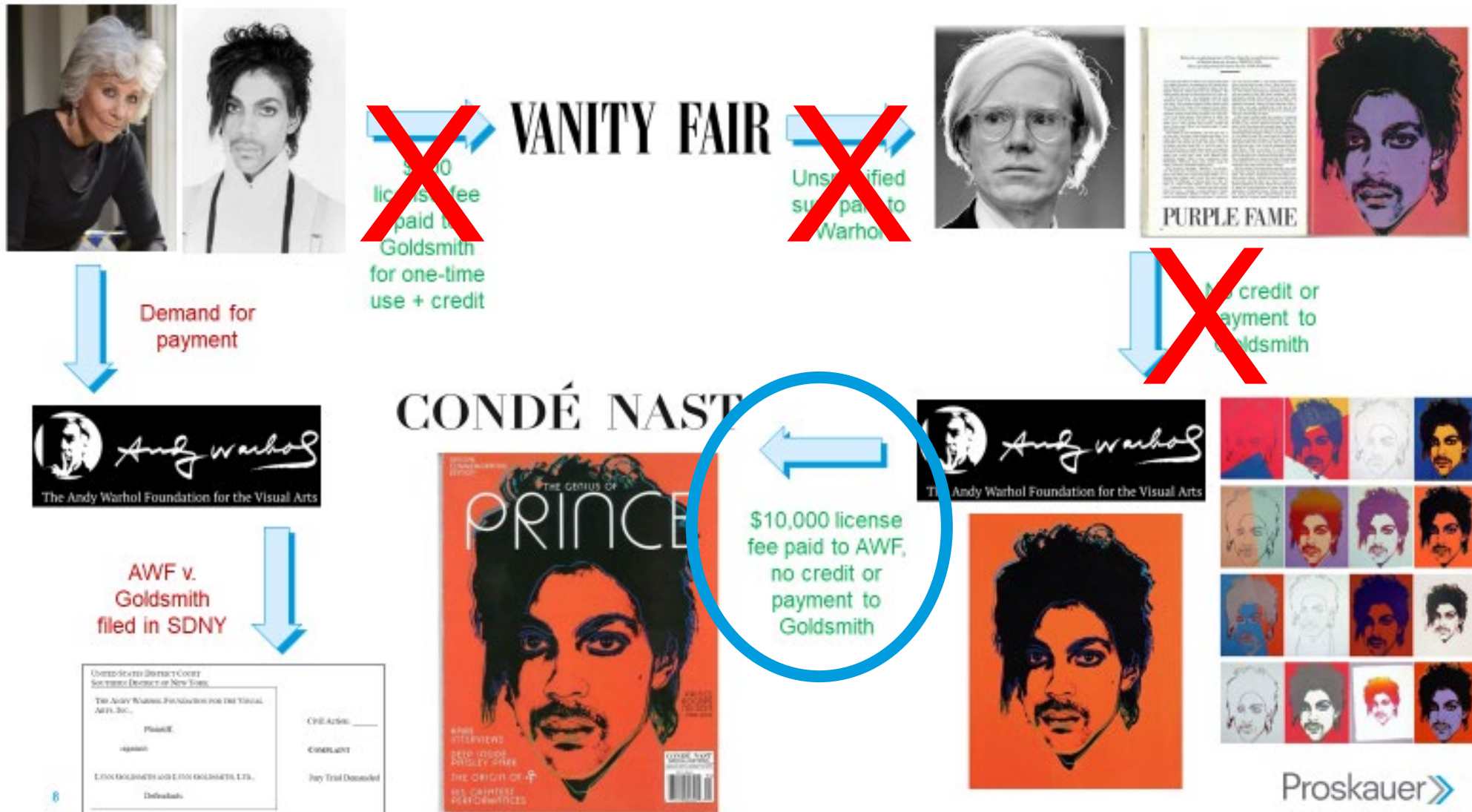
Thomas

Kagan

Kavanaugh

Jackson

AWF v. Goldsmith | SCOTUS Ruling



AWF v. Goldsmith | SCOTUS Ruling

- The “purpose and character” of AWF’s use – **licensing it to a magazine** – does not favor fair use
 - AWF’s use was **commercial**
 - Both uses serve “**substantially the same purpose**” (illustrate a magazine about Prince with a portrait of Prince)
 - Goldsmith also licensed her photos to magazines
 - The “**new expression, meaning, or message**” added to Orange Prince did not outweigh the commercial use
 - Fair use is an objective, not subjective, inquiry – **Judges aren’t art critics**



AWF v. Goldsmith | SCOTUS Ruling



Velázquez, Pope Innocent X,
c. 1650, oil on canvas



Francis Bacon, Study After
Velázquez's Portrait of Pope
Innocent X, 1953, oil on canvas

- The majority **undervalues** Warhol's independent creative contributions to the work
 - The two works are not fungible
- Art necessarily **depends on** building on others' works
- The “limitation” to commercial licensing of works is **artificial**
 - Most art is created for commercial purposes
 - Artists will be less incentivized to create new works if they cannot profit from them

AWF v. Goldsmith | Significance

- A **win** for artists who license their works (or want to)

The dissent thus misses the forest for a tree. Its single-minded focus on the value of copying ignores the value of original works.

Sotomayor, J.

AWF v. Goldsmith | Significance

- A (potential) **loss** for artists who build on other artists' works

[This decision] will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer.

Kagan, J., dissenting



***Financial Oversight and Management Board for Puerto Rico v.
Centro de Periodismo Investigativo, Inc.***

Question Presented and Arguments

No. 22-096

IN THE
Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD FOR PUERTO RICO,
Petitioner,

v.

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

TIMOTHY W. MUNGOVAN
JOHN E. ROBERTS
WILLIAM D. DALSEN
KATHLEEN M. RITTER
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
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MARTIN J. BIENENSTOCK
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MARK D. HARRIS
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mbienenstock@proskauer.com

Counsel for Petitioner

(For Continuation of Appearances See Inside Cover)

316169

48 U.S.C. § 2126(a):

JURISDICTION. Except as provided in section 2124(f)(2) of this title (relating to the issuance of an order enforcing a subpoena), and subchapter III (relating to adjustments of debts), any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory or, for any covered territory that does not have a district court, in the United States District Court for the District of Hawaii.

FOMB's Question Presented:

Does § 2126(a)'s abrogate the Board's sovereign immunity with respect to all federal and territorial claims?

CPI:

Puerto Rico and the Board don't have sovereign immunity in the first place.

Solicitor General:

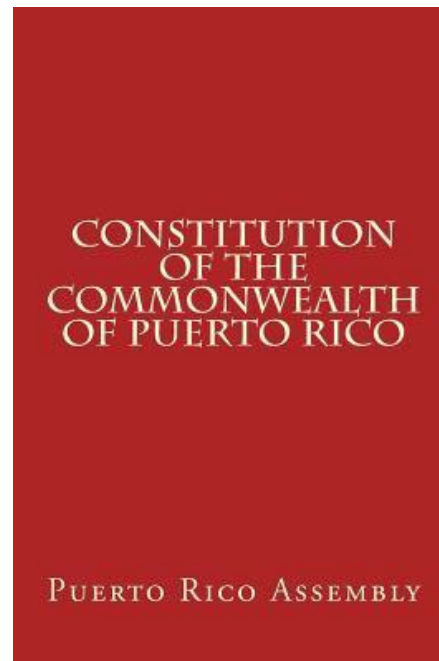
The Board does have sovereign immunity, and § 2126(a) doesn't abrogate it, but Puerto Rico may have waived it.

Oral Argument Prep

- Moot arguments:
 - Figure out your core positions
 - Practice delivery
 - Field hard questions



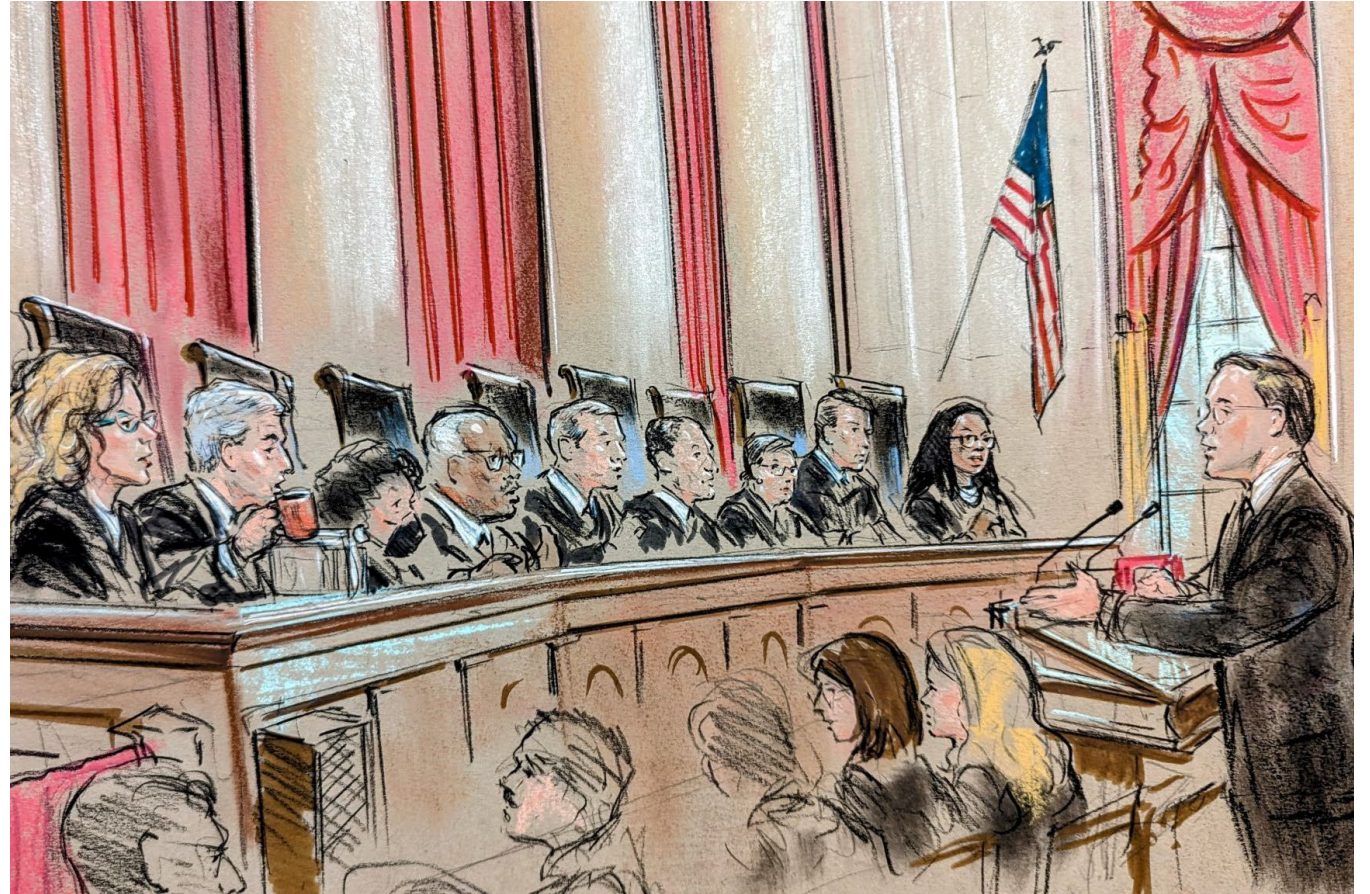
Northwestern
PRITZKER SCHOOL OF LAW



Oral Argument

Argument Strategies

1. Try to give every Justice what they want
2. Demonstrate confidence about the intricacies of the case
3. Keep returning to main arguments
4. Display absolute candor
5. Use rebuttal to refocus Justices on what case is really about



1 Puerto Rico could pass a law and, in federal court,
2 Puerto Rico could be sued under that very law. That
3 would be a serious invasion of Puerto Rico's sovereignty
4 and autonomy to hold it responsible that way.

5 CHIEF JUSTICE ROBERTS: You analogize in
6 your argument to the sovereign immunity of states, the
7 sovereign immunity of -- of tribes, and I wonder if
8 Puerto Rico's situation, though, is significantly
9 different both with respect to states and with respect
10 to tribes. They had sovereignty at the time of the
11 convention, and that carried forward just as the states'
12 carried forward, just as the tribes' carried forward.

13 Puerto Rico, obviously, at some point at --
14 at points in the past had the sovereignty of Spain, but
15 that did not carry over in any sense. It -- so the
16 question would be not to the -- the extent to which the
17 Constitution recognized the existing sovereignty. The
18 question would be, did they -- the Constitution in any
19 way confer sovereignty, create sovereignty, with respect
20 to Puerto Rico?

21 And, as far as the Plan of the Convention
22 goes, the Plan of the Convention was to cover the
23 territories with plenary authority on Congress's part,
24 not with any notion of sovereignty.

25 MR. HARRIS: So our position is that it --

1 the sovereignty should not depend on history. That
2 position was adopted by the Court, that history matters,
3 in the Sanchez Valle case, really only for the purpose
4 of a double jeopardy analysis. And I think the Court
5 went out of its way in Sanchez Valle to say this is not
6 the standard rule. In fact, I think the Court said the
7 ordinary meaning of sovereignty is not like what
8 happened there. The --

9 CHIEF JUSTICE ROBERTS: All right. I'll
10 give you -- I'll give you that.

11 MR. HARRIS: Okay. The question of whether
12 or not there is sovereign immunity, again, I think
13 there's two steps that are involved. One of them is
14 that Congress has to confer attributes of sovereignty
15 onto the entity. Usually, it does that by an organic
16 act. Here, there were several organic acts. But then
17 even more important than that was the constitutional
18 assembly in the 1950s, which, as this Court has said
19 many times, really made Puerto Rico unique and gave
20 it --

21 CHIEF JUSTICE ROBERTS: Well, that's right.
22 That's sort of my point, unique, and so I'm just
23 wondering how far you can stretch the analogy to state
24 sovereign immunity, to tribal sovereign immunity.

25 MR. HARRIS: Again, if it's unique, we would

1 Court should do that here, because, as CPI, I think,
 2 acknowledged in their opposition to cert, certiorari,
 3 this really wasn't -- none of these arguments were made
 4 below. The two-tiered theory of sovereign immunity
 5 which CPI is pressing now, that was not raised blow.
 6 The First Circuit was simply following its own
 7 precedents really with no analysis.

8 I agree that this Court, as it's said many
 9 times, is a court of review and not first view, and,
 10 therefore, the Court doesn't need to reach that issue.

11 JUSTICE SOTOMAYOR: Counsel, if we reach
 12 this issue, it has tremendous implications outside of
 13 PROMESA, doesn't it?

14 MR. HARRIS: Yes, Justice Sotomayor.

15 JUSTICE SOTOMAYOR: Now let's go back to the
 16 foundational question by Justice Thomas and Justice
 17 Roberts. Territories like Louisiana and others didn't
 18 have their own sovereignty before they became
 19 territories of the United States, correct? They had --

20 MR. HARRIS: Correct.

21 JUSTICE SOTOMAYOR: -- they had sovereignty
 22 of France or of other countries, correct?

23 MR. HARRIS: In -- in most cases, yes.

24 JUSTICE SOTOMAYOR: And, historically, no
 25 territory was dragged into federal or state -- or

1 territorial courts unless their sovereignty had been
 2 waived, correct?

3 MR. HARRIS: Yes.

4 JUSTICE SOTOMAYOR: So, in 200 years of our
 5 history, the Holmes -- Justice Holmes's proposition that
 6 no sovereign, which I think we have given to mean no
 7 governing entity, would be dragged into a court without
 8 the consent of the sovereign, correct?

9 MR. HARRIS: Yes.

10 JUSTICE SOTOMAYOR: And so, to the extent
 11 that the United States has not permitted, entertained,
 12 looked at suits against these territories, they've acted
 13 akin to states, correct?

14 MR. HARRIS: Yes.

15 JUSTICE SOTOMAYOR: That's what we said in a
 16 long line of cases. In Rosaly, in Emadeline, we said
 17 that Puerto Rico is like a state, correct?

18 MR. HARRIS: Correct.

19 JUSTICE SOTOMAYOR: All right. Having taken
 20 those propositions as a given, assuming we have
 21 sovereignty, the government -- not the government, but
 22 your adversary says, okay, it acts like a state now
 23 through the 1952-54 Act, but that means it only has
 24 sovereignty in its territorial courts. It doesn't have
 25 sovereignty in federal court.

1 diversity jurisdiction could sue under the exact same
2 law in federal court against the sovereign.

3 CHIEF JUSTICE ROBERTS: Does the --

4 MR. HARRIS: It really doesn't make sense.

5 CHIEF JUSTICE ROBERTS: -- does the Eleventh
6 Amendment say states or things like states?

7 MR. HARRIS: The Eleventh Amendment says
8 states.

9 JUSTICE SOTOMAYOR: So what do you do with
10 that? Meaning the government itself is saying it's not
11 Eleventh Amendment immunity, which is what the First
12 Circuit has relied on, but it's common law foreign
13 sovereignty. Isn't that a reason to remand and let them
14 look at this issue more closely?

15 MR. HARRIS: No, I -- I don't think there's
16 a need to remand here. I think -- first of all, the --
17 the Eleventh Amendment analysis actually --

18 JUSTICE SOTOMAYOR: I don't mean remand. I
19 mean -- answer your question. Answer the question
20 presented. But that issue could be addressed more fully
21 below, correct?

22 MR. HARRIS: Yes, it could. And, in fact,
23 this Court has actually left open the question of
24 whether the Eleventh Amendment applies to Puerto Rico.
25 We're not relying on that argument here because we don't



National Pork Producers Council v. Ross

National Pork Producers Council v. Ross | Background

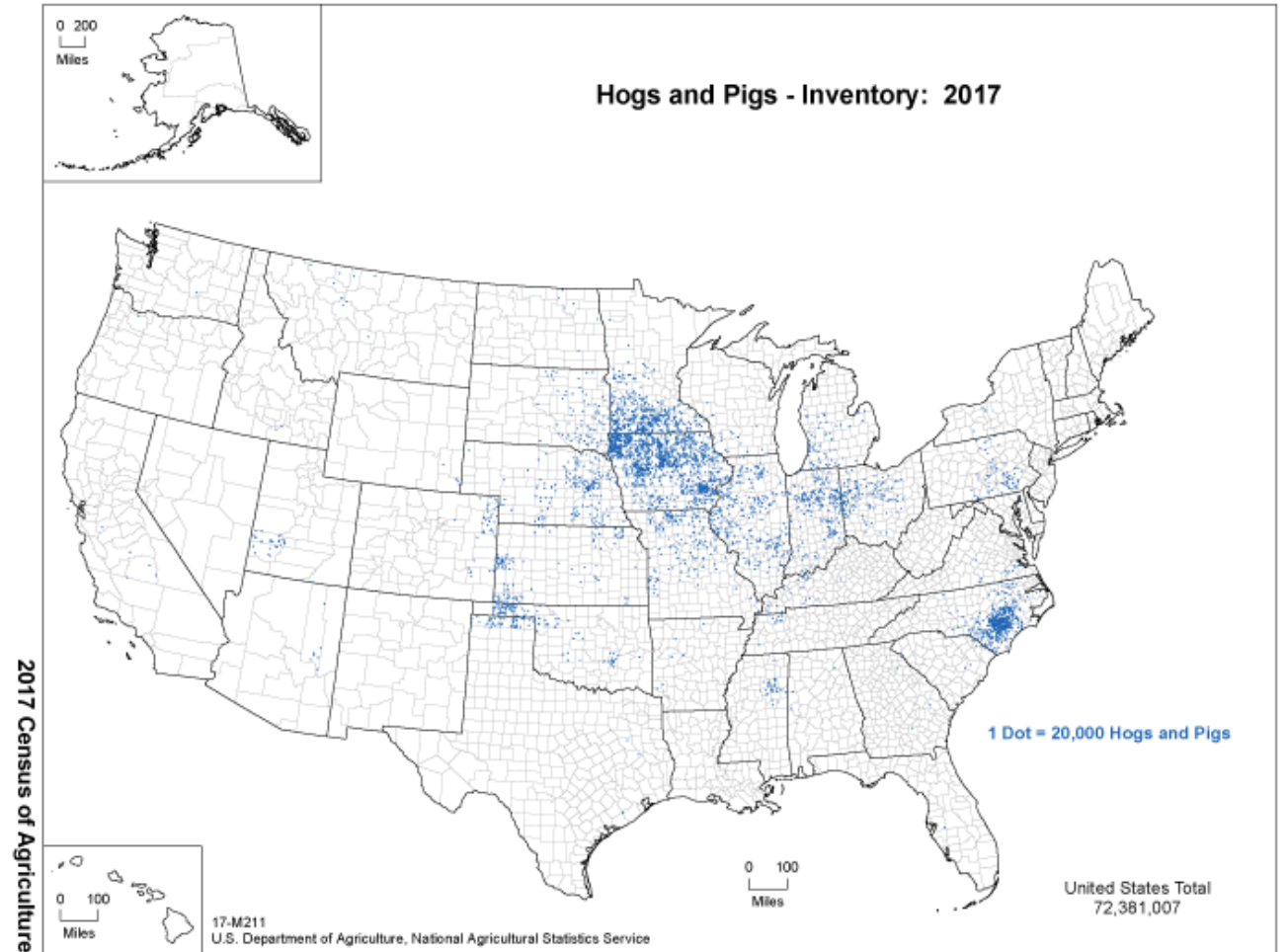


California's Proposition 12 forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are “confined in a cruel manner,” meaning it prevents a pig from “lying down, standing up, fully extending [its] limbs, or turning around freely”

National Pork Producers Council v. Ross | Background

- **Hogs & Pigs in 2017**
 - California: 96,456
 - Iowa: **22,730,540**
- **People in 2020**
 - California: **39,538,223**
 - Iowa: 3,190,369

“California’s **13-percent share of the consumer pork market** makes it economically infeasible for many pig farmers and pork producers to exit the California market.”



Source: *Census of Ag Atlas Maps, Hogs and Pigs – Inventory: 2017*, USDA (last visited Nov. 10, 2023)

National Pork Producers Council v. Ross | Background

Commerce Clause

Congress has the power to “*regulate Commerce . . . among the several States.*”

Art. I, § 8, cl. 3

National Pork Producers Council v. Ross | Background

Commerce Clause

Congress has the power to “*regulate Commerce . . . among the several States.*”

Art. I, § 8, cl. 3

Dormant Commerce Clause

The Clause’s “further, negative command” effectively *forbidding the enforcement of “certain state [economic regulations] even when Congress has failed to legislate on the subject.”*

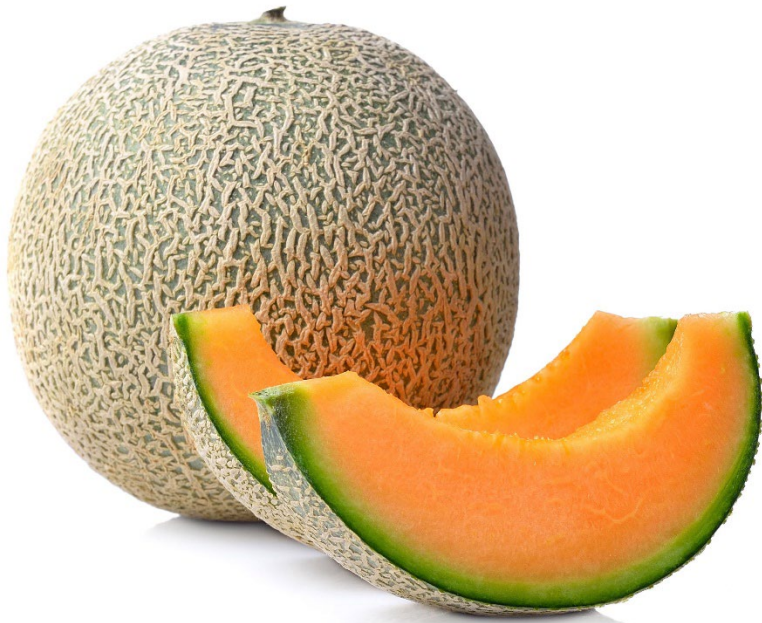
Okla. Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)

National Pork Producers Council v. Ross | Issue & Holding

1. Does California's Proposition 12 violate the anti-discrimination principle?
2. Does the Dormant Commerce Clause have an “almost *per se* rule” forbidding California's Proposition 12 because it has the “practical effect of controlling commerce outside the State”?
3. Does Proposition 12 satisfy *Pike* balancing test?

National Pork Producers Council v. Ross | Opinions

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)



- AZ required cantaloupes grown in state to be processed and packaged in state, which was not facially neutral and violated the dormant Commerce Clause. It was insulating in-state processing and packaging businesses from out-of-state competition.
- No enforcement of a state law that imposes a **clearly excessive** burden on interstate commerce “in relation to the putative local benefits.”

National Pork Producers Council v. Ross | Opinions

Under *Pike*, can a court weigh non-economic costs/benefits to determine what is *clearly excessive*?

- Gorsuch / Thomas (plurality): No, never
- Barrett (concur): Not in this case
- Sotomayor / Kagan (concur): Yes
- Roberts / Alito / Jackson (concur/dissent): Yes
- Kavanaugh (concur/dissent): Yes

National Pork Producers Council v. Ross | Opinions

How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any judicial principle.

Gorsuch, J.

***National Pork Producers Council v. Ross* | Opinions**

I agree with The Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of law with some frequency.

Sotomayor, J., concurring in part

National Pork Producers Council v. Ross | Kavanaugh's Dissent

What if a state law prohibits . . .

- the sale of a fruit picked by noncitizens who are unlawfully in the country?
- the sale of goods produced by workers paid less than \$20 per hour?
- the retail sale of goods from producers that do not pay for employees' birth control or abortions (or alternatively, that do pay for employees' birth control or abortions)?

National Pork Producers Council v. Ross | Kavanaugh's Dissent

- Other constitutional protections could be among non-economic interests weighed

[S]tate economic regulations like California's Proposition 12 may raise questions not only under the Commerce Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

Kavanaugh, J., dissenting



303 Creative LLC v. Elenis

303 Creative LLC v. Elenis | Issue

Under the First Amendment, can Smith deny services to customers who would require her to create wedding websites that go against her religious beliefs?



303 Creative LLC v. Elenis | Background

- Plaintiff Lorie Smith wanted to expand her website and graphic design services to include services for couples seeking websites for their weddings.
- She was concerned that Colorado law would “force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman.”
- She filed suit seeking an injunction to prevent Colorado from forcing her to create wedding websites celebrating marriages that defy her beliefs.



303 Creative LLC v. Elenis | Background

“expressive”

“original, customized”

Contributes to the overall messages her business conveys

4

303 CREATIVE LLC v. ELENIS

Opinion of the Court

In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. 6 F. 4th 1160, 1173–1174 (CA10 2021). As evidence, Ms. Smith pointed to Colorado’s record of past enforcement actions under CADA, including one that worked its way to this Court five years ago. See *Masterpiece Cakeshop*, 584 U. S., at ____ (slip op., at 9); see also App. 25–155 (discussing Colorado’s other past enforcement actions).

To facilitate the district court’s resolution of the merits of her case, Ms. Smith and the State stipulated to a number of facts:

- Ms. Smith is “willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,” and she “will gladly create custom graphics and websites” for clients of any sexual orientation. App. to Pet. for Cert. 184a.
- She will not produce content that “contradicts biblical truth” regardless of who orders it. *Ibid*.
- Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction. *Id.*, at 179a.
- All of the graphic and website design services Ms. Smith provides are “expressive.” *Id.*, at 181a.
- The websites and graphics Ms. Smith designs are “original, customized” creations that “contribut[e] to the overall messages” her business conveys “through the websites” it creates. *Id.*, at 181a–182a.

tected classification. Colo. Rev. Stat. §24–34–601(2)(a) (2022). The Communication Clause, Ms. Smith notes, prohibits any speech inconsistent with the Accommodation Clause. Because Colorado concedes that its authority to apply the Communication Clause to Ms. Smith stands or falls with its authority to apply the Accommodation Clause, see Brief for Respondents 44–45, we focus our attention on the Accommodation Clause.

Cite as: 600 U. S. ____ (2023)

5

Opinion of the Court

- Just like the other services she provides, the wedding websites Ms. Smith plans to create “will be expressive in nature.” *Id.*, at 187a.
- Those wedding websites will be “customized and tailored” through close collaboration with individual couples, and they will “express Ms. Smith’s and 303 Creative’s message celebrating and promoting” her view of marriage. *Id.*, at 186a–187a.
- Viewers of Ms. Smith’s websites “will know that the websites are [Ms. Smith’s and 303 Creative’s] original artwork.” *Id.*, at 187a.
- To the extent Ms. Smith may not be able to provide certain services to a potential customer, “[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services.” *Id.*, at 190a.

C

Ultimately, the district court ruled against Ms. Smith. 405 F. Supp. 3d 907, 912 (Colo. 2019). So did the Tenth Circuit. 6 F. 4th, at 1168. For its part, the Tenth Circuit held that Ms. Smith had standing to sue. In that court’s judgment, she had established a credible threat that, if she follows through on her plans to offer wedding website services, Colorado will invoke CADA to force her to create speech she does not believe or endorse. *Id.*, at 1172–1175. The court pointed to the fact that “Colorado has a history of past enforcement against nearly identical conduct—i.e., *Masterpiece Cakeshop*”; that anyone in the State may file a complaint against Ms. Smith and initiate “a potentially burdensome administrative hearing” process; and that “Colorado [has] decline[d] to disavow future enforcement” proceedings against her. *Id.*, at 1174. Before us, no party challenges these conclusions.

Turning to the merits, however, the Tenth Circuit held that Ms. Smith was not entitled to the injunction she

“expressive in nature”

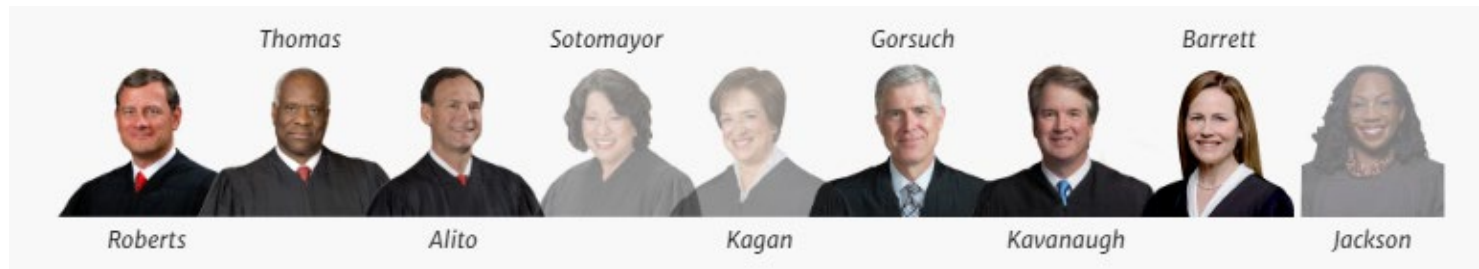
“close collaboration with individual couples”

“express Ms. Smith’s and 303 Creative’s message” about marriage

“original artwork”

303 Creative LLC v. Elenis | Result

- In a 6-3 opinion written by Justice Gorsuch, the Court held the First Amendment prohibits Colorado from forcing Smith to create expressive designs that convey messages with which she disagrees.
- The parties' stipulations made clear that her website design was expressive and protected First Amendment speech.
- Colorado's law, intending to enforce non-discrimination, would compel her to express messages contrary to her beliefs.
- "[N]o public accommodations law is immune from the demands of the Constitution."



303 Creative LLC v. Elenis | Sotomayor's Dissent

- “Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class.”
- A public accommodations law regulates only businesses that choose to sell goods or services to the general public—they do not force anyone to start a business or to hold out goods and services to the public at large.
- The question is not whether the company’s products include “elements of speech.” Rather, it is whether the state action is a content-neutral regulation of conduct, with any burden on speech being incidental.
- *What is the line for work/services being “expressive”?*

303 Creative LLC v. Elenis | Post-Script

COLORADO NEWSLINE

303 Creative: A fake case with real consequences

Conservative Supreme Court justices were looking for a reason to overturn the gains made by LGBTQ Americans



LAURA K. CHAPIN



The Real Story of *303 Creative v. Elenis*

The legal reasoning is only part of the story.

BY MARK JOSEPH STERN

JUNE 01, 2023 • 5:52 AM

The Soapbox

Melissa Gira Grant / June 29, 2023

SCOTUS PUZZLE

The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court



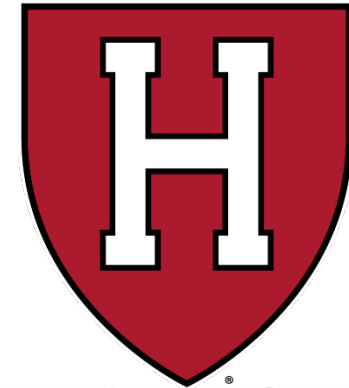
Students for Fair Admissions, Inc. v. Harvard

SFA v. Harvard | Issue & Holding

May institutions of higher education use race as a factor in admission?

Can consider race in admissions

- **Harvard**
 - **First stage**: award points for application's overall rating
 - **Second stage**: subcommittee holistic reviews
- **UNC**
 - **First stage**: receive a “plus” in reader recommendations
 - **Second stage**: committee holistic reviews



The Harvard and UNC admissions programs violate the Equal Protection Clause of the Fourteenth Amendment.

SFA v. Harvard | Equal Protection Clause

No State shall “deny to any person . . . the equal protection of the laws.”
Amdt. 14, § 1

- **Majority (Roberts):** The Equal Protection Clause is supposed to remove all governmentally imposed discrimination on race. “Eliminating racial discrimination means eliminating all of it.”
- **Dissent (Sotomayor):** “The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic and pluralistic society.”
- **Concurrence (Gorsuch):** Title VI is not the same as the Equal Protection Clause, and these admissions processes are violations of Title VI.

SFA v. Harvard | Views on Precedent

Majority (Roberts)

Bakke (1978)

- Obtaining the educational benefits that flow from a racially diverse student body is constitutionally permissible, but freedom to do so is not unlimited. The Court had serious reservations about racial preferences.

Grutter (2003)

- Consideration of race must end at some point, previously estimated at 2028, but the schools have no end in sight.

Fisher (2013)

- Schools could use race to obtain a “critical mass” of certain minority students, but that’s not what is happening here.

Dissent (Sotomayor)

Bakke (1978)

- Race-conscious college admissions are constitutional, and this has been re-affirmed numerous times.

Grutter (2003)

- The work is not done – “A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable.”

Fisher (2013)

- This reaffirmed the use of race-conscious admissions if it satisfies strict scrutiny, which these admissions process still do.

SFA v. Harvard | The Need for Race-Based Admissions

NOT NEEDED

Based on Data

- **Majority (Roberts):** The admitted classes for 2009–2018 have had roughly the same racial percentages, not yet achieving the same representation as in the school's state, because the schools keep their numbers below to effectively assure race will always be a factor.

And Ideology

- **Concurrence (Thomas):** "Individuals are the sum of their unique experiences, challenges, and accomplishments. . . A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism."

NEEDED

Based on Data

- **Dissent (Sotomayor):** Looking to admission rates after California amended its State Constitution to prohibit race-conscious college admissions in 1996 as an example, this opinion "will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation's colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved."

And Ideology

- **Dissent (Jackson):** "It is hardly John's fault that he is the seventh generation to graduate from UNCS. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why."

SFA v. Harvard | Looking Forward

Race can still be a part of a student's application.

“[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . [T]he student must be treated based on his or her experiences as an individual—not on the basis of race.”

Roberts, C.J.

Photo Sources

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The background of the slide is a blurred image of a large stadium at night, filled with spectators. Bright, glowing lights from the stadium's floodlights create a hazy, atmospheric effect, with light rays and lens flares visible. The overall color palette is dominated by warm oranges, yellows, and soft blues.

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