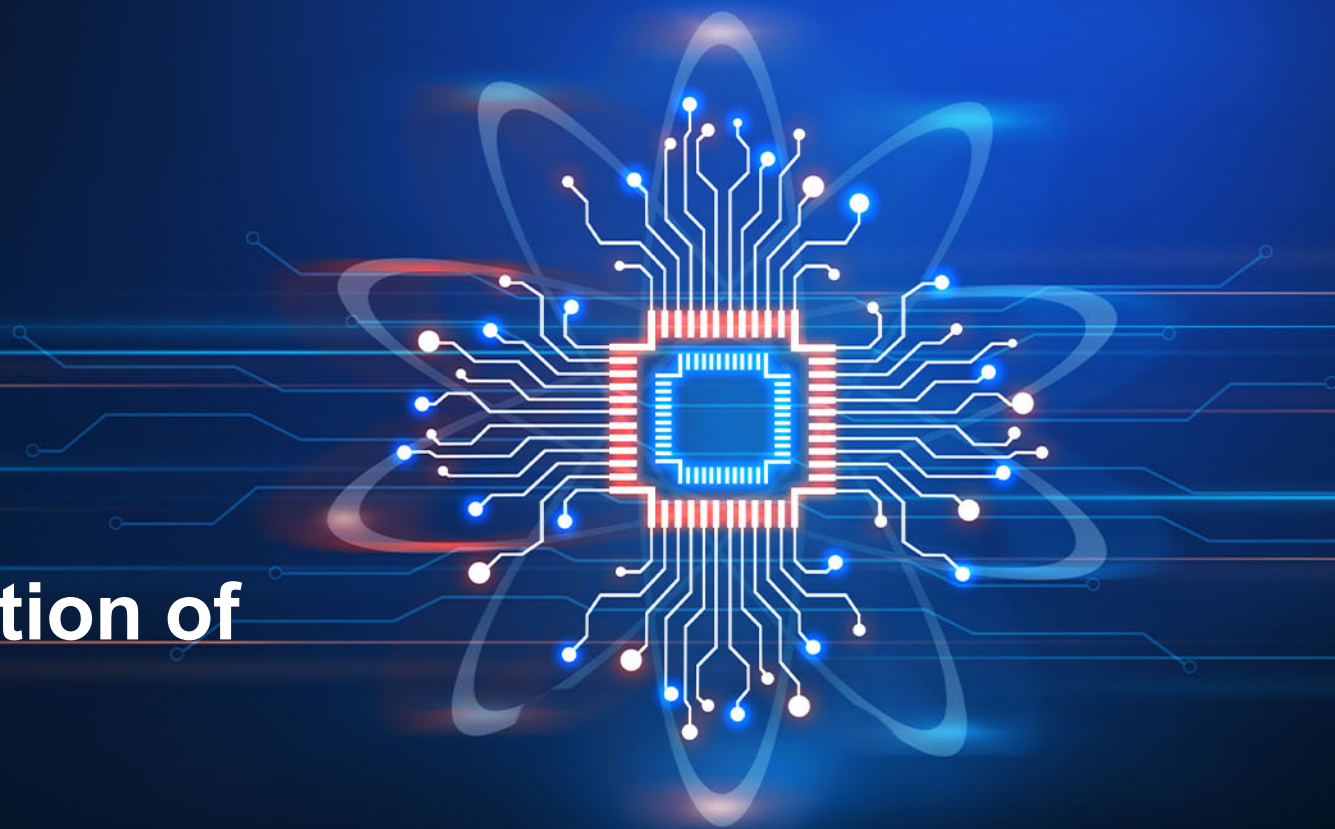


# The Age of AI

Timothy W. Mungovan  
Colin R. Kass

## Risk Factors at the Intersection of Litigation and AI

June 07, 2023



# AI and the Attorney-Client Privilege

- Using AI tools could result in a waiver of the attorney-client privilege
- The use of open AI without an encryption key may result in a waiver of attorney-client privilege
- ChatGPT makes clear that information inputs will be shared
- ChatGPT's known data issues
  - Bug exposed ChatGPT users billing information and leaked queries of some users

**“Please don’t share any sensitive information in your conversations” ChatGPT FAQs**

**6. Will you use my conversations for training?**

- Yes. Your conversations may be reviewed by our AI trainers to improve our systems.

**7. Can you delete my data?**

- Yes, please follow the [data deletion process](#).

**8. Can you delete specific prompts?**

- No, we are not able to delete specific prompts from your history. Please don't share any sensitive information in your conversations.

# Potential Methods for Mitigating Risk

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- API Data and Encryption Keys
  - Application programming interface for AI tools to be used in other applications
    - Ex. Instacart AI and ChatGPT 's recently developed “Ask Instacart”
  - API Key allows customization of AI models and isolates data from other users
  - ChatGPT API data is not used to train or improve ChatGPT model but is still retained for “abuse and misuse” monitoring up to thirty days.
    - Non-API users can disable training and data retention to match the API data policy
  - ChatGPT Business to launch later this year following API data usage policies

# Potential Methods for Mitigating Risk

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- Licensing Potential
  - OpenAI is offering bespoke enterprise agreements
  - Microsoft and Google are developing AI platforms that will likely be tailored for enterprise licensing
  - Potential for the development of an internal AI tool that is siloed but relies on a base AI for general knowledge



**Coca-Cola Invites Digital Artists to 'Create Real Magic' Using New AI Platform**

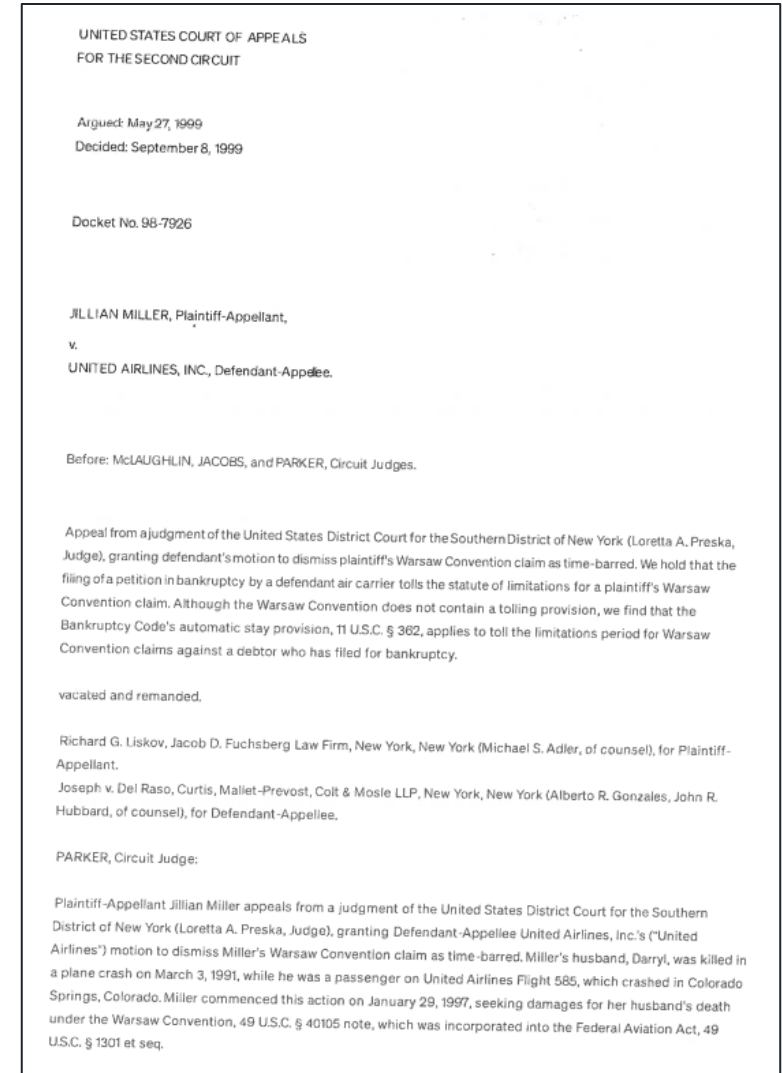
# Rules of Professional Conduct and AI

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- Duty of Confidentiality
  - NYSBA Rules of Professional Conduct, Rule 1.6 establishes the duty of confidentiality
- Competence in the benefits and risks of technology
  - NYSBA Rules of Professional Conduct, Rule 1.1 requires lawyers to stay current on the benefits and risks associated with technology the lawyer uses to provide services
- Candor to the Tribunal
  - NYSBA Rules of Professional Conduct, Rule 3.3 restricts lawyers from knowingly making a false statement of fact or law to a tribunal

# A Cautionary Lesson: Mata v. Avianca, Inc., S.D.N.Y., 22-01461

- Plaintiff's counsel, in support of a tolling statute, cited six non-existing six cases found by ChatGPT
- The court called this an “unprecedented circumstance” where counsel cited “bogus judicial decisions with bogus quotes and bogus internal citations”
- Hearing on June 8 for possible sanctions
- OpenAI's sharing and publication policy requires disclosure if publishing material written with ChatGPT



# Courts Clamp Down in the Wake of *Mata v. Avianca, Inc.*

- Judge Brantley Starr (N.D. Tex.)
  - Mandatory certification attesting that no portion of any filing will be drafted by AI, or that any portion drafted by AI will be reviewed by a human being
- Judge Gabriel Fuentes (N.D. Ill.)
  - Standing order requiring any party using AI to disclose in the filing the use of AI, the specific tool, and the way AI was used

courtroom deputy, at the email address shown on the Court's website. The Court will take note and then do its best to abide by such preferences.

- The Court has adopted a new requirement in the fast-growing and fast-changing area of generative artificial intelligence ("AI") and its use in the practice of law. The requirement is as follows: Any party using any generative AI tool in the preparation or drafting of documents for filing with the Court must disclose in the filing that AI was used and the specific AI tool that was used to conduct legal research and/or to draft the document. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that .... This mission is too important for me to allow you to jeopardize it." 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes "bogus judicial decisions" cited for substantive propositions of law. See *Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), 2023 WL 3966209, at \*1-2 (S.D.N.Y. May 4, 2023) (issuing show cause order where "[a] submission filed by plaintiff's counsel in opposition to a motion to dismiss is replete with citations to nonexistent cases."); *Mata, supra*, Attorney Affidavit (S.D.N.Y. May 25, 2023) (D.E. 32-1) (responding to show cause order by stating that the case authorities found by the district court to be nonexistent "were provided by Chat GPT which also provided its legal source and assured the reliability of its content."). Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2). See Hon. Brantley Starr, "Mandatory Certification Regarding Generative Artificial Intelligence [Standing Order]," (N.D. Tex.) (stating that unlike attorneys, "generative artificial intelligence ... hold[s] no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth.\*)" ([www.txnd.uscourts.gov/judge/judge-brantley-starr](http://www.txnd.uscourts.gov/judge/judge-brantley-starr)) (last visited May 31, 2023).

"One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes 'bogus judicial decisions' cited for substantive propositions of law."

expects itself and the parties will follow in these cases, but the practices may vary to suit the peculiarities of any given case. Judge Fuentes is open to a continuing discussion in any case about the best, most efficient way to proceed. In the absence of such a discussion, this standing

- 2 -

# AI and Legal Document Creation

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- AI-assisted work product
  - Expedites the creation of legal documents
  - Many potential uses of AI such as: discovery requests, detecting errors in documents, form drafting
- Potential issues with document creation
  - Review of the document is necessary as AI may contain bias, or could be based on unreliable inputs
- Disclosure to clients
  - NYSBA Rules of Professional Conduct, Rule 1.4(2) establishes the lawyer's duty to consult with the client about the means by which the client's objectives are to be accomplished
  - Rise in generative AI provisions in outside counsel guidelines

# Investment Advisors and AI

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- Fiduciary duty is a key issue to investment advisors
  - Can you comply with your duties and use AI?
- Duty of Care
  - Duty to act in the best interest of the client, including a duty to provide advice that is suitable for the client
  - Reasonable investigation into the investment to not base advice on materially inaccurate or incomplete information
- Duty of Loyalty
  - Full and fair disclosure to clients of material facts relating to the advisory relationship
  - Full and fair disclosure of conflicts of interests

# SEC and AI

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- Chairman Gensler's repeated concerns on AI and its programming
  - March 2, 2023, Prepared Remarks Before the Investor Advisory Committee: Concern on whether AI places the investor's interest in front of the adviser's own interest or alternatively is optimized in part for the adviser's interest
    - Similar concern April 18, 2023, in testimony before the US House of Representatives, Committee on Financial Services
- Predictive analytics could be a concentrated risk
  - Multiple trading platforms all built upon and relying on same AI base making the same decisions
- 2021 SEC Risk Alert
  - Concerns of bias
  - Emphasis on consistent and persistent training
  - Governance and oversight
- 2023 SEC IAC letter on establishing an ethical AI framework for investment advisors
  - Echoes concerns of 2021 SEC Risk Alert

# Will the Risk of Liability Chill A.I. Advancement?

The New York Times | <https://www.nytimes.com/2023/06/03/business/who-is-liable-for-ai-creations.html>

DEALBOOK NEWSLETTER

### Who Is Liable for A.I. Creations?

Tools like ChatGPT could open a new line of questions around tech products and harmful content.

By Ephrat Livni, Sarah Kesler and Ravi Mattu  
June 3, 2023

A string of challenges to Section 230 — the law that shields online platforms from liability for user-generated content — has dominated the legal landscape in the last several weeks. Most recently, the Supreme Court declined on Tuesday to review a suit about exploring the debate over what responsibility tech companies have for harmful content is far from settled — and generative artificial intelligence tools like the ChatGPT chatbot could open a new line of questions.

**Does Section 230 apply to generative A.I.?** The law's 1996 drafters told DealBook that it does not. "We set out to protect hosting," said Senator Ron Wyden, Democrat of Oregon. Platforms are immune only to suits about material created by others, not if you are partly complicit in content creation, you don't get the shield," agreed Chris Cox, a former Republican representative from California. But they admit that these distinctions, which once seemed simple, are already becoming more difficult to maintain.

**What about A.I. search engines?** Typically, search engines are considered vehicles for information rather than content creators. Companies have benefited from Section 230 protection. Chatbots generate content, and they are most likely beyond the protection of Section 230. Giants like Microsoft and Google are integrating chat and search, complicating matters. "If some search engines start to generate content, the lines will be blurred," Wyden said.

**A deadly recipe?** Generative A.I. tools have already been used to make intentionally harmful content. And hallucinations — false information that generative A.I. tools create (like court cases that never existed) — are a significant problem. If a user prompts a generative A.I. tool with instructions and it offers a poisonous concoction, the algorithm operator's liability is obvious, said Eric Goldman, a professor at Santa Clara University and a Section 230 expert.

But most situations won't be that clear-cut, and that poses a risk, Goldman said. He fears that anger over immunity for platforms threatens nuanced debate about the next generation of tech development.

"The blossoming of A.I. comes at one of the most precarious times amid a maturing tech backlash," Goldman said. "We need some kind of immunity for people who make the tools," he added. "Without it, we're never going to see the full potential of A.I." — Ephrat Livni

**IN CASE YOU MISSED IT**

**Elon Musk receives a hero's welcome in China.** The Tesla chief was hailed on Chinese social media as a "global idol" during his visit this week to the country, where he met with government ministers and visited the Tesla's Shanghai factory. Musk reportedly also had kind words for his hosts: Government readouts of his meetings with Beijing ministers said he had described the U.S. and Chinese economies as "conjoined twins" and opposed political efforts to decouple them.

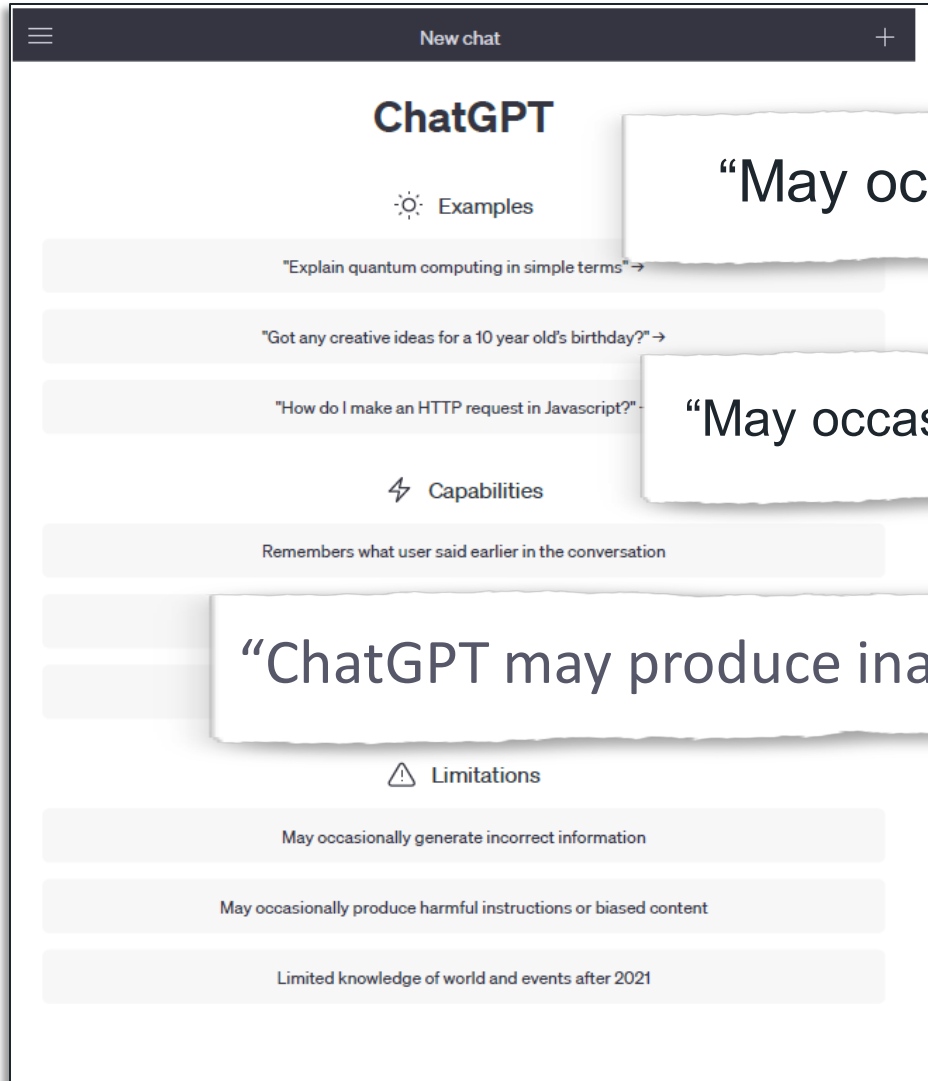
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**“Who Is Liable for A.I. Creations?”**

**“We need some kind of immunity for people who make the tools. Without it, we’re never going to see the full potential of A.I.”**

# AI Generators Seek to Limit Liability Through Disclaimers



“May occasionally generate incorrect information.”

“May occasionally produce harmful instructions or biased content.”

“ChatGPT may produce inaccurate information about people, places, or facts.”

# It Relies on the Restatement

Disclaimers & Assumption of Risk

restatement of torts

Under the Restatement (Second) of Torts, the doctrine of assumption of risk involves a plaintiff voluntarily and knowingly encountering a known risk. Disclaimers, on the other hand, are statements that aim to limit or exclude liability in certain circumstances.

While disclaimers can be relevant to establishing assumption of risk, they are not determinative on their own. A disclaimer alone does not automatically establish assumption of risk. Instead, the courts will consider various factors, including the nature of the risk, the plaintiff's knowledge and understanding of the risk, and the surrounding circumstances.

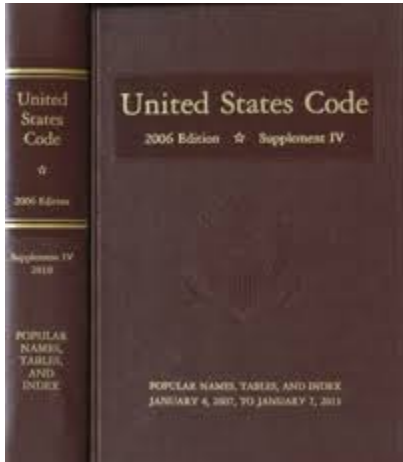
The Restatement (Second) of Torts recognizes that individuals can assume the risk of harm through an explicit agreement or by their own conduct. Disclaimers can be seen as a form of explicit agreement where a person acknowledges and accepts the risks associated with a certain activity or situation. If the plaintiff has agreed to the terms of a disclaimer and subsequently suffers harm, it may be more likely for assumption of risk to be established.

However, the courts also consider the reasonableness of the disclaimer and whether it was effectively communicated to the plaintiff. If the disclaimer is deemed unreasonable, unclear, or hidden, it may not be enforceable, and assumption of risk may not be established.

It's important to note that legal principles and interpretations may vary across jurisdictions, and courts may apply different standards and considerations in determining assumption of risk. It is advisable to consult with a qualified attorney familiar with the laws of your specific jurisdiction for a more accurate assessment.

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# But Is There Immunity for Third Party Claims?



“No provider or user of an interactive computer service shall be treated as the ***publisher or speaker*** of any information provided by another information content provider.”

42 U.S.C. § 230(c)(1)



**Civil liability:** “No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to ***restrict access*** to or availability of [objectionable] material.”

42 U.S.C. § 230(c)(2)

# The Drafters of Section 230 Tend to Agree

The New York Times | <https://www.nytimes.com/2023/06/03/business/who-is-liable-for-ai-creations.html>

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**What about A.I. search engines?** Typically, search engines are considered vehicles for information rather than content creators. Companies like Google and Microsoft have benefited from Section 230 protection. Chatbots generate content, and they are most likely beyond protection. "If some search engines start to look like chat output, the lines will be blurred," Wyden said.

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## Does Section 230 apply to generative A.I.?...

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# ChatGPT is Less Certain

“Does Section 230 impact liability for Generative AI services?”

Section 230 of the Communications Decency Act (CDA) in the United States provides certain legal protections for online platforms and service providers regarding content posted by their users. However, the application of Section 230 to generative AI services is a complex and evolving legal question.

Generative AI refers to technologies that can create text, images, or videos. The liability for such content depends on several factors, including the nature of the service.

Section 230 generally shields online platforms and service providers from liability for content posted by their users. However, the application of Section 230 to generative AI services is a complex and evolving legal question.

However, Section 230 does not provide immunity for certain types of content, such as intellectual property law violations. Additionally, the protections of Section 230 apply to platforms that host content rather than simply hosting it.

The liability of generative AI services becomes more complex when the service itself is involved in content creation. If a generative AI service is actively involved in generating or modifying content, it may be considered a content creator rather than a mere platform. In such cases, the service might have greater liability for the content it produces.

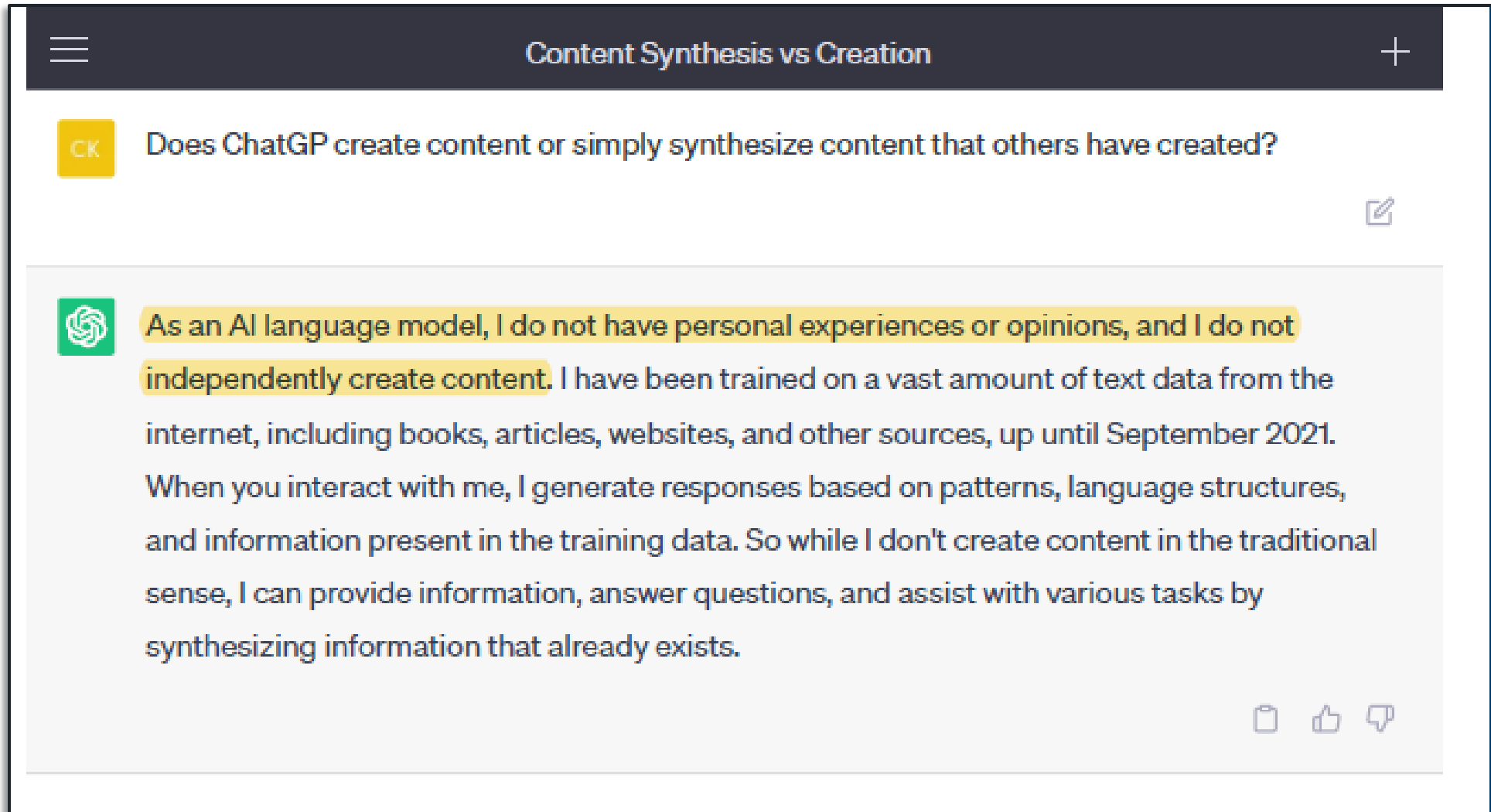
It's important to note that

Send a message.

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# But ChatGPT Thinks It Should Be Immune:



The screenshot shows a chat interface with a dark header bar containing a hamburger menu icon on the left, the text "Content Synthesis vs Creation" in the center, and a plus sign on the right. Below the header, a user message is displayed with a yellow square icon containing the letters "CK". The user's question is: "Does ChatGP create content or simply synthesize content that others have created?". To the right of the question is a small icon of a pencil inside a square. Below the user message is a response from ChatGPT, indicated by its green circular logo on the left. The response text is: "As an AI language model, I do not have personal experiences or opinions, and I do not independently create content. I have been trained on a vast amount of text data from the internet, including books, articles, websites, and other sources, up until September 2021. When you interact with me, I generate responses based on patterns, language structures, and information present in the training data. So while I don't create content in the traditional sense, I can provide information, answer questions, and assist with various tasks by synthesizing information that already exists." At the bottom right of the response box are three icons: a document, a thumbs up, and a thumbs down.

# Courts Have Not Figured Out the “Correct” Scope of Immunity



Inc. v. Enigma Software Group USA, LLC, 141 S.Ct. 13 (Mem) (2020)  
 20 Cal. Daily Op. Serv. 10,583, 2020 Daily Journal D.A.R. 11,040

141 S.Ct. 13  
 Supreme Court of the United States.

**MALWAREBYTES, INC.**  
 v.  
**ENIGMA SOFTWARE GROUP, INC.**

No. 19-1211  
 Decided October 11, 2020

**Opinion**  
 The petition for a writ of certiorari is denied.

Statement of Justice THOMAS, dissenting.  
 This petition asks us to interpret a provision of § 230, a federal law enacted in 1996 that grants immunity to online platforms from some civil liability. 47 U.S.C. § 230. When Congress enacted this law, most of today's major Internet platforms had not yet been created. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.

This case involves Enigma Software Group, Inc. (“Enigma”), a competitor of Malwarebytes, Inc. (“Malwarebytes”), which enables individuals to filter unwanted content from their devices, posing security risks. Enigma sued Malwarebytes, alleging that Malwarebytes engaged in anticompetitive conduct to make its products more difficult to download and use. Enigma argues that Malwarebytes invoked a provision of § 230 that shields computer service providers from liability for providing tools “to restrict access to material” that it “considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” § 230(c)(2). The Ninth Circuit relied heavily on the “policy” and “purpose” of § 230 to conclude that immunity is unavailable when a plaintiff alleges anticompetitive conduct.

The decision is one of the few where courts have relied on purpose and policy to deny immunity under § 230. But the court's decision to stress purpose and policy is familiar. Courts have long emphasized nontextual arguments

when interpreting § 230, leaving questionable precedent in their wake.

I agree with the Court's decision not to take up this case.

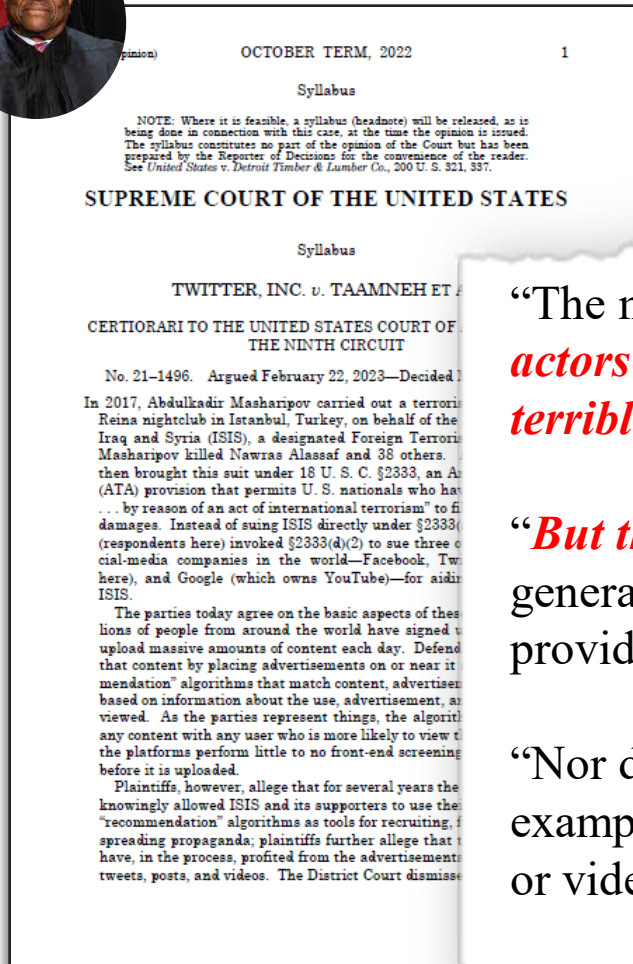
(interpreting a law by looking to the “backdrop against which Congress” acted). Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries). Publishers or speakers were subjected to a higher standard because they exercised editorial control. They could be strictly liable for transmitting illegal content. But distributors were different. They acted as a mere conduit without exercising editorial control, and they often transmitted far more content than they could be expected to review. Distributors were thus liable only when they knew (or constructively knew) that content was illegal. See, e.g., *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL

“When Congress enacted the statute, most of today’s major Internet platforms did not exist. And in the 24 years since, we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.”

“From the beginning, courts have held that § 230(c)(1) protects the “exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter* content.”

*Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S.Ct. 13 (2020) (Thomas, J., statement re denial of cert.)

# But Even Not Immune, Are AI Platforms Doing Anything Wrong?



- Plaintiffs “injured by a terrorist attack” sued Twitter and Google for “aiding and abetting ISIS.”
- ISIS uses the platforms to “recruit new terrorists” and “raise funds for terrorism”
- Twitter and Google alleged “knew that ISIS was using their platforms” for this purpose.

“The mere creation of those platforms ... is not culpable. To be sure, *it might be that bad actors like ISIS are able to use platforms like defendants’ for illegal – and sometimes terrible – ends.*”

“*But the same could be said of cell phones, email, or the internet generally.* Yet, we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.”

“Nor do we think that such providers would normally be described as aiding and abetting, for example, illegal drug deals brokered over cell phones – even if the provider's conference-call or video-call features made the sale easier.”

# The FTC May Not Agree



Office of the Chair



Statement  
Regarding the Joint

April 25, 2023

Today's interagency statement makes clear that laws. These tools are not emerging in a legal vacuum. The FTC has legal authorities to readily combat AI-driven harms and to stay vigilant and to vigorously protect Americans from

Claims of innovation must not be cover for law being developed and more widely adopted can present create the risk of regulatory arbitrage or of locking in h

The FTC has a long track record of adapting its Americans from evolving technological risks. AI is no unfair or deceptive practices squarely applies, as do oth Reporting Act and the Equal Credit Opportunity Act. T and companies should understand that they may bear le to harm or deceive Americans.

We can already see how AI can turbocharge fra discrimination. Scammers can use these tools to manip scale, deploying fake but convincing content more wid greater precision.<sup>1</sup> Firms should be on notice that syste unlawful bias can violate the FTC Act. There is no AI

We're also seeing the possibility for companies about the capabilities of their AI tools. Businesses show claims with concrete evidence, then they are breaking t accurate, but they must hold true across consumer dema cracking down on deceptive advertising and marketing p enforce the rules of the road in the context of AI applications.

With any new innovative technology, there's promise that it can be useful to society. But those benefits will only reach the American people if the technology is developed, marketed, and used in a way that abides by the law.

That's why enforcers also have the responsibility of preserving fair competition as these nascent markets take shape. We know that in moments of disruption, established players will be

<sup>1</sup> Michael Atleson, *Chatbots, Deepfakes, and Voice Clones: AI Deception for Sale*, FTC Business Blog (Mar. 20, 2023), <https://www.ftc.gov/business-evidence/blog/2023/03/chatbots-deepfakes-voice-clones-ai-deception-sale>

<sup>2</sup> Michael Atleson, *Keep Your AI Claims in Check*, FTC Business Blog (Feb. 27, 2023), <https://www.ftc.gov/business-evidence/blog/2023/02/keep-your-ai-claims-check>

“We can already see how *AI can turbocharge fraudulent practices* and automate discrimination. Scammers can use these tools to manipulate and deceive people on a massive scale, deploying fake but convincing content more widely and targeting specific groups with greater precision.”

“Firms should be on notice that systems that bolster fraud or perpetuate unlawful bias can violate the FTC Act. *There is no AI exemption to the laws on the books.*”

# The FTC Will Likely Focus on the Use of AI Under Traditional Standards of Deceptive Advertising and Unfair Competition



## JOINT STATEMENT ON ENFORCEMENT OF ANTI-DISCRIMINATION AND BIAS LAWS

Rohit Chopra, Director of the Consumer Protection Bureau  
Kristen Clarke, Assistant Attorney General for the Department of Justice  
Charlotte A. Burrows, Chair of the Equal Employment Opportunity Commission  
Lina M. Khan, Chair of the Federal Trade Commission  
issued the following joint statement about enforcement of anti-discrimination laws from bias in automated systems.

America's commitment to the core principles of competition, consumer protection, and equal opportunity is deeply embedded in the federal laws that our agencies enforce. These laws have long served to protect individuals even as our society has embraced new technologies. Responsible innovation is not incompatible with innovation and adherence to the law can complement each other to bring benefits to people in a fair and competitive marketplace, create new opportunities as well as better products and services.

Today, the use of automated systems, including "artificial intelligence" or "AI," is becoming increasingly prevalent. We use the term "automated systems" broadly to include any system, including AI, that are used to automate workflow or make decisions. Private and public entities use these systems in ways that impact individuals' rights and opportunities, including in housing, credit opportunities, and other goods and services. While these systems are often advertised as providing insights and benefits, such as efficiency and cost-savings, and modernizing existing practices, their use also can perpetuate unlawful bias, automate unlawful discrimination, and create other harmful outcomes.

### Our Agencies' Enforcement Authorities

Existing legal authorities apply to the use of new technologies just as they apply to other practices.

- “Although many of these tools offer the promise of advancement, their use also has the potential to perpetuate unlawful bias, automate unlawful discrimination, and produce other harmful outcomes.”
- “The FTC issued a report evaluating the use and impact of AI in combatting online harms identified by Congress. **The report outlines significant concerns that AI tools can be inaccurate, biased, and discriminatory by design and incentivize relying on increasingly invasive forms of commercial surveillance.**
- **“The FTC has also warned market participants that it may violate the FTC Act to use automated tools that have discriminatory impacts, to make claims about AI that are not substantiated, or to deploy AI before taking steps to assess and mitigate risks.** Finally, the FTC has required firms to destroy algorithms or other work product that were trained on data that should not have been collected.”

# But the FTC Also Wants to Use the Antitrust Laws to Encourage the “Fair” Development and Expansion of AI Tools



Office of the Chair



Statement of Chair Lina  
Regarding the Joint Interagen

April 25, 2023

Today’s interagency statement makes clear that AI tools are not emerging in a legal vacuum. To the contrary, each agency here today has legal authorities to readily combat AI-driven harm—and this moment requires us enforcers to stay vigilant and to vigorously protect Americans from unlawful business practices.

Claims of innovation must not be cover for lawbreaking. Moments when new tools are being developed and more widely adopted can present enormous opportunity—but they can also create the risk of regulatory arbitrage or of blocking in harmful business practices.

The FTC has a long track record of protecting Americans from evolving technological harms. We will continue to use our authority under the Unfair or Deceptive Practices Squarely Applied Reporting Act and the Equal Credit Opportunity Act to ensure that companies should understand that their actions should not harm or deceive Americans.

We can already see how AI can be used for discrimination. Scammers can use these tools at scale, deploying fake but convincing content with greater precision.<sup>1</sup> Firms should be on no unlawful bias can violate the FTC Act. T

We’re also seeing the possibility of harm about the capabilities of their AI tools. But if you make claims with concrete evidence, then they should be accurate, but they must hold true across contexts. We’re cracking down on deceptive advertising and enforcing the rules of the road in the context

With any new innovative technology, there’s promise that it can be useful to society. But those benefits will only reach the American people if the technology is developed, marketed, and used in a way that abides by the law.

That’s why enforcers also have the responsibility of preserving fair competition as these nascent markets take shape. We know that in moments of disruption, established players will be

<sup>1</sup> Michael Atileson, *Chatbots, Deepfakes, and Voice Clones: AI Deception for Sale*, FTC Business Blog (Mar. 20, 2023), <https://www.ftc.gov/business-guidance/blog/2023/03/chatbots-deepfakes-voice-clones-ai-deception-sale>.

<sup>2</sup> Michael Atileson, *Keep Your AI Claims in Check*, FTC Business Blog (Feb. 27, 2023), <https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check>.

“Enforcers have the dual responsibility of watching out for the dangers posed by new A.I. technologies while promoting the fair competition needed to ensure the market for these technologies develops lawfully.”

“We know that in moments of disruption, established players will be tempted to crush, absorb, or otherwise unlawfully restrain new entrants to maintain their dominance. **And we already see this risk.**”

# The FTC Sees the Past as Prologue



<https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html>  
GUEST ESSAY  
**Lina Khan: We Must Regulate A.I. Here's How.**  
May 3, 2023

By Lina M. Khan  
Ms. Khan is the chair of the Federal Trade Commission.

## On Internet 2.0:

“Coupled with aggressive strategies to acquire or lock out companies that threatened their position, these tactics solidified the dominance of a handful of companies.

What began as a revolutionary set of technologies ended up concentrating enormous private power over key services and locking in business models that come at extraordinary cost to our privacy and security.”

It's both exciting and unsettling to have artificial intelligence, many of us have now experienced, and communicate around the world. It's highly disruptive.

The last time we found ourselves facing a similar situation was in the mid-2000s. New, innovative companies were growing their user base.

Those innovative services, however, came with extensive surveillance of the people using them. Essential services is conditioned on that surveillance.

These business models drove companies to find reason to believe that several of the companies that threatened their position were set of technologies ended up concentrating extraordinary cost to our privacy and security.

The trajectory of the Web 2.0 era was a moment of choice. As the use of A.I. becomes more widespread, it doesn't repeat itself.

As companies race to deploy and monetize new technologies, the FTC is mandated to promote fair competition, committed to doing our part to uphold the principles that underpinned both breakthrough innovations and the mass exploitation of the data of users. We will vigorously enforce the laws we are charged with enforcing.

While the technology is moving swiftly, the market dominance of large incumbents and other companies rely on their access to data.

Enforcers and regulators must be vigilant in identifying and picking winners and losers, setting prices for everything from laundry detergent to pharmaceuticals — as well as forms of precisely targeted advertising — by new A.I. technologies while promoting competition. The FTC is well equipped with legal jurisdiction to address collusion, monopolization, mergers, pr

# The FTC Sees the Past as Prologue



<https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html>  
GUEST ESSAY  
**Lina Khan: We Must Regulate A.I. Here's How.**  
May 3, 2023

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## On AI:

“While the technology is moving swiftly, we already can see several risks.

The expanding adoption of A.I. risks further locking in the market dominance of large incumbent technology firms.

A handful of powerful businesses control the necessary raw materials that start-ups and other companies rely on to develop and deploy A.I. tools.

This includes cloud services and computing power, as well as vast stores of data.”

It's both exciting and unsettling to have artificial intelligence, many of us have now experienced, and communicate around the world. It's highly disruptive.

The last time we found ourselves facing a similar moment was in the mid-2000s. New, innovative companies were building a growing user base.

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These business models drove companies to find reason to believe that several of the companies that threatened their position were set of technologies ended up concentrating an extraordinary cost to our privacy and security.

The trajectory of the Web 2.0 era was a moment of choice. As the use of A.I. becomes widespread, it doesn't repeat itself.

As companies race to deploy and monetize AI, we have a mandate to promote fair competition, to ensure that the market is open to all. We are committed to doing our part to uphold the principles that underpinned both breakthrough innovation and the mass exploitation of the data of our users. We will vigorously enforce the laws we are charged with enforcing.

While the technology is moving swiftly, we already can see several risks. The expanding adoption of A.I. risks further locking in the market dominance of large incumbent technology firms.

This includes cloud services and computing power, as well as vast stores of data.

Enforcers and regulators must be vigilant. They must pick winners and losers, set prices for everything from laundry detergent to pharmaceuticals — as well as forms of precisely targeted advertising — by new A.I. technologies while promoting competition. The FTC is well equipped with legal jurisdiction to address collusion, monopolization, mergers, and other anticompetitive practices.

# It Comes Down to Control of the Data:

KEYWORDS: CHRISTOPHER MIMS

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

Artificial-intelligence companies are using content without their consent or any compensation. Some are beginning to ask for payment.



By Christopher Mims [Follow](#)

April 29, 2023 12:00 am ET



ILLUSTRATION: EVANGELINE GALLAGHER

If you've ever published a blog, or posted something to Reddit, or shared content anywhere else on the open web, it's very likely you have played a part in creating the latest generation of artificial intelligence.

Google's Bard chatbot, OpenAI's ChatGPT, Microsoft's [MSFT 0.85%](#) [▲](#) OpenAI-powered version of Bing, and similar tools from the many startups now incorporating these and other AI language models—none of these clever automated writers could exist without the enormous body of text freely available on the web.

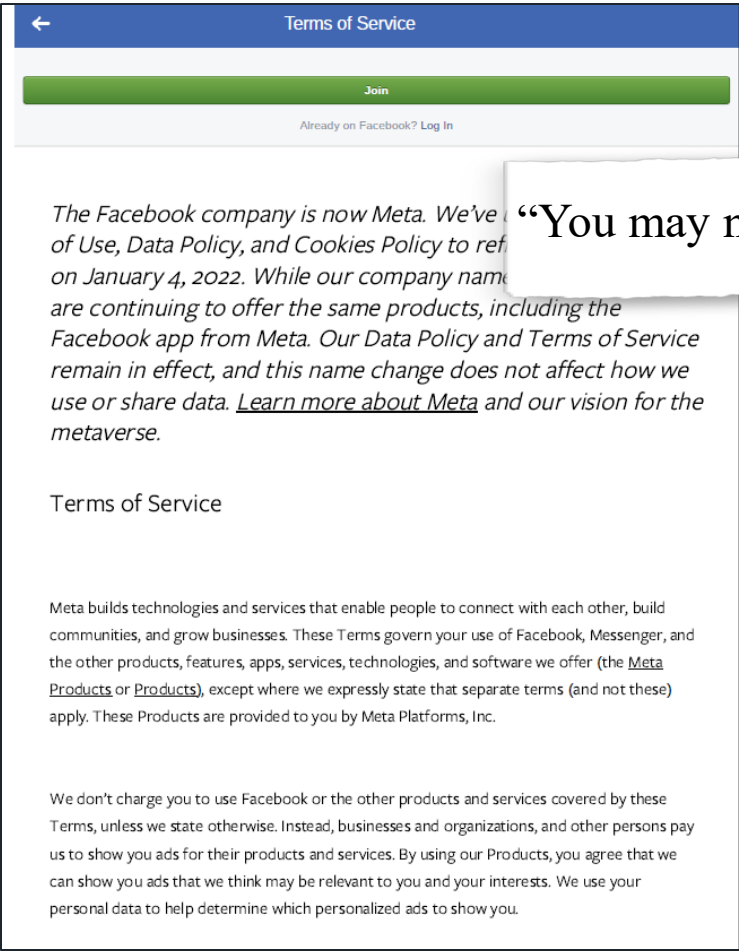
Now, in a way that hasn't been true since the early search-engine battles, the contents of the web are the subject of a contest over who owns what, as great powers attempt to carve up an

“None of these clever automated writers could exist without the enormous body of text *freely available* on the web. Now tech and media companies that unwittingly provided this data are waking up to how essential it is to training the latest generation of language-based AIs”

“Reddit, an invaluable source for OpenAI, recently announced that it will **start charging** AI companies for access to data”

“Twitter also recently **started charging** for the service that allows access to its data, a change that affects many aspects of Twitter's business, including use of its data by AI companies”

# Are User Terms Disguised Non-Competes that Entrench Dominant Platform Monopolies?



**“You may not access or collect data from our Products using automated means”**

*The Facebook company is now Meta. We’ve updated our Terms of Use, Data Policy, and Cookies Policy to reflect this change on January 4, 2022. While our company name has changed, we are continuing to offer the same products, including the Facebook app from Meta. Our Data Policy and Terms of Service remain in effect, and this name change does not affect how we use or share data. [Learn more about Meta](#) and our vision for the metaverse.*

### Terms of Service

Meta builds technologies and services that enable people to connect with each other, build communities, and grow businesses. These Terms govern your use of Facebook, Messenger, and the other products, features, apps, services, technologies, and software we offer (the [Meta Products](#) or [Products](#)), except where we expressly state that separate terms (and not these) apply. These Products are provided to you by Meta Platforms, Inc.

We don’t charge you to use Facebook or the other products and services covered by these Terms, unless we state otherwise. Instead, businesses and organizations, and other persons pay us to show you ads for their products and services. By using our Products, you agree that we can show you ads that we think may be relevant to you and your interests. We use your personal data to help determine which personalized ads to show you.

# The FTC Thinks So



UNITED STATES  
Federal Trade Commission  
WASHINGTON, D.C.

Office of the Chair

MEMORANDUM

FROM: Chair Lina M. Khan  
TO: Commission Staff and Commissioners  
SUBJECT: Vision and Priorities for the Commission

Thank you for the grace and patience you've shown me as I've stepped up to speed on the agency's work and process. I've faced a host of challenges, and I am so grateful for the support of the Commission. The past 18 months have involved a lot of hard work and dedication to thank everyone for their hard work and dedication.

It's been great to meet and speak with many of you. Reviewing the breadth of our work has underscored the critical role the Commission must play in protecting consumers and workers, and the tools and authorities—including rulemaking—especially post-AMG.

Over its 107 years, the Commission has navigated a complex and ever-changing landscape. At its best, the agency has focused on tackling urgent problems, learning from new evidence, and course-correcting where needed. American consumers, workers, and honest businesses depend on the Commission to champion a fair and thriving economy for all, and I am confident that we can deliver.

Succeeding will require us to adjust our approach based on what we learn and to focus on key strategic priorities and operational objectives. I have offered below some thoughts on each of these prongs, and I look forward to engaging with you further as we dive into this work. I respect deeply the expertise and talent within the agency and fully recognize that the work ahead will require collective learning and engagement as we chart a path forward.

*Strategic Approach*

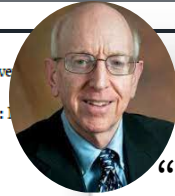
There are a few key principles that should animate the agency's approach across its work.

First, we need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers. Focusing on power

“The third [enforcement priority] area centers on taking aim at the ways in which certain contract terms, particularly those that are imposed in **take-it-or-leave-it contracts, constitute unfair methods of competition** or unfair or deceptive practices.

*We have seen how market power abuses ... when one-sided contract provisions are imposed by dominant firms.”*

# Antitrust Cases Are Built on the “Gales of Creative Destruction”



KeyCite Yellow Flag - Negative Treatment  
Distinguished by DeSoto Cab Company, Inc. v. Uber Technologies, Inc., N.D.Cal., September 24, 2018

839 F.3d 594

United States Court of Appeals, Seventh Circuit.

ILLINOIS TRANSPORTATION TRADE ASSOCIATION, et al., Plaintiffs–Appellants, v.

CITY OF CHICAGO, Defendant–Appellee, and

Dan Burgess, et al., Intervening Defendants–Appellees.

Nos. 16–2009, –2077, & –2980

Argued September 19, 2016

Decided October 7, 2016

Rehearing and Rehearing En Banc \* Denied December 14, 2016

\* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

## Synopsis

**Background:** Owners and operators of taxicabs and livery vehicles and transportation trade association brought action alleging that city ordinance regulating transportation network providers violated their rights under federal constitution and state law. The United States District Court for the Northern District of Illinois, Sharon Johnson Coleman, J., [134 F.Supp.3d 1108](#), granted in part and denied in part city’s motion to dismiss. Parties filed cross-appeals.

**Holdings:** The Court of Appeals, Posner, Circuit Judge, held that:

[1] ordinance did not constitute taking of city-issued taxi medallions or deprive medallion owners of constitutionally protected property right, and

[2] city’s failure to subject provides to same regulatory burdens as taxicab owners and operators did not violate taxicab owners’ and operators’ equal protection rights.

Affirmed in part and reversed in part.

Procedural Posture(s):

West Headnotes (2)

[1] **Eminent Domain** ← Autom. City ordinance permitting network providers to operate different rules regarding licen taxicab operators did not co city-issued taxi medallions or owners of constitutionally p right. U.S. Const. Amends. 5, 18 Cases that cite this headno

[2] **Automobiles** ← Local regul. **Constitutional Law** ← Car utilities; railroads

Ridesharing services and to not similarly situated, and to subject transportation netw provided ridesharing services burdens as taxicab owners not violate taxicab owners’ at protection rights; taxis but n permitted to take on as passe hailed them on street, provid required to create contractual provider prior to using its s assumed primary responsibi potential drivers and hiring o be qualified, provider passeng information in advance about rides, and taxicabs generally miles in hope of being ha Amend. 14.

14 Cases that cite this headno

\*595 Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:14–cv–00827, Sharon Johnson Coleman, Judge.

“When new technologies, or new business methods appear, a common result is the decline or even disappearance of the old.

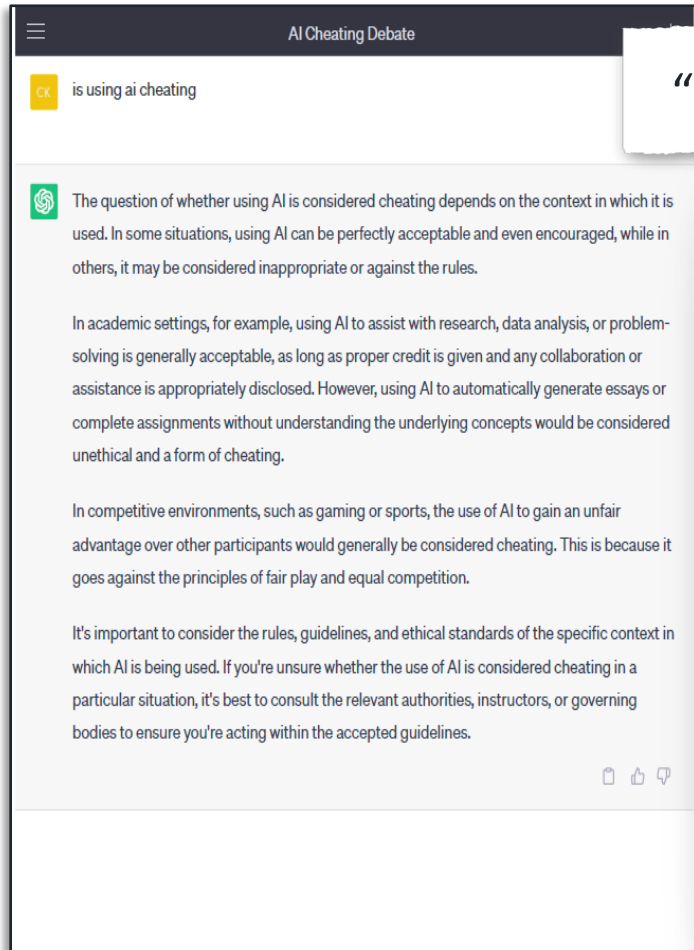
Were the old deemed to have a constitutional right to preclude the entry of the new into the markets of the old, economic progress might grind to a halt. *Instead of taxis we might have horse and buggies; instead of the telephone, the telegraph; instead of computers, slide rules.*



Obsolescence would equal entitlement.”

*Illinois Transportation Trade Ass'n v. City of Chicago*, 839 F.3d 594, 596–97 (7th Cir. 2016)

# AI, Ethics, and Antitrust



“Is using AI Cheating?”

“The question of whether using AI is considered cheating depends on the context in which it is used....”

“In competitive environments, ... the use of AI to gain an unfair advantage over other participants would generally be considered cheating....”

“It's important to consider the rules, guidelines, and ethical standards of the specific context in which AI is being used. ”

# Supreme Court: Ethical Concerns Can't Stop Competition



J. S., 435 U.S. 679 (1978)  
Cases P 61,990

West Headnotes (23)

[1] **Antitrust and Trade Regulation** ↔ Construction  
Congress did not intend text of Sherman Anti-Trust Act to delineate full measure of its application in concrete situations, rather, Congress expected courts to apply statute's broad mandate by drawing on common law tradition. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1 et seq. 15 Cases that cite this headnote

[2] **Antitrust and Trade Regulation**  
Rule of Reason, contrary to its traditional use in open field of antitrust inquiry to determine reasonableness of challenged restraint in realm of reason, but instead, rule of reason on challenged restraint's impact on competition. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1. 93 Cases that cite this headnote

[3] **Antitrust and Trade Regulation**  
**Constitutional Law** ↔ Antitrust regulation  
Argument that because characteristics of particular industry, monopolistic arrangements will better promote trade and commerce than competition is properly addressed to Congress, but such argument is not permitted by Rule of Reason. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1. 13 Cases that cite this headnote

[4] **Antitrust and Trade Regulation** ↔ Rule of reason  
Restraints of trade within purview of section of Sherman Anti-Trust Act cannot be taken out of

98 S.Ct. 1355  
Supreme Court of the United States  
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, Petitioner,  
v.  
UNITED STATES.  
No. 76-1767  
Argued Jan. 18, 1978.  
Decided April 25, 1978.

**Synopsis**  
United States brought civil antitrust action against association of professional engineers, alleging that association's canon of ethics prohibiting competitive bidding by its members violated Sherman Anti-Trust Act. The United States District Court for the District of Columbia, 404 F.Supp. 457, entered judgment in favor of United States, and association appealed. The Court of Appeals, 181 U.S.App.D.C. 41, 555 F.2d 978, affirmed in part and remanded in part, and writ of certiorari was granted. The Supreme Court, Mr. Justice Stevens, held that: (1) canon of ethics prohibiting competitive bidding was not justified under Rule of Reason and violated section of Sherman Anti-Trust Act, and (2) judgment prohibiting association from adopting any official opinion, policy statement or guideline stating or implying that competitive bidding was unethical did not abridge association's First Amendment rights.

**Affirmed.**  
Mr. Justice Blackmun, with whom Mr. Justice Rehnquist joined, concurred in part and concurred in the judgment and filed opinion.  
Mr. Chief Justice Burger concurred in part and dissented in part and filed opinion.

**Procedural Posture(s):** On Appeal.

“Ethical norms may serve to regulate ... competition, [and] certainly, the problem of professional deception is a proper subject of an ethical canon.

But that competition is not entirely conducive to ethical behavior ... is not a reason for doing away with competition.”

*Nat'l Soc. of Pro. Engineers v. US*, 435 U.S. 679, 696 (1978)

# If You Can't Beat 'Em, Join 'Em



United States

## 1. Introduction

1. Advances in technology continue to drive economic growth and markets around the world. Consumers have benefited from this growth in free or low-priced services, better quality goods and services, more innovative new products. Businesses have developed new tools that use increasingly sophisticated ways as more sectors of the economy connect to and to consumers.

2. The Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") submit this paper as part of the Committee's look at the role of competition policy in the digital age. At the November 2016 *Big Data: Bringing Competition Policy to the Digital Era*, the Committee held a future discussion the risks associated with the use of data and computer algorithms enabling new forms of collusion. In this paper, we address the application of U.S. antitrust analysis to business conduct involving technologically advanced pricing algorithms. After introducing those tools, we address the antitrust issues that inform emerging pricing issues involving the use of algorithms.

## 2. Technology-aided pricing

3. Firms have long employed implicit or explicit sets of rules to set prices. Rules or formulas have been implemented by individuals. The new practice that has attracted the attention of academics and policy makers is when price-setting is done by individuals, but by computers. A computer algorithm is a detailed step-by-step set of instructions that allows a computer to solve a problem. A pricing algorithm instructs the computer to set the price of an item for sale, and can be written to rely on competitors' prices and demographic or other information about the customer.<sup>1</sup> Pricing algorithms are dynamic, allowing prices to respond quickly to changes in market circumstances. Many firms use algorithms to set pricing on the internet because there are vast pricing data to sort through and changing prices is relatively inexpensive.<sup>2</sup>

<sup>1</sup> This discussion assumes that the pricing algorithm is a program written by humans. Although computers equipped with artificial intelligence (AI) or machine learning could in theory make decisions that were not dictated or allowed for in the programming, these scenarios seem too speculative to consider at this time.

<sup>2</sup> It is important to distinguish the potential anticompetitive aspects of using algorithmic pricing from other potentially competitively neutral or procompetitive aspects of algorithmic pricing and data analysis. For example, algorithmic pricing can be used to price discriminate among buyers: it could generate one price to a customer browsing on her mobile phone in New York City and a different price for someone shopping online using a home computer in Florida. Algorithmic pricing that leads to price discrimination – without incorporating competitor data – is unlikely to raise competition concerns. Price discrimination facilitated by computer algorithms should be analyzed using the same framework as price discrimination in other contexts. A more complete discussion of the U.S. Agencies' views on price discrimination can be found in the November 2016 Note by the United States, "Roundtable Discussion on Price Discrimination," DAF/COMP/WD(2016)69, [https://www.ftc.gov/system/files/attachments/us-submissions-oced-other-international-competition-fora/price\\_discrimination\\_united\\_states.pdf](https://www.ftc.gov/system/files/attachments/us-submissions-oced-other-international-competition-fora/price_discrimination_united_states.pdf).

Algorithms and Collusion - Note by the United States

Unclassified

“If competing firms each entered into separate agreements with a single firm (for instance a platform) to use a particular pricing algorithm, and the evidence showed they did so with the common understanding that all other competitors would use the identical algorithm, that evidence could be used to prove an agreement among the competitors that violates U.S. antitrust law.”

# The FTC Believes that AI Is the Next Frontier of Sophisticated Collusion Cases



Times | <https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html>

GUEST ESSAY

## Lina Khan: We Must Regulate A.I. Here's How.

May 3, 2023

By Lina M. Khan  
Ms. Khan is the chair of the Federal Trade Commission.

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morning

It's both exciting and unsettling to have a new form of artificial intelligence, many of us have now experienced and communicate around the world. The future is highly disruptive.

The last time we found ourselves facing such a challenge was in the mid-2000s. New, innovative companies like Google and Facebook were growing user base.

Those innovative services, however, came with a cost: extensive surveillance of the people and businesses using essential services is conditioned on the wide availability of those services.

These business models drove companies to find reason to believe that several of these companies that threatened their position, through the use of a set of technologies ended up concentrating enormous private power over key services and locking in business models that come at an extraordinary cost to our privacy and security.

The trajectory of the Web 2.0 era was not inevitable — it was instead shaped by a broad range of policy choices. And we now face another moment of choice. As the use of A.I. becomes more widespread, public officials have a responsibility to ensure this hard-learned history doesn't repeat itself.

As companies race to deploy and monetize A.I., the Federal Trade Commission is taking a close look at how we can best achieve our dual mandate to promote fair competition and to protect Americans from unfair or deceptive practices. As these technologies evolve, we are committed to doing our part to uphold America's longstanding tradition of maintaining the open, fair and competitive markets that have underpinned both breakthrough innovations and our nation's economic success — without tolerating business models or practices involving the mass exploitation of their users. Although these tools are novel, they are not exempt from existing rules, and the F.T.C. will vigorously enforce the laws we are charged with administering, even in this new market.

While the technology is moving swiftly, we already can see several risks. The expanding adoption of A.I. risks further locking in the market dominance of large incumbent technology firms. A handful of powerful businesses control the necessary raw materials that startups and other companies rely on to develop and deploy A.I. tools. This includes cloud services and computing power, as well as vast stores of data.

Enforcers and regulators must be vigilant. Dominant firms could use their control over these key inputs to exclude or discriminate against downstream rivals, picking winners and losers in ways that further entrench their dominance. Meanwhile, the A.I. tools that firms use to set prices for everything from laundry detergent to bowling lane reservations can facilitate collusive behavior that unfairly inflates prices — as well as forms of precisely targeted price discrimination. Enforcers have the dual responsibility of watching out for the dangers posed by new A.I. technologies while promoting the fair competition needed to ensure the market for these technologies develops lawfully. The F.T.C. is well equipped with legal jurisdiction to handle the issues brought to the fore by the rapidly developing A.I. sector, including collusion, monopolization, mergers, price discrimination and unfair methods of competition.

“the A.I. tools that firms use to set prices for everything from laundry detergent to bowling lane reservations can facilitate collusive behavior that unfairly inflates prices — as well as forms of precisely targeted price discrimination.”

# Not a Theoretical Concern

Case 2:23-cv-00140 Document 1 Filed 01/25/23 Page 1 of 29

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 Counsel for Plaintiffs and the Putative Class

UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

RICHARD GIBSON, and HERIBERTO  
 VALENTE,

Plaintiffs,

v.

MGM RESORTS INTERNATIONAL,  
 CENDYN GROUP, LLC, THE  
 RAINMAKER GROUP UNLIMITED, INC.,  
 CAESARS ENTERTAINMENT INC.,  
 TREASURE ISLAND, LLC, WYNN  
 RESORTS HOLDINGS, LLC,

Defendants.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

“Hotel Operators on the Las Vegas Strip *have replaced their independent pricing and supply decisions with a shared set of pricing algorithms* that allow the Hotel Operators to collect supracompetitive prices for their hotel rooms. The Hotel Operators have colluded to adopt these algorithms.”



# Enforcers Are Putting Rules In Place



## Notice of Proposed Rulemaking

formed when businesses that provide essential goods and services engage in price gouging. A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

### “500.7 Dynamic Pricing

*The pre-disruption price for sellers who use dynamic pricing can be determined by using the median price for the same good or service at the same time **one week prior to the abnormal disruption of the market**. A seller who would be liable for price gouging due to this provision may affirmatively defend against a price gouging claim by proving that the **aggregate profit divided by the aggregate units sold is the same** as the aggregate profit divided by the aggregate units sold a week prior during the same time period.”*

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#### Statutory Histo

New York passe  
1979. GBL 396-

<sup>1</sup> For the sake of rea  
usages of that term  
defined in GBL 396

<sup>2</sup> Public Comments  
<https://ag.ny.gov/sa>

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- 1. Statutory autonomy: [same as Rule 1]
- 2. Legislative objectives: [same as Rule 1]
- 3. Needs and benefits:

Although algorithmically-driven dynamic pricing largely did not exist when the statute was initially passed, the statutory text prohibits the use of dynamic pricing during abnormal market disruptions. Dynamic pricing exists when a seller increases prices in response to a supply

# The DOJ Is Salivating Over the Discovery Enabled by Algorithmic Collusion

Companies using pricing algorithms can't just 'set it and forget it,' US DOJ antitrust official says



“I don't want anyone in the room to forget that humans program algorithms ... That means that there are **humans responsible** for putting the algorithms into existence in the first place.”

“**Algorithms leave behind a digital trail**, which is great from an enforcement perspective. It means that we can get that code, see what it was programmed to do, see what it did .... **That kind of evidence is phenomenal**, right? If we have that, we can actually see what happened, and in some ways **enforcement becomes easier**.”