Navigating the Future of IP
AI and IP – case law and legislative developments

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Speaking with you today

Richard May
Partner
United Kingdom

T +44 207 105 7857
richard.may@osborneclarke.com

Richard is one of the UK's leading experts in IP law. His practice covers all aspects of brand protection and IP disputes, with a focus on trade marks, copyright and designs.

Richard is a trusted advisor to some of the world's leading brands and combines global portfolio management and litigation to offer clients a holistic service.

Richard is a ranked lawyer in leading legal directories and is an active member of CITMA, INTA and MARQUES.

Martin Soppe
Partner
Germany

T +49 40 55436 4050
martin.soppe@osborneclarke.com

Martin is a partner in OC's Hamburg office with almost 25 years of experience.

Martin served as Associate General Counsel in an international media company before joining Osborne Clarke as a partner in early 2015.

He advises and represents companies primarily in copyright law, advertising law and media law, both in and out of court.

AI systems and IP rights - the public debate so far

Use of third-party content for training purposes
Lawsuits, e.g. by the photo agency Getty Images against Stability AI in the UK and USA for allegedly using 12 million photos (including captions and metadata) without permission to train the Stable Diffusion AI software.
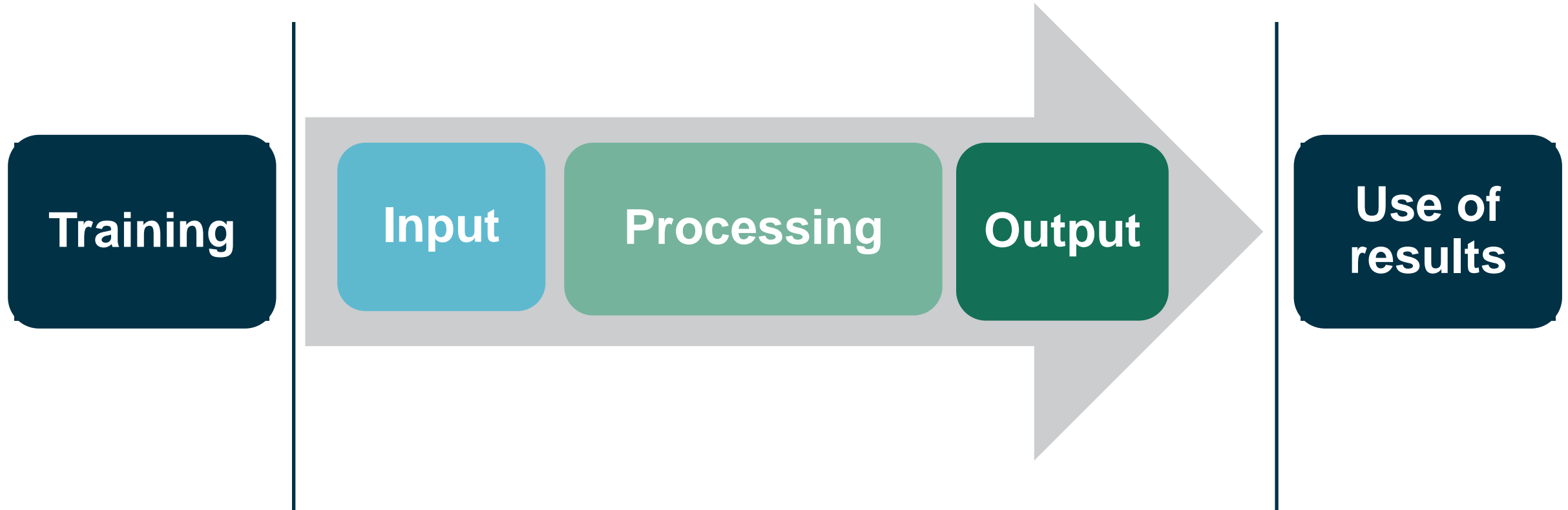

https://www.youtube.com/watch?v=ESZO-XJZr0s

Protectability of the output
Is AI-generated output eligible for copyright protection?

https://www.heise.de/news/12-Millionen-Bilder-kopiert-Getty-klagt-auch-in-den-USA-gegen-Stability-AI-7487081.html

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AI systems and IP rights - structure of a legal analysis

Training

Input

Processing

Output

Use of results

Copyright: Permissibility of using third-party IP content for training purposes?

Copyright: protectability of the output?

AI and IP rights – there's more to it than in the public debate so far

IP = **Intellectual** Property

- In the narrower sense: Intellectually (= humanly!) created works

=> **Copyright**

In the broader sense: industrial property rights

=> **Brands** and **designs**

=> Unfair competition law (supplementary performance protection)

=> "Hard IP": patents, utility models

If applicable, other rights, for example

⇒ **Personal rights**

⇒ => **Trade secrets**

⇒ => Databases

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Use of IP content (overview, without training)

Using IP-protected content in the AI system

Utilisation

Input
(Prompting)

Processing
(with/without database access)

Output
(texts, pictures etc.)

Use of results
(THINK!)

IP rights – Copyrighted Content – Examples

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Use of copyrighted content

Using copyright-protected content in the AI system | Utilisation

Input
(Prompting)

Processing
(with/without database access)

Output
(texts, pictures etc.)

Use of results

Usually **reproduction**, but possibly privileged by Art. 5 (1) Dir. 2001/29/EC

Bypassing technical protective measures?

If **no database access** (download/upload) generally no **reproduction** or **adaptation**
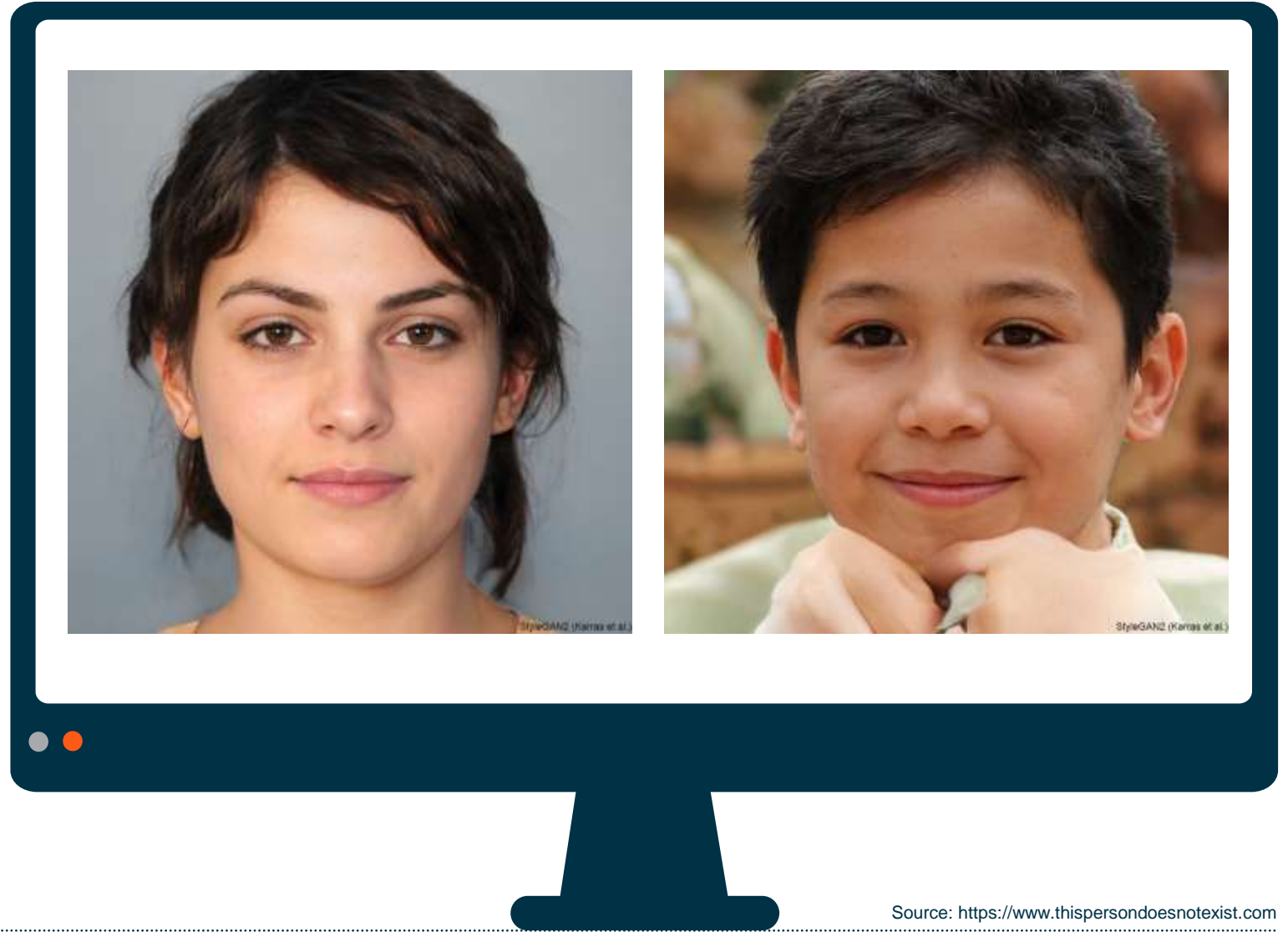
Reproduction?
Adaptation?

Reproduction?
Adaptation?
Making publicly available?
Distribution?
Broadcasting?
...

Personality rights

≠ personal data (GDPR)

Source: https://www.thispersondoesnotexist.com

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Use of personality rights

Using personality rights in the AI system

Utilisation

Input (Prompting)	**Processing** (with/without database access)	**Output** (texts, pictures etc.)

Use of results

Infringement of personality rights? In **Germany** probably not, depending on specific case

Infringement? In **Germany** probably not, if no database access (upload/download)

Infringement? In **Germany** probably not (yet), depending on specific case

Rights **actually affected**?
✓ if person "recognizable" (celebs!)

Unlawful **publication**?
Unlawful **display**?
…

IP - trade secrets - the "AI trap"
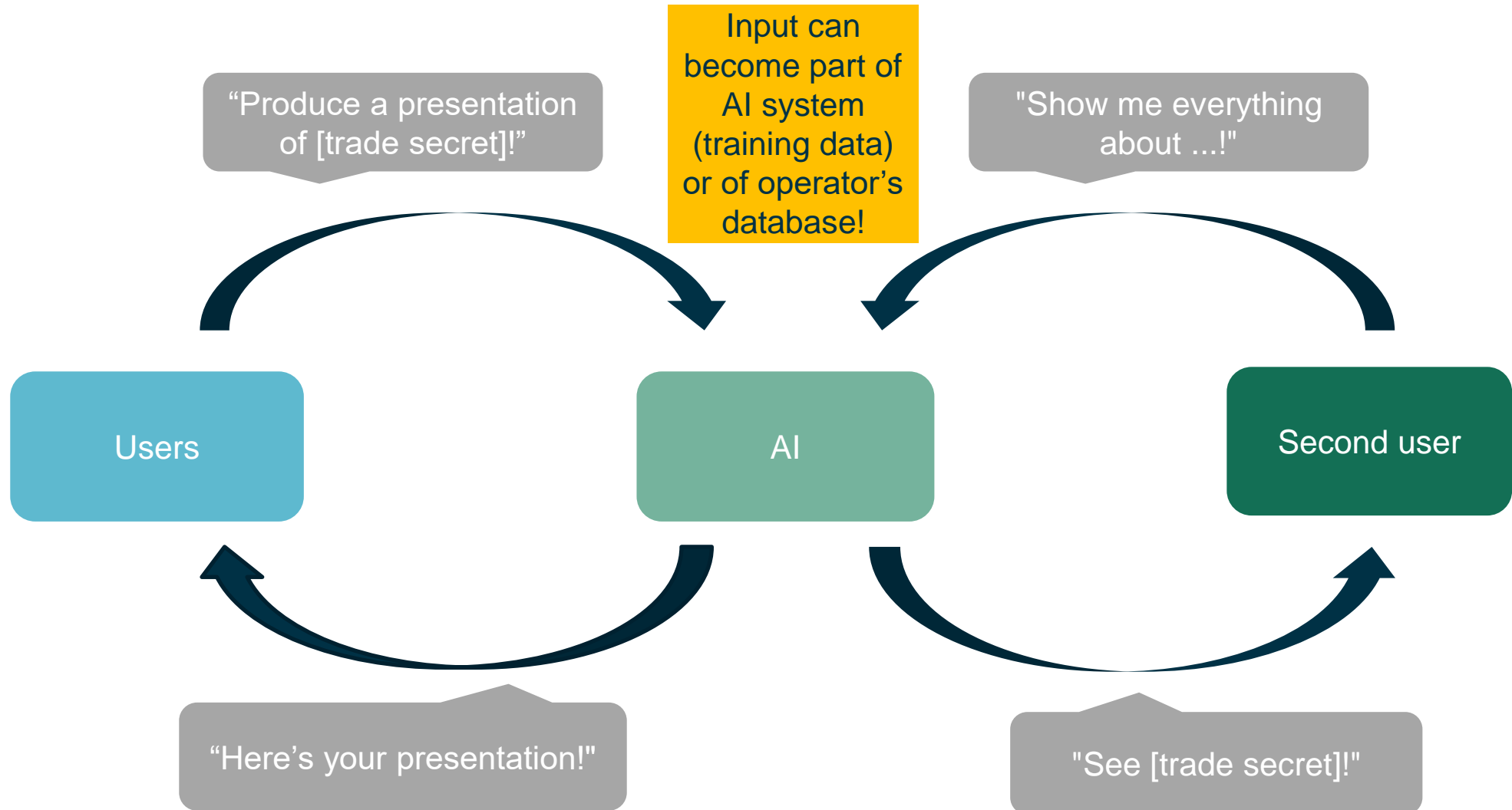
The context

AI's rise

- *Power dynamics in favour of Gen AI providers?*
- *No deals with rightsholders*

The response

- *IP infringement claims e.g. New York Times and Getty Images*
- *Licensing from rights holders e.g. News Corp and Reddit*
- *New legislation / conduct?*

The law

- *No new laws on trade mark infringement*
- *"use in the course of trade"?*
- *"use in relation to goods/services"?*
- *"use affecting the TM functions or LOC"?*
- *And by whom?*

The context cont.

UK Trade Marks Act – s103 "Minor definitions"

*"References in this Act to **use…of a trade mark, include** use…otherwise than by means of graphic representation"*

e.g. use in a form not capable of human perception

The context cont.

"The proposed new s103 therefore covers not only audible use, but any use of a trade mark which is other than by graphic representation. This would, e.g. apply where a trade mark is **encoded electronically in a video cassette***.* **It is not visible at the time of sale, and only becomes so when the purchaser plays it.***"*

Lord Strathclyde, Minister for State, Department of Trade and Industry c.1993/94

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Use of content protected by trade mark law

Using trade marks in the AI system

Utilisation

Input
(Prompts)

Processing
(with/without database access)

Output
(texts, pictures etc.)

Use of results

Generally no use **as a trade mark** and not in the course of trade/a commercial communication

If **no database access** (download/upload):
• generally no use **as a trade mark** and not in the course of trade

Generally not (yet) used **as a trade mark** and not (yet) in the course of trade/commercial communication

Use as a **trade mark** in the course of trade? Affecting TM functions? Likelihood of confusion with earlier rights?

Trade Mark Infringement

UK – s. 10(1), 10(2) and 10(3) claims (Getty)

- Use in the course of trade

- Within the relevant territory

- Liable to affect the functions of the trade mark / detrimental to distinctive character or repute of the mark

US – dilution by blurring / tarnishment (NYT)

- Famous mark (inherent / acquired distinctiveness)

- Use "in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark"
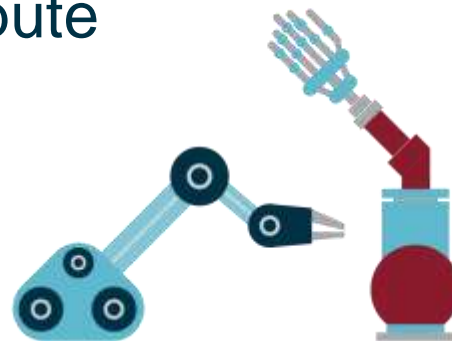
Stability's defence – not use in the course of trade (70ff.)

"*[I]t is admitted that it may be possible to generate synthetic image outputs which feature watermarks*."

BUT:

- "*Where such images are generated by a user, this is the result of third party use of Stable Diffusion and not a statement or commercial communication attributable to Stability or for which Stability is responsible in law*."

- "*"watermarked" synthetic image outputs will only be generated with wilful contrivance by the user*", i.e. "*text prompts which were identical to, or in a small number of cases closely derivative of, Getty Image Websites captions*" or by highly constrained image prompts

- The examples were produced with Getty's consent (by its lawyers) and are not instances of infringement or typical outputs

- Terms of use prohibit using the AI to violate any third-party IP right

"*any such inclusion of a watermarks does not amount to use of any sign in those watermarks in the course of trade*"

Steer from metatag / advertising keywords cases? (Especially re: inputs / training of AI)

Google v Louis Vuitton – Google not liable for TM infringement

- Not use in course of trade by Google

- Use of a sign implies use in one's **own commercial communication**

L'Oréal v eBay – eBay liable for TM infringement

- Mere hosting defence not available if provider plays an **active** role

- eBay processed data from customer-sellers and provides assistance in some cases = **active**

← AI →

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Round-up: current cases of TM infringement by AI (UK and US)

UK

Getty Images v Stability AI (IL-2023-000007)

- TM claim due to AI image outputs using Getty Images' watermarks

US

Dow Jones and The New York Times v Perplexity (1:24-cv-07984)

- Alleging damage / dilution to WSJ and NYT brands by falsely attributing content they did not write

Daily News v Microsoft and OpenAI (1:24-cv-03285)

- 8 newspaper publishers alleging unauthorised use of TMs and dilution by tarnishment in low quality outputs

Andersen v Stability AI (3:23-cv-00201)

- Class action by visual artists due to use of artists' names in promotion and relying on distinctive trade dress

The New York Times v Microsoft and OpenAI (1:23-cv-1195)

- Lower quality and inaccurate writing dilutes the famous NYT marks by tarnishment

Getty Images v StabilityAI (1:23-cv-00135)

- As for UK, gen AI outputs replicate Getty Images' watermarks

Any questions?

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