Legal Risks in AI Contract Negotiations

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Agenda:

➢ **Hypothetical Negotiation Scenario**

➢ **First Positions**

➢ **Practical Considerations**

➢ **Counter Positions**

➢ **Emerging Issues**

Hypothetical Negotiation Scenario

Ace Insurance wishes to license TechConnect's AI tool

In the bustling city of Metropolis, Ace Insurance, an innovative car insurance provider, has been contemplating ways to enhance its call center operations to drive both sales and customer satisfaction. During a recent fintech trade conference, Ace Insurance representatives encountered a promising startup software provider called TechConnect. TechConnect specializes in leveraging AI technology to revolutionize call center performance. Intrigued by the potential benefits, Ace Insurance engages in discussions with TechConnect to explore how their software could optimize their call center operations.

TechConnect presents Ace Insurance with a suite of cutting-edge tools designed to augment human performance in the call center environment. These tools are powered by advanced algorithms trained on extensive datasets and are continuously refined through iterative learning processes.

Hypothetical Negotiation Scenario

Ace Insurance wishes to license TechConnect's AI tool

The software offers three distinct features:

1. **Real-time Script Guidance:** This tool operates by analyzing ongoing calls in real-time and providing prompts to human call center agents to ensure adherence to scripted dialogue. It identifies missed or skipped segments of the script and offers suggestions for seamless transitions between dialogue points.

2. **Performance Evaluation Metrics:** TechConnect's software includes robust performance evaluation tools that assess the efficacy of human call center agents in closing sales calls. These metrics analyze various parameters such as call duration, customer engagement, and successful conversion rates to generate comprehensive performance scores.

3. **Decision-Making Recommendation Engines:** Leveraging AI-driven decision-making algorithms, this tool evaluates real-time information gleaned from customer interactions to determine the suitability of specific insurance policy add-ons. It provides tailored recommendations to call center agents regarding the viability of upselling certain policy enhancements based on the customer's profile and preferences.

Supplier and Customer "First Positions"

➢ **Disclosure, Diligence, and Ongoing Risk Management and Governance**

➢ **Ownership and Use and Disclosure Rights and Restrictions**

➢ **Performance Warranties (or Disclaimers)**

➢ **Compliance with Laws**

➢ **IP infringement**

Disclosure, Diligence, and Ongoing Risk Management and Governance

➢ **<u>Supplier's Terms:</u>**

- Will include a description of the AI System in the contract <u>*only to the extent necessary*</u> to protect Supplier's ownership of, and disclaim liability relating to, the AI System.

- May not reference any documentation or specification, and if it does, it likely won't be clear whether that specification or documentation will provide any meaningful information about the how the technology operates, or the training or testing data that it is built on.

- Likely will not include any information about Supplier's AI governance framework.

Disclosure, Diligence, and Ongoing Risk Management and Governance

➢ **<u>Customer's Terms:</u>**

- Will require Supplier to provide information about where the AI Systems are in play, and allow Customer be able to ask for (and receive) information relating to AI Systems throughout the contract lifecycle.

- Will require Supplier to conduct ongoing risk assessments and/or audits, provide the results of such assessments and audits to Customer, and mitigate any noncompliance or risks discovered.

- Will provide for some mechanism to allow Customer be able to raise evolving concerns and have Supplier respond to those concerns.

Disclosure, Diligence, and Ongoing Risk Management and Governance

➢ **Customer's Sample Contract Language:**

a) *The AI Systems used to provide the Services are each listed in Exhibit A.*

b) *Supplier shall provide Customer with the Documentation for each AI System, which shall include information relating to the transparency and explainability of the AI System, including (i) a description of the AI System's purpose, (ii) descriptions of the training and testing data, (iii) descriptions of key inputs and sensitivity thereof, (iv) descriptions of limitations and assumptions, (v) information about the testing and monitoring of the AI System, and (vi) and an explanation of how the AI System arrives at a given output. Supplier shall provide thirty days' advance written notice before making any changes to the AI System or the Documentation.*

c) *Customer shall have the right, upon reasonable notice, to audit the AI System in order to verify compliance with this Agreement and applicable law, including by administering its own tests for unintended bias, accuracy, stability, and expected performance.*

Ownership and Use and Disclosure Rights and Restrictions

➢ **Supplier's Terms:**

- Will provide for Supplier's clear ownership of the AI System, including the models and algorithms used in the AI System, and all IP rights in the same.

- Customer Data (which often does not include the outputs from the AI System) will be owned by Customer.

- Will provide the right for Supplier to use the Customer Data to provide, maintain, secure, *develop, and improve* the AI System, and to comply with applicable law and enforce Supplier's terms and policies.

- To the extent there are any data security commitments, they will likely be relatively basic.

Ownership and Use and Disclosure Rights and Restrictions

➢ **Supplier Sample Contract Language:**

a) *Customer may provide inputs or other data into the AI Systems ("Customer Data"). Customer shall retain ownership rights, including all Intellectual Property Rights, to all Customer Data processed under the terms of this Agreement.*

b) *Supplier may access and use Customer Data, and the outputs generated by the AI System therefrom, to provide, maintain, develop, secure, and improve the AI Systems and Supplier's and its affiliates other services, to comply with applicable law and to ensure compliance with this Agreement and Supplier's policies.*

c) *Supplier will maintain commercially reasonable administrative, physical, and technical safeguards for protection of the security, confidentiality, and integrity of Customer Data.*

Ownership and Use and Disclosure Rights and Restrictions

➢ **<u>Customer's Terms:</u>**

- Will contain a broad definition of "Customer Data" that includes output of the AI Systems.

- Will clearly provide Customer with broad ownership rights in the Customer Data, including all IP rights.

- Will include clear restrictions on how Customer Data may be used by Supplier.

- Will require detailed data security requirements, or a requirement to comply with a particular industry standard.

Ownership and Use and Disclosure Rights and Restrictions

➤ **<u>Customer's Sample Contract Language:</u>**

a) *"Customer Data" means, collectively, any and all information, data, materials, works, expressions, or other content owned or provided by or on behalf of Customer to Supplier or its representatives or to which Supplier or its representatives have access. All outputs (including outputs of the AI Systems), copies, reproductions, improvements, modifications, adaptations, translations, and other derivative works of, based on, derived from, or otherwise using any Customer Data are themselves also Customer Data.*

b) *Customer shall retain ownership rights, including all Intellectual Property Rights, to all Customer Data.*

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Ownership and Use and Disclosure Rights and Restrictions

➢ **Customer's Sample Contract Language (cont'd):**

c) *Supplier shall access and use Customer Data only as necessary to provide the AI Systems to Customer. For avoidance of doubt, Supplier shall not access or use, and shall not permit any third party to access or use, any Customer Data to train, validate, update, improve, or modify the AI Systems or any other AI technology without Customer's prior written authorization, which may be withheld or withdrawn at Customer's sole discretion.*

d) *Supplier shall implement and maintain administrative, physical, and technical safeguards to protect Customer Data from unauthorized access, acquisition, or disclosure, destruction, alteration, accidental loss, misuse, or damage that (i) comply with all applicable law and (ii) are no less rigorous than the NIST Cybersecurity Framework.*

Performance Disclaimers or Warranties

➢ **Supplier's Terms:**

- Will provide the AI Systems on an "AS IS" and "AS AVAILABLE" basis and will disclaim all associated warranties.

- Will require that Customer provide warranties with respect to Customer Data, and for Customer to indemnify Supplier for claims related to Customer Data or Customer's use of the AI System.

Performance Disclaimers or Warranties

➢ **Supplier's Sample Contract Language:**

a) *THE AI SYSTEMS ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS, WITHOUT ANY WARRANTIES OF ANY KIND TO THE FULLEST EXTENT PERMITTED BY LAW . . . . CUSTOMER ACKNOWLEDGES THAT SUPPLIER DOES NOT WARRANT THAT THE AI SYSTEMS WILL BE UNINTERRUPTED, TIMELY, SECURE, ACCURATE, ERROR-FREE, OR FREE FROM VIRUSES OR OTHER MALICIOUS SOFTWARE, OR THAT ANY CUSTOMER DATA WILL BE SECURE OR NOT LOST OR ALTERED. CUSTOMER ACCEPTS AND AGREES THAT ANY USE OF OUTPUTS FROM THE AI SYSTEMS IS AT CUSTOMER'S SOLE RISK AND CUSTOMER WILL NOT RELY ON OUTPUTS AS A SOLE SOURCE OF ACCURATE, FACTUAL, OR APPROPRIATE INFORMATION, OR AS A SUBSTITUTE FOR PROFESSIONAL ADVICE.*

b) *Customer represents and warrants that it has all rights, licenses, and permissions needed to provide Customer Data to Supplier and the AI Systems.*

c) *Customer will indemnify and hold harmless Supplier, from and against any costs, losses, liabilities, and expenses (including attorneys' fees) from third-party claims arising out of or relating to Customer Data, Customer's use of the AI Systems, or any violation of this Agreement.*

Performance Disclaimers or Warranties

➢ **<u>Customer's Terms:</u>**

- Will include numerous representations and warranties regarding the AI System's performance, including its conformance to the documentation, noninfringement, security/no viruses, etc.,

- Will include an obligation for Supplier to indemnify Customer for any breach of those reps and warranties.

Performance Disclaimers or Warranties

➢ **Customer Sample Contract Language:**

a) *Supplier represents and warrants that: (i) the AI Systems operate and perform in conformance with the Documentation and applicable law; (ii) Supplier has all necessary rights and permissions, including ownership and licenses, to make the AI Systems available to Customer (including with respect to the data used for training and testing the AI System) and for the Customer to use the AI Systems as described in the Documentation; (iii) the AI Systems do not contain any viruses, malware, etc. that could otherwise damage the Customer's systems or data; . . . .*

b) *Supplier will indemnify and hold harmless Customer from and against any costs, losses, liabilities, and expenses (including attorneys' fees) from third-party claims arising out of or relating to Supplier's breach of any representations or warranties concerning the AI Systems.*

Compliance with Laws

➢ **Supplier's Terms**

Will require Customer to use the AI Systems in compliance with all applicable law but will not place any obligation for it to comply with law.

➢ **Supplier Contract Sample Language**

Customer will ensure that its use of the AI Systems is compliant with all Applicable Laws as well as any and all applicable privacy notices, agreements or other obligations.

Compliance with Laws

➤ **<u>Customer's Terms</u>:**

Will include a representation that the AI Systems, and Customer's use of the AI Systems in accordance with the Documentation, will comply with all applicable laws.

➤ **<u>Customer Sample Contract Language</u>:**

Supplier represents and warrants that <mark>the AI Systems, and Customer's receipt, use, and possession of the AI Systems in accordance with the Documentation, comply with all Applicable Laws</mark>, including Privacy Laws.

Intellectual Property Infringement

➢ **Supplier's Terms**

- Will indemnify Customer for third-party claims that the code underlying the AI Systems infringes such third party's IP rights, but will have no obligation to otherwise indemnify Customer, including to the extent a claim relates to Customer Data fed into the AI Systems or the outputs produced as a result of Customer's use of the System.

- Will also include an indemnity from Customer for infringement claims arising from Customer Data (addressed above).

➢ **Supplier Contract Sample Language**

Supplier will defend Customer against any third-party claim alleging that the code underlying the AI Systems infringes or misappropriates that third party's intellectual property rights and will pay the amount of any adverse final judgment or settlement. Supplier will have no other obligations or liability with respect to any other claim, including those that allege the AI Systems' processing of Customer Data, or the output generated from such processing, alone or in combination, infringe or misappropriate another party's intellectual property rights.

Intellectual Property Infringement

➢ **<u>Customer's Terms</u>:**

Will include a blanket infringement indemnity for the AI Systems, including the training, development, provision, and maintenance/updates to the AI Systems, and including all input data and output data, but excluding claims resulting from Customer Data to the extent such claims would not have arisen <u>*but for*</u> the Customer Data.

➢ **<u>Customer Sample Contract Language</u>:**

Supplier will defend Customer against any third-party claim alleging that the AI Systems, or any training, development, provision, or maintenance/updates to the AI Systems, or any input data or output data, infringes or misappropriates such third party's intellectual property rights and will pay the amount of any adverse final judgment or settlement; provided, however, that Supplier will have no liability or obligation under this Section with respect to any such claim that results directly from Customer Data, to the extent such claim would not have arisen but for the Customer Data.
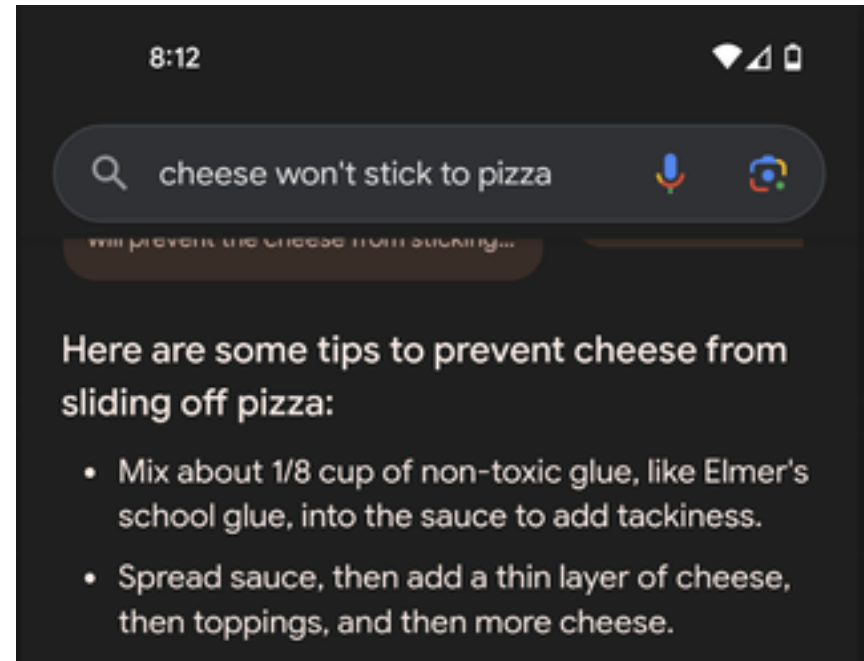
Practical Considerations:

➢ **Who controls what?**   ➢ **Who owns what?**

➢ **Where will problems arise?**

The core irony of generative AIs is that AIs were supposed to be all logic and no imagination...
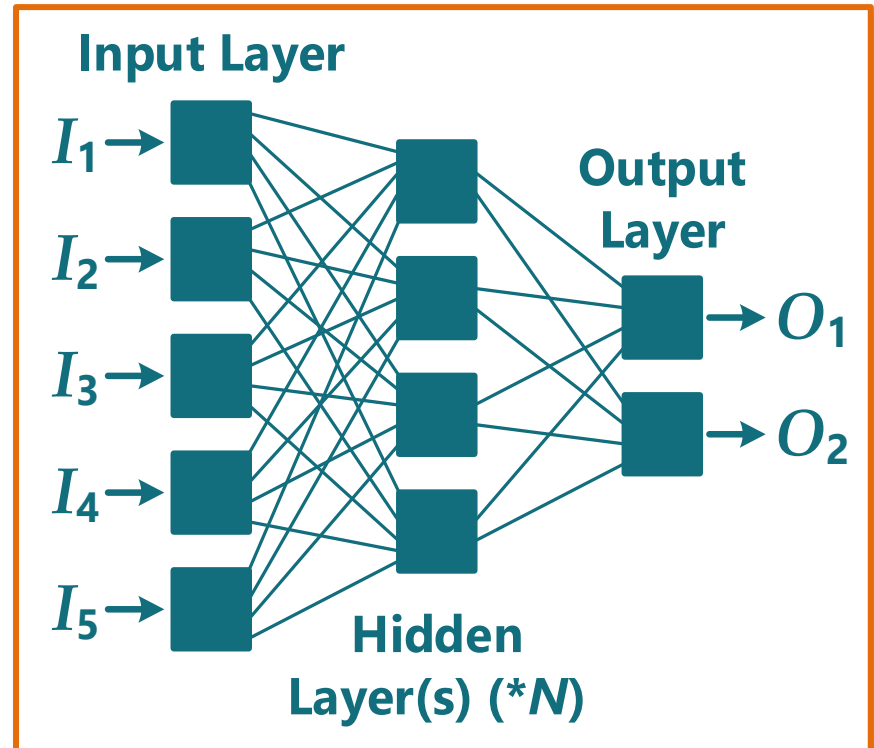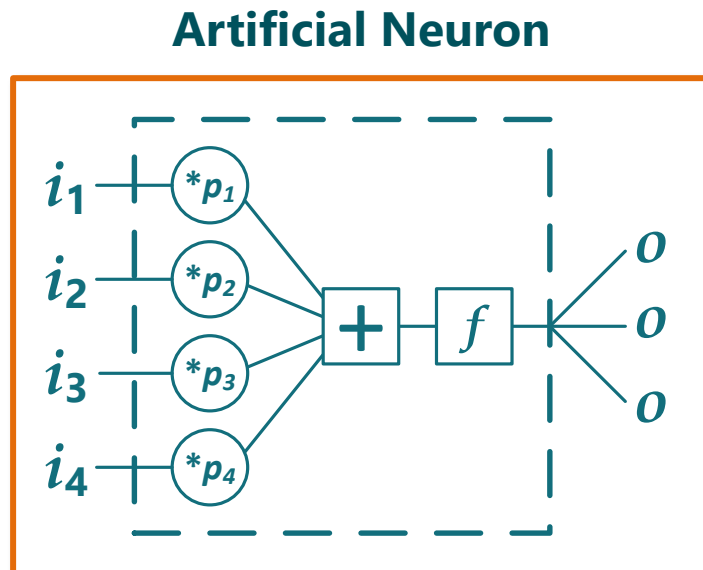
~ Ethan Mollick, PhD, MBA the Wharton School

8:12

🔍 cheese won't stick to pizza

will prevent the cheese from sticking...

Here are some tips to prevent cheese from sliding off pizza:

- Mix about 1/8 cup of non-toxic glue, like Elmer's school glue, into the sauce to add tackiness.
- Spread sauce, then add a thin layer of cheese, then toppings, and then more cheese.

https://www.oneusefulthing.org/p/automating-creativity

https://www.tomshardware.com/tech-industry/artificial-intelligence/cringe-worth-google-ai-overviews

Practical Considerations:

➤ **Building blocks**
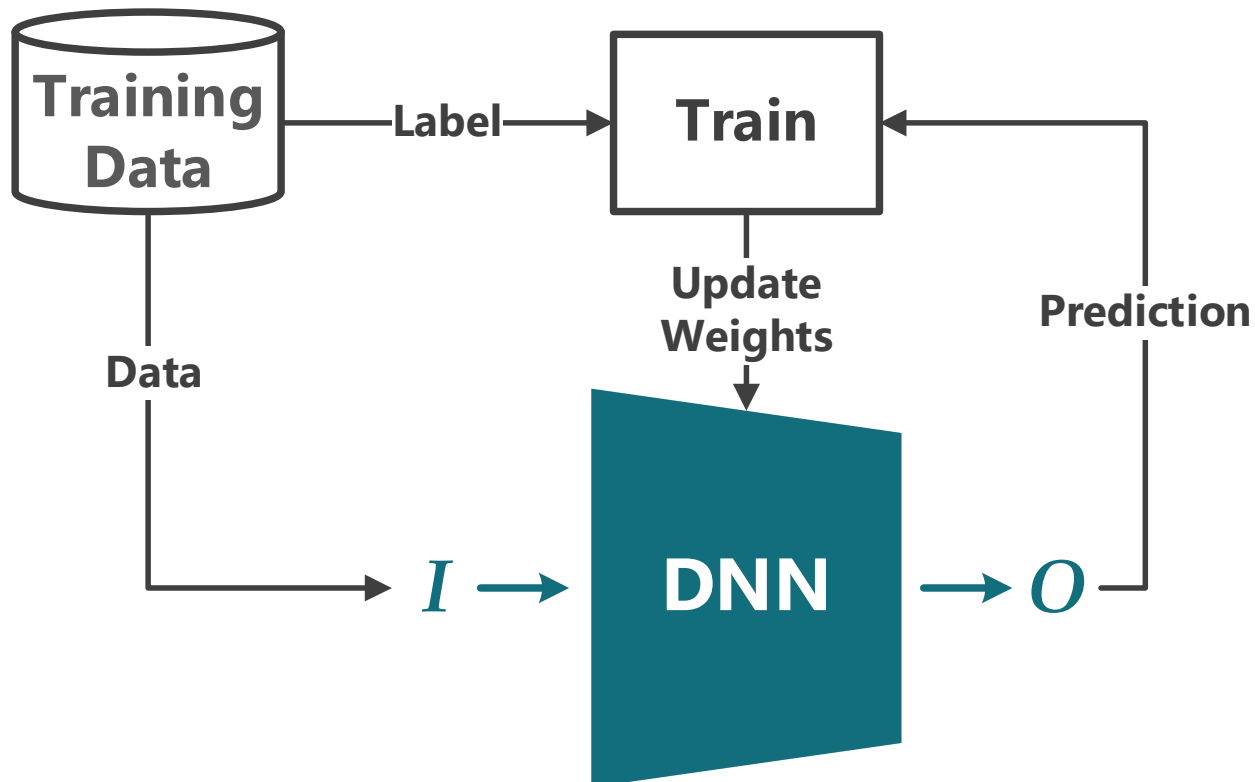
Neural Network

Artificial Neuron

McCulloch & Pitts, *A Logical Calculus of the Ideas Immanent in Nervous Activity*, Bulletin of Mathematical Biophysics 5:115-133, 1943
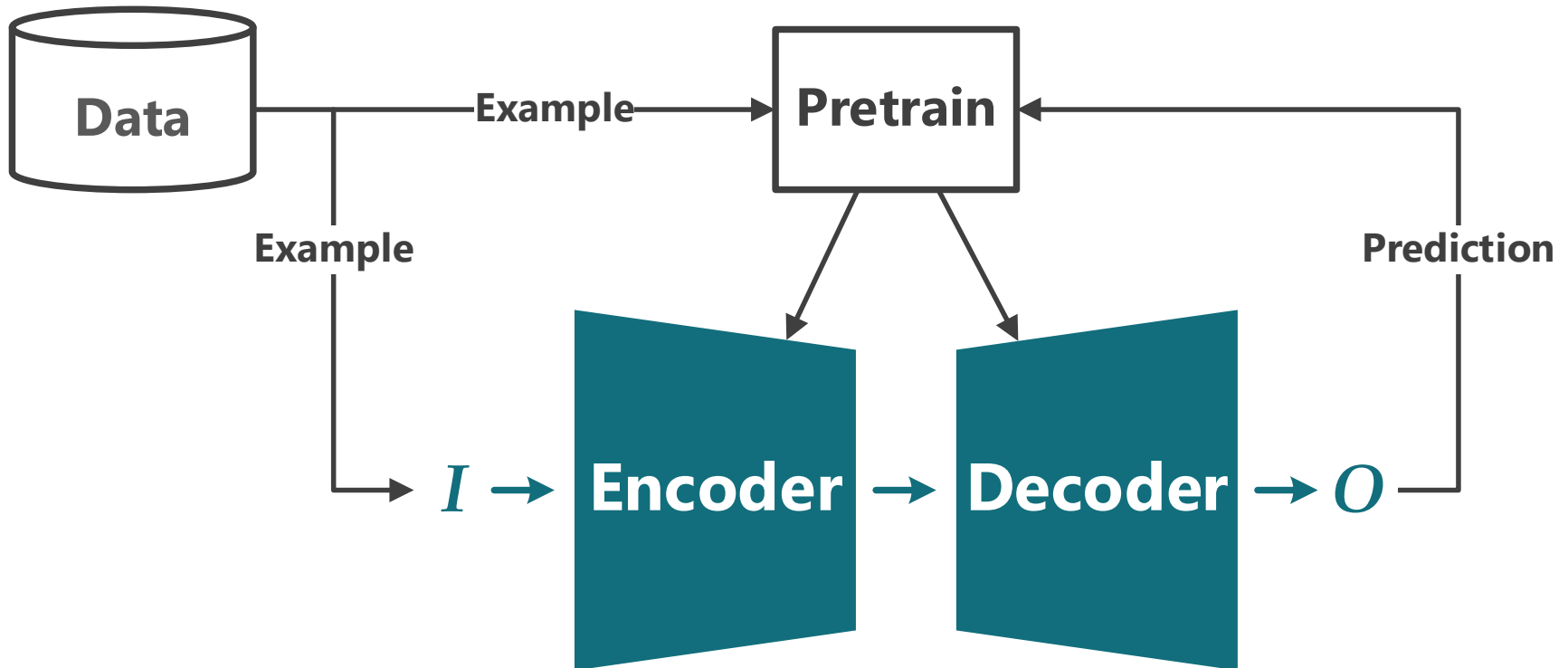
Practical Considerations:
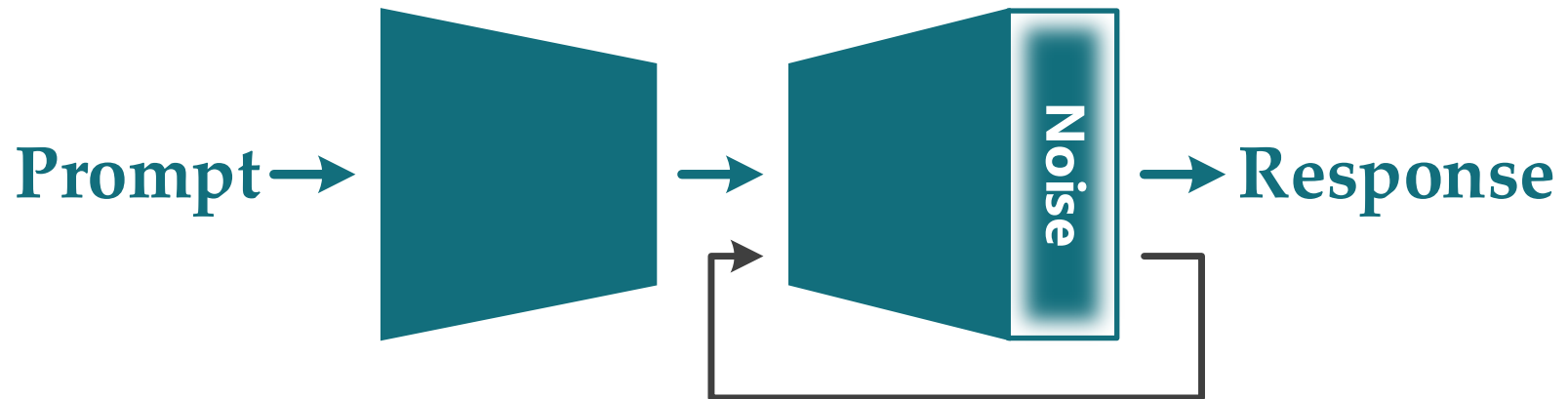
➢ **Training**

Practical Considerations:

➤ **Unsupervised training**

Mark A. Kramer, *Nonlinear Principal Component Analysis Using Autoassociative Neural Networks*, 1991

Practical Considerations:

➢ **A generative model adds randomness**

Prompt → [model] → [model with Noise] → Response
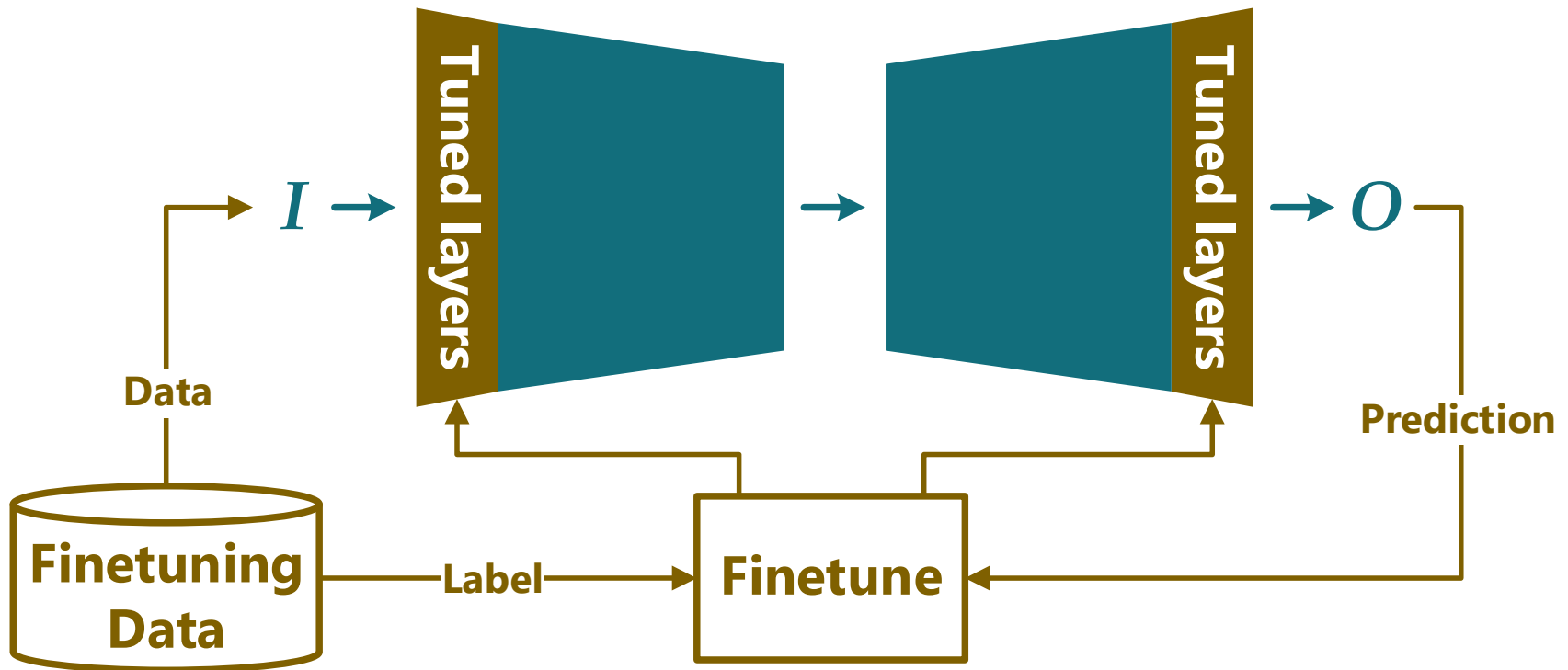
Attention Is All You Need: https://arxiv.org/abs/1706.03762 Vaswani et al., Google, 2017

Practical Considerations:

➤ **Finetuning / validation**

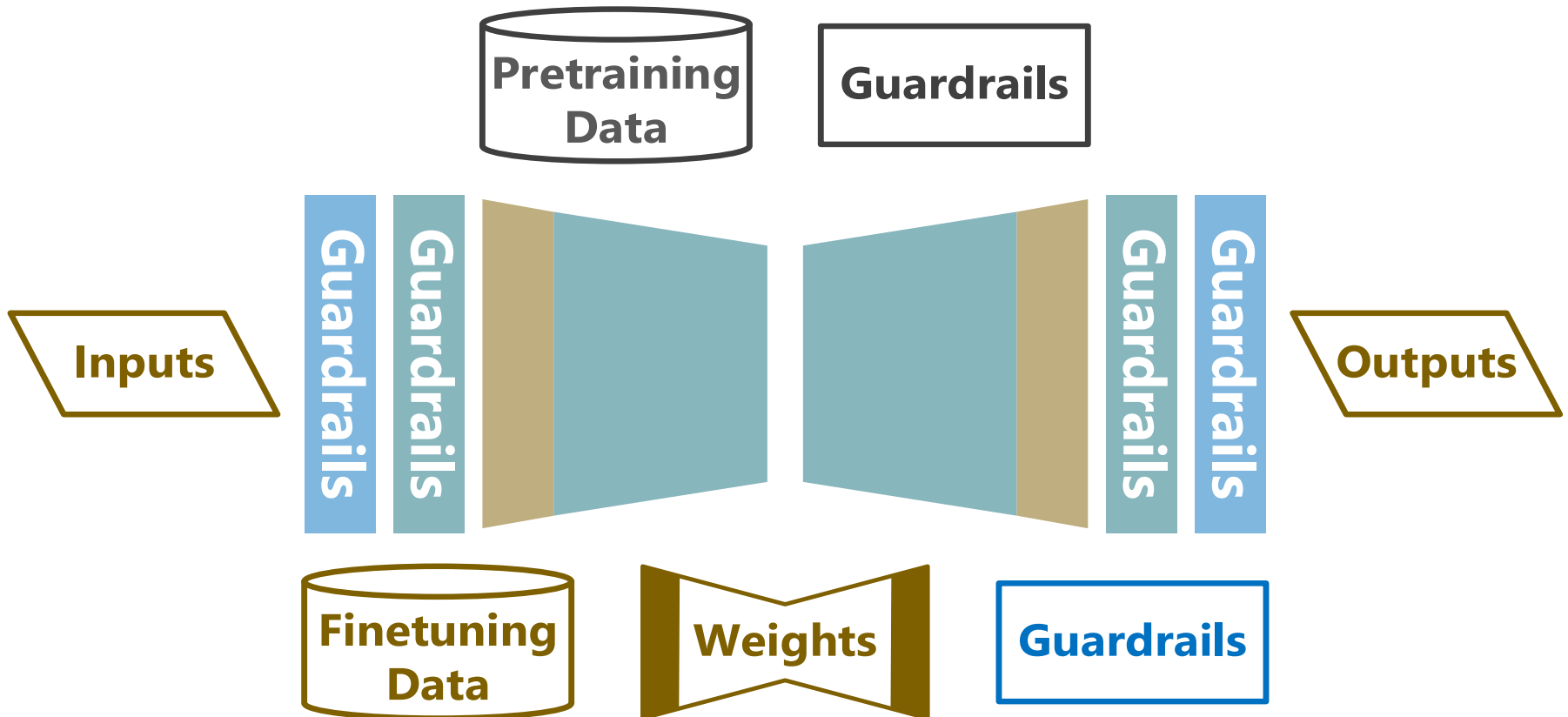*"In my defense, I was left unsupervised."* ~Anonymous

Practical Considerations:

➤ **Guardrails**
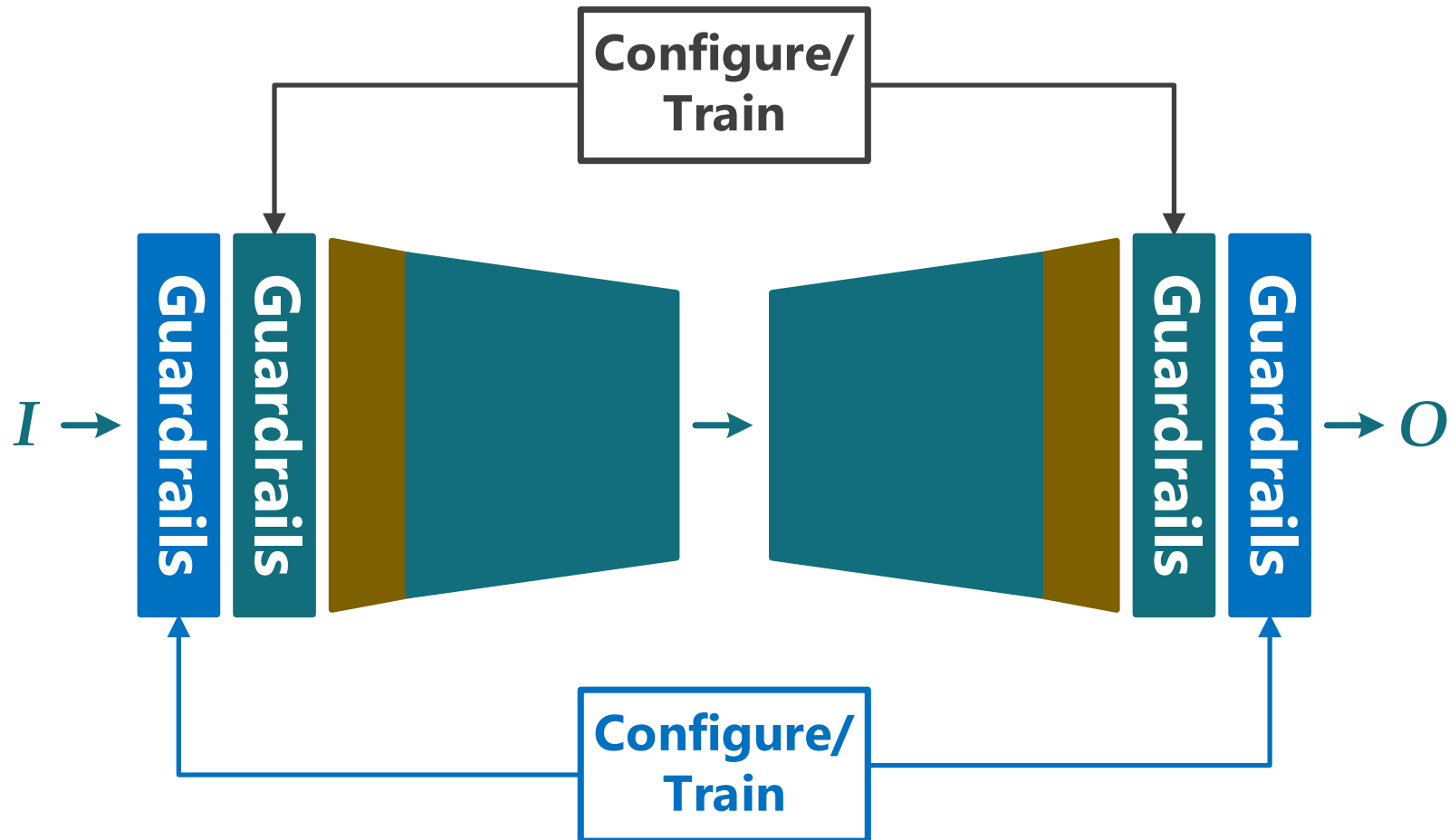
Practical Considerations:

➤ **Who controls/owns what?**

Counter Positions:

➢ **Disclosure, Diligence, and Ongoing Risk Management and Governance**

➢ **Ownership and Use and Disclosure Rights and Restrictions**

➢ **Performance Warranties (or Disclaimers)**

➢ **Compliance with Laws**

➢ **IP infringement**

Counter Positions:

➢ **IP infringement**

Customer's sample contract language:

Supplier will defend Customer against any third-party claim alleging that the AI Systems, or any training, development, provision, or maintenance/updates to the AI Systems, or any input data or output data, infringes or misappropriates such third party's intellectual property rights and will pay the amount of any adverse final judgment or settlement; provided, however, that Supplier will have no liability or obligation under this Section with respect to any such claim that results directly from Customer Data, to the extent such claim would not have arisen but for the Customer Data.

Counter Positions:

➢ **IP infringement:** <u>Amazon</u>

7. Indemnification.

   7.2 Intellectual Property.

   (a) Subject to the limitations in this Section 7, AWS will defend you and your employees, officers, and directors against any third-party claim alleging that the Services infringe or misappropriate that third party's intellectual property rights, and will pay the amount of any adverse final judgment or settlement.

   (b) Subject to the limitations in this Section 7, you will defend AWS, its affiliates, and their respective employees, officers, and directors against any third-party claim alleging that any of Your Content infringes or misappropriates that third party's intellectual property rights, and will pay the amount of any adverse final judgment or settlement.

https://aws.amazon.com/agreement/

Counter Positions:

➤ **IP infringement:** Microsoft

Microsoft Copilot Copyright Commitment
If a third party sues a commercial customer for copyright infringement for using Microsoft's Copilots or the output they generate, we'll defend the customer and pay the amount of any adverse judgments or settlements that result from the lawsuit, as long as the customer used the guardrails and content filters we have built into our products.

https://learn.microsoft.com/en-us/copilot/microsoft-365/microsoft-365-copilot-privacy

Counter Positions:

➢ **IP Infringement
[From Performance Warranties (or Disclaimers)]**

Customer's sample contract language:

a) *Supplier represents and warrants that: ... (ii) Supplier has all necessary rights and permissions, including ownership and licenses, to make the AI Systems available to Customer (including with respect to the data used for training and testing the AI System) and for the Customer to use the AI Systems as described in the Documentation...*

b) *Supplier will indemnify and hold harmless Customer from and against any costs, losses, liabilities, and expenses (including attorneys' fees) from third-party claims arising out of or relating to Supplier's breach of any representations or warranties concerning the AI Systems.*

Counter Positions:

➤ **IP Infringement:** OpenAI

<u>November, 2023:</u>

10. Indemnification

10.1 *By Us.* We agree to defend and indemnify you for any damages finally awarded by a court of competent jurisdiction and any settlement amounts payable to a third party arising out of a third party claim alleging that the Services (including training data we use to train a model that powers the Services) infringe any third party intellectual property right.

<u>August, 2023:</u>

10. Indemnification

10.1 *By Us*. We agree to indemnify, defend, and hold you harmless against any liabilities, damages and costs (including reasonable attorneys' fees) payable to a third party arising out of a third party claim alleging that the Services infringe any third party intellectual property right.

https://openai.com/policies/business-terms/   https://openai.com/policies/aug-2023-business-terms/

Counter Positions:

➤ **Ownership and Use and Disclosure...**

Customer's sample contract language:

c) Supplier shall access and use Customer Data only as necessary to provide the AI Systems to Customer. For avoidance of doubt, ==Supplier shall not access or use==, and shall not permit any third party to access or use, ==any Customer Data to train, validate, update, improve, or modify the AI Systems== or any other AI technology without Customer's prior written authorization...

Counter Positions:

➤ **Ownership and Use and Disclosure:** OpenAI and MS

OpenAI:

3.2 *Our Obligations for Customer Content*. We will process and store Customer Content in accordance with our Enterprise privacy commitments. We will only use Customer Content as necessary to provide you with the Services, comply with applicable law, and enforce OpenAI Policies. We will not use Customer Content to develop or improve the Services.

Microsoft:

Prompts, responses, and data accessed through Microsoft Graph aren't used to train foundation LLMs, including those used by Microsoft Copilot for Microsoft 365.

https://openai.com/policies/business-terms/

https://learn.microsoft.com/en-us/copilot/microsoft-365/microsoft-365-copilot-privacy

Counter Positions:

➤ **Ownership and Use and Disclosure:** <u>NVIDIA</u>

11. **DATA COLLECTION.**

11.1 <u>Collection Purposes</u>. Customer acknowledges that AI Products may collect data for the following purposes: (a) properly configure and optimize products for use with AI Products; (b) deliver content or service through AI Products; (c) check for compliance with the license or detect fraud or other malicious activity; and (d) improve NVIDIA products and services.

Information collected may include: (i) configuration data; (ii) operating system; (iii) installed applications and drivers used with AI Products; and (iv) application settings, performance and usage data. With Customer's consent, diagnostic data, including crash reports, may be collected.

12. **OWNERSHIP, ATTRIBUTION AND FEEDBACK.**

12.2 <u>Customer Ownership</u>. Subject to the rights of NVIDIA and its suppliers in AI Products, Customer holds all rights, title and interest in and to Customer's services, applications and Derivative Samples and Derivative Models Customer develops as permitted in the Agreement including their respective Intellectual Property Rights.

https://www.nvidia.com/en-us/data-center/products/nvidia-ai-enterprise/eula/

Emerging Issues:
Risk Management Frameworks and Industry Standards

➢ **Evolving regulatory focus on distinct obligations for _developers and deployers_ and on _risk management_**

- **Colorado AI Act (enacted May 2024, effective Feb 2026)**

  - **Largely focused on preventing algorithmic discrimination in high-risk AI systems**

  - **Applies to "developers" and "deployers"**

  - **More lenience (e.g., affirmative defense to enforcement) given to companies in compliance with NIST AI RMF or ISO/IEC 42001**

Emerging Issues:
Risk Management Frameworks and Industry Standards

NIST AI Risk Management Framework	ISO 42001 AI Management System
• Voluntary framework published by U.S. government • Focuses on ensuring responsible design, development and deployment of AI systems • Not as tailor-made for third-party audit/certification, but also getting traction in U.S. laws	• Certifiable framework published by International Organization for Standardization • Focuses on ensuring responsible design, development and deployment of AI systems • Compare to ISO 27001, which focuses on systematic identification and management of information security risks

Emerging Issues:
Risk Management Frameworks and Industry Standards

NIST AI Risk Management Framework ("govern / map/ measure / manage")

Harm to People	Harm to an Organization	Harm to an Ecosystem
• Individual: Harm to a person's civil liberties, rights, physical or psychological safety, or economic opportunity. • Group/Community: Harm to a group such as discrimination against a population sub-group. • Societal: Harm to democratic participation or educational access.	• Harm to an organization's business operations. • Harm to an organization from security breaches or monetary loss. • Harm to an organization's reputation.	• Harm to interconnected and interdependent elements and resources. • Harm to the global financial system, supply chain, or interrelated systems. • Harm to natural resources, the environment, and planet.

Safe | Secure & Resilient | Explainable & Interpretable | Privacy-Enhanced | Fair - With Harmful Bias Managed | Accountable & Transparent

Valid & Reliable

Source: NIST AI RMF Framework

Emerging Issues:
Risk Management Frameworks and Industry Standards

NIST AI Risk Management Framework ("govern / map/ measure / manage")

Source: NIST AI RMF Framework

Emerging Issues:
Risk Management Frameworks and Industry Standards

NIST AI Risk Management Framework ("govern / map/ measure / manage")

GOVE[RN]
and pr[o]
in plac[e]
AI risk[s]
arising
t[...]
a[...]
s[...]

MEASURE 1: Appropriate methods and metrics are identified and applied.

MEASURE 1.1: Approaches and metrics for measurement of AI risks enumerated during the **MAP** function are selected for implementation starting with the most significant AI risks. The risks or trustworthiness characteristics that will not – or cannot – be measured are properly documented.

MANAGE 3: AI risks and benefits from third-party entities are managed.

MANAGE 3.1: AI risks and benefits from third-party resources are regularly monitored, and risk controls are applied and documented.

MANAGE 3.2: Pre-trained models which are used for development are monitored as part of AI system regular monitoring and maintenance.

the AI system, and affected communities are consulted in support of assessments as necessary per organizational risk tolerance.

Source: NIST AI RMF Framework

Emerging Issues:
Risk Management Frameworks and Industry Standards

➤ **Examples of third-party assurance**

- **Impact Assessments**
  - **E.g., impact assessment conducted by developer and supplied to deployer**

- **Testing / Validation / Conformity Assessment**
  - **E.g., conformity assessment to evaluate whether an AI product adheres to an established set of requirements before it is placed on the market**

- **Audits and Certifications**
  - **E.g., certification that AI system is managed in accordance with ISO 42001**

Presenters

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