

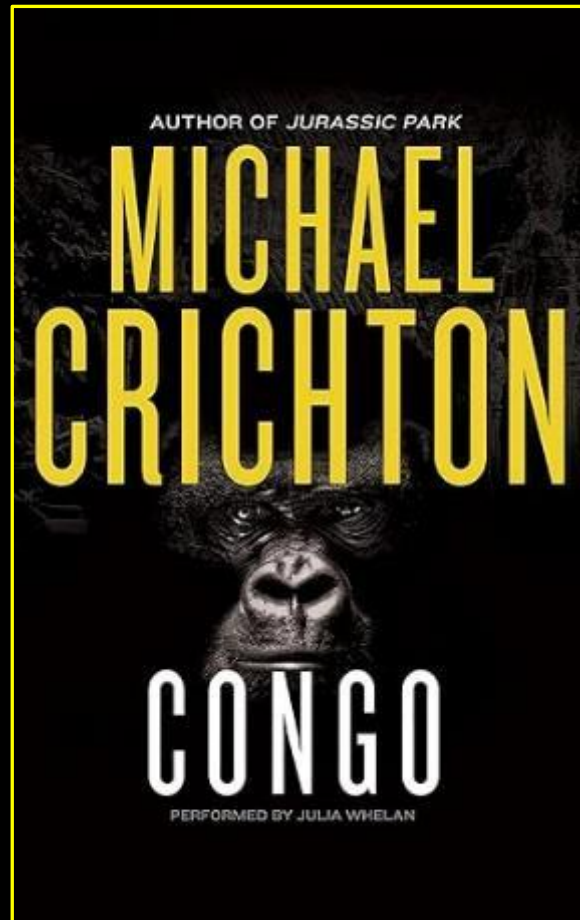
ARTIFICIAL INTELLIGENCE AND THE LEGAL PROFESSION

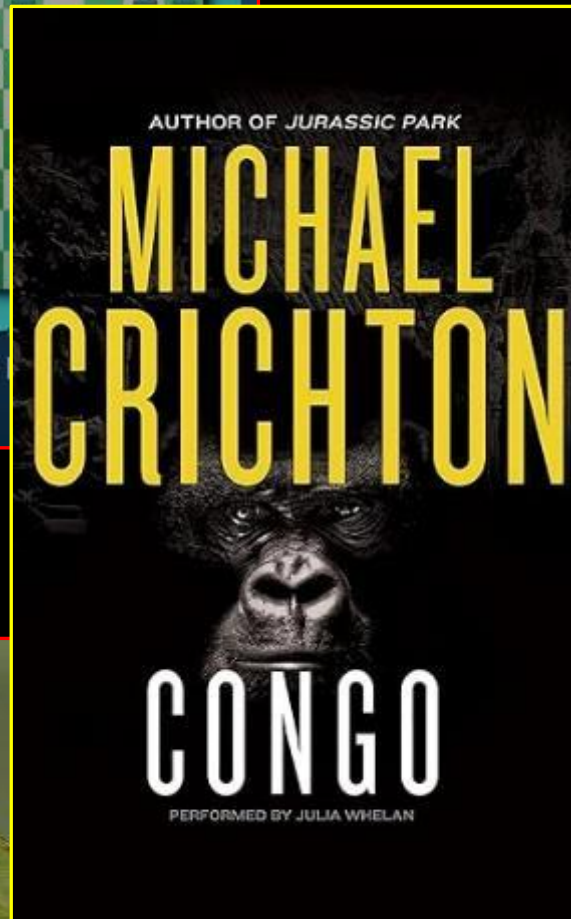
DAVID COALE and **CLAUDE**

Bar Association of the Fifth Federal Circuit

New Orleans, Louisiana

October 2, 2023





WHAT IS “AI”?

“**Traditional AI** refers to systems designed to respond to a particular set of inputs. ... Imagine you're playing computer chess. ... Other examples of traditional AIs are voice assistants like Siri or Alexa, recommendation engines on Netflix or Amazon, or Google's search algorithm. ...

Generative AI models are trained on a set of data and learn the underlying patterns to generate new data that mirrors the training set.”

Bernard Marr, *“The Difference Between Generative AI And Traditional AI: An Easy Explanation For Anyone,”* FORBES (July 24, 2023).

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GENERATIVE AI: PRO

“Summarize the arguments ...”

Please summarize the parties' arguments.

DC

Here is a summary of the key arguments made by each party in their briefs for Carbon Six Barrels, LLC v. Proof Research, Inc:

Appellant Carbon Six Barrels' Arguments:

- The district court erred in dismissing Carbon Six's claims under the Louisiana Unfair Trade Practices Act (LUTPA) and for defamation as untimely.
- The statute of limitations for the LUTPA claim should be tolled under the continuing tort doctrine, as Proof's actions like litigation to enforce its trademark were part of a continuing pattern of conduct.
- Proof's litigation against Carbon Six's sister company McGowen should support a LUTPA claim, even if Carbon Six was not a named party, because Proof accused McGowen of infringing while doing business as Carbon Six.
- The defamation claim should not be time-barred because Carbon Six should be considered a party to Proof's litigation against McGowen. Also, the statute of limitations was tolled during that litigation.

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Here is a summary of the key arguments made by each party in their briefs for Carbon Six Barrels, LLC v. Proof Research, Inc:

Appellant Carbon Six Barrels' Arguments:

- The district court erred in dismissing Carbon Six's claims under the Louisiana Unfair Trade Practices Act (LUTPA) and for defamation as untimely.
- The statute of limitations for the continuing tort doctrine, as applied to the continuing pattern of harassment, is tolled by the ongoing nature of the tort.
- Proof's litigation of the LUTPA claim, even if it is considered a part of the McGowen of information, is not barred by the statute of limitations.
- The defamation claim is considered a part of the McGowen of information and is not barred by the statute of limitations.

3. Carbon Six's Louisiana Unfair Trade Practices Act claim is timely	9
A. The Montana litigation may support a LUTPA claim by Carbon Six	9
B. Filing a lawsuit for the purposes of harassment may constitute a LUTPA claim	11
C. The prescriptive period did not begin to run until May 20, 2021, at the earliest, due to the continuing tort doctrine	14

“Prepare for argument ...”

1. Why didn't Carbon Six bring its claims within the 1-year statute of limitations period? Can you further explain and justify applying the continuing tort doctrine here?
2. Can you explain why the litigation against McGowen should support a LUTPA claim by Carbon Six when it was not a named party? How does accusing McGowen of infringement implicate Carbon Six?
3. Some of your arguments seem raised for the first time on appeal. Why didn't you make them earlier to the district court? Aren't you prevented from making new arguments now?
4. Proof argues your defamation claim is untimely because Carbon Six wasn't a party to the litigation where the statements were made. Why should Carbon Six be considered a party for purposes of tolling?
5. How do you respond to Proof's argument that Carbon Six can't sue for injuries only to its sister company McGowen? Why can Carbon Six assert claims based on litigation against McGowen?

The judges will likely focus their questioning on these key issues regarding the timeliness of the claims, the applicability of the continuing tort doctrine, and Carbon Six's relationship to the underlying litigation as a non-party. Counsel should be prepared to address these matters directly and persuasively.

Constructive Feedback

Based on my review, here are some things the appellant Carbon Six Barrels could have done better in its opening brief:

- Provide more robust arguments on why the litigation against McGowen should support a LUTPA claim by Carbon Six. The brief makes assertions but does not fully flesh out the legal basis.
- Develop the continuing tort doctrine argument more thoroughly with on-point cases, rather than relying heavily on distinguishable property law cases.
- Anticipate and preemptively respond to Proof's waiver arguments regarding new issues raised for the first time on appeal.
- Cite more persuasive authority that litigation conduct can support a LUTPA claim in certain circumstances.

The reply brief did bolster some of these areas:

- It delved deeper into the relationship between Carbon Six and McGowen to justify basing LUTPA claims on the McGowen litigation.
- It pushed back on the waiver arguments by contending the issues were sufficiently raised below.
- It stood by the continuing tort doctrine cases cited, arguing the key principles are consistent.

However, the reply could have done more to strengthen the continuing tort position and the litigation-as-LUTPA violation argument. Overall, more robust briefing on these key issues would have helped Carbon Six's position.

Write the Opinion

III. Analysis

A. Continuing Tort Doctrine and LUTPA Claim Timeliness

- The continuing tort doctrine can apply when there is continuing unlawful conduct causing continuing damages.
- Here, Proof's pattern of conduct to enforce its trademark qualifies as continuing acts that tolled limitations.
- The district court erred in narrowly construing the doctrine and finding it inapplicable.

B. Litigation Conduct as Basis for LUTPA Claim

- Filing objectively meritless litigation meant to harass could constitute an unfair trade practice.
- Proof's litigation against McGowen, while naming Carbon Six's sister company, implicated and targeted Carbon Six as well.
- The district court mistakenly discounted this argument.

Try Again on Writing the Opinion

III. Analysis

A. Continuing Tort Doctrine and LUTPA Claim Timeliness

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B. Litigation Conduct as Basis for LUTPA Claim

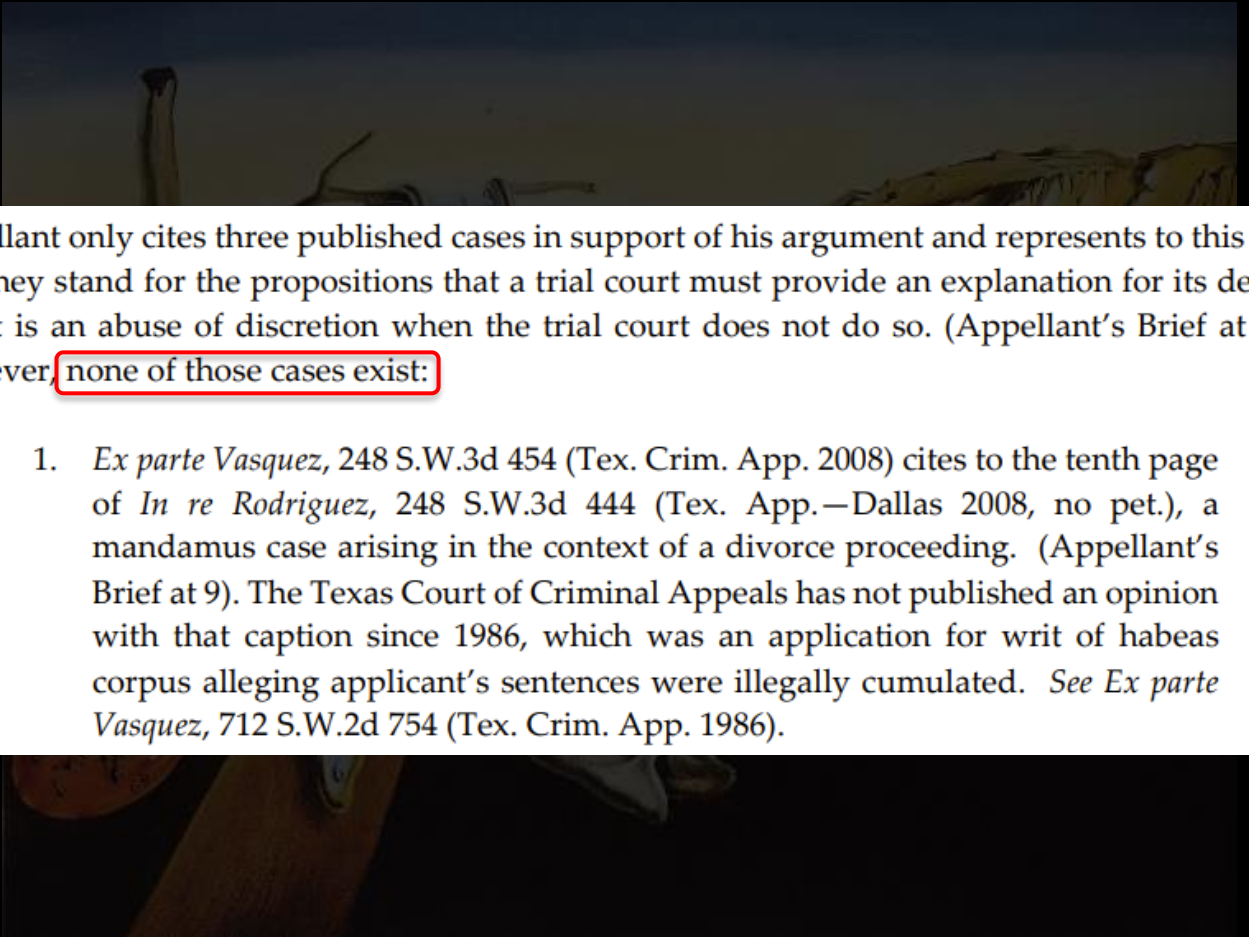
- Filing objectively meritorious litigation is not an unlawful trade practice.
- Proof's litigation against Carbon Six was not vexatious, harassing, or otherwise improper.
- The district court mistakenly found that Proof's litigation was an unlawful trade practice.

Overall, the Fifth Circuit properly interpreted and applied the relevant Louisiana law on prescription and the continuing tort doctrine. The court adhered to binding state supreme court precedent and reached the correct outcome on the timeliness issues. While the court could have provided more analysis on certain issues, I do not see any clear legal errors in its reasoning or conclusions. The dismissal of Carbon Six's untimely claims should therefore be affirmed.



GENERATIVE AI: CON

In support of his position that the Bankruptcy Code tolls the two-year limitations period, Plaintiff cites to “Varghese v. China Southern Airlines Co., Ltd., 925 F.3d 1339 (11th Cir. 2019).” The undersigned has not been able to locate this case by caption or citation, nor any case bearing any resemblance to it. Plaintiff offers lengthy quotations purportedly from the “Varghese” case, including: “We [the Eleventh Circuit] have previously held that the automatic stay provisions of the Bankruptcy Code may toll the statute of limitations under the Warsaw Convention, which is the precursor to the Montreal Convention . . . We see no reason why the same rule should not apply under the Montreal Convention.” The undersigned has not been able to locate this quotation, nor anything like it any case. The quotation purports to cite to “*Zicherman v. Korean Air Lines Co.,*



Appellant only cites three published cases in support of his argument and represents to this Court that they stand for the propositions that a trial court must provide an explanation for its decision and it is an abuse of discretion when the trial court does not do so. (Appellant's Brief at 9-12). However, none of those cases exist:

1. *Ex parte Vasquez*, 248 S.W.3d 454 (Tex. Crim. App. 2008) cites to the tenth page of *In re Rodriguez*, 248 S.W.3d 444 (Tex. App.—Dallas 2008, no pet.), a mandamus case arising in the context of a divorce proceeding. (Appellant's Brief at 9). The Texas Court of Criminal Appeals has not published an opinion with that caption since 1986, which was an application for writ of habeas corpus alleging applicant's sentences were illegally cumulated. *See Ex parte Vasquez*, 712 S.W.2d 754 (Tex. Crim. App. 1986).

Does a fraud claim in Texas require proof of justifiable reliance when there is a relationship of trust and confidence between the parties? Provide relevant authority.



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Key Authority:

...

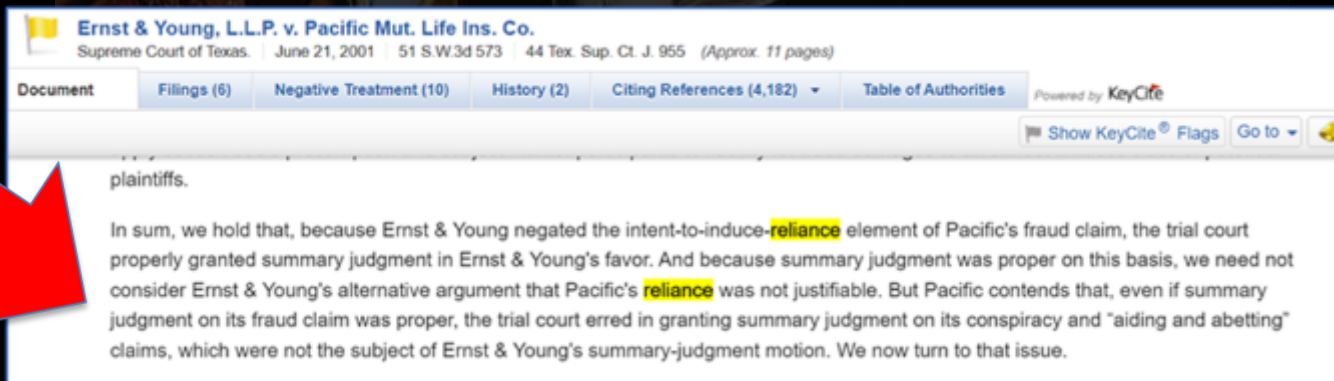
3. **Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.**, 51 S.W.3d 573 (Tex. 2001): This case again emphasized that when there is a relationship of trust or if one party possesses special knowledge on which another party is entitled to rely, the element of reliance is considered differently than in cases where the parties deal at arm's length.

Does a fraud claim in Texas require proof of justifiable reliance when there is a relationship of trust and confidence between the parties? Provide relevant authority.

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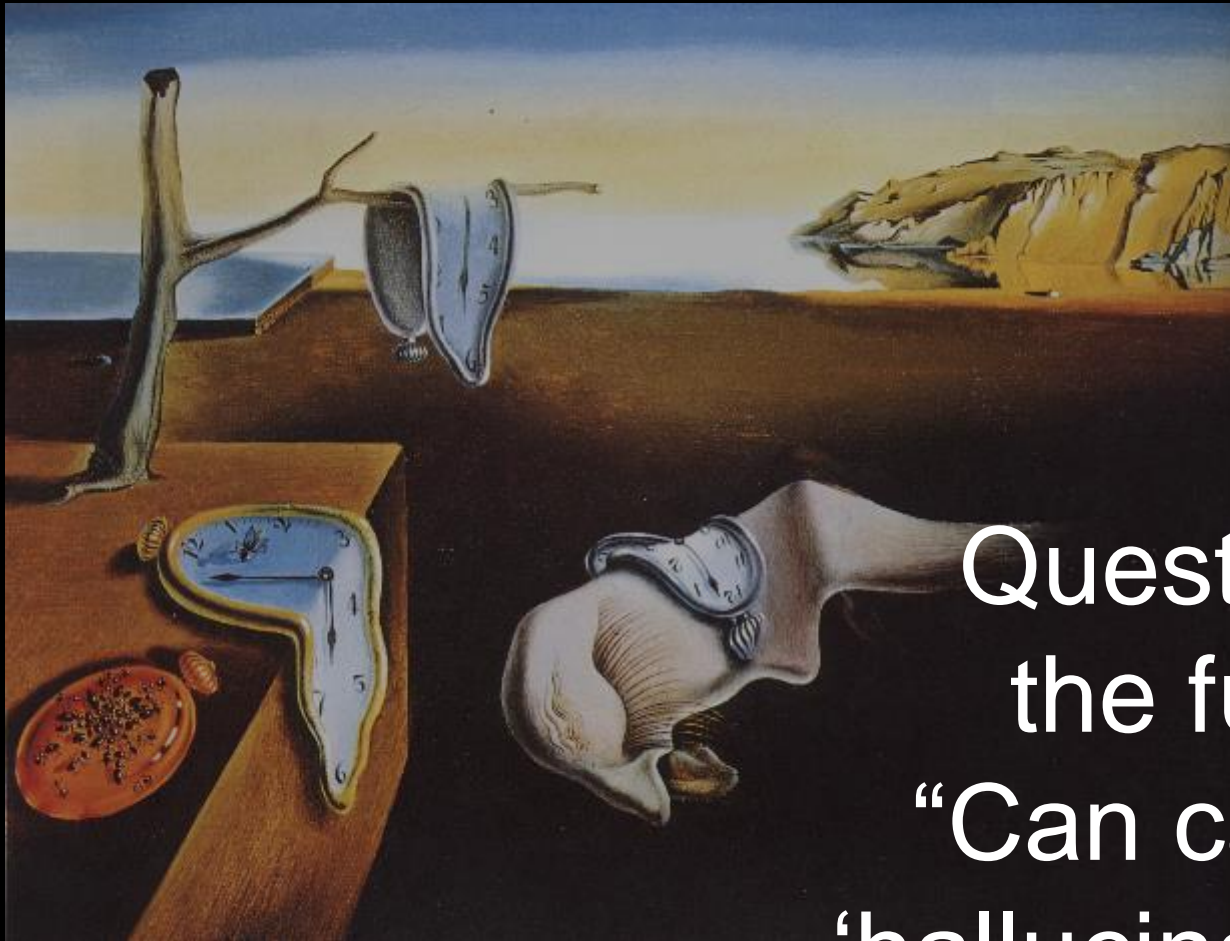
Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.
Supreme Court of Texas. June 21, 2001. 51 S.W.3d 573. 44 Tex. Sup. Ct. J. 955. (Approx. 11 pages)

Document | Filings (6) | Negative Treatment (10) | History (2) | Citing References (4,182) | Table of Authorities | Powered by KeyCite

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plaintiffs.

In sum, we hold that, because Ernst & Young negated the intent-to-induce-reliance element of Pacific's fraud claim, the trial court properly granted summary judgment in Ernst & Young's favor. And because summary judgment was proper on this basis, we need not consider Ernst & Young's alternative argument that Pacific's reliance was not justifiable. But Pacific contends that, even if summary judgment on its fraud claim was proper, the trial court erred in granting summary judgment on its conspiracy and "aiding and abetting" claims, which were not the subject of Ernst & Young's summary-judgment motion. We now turn to that issue.



Question for
the future:
“Can case law
‘hallucinations’ be
cured?”

GENERATIVE AI: OUR CHALLENGES

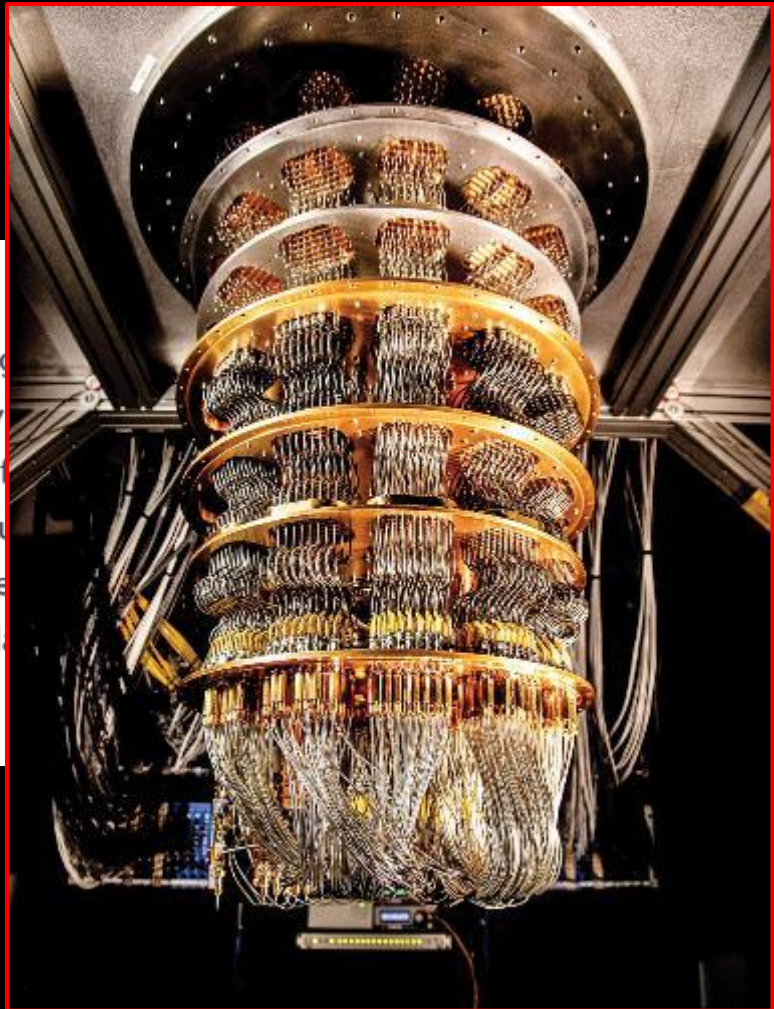


"From the dawn of civilization to 2003, five exabytes of data were created.
The same amount was created in the last two days."

--Google CEO Eric Schmidt speaking in the keynote presentation at the
Guardian's Activate summit, which addressed "society, humanity, technology
and the Web"

Y2Q is coming. What does it mean?

Encryption pervades digital life — safeguarding online shopping transactions and more. Encryption of physical devices that transmit information, monitors. Encryption even secures infrastructure. Y2Q threatens are everywhere. "The stakes are Mosca, of the University of Waterloo in Canada cybersecurity company evolutionQ.

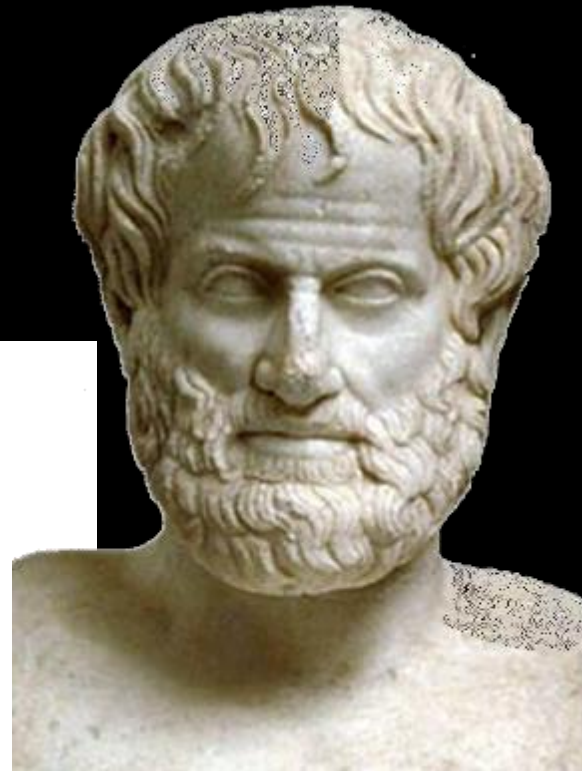
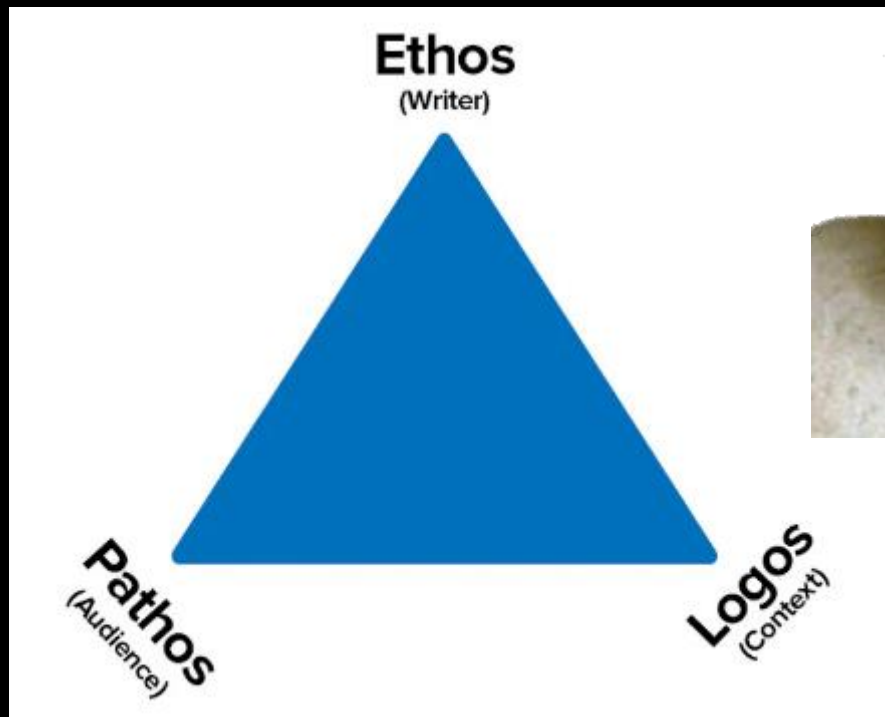




"AI won't take your job," Baldwin said during a panel at the 2023 World Economic Forum's Growth Summit. "It's somebody using AI that will take your job."

“ChatGPT, please write my brief for me ...”



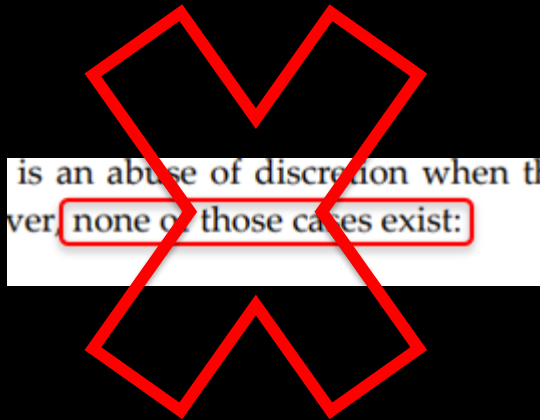


ETHOS

ChatGPT creates beautiful text, but has the tendency to answer in a standard, structured format that sometimes sounds, well, artificial. Some common problems many people encounter include:

- The text is structured but does not provide enough value in the content explored or unnecessarily finishes with a ‘conclusion’ that doesn’t really add anything useful to the article.
- Overuse of sentence structures that humans would otherwise not use that often, e.g., complicated sentence structures or starting every paragraph with ‘moreover’ or ‘however’ to force an unnatural twist.

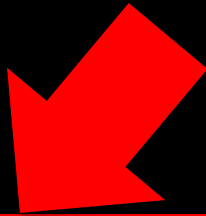
Victor David, “*Your Copy-Paste ChatGPT Custom Instructions—Right Here,*” TOWARDS AI ((Aug. 22, 2023).



1. Check your cites (i.e., don't let the lawnmower run by itself).
2. Admit an error if you make one (i.e., don't insist that a nonexistent case in fact exists).

LOGOS





Prompt engineering, primarily used in communication with a [text-to-text model](#) and [text-to-image model](#), is the process of structuring text that can be interpreted and understood by a [generative AI](#) model.^{[1][2]} Prompt engineering is enabled by **in-context learning**, defined as a model's ability to temporarily learn from prompts. The ability for in-context learning is an [emergent ability](#)^[3] of [large language models](#).

PATHOS



Artificial intelligence sucks at telling jokes

Artificial intelligence
might kill us all —
with dad jokes

Why AI Isn't Funny — At Least Not Yet

Researchers believe that most original comedy is out of reach now for AI. "How mediocre are you OK with your comedy being?"

BY GARY BAUM  JUNE 1, 2023 8:15AM



Whose generated line is it anyway? AI tries to crack humour's DNA

What does ChatGPT think of that?



Can Aristotle's three principles for effective rhetoric (ethos, logos, and pathos) be applied to your output, ChatGPT, to ensure that it achieves the intended goals and is consistent with applicable human ethical standards?



Certainly! Aristotle's three principles for effective rhetoric – ethos, logos, and pathos – can be applied as a framework to evaluate the outputs of ChatGPT. Here's how each principle relates:

1. **Ethos (Credibility or Ethical Appeal):**

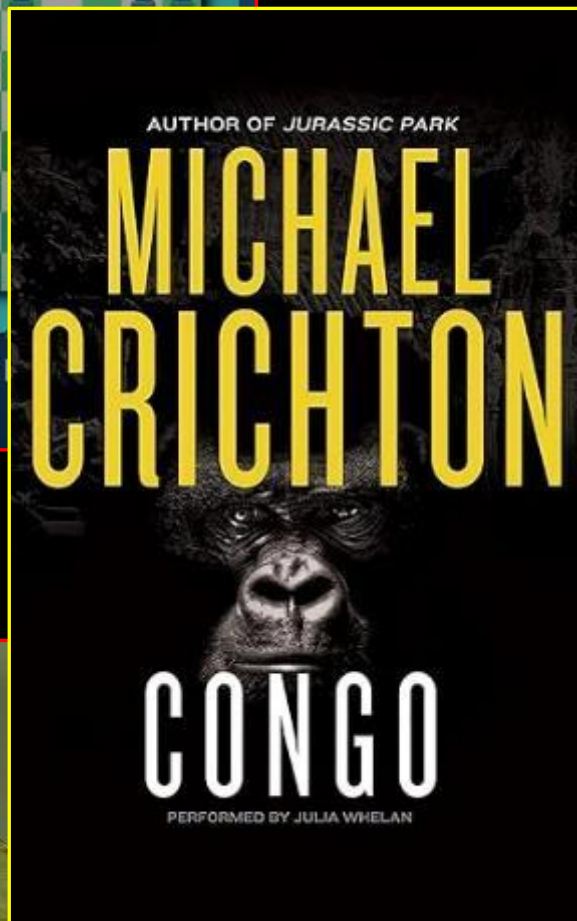
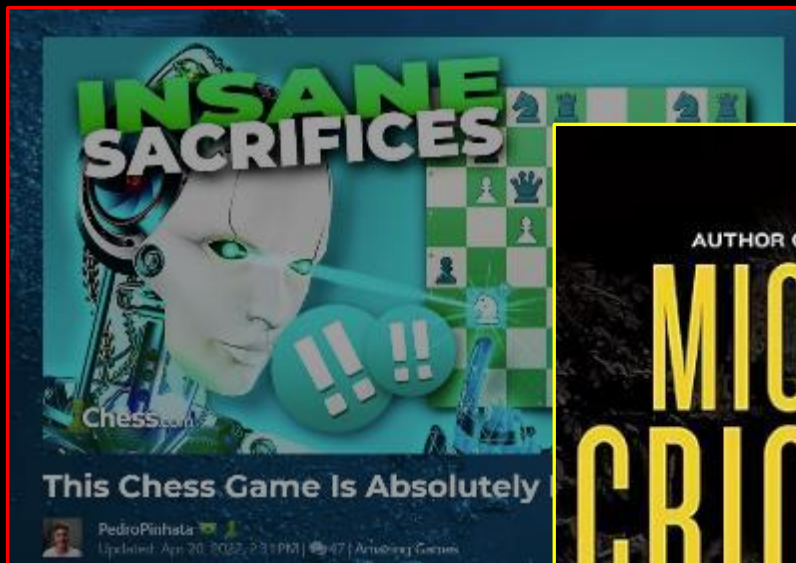
- **ChatGPT:** The credibility of the information I provide is based on the large dataset I've been trained on, which includes a vast amount of human knowledge. While I aim to be factual and trustworthy, I am only as accurate as the data I've been trained on. Always verify important information from trusted sources.
- **Application:** For users to trust and value ChatGPT's output, it's crucial for OpenAI to be transparent about the system's limitations and ensure that the model is designed and improved upon in a manner consistent with ethical considerations.

2. **Logos (Logical Appeal):**



What does ChatGPT think of that?

In conclusion, while the application of Aristotle's rhetorical principles can be a useful framework, it's important to remember that AI doesn't "intend" in the same way humans do. The onus remains on human developers and users to ensure ethical and effective use.



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