

Generative AI

Legal implications in a rapidly changing environment

Weil

ACC Association of
Corporate Counsel
— NATIONAL CAPITAL REGION —

ChatGPT's advice

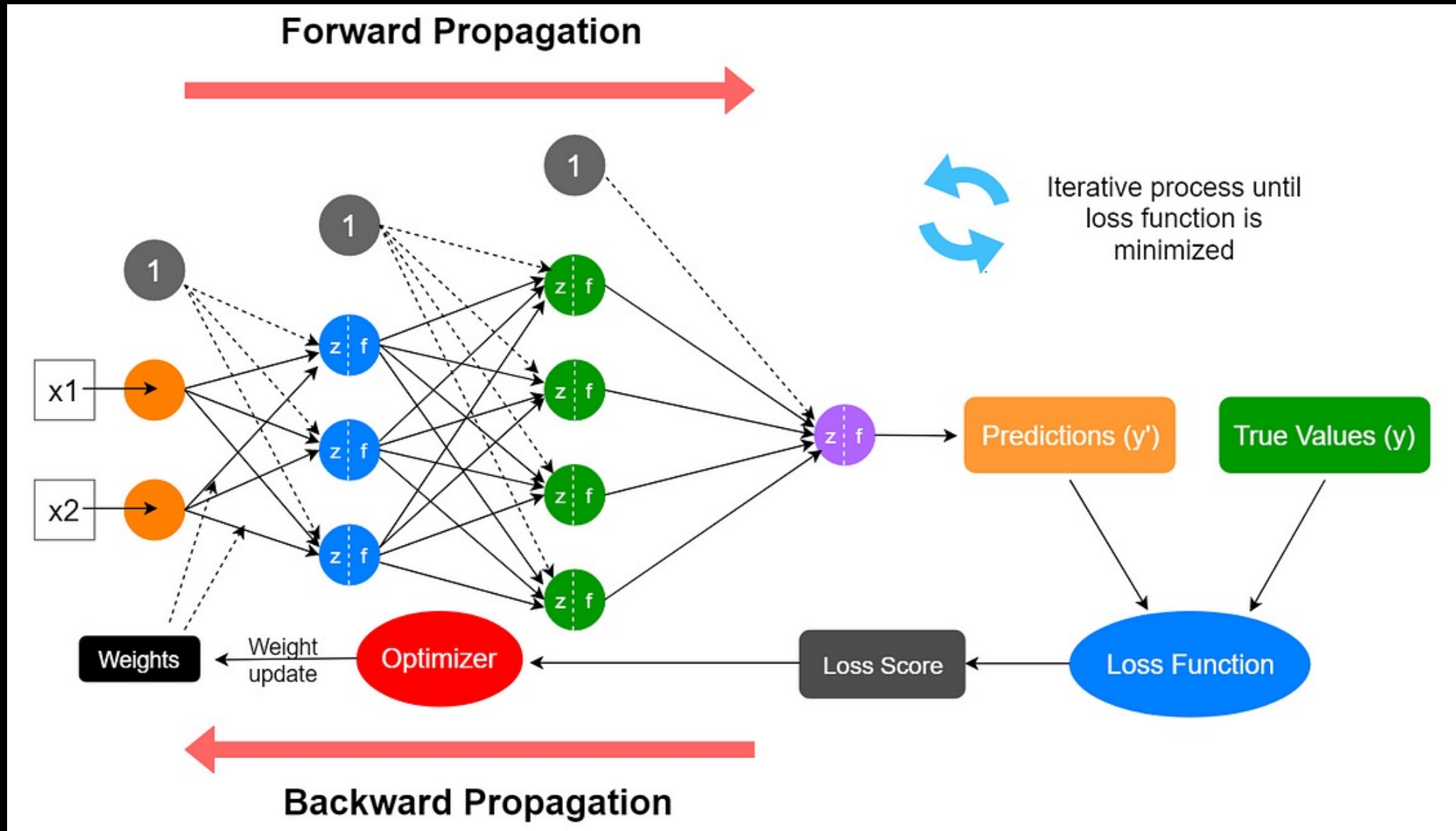
 ZACK

I'm giving a talk to a group of in-house counsel about legal risks and implications of using generative AI. How should I approach the talk and what should I say?

 CHATGPT

That's a great topic and here's a potential approach for your talk:

1. **Introduction to Generative AI:** Start by explaining what generative AI is, its functioning, and its common applications. Make sure to highlight prominent examples like GPT, StyleGAN, and DeepArt. Understanding the technology will help your audience appreciate the legal risks involved.

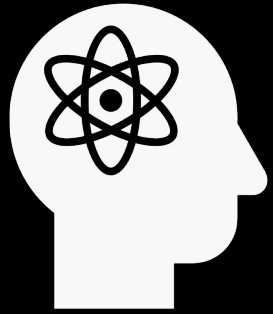


What is AI?

- Turing proposed that a human would judge natural language conversations between a human and a machine designed to generate human-like responses.
- If the evaluator could not reliably tell the machine from the human, the machine would be said to have passed the test.
- The “Imitation Game” or “Turing test”

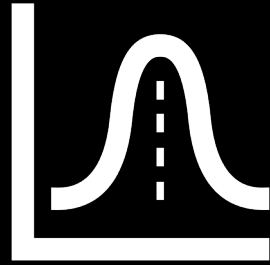


What does generative AI do?



Converts
human
knowledge
into tokens

+

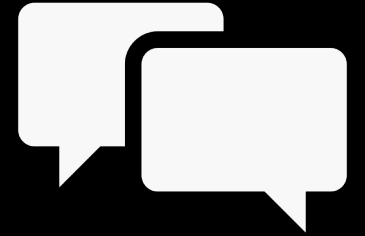


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Refines the model
with RLHF
(Reinforcement
Learning
from
Human
Feedback)

+



Generates
the most
likely
response to
queries
using
session-
based
prompting

Generative AI responds to a series of prompts by returning a sequence of the most likely tokens.

Generative AI returns text that is the most likely response to your query.

Complete the sequence

To be or not to be that is the question

Opportunities

Countless use cases

Chatbots

Drafting

Document review and summarization

Natural language research

Always learning

Limitations

Always learning

Confidentiality

Not a search engine

Hallucinations

Bias

Black box

The New York Times

Here's What Happens When Your Lawyer Uses ChatGPT

By Benjamin Weiser

May 27, 2023

A lawyer representing a man who sued an airline relied on artificial intelligence to help prepare a court filing. It did not go well.

Hallucinations and Rule 11

Mata v. Avianca, ____ F.Supp.3d ____,
2023 WL 4114965 (SDNY June 22, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
ROBERTO MATA,

Plaintiff,

-against-

AVIANCA, INC.,

Defendant.
-----X

22-cv-1461 (PKC)

OPINION AND ORDER
ON SANCTIONS

Mr. Schwartz testified at the sanctions hearing that when he reviewed the reply memo, he was “operating under the false perception that this website [i.e., ChatGPT] could not possibly be fabricating cases on its own.” (Tr. at 31.) He stated, “I just was not thinking that the case could be fabricated, so I was not looking at it from that point of view.” (Tr. at 35.) “My reaction was, ChatGPT is finding that case somewhere. Maybe it’s unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up.” (Tr. at 33.)

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other

and the Levindow
response to the
Orders to Show Cause submitted to the Court, it included three of the fake cases in its Table of Authorities. (ECF 45.)

5. The filing of papers “without taking the necessary care in their preparation” is an “abuse of the judicial system” that is subject to Rule 11 sanction. Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 398 (1990). Rule 11 creates an “incentive to stop, think and investigate more carefully before serving and filing papers.” Id. (quotation marks omitted). “Rule 11 ‘explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed.’” AJ Energy LLC v. Woori Bank, 829 Fed. App’x 533, 535 (2d Cir. 2020) (summary order) (quoting Gutierrez v. Fox, 141 F.3d 425, 427 (2d Cir. 1998)).

a. Mr. LoDuca violated Rule 11 in not reading a single case cited in his March 1 Affirmation in Opposition and taking no other steps on his own to check whether any aspect of the assertions of law were warranted by existing law. An inadequate or inattentive “inquiry” may be unreasonable under the circumstances. But signing and filing that affirmation after making no “inquiry” was an act of subjective bad faith.

Disclosure requirements

ORDERED that *any* submission in a case assigned to Judge Vaden that contains text drafted with the assistance of a generative artificial intelligence program on the basis of natural language prompts, including but not limited to ChatGPT and Google Bard, must be accompanied by:

- (1) A disclosure notice that identifies the program used and the specific portions of text that have been so drafted;
- (2) A certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party; and it is further

Judge Vaden standing order (June 8, 2023)

ChatGPT

2. **Potential Legal Risks:** Next, delve into the legal risks associated with generative AI. Some key areas could be:

- **Intellectual Property:** Talk about copyright issues if an AI creates a piece of content. Who owns it – the AI, the operator, or the programmer? Discuss cases like that of the “Monkey Selfie” to show how complex this can become.
- **Data Privacy:** The training data used by generative AI can sometimes include personal or sensitive information. Discuss GDPR and other privacy laws, and their potential implications.
- **Liability:** When AI causes harm, who is responsible? Is it the AI, the programmer, or the user?

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KASHTANOVA
MIDJOURNEY

ZARYA OF THE DAWN



United States Copyright Office

Library of Congress • 101 Independence Avenue SE • Washington DC 20559-6000 •
www.copyright.gov

February 21, 2023

Van Lindberg
Taylor English Duma LLP
21750 Hardy Oak Boulevard #102
San Antonio, TX 78258

Previous Correspondence ID: 1-5GB561K

Re: Zarya of the Dawn (Registration # VAu001480196)

Dear Mr. Lindberg:

The United States Copyright Office has reviewed your letter dated November 21, 2022, responding to our letter to your client, Kristina Kashtanova, seeking additional information concerning the authorship of her work titled *Zarya of the Dawn* (the “Work”). Ms. Kashtanova had previously applied for and obtained a copyright registration for the Work, Registration # VAu001480196. We appreciate the information provided in your letter, including your description of the operation of the Midjourney’s artificial intelligence (“AI”) technology and how it was used by your client to create the Work.

The Office has completed its review of the Work’s original registration application and deposit copy, as well as the relevant correspondence in the administrative record.¹ We conclude that Ms. Kashtanova is the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the Work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created.

Zaraya of the Dawn copyrightability analysis

- A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a).
- “Courts interpreting the phrase ‘works of authorship’ have uniformly limited it to the creations of human authors.”
- The Copyright Office “will refuse to register a claim if it determines that a human being did not create the work.”
- “[T]he Office concludes that the images generated by Midjourney contained within the Work are not original works of authorship protected by copyright.... Though she claims to have ‘guided’ the structure and content of each image, the process [Kashtanova] described ... makes clear that it was Midjourney—not Kashtanova—that originated the ‘traditional elements of authorship’ in the images.

Intellectual property risks



Fair use in AI

- Fair use violations in training and output require analysis of four-factor test:
 - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- 17 U.S.C. 107

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Fair use risks

Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023).

- QP: When the Warhol Foundation licenses a painting of Prince to illustrate an article about Prince, does that share the same purpose and character as the original photograph?
- A: Yes. 7-2 (Sotomayor, J.). The use of the two images was essentially the same. We do not decide whether Warhol lawfully made the painting in the first place.



71. Getty Images is further entitled to recover from Stability AI the damages it has sustained and will sustain as a result of the infringing acts alleged above, together with any additional profits obtained by Stability AI. The amount of such damages and profits cannot be fully ascertained by Getty Images at present but will be established according to proof at trial.

72. For any infringing acts occurring after registration of the applicable Getty Images' copyrights, Getty Images is entitled, at its election, as an alternative to an award of actual damages and any additional profits earned by Stability AI, to recover statutory damages of up to \$150,000 for each infringed work.

Data privacy

How your data is used to improve model performance

Learn more about OpenAI's data usage policies for our API, ChatGPT and DALL-E



Written by Yaniv Markovski

Updated over a week ago


One of the most useful and promising features of AI models is that they can improve over time. We continuously improve our models through research breakthroughs as well as exposure to real-world problems and data. When you share your data with us, it helps our models become more accurate and better at solving your specific problems and it also helps improve their general capabilities and safety. We don't use data for selling our services, advertising, or building profiles of people—we use data to make our models more helpful for people. ChatGPT, for instance, improves by further training on the conversations people have with it, unless you choose to disable training.

Liability risks

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.


 Share full article



Sam Altman runs OpenAI, the start-up behind the ChatGPT chatbot. Joel Saget/Agence France-Presse — Getty Images

Tesla Autopilot and Other Driver-Assist Systems Linked to Hundreds of Crashes

The National Highway Traffic Safety Administration released data on 10 months of crashes involving cars with automated components. A few were fatal.

 Share full article



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Tesla Autopilot is among the advanced driver-assistance systems being scrutinized by the National Highway Traffic Safety Administration. Christopher Goodney/Bloomberg

ChatGPT

3. **Ethical Considerations:** Briefly discuss some ethical dilemmas with AI, like the manipulation of public opinion with AI-generated fake news, deepfakes, and AI bias.
4. **Regulatory Landscape:** Discuss existing and proposed regulations around AI in different jurisdictions. Highlight the European Union's proposal for the Artificial Intelligence Act, which aims to regulate AI usage.

Privacy risks and bias

What Can You Do When A.I. Lies About You?

People have little protection or recourse when the technology creates and spreads falsehoods about them.

VICE News

High Schoolers Made a Racist Deepfake of a Principal Threatening Black Students

When A.I. Chatbots Hallucinate

The EU's Proposed AI Act

Risk Classification	Examples	Regulation
Unacceptable Risk	<ul style="list-style-type: none">▪ Social scoring by governments▪ Verbal toys that encourage dangerous behavior	Banned
High Risk	<ul style="list-style-type: none">▪ Critical infrastructure▪ Vocational training (i.e. exam scoring)▪ Essential services (i.e. credit scoring for loans)<ul style="list-style-type: none">▪ Law enforcement▪ Democratic processes	<ul style="list-style-type: none">▪ Risk assessments & mitigation▪ Quality of datasets▪ Logging/traceability▪ Transparency to users<ul style="list-style-type: none">▪ Human oversight▪ Security & accuracy
Limited Risk	<ul style="list-style-type: none">▪ Chatbots	<ul style="list-style-type: none">▪ Transparency
Minimal/No Risk	<ul style="list-style-type: none">▪ Video games▪ Spam filters	General “market surveillance” by regulators

U.S. Federal Regulation

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State and local regulation

States and localities are already regulating AI for bias and privacy:

- California Consumer Privacy Act
- Virginia Consumer Data Privacy Act
- New York City regulation of "automated employment decision tools"

Many more in the pipeline

Focus on policy and governance

Colorado proposed regulations establishing “governance and risk management requirements” for use of AI by life insurers to avoid race discrimination in underwriting. 3 CCR 702-4 (proposed May 26, 2023).

Proposed regs focus on policy, governance, and process:

- Document governing principles regarding values and objectives
- Board-level oversight
- Senior management responsibility and accountability for policies
- Prioritize risks and inventory use cases
- Establish protocols for testing (and document testing)
- Establish process for selection and oversight of vendors

Rev. Reg. § 5

ChatGPT

5. **Best Practices for In-House Counsel:** Provide practical steps that counsel can take to minimize these risks. These could include conducting thorough due diligence before using AI, ensuring data privacy and security measures are in place, and staying updated on relevant legal and regulatory developments.
6. **Future Outlook:** Discuss what legal professionals predict for the future of AI legislation and what it means for companies. Include possible changes in copyright law, privacy regulations, and international treaties.
7. **Q&A Session:** End the talk with a Q&A session to answer queries and discuss practical scenarios or cases your audience may be dealing with.

Best practices

This is the future

Stay informed

Learn different use cases

Due diligence on vendors

Privacy policies and transparency

IP licensing

Monitoring, audits and feedback

Risks by industry

Government contractors

Financial services

Technology

Healthcare

Weil