

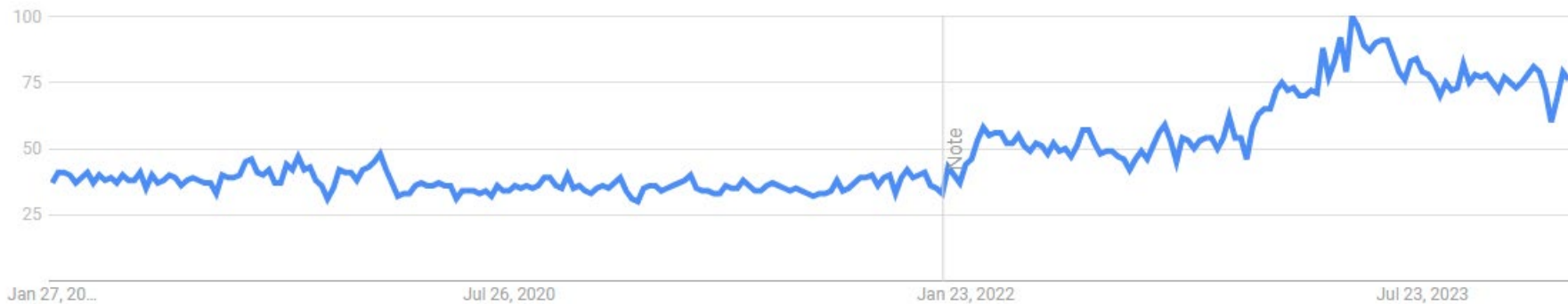


Generative AI & the Law: Overview of the Key Legal & Ethical Issues

April 9, 2024

Google Worldwide Search Queries for “Artificial Intelligence”

Interest over time [?](#)



Presenters



Tammy Zhu
tammy@runwayml.com



Paven Malhotra
pmalhotra@keker.com



Matan Shacham
mshacham@keker.com



Julia Greenberg
jgreenberg@keker.com

Agenda

1. Introduction to Artificial Intelligence & Machine Learning
2. Overview of Government Regulations, Legislation & Enforcement
3. Overview of Private Litigation
4. Ethical Considerations

Agenda

1. Introduction to Artificial Intelligence & Machine Learning
2. Overview of Government Regulations, Legislation & Enforcement
3. Overview of Private Litigation
4. Ethical Considerations

What's new?

Generative AI

Artificial Intelligence

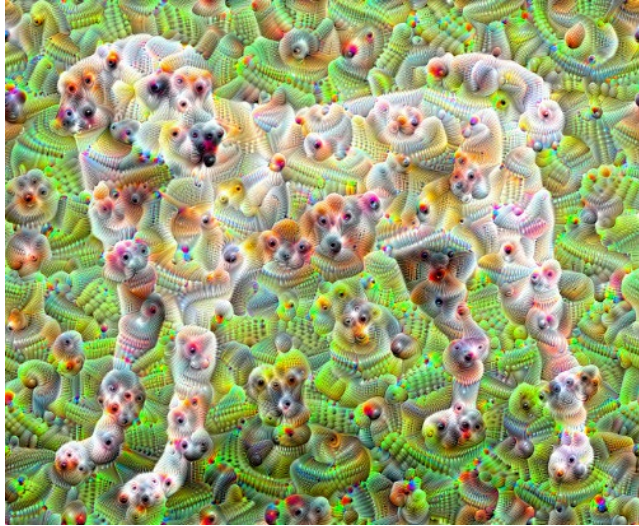
- Set of analytical approaches to problem solving, including natural language processing and machine learning

Generative AI

- AI system capable of generating new content (text, images, sound, video, and more)
- Large language models (LLMs) like ChatGPT, Claude
 - Generative pre-trained transformers (GPTs)
- Diffusion models
 - Synthetic data generation that matches a target distribution

Generative AI's capabilities have evolved *rapidly*

How did we get from this...



to this?



Why now?

High volume of potential training data

- Everything on the internet!

Advancements in hardware

- Cloud provides scalable computing on demand
- GPUs
- Decreasing compute costs

Breakthroughs in NN architecture

- Landmark papers introducing transformer-based architecture has led to the LLMs we see today
- Similar innovation in diffusion models

Advancements in AI: Text

Write me a Shakespearean sonnet about how delicious pizza is

Here is a Shakespearean sonnet praising the deliciousness of pizza:

O perfect pie of saucy bread, arrayed

With melted cheese and varied toppings sweet,
In shapes of triangles served or squares made,
How thee I love, my hunger to entreat!
The crusted rim with flavored oils bedecked,
The tangy sauce which dots in red so bright,

With stretches molten cheese now intersected,
Creates a sight to give my soul delight.
The savory scents of garlic, basil, spice,
Oregano and others tempt my tongue
To take a slice and in this meal rejoice,
Where every luscious bite leads to another.
Pizza, thy wondrous tastes like heaven feel.
To ever eat thee is such wondrous weal!

 Copy  Retry



Advancements in AI: Images



Prompt: *"The Pope in Balenciaga puffy coat, Moncler, walking the streets of Rome, Paris."*



Prompt: *"Cinematic, off-center, two-shot, 35mm film still of a 30-year-old french man, curly brown hair and a stained beige polo sweater, reading a book to his adorable 5-year-old daughter, wearing fuzzy pink pajamas, sitting in a cozy corner nook, sunny natural lighting, sun shining through the glass of the window, warm morning glow, sharp focus, heavenly illumination, unconditional love --ar 16:9"*

Agenda

1. Introduction to Artificial Intelligence & Machine Learning
2. Overview of Government Regulations, Legislation & Enforcement
3. Overview of Private Litigation
4. Ethical Considerations

Global Overview

Country	Status	Coverage
United States	No comprehensive national AI law Dozens of bills introduced	N/A
Canada	In Progress Artificial Intelligence and Data Act (AIDA) November 2023: amendments to draft AI bill published	"High-Impact" system obligations: Assessing, mitigating and monitoring risk Maintaining records Publishing description of AI systems in use Providing notice of harm Align with EU AI Act and OECD Frameworks
European Union	In Progress Artificial Intelligence Act Passed by European Parliament in March 2024; expected to come into force in May or June 2024; fully implemented over the next 2-3 years	Establishes EU AI Office (Feb. 2024) for oversight and enforcement Impose transparency and copyright regulations on generative AI Prohibits certain AI practices Imposes stringent restrictions on certain "high-risk" AI systems Gives citizens right to lodge complaints Sanctions for violations
China	In effect Artificial Intelligence Regulations Three PRC-wide regulations implemented in 2022-2023	Cyberspace Administration of China issued regulations concerning: Algorithm recommendations Deep synthesis Generative AI

White House: Executive Order (October 2023)

Standards and Regulations

The Executive Order calls upon over 20 government agencies to develop standards and issue regulations.

New Requirements on Private Companies

Private companies that develop “dual-use foundation models” **must provide the US Commerce Department regular reports explaining how they will protect their technology, their red-team testing results, and safety measures implemented before any such model is made public.**

“Dual-use foundation model” is defined as an **“AI model that** is trained on broad data; generally uses self-supervision; contains at least tens of billions of parameters; is applicable across a wide range of contexts; and that exhibits, or could be easily modified to exhibit, high levels of performance at tasks that **pose a serious risk to security, national economic security, national public health or safety,** or any combination of those matters.”

Private companies that acquire, develop, or possess large-scale computing clusters must also **report to the Commerce Department information about the location of clusters and their computing powers.**



White House: Voluntary Industry Commitments

Safety

- Internal and external security testing of AI systems before release
- Share information to manage AI risk

Security

- Protect proprietary and unreleased model weights through investments in cybersecurity and insider threat safeguards
- Facilitate third-party discovery and reporting of vulnerabilities in AI systems

Trust

- Enable users to identify AI-generated content
- Publicly report AI system capabilities, limitations, and permissible use
- Prioritize research on societal risks including bias, discrimination and privacy
- Deploy AI to help address society's greatest challenges (health care, climate change, etc.)

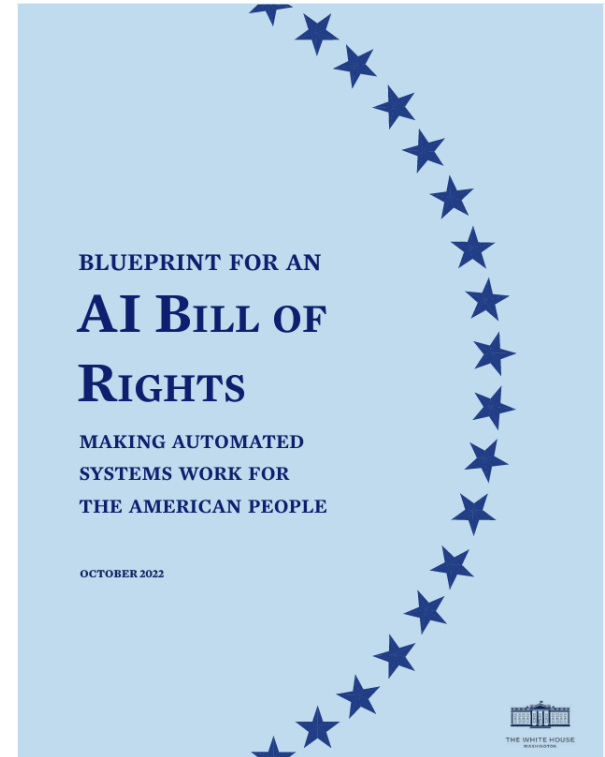
July 2023



Signatories: Adobe, Amazon, Anthropic, Cohere, Google, IBM, Inflection, Meta, Microsoft, Nvidia, OpenAI, Palantir, Salesforce, Scale AI, and Stability AI.

White House: Blueprint for AI Bill of Rights (Oct. 2022)

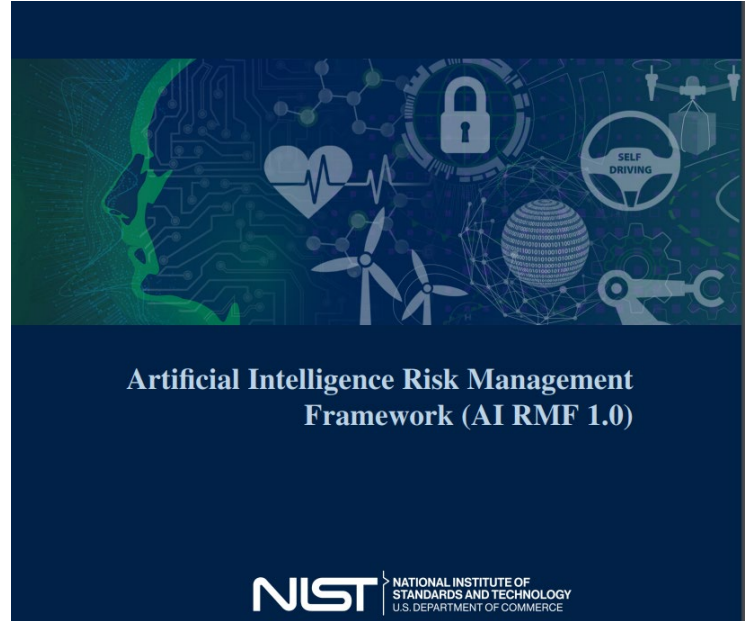
1. **Safe and Effective Systems:** Protects consumers from unsafe or ineffective systems.
2. **Algorithmic Discrimination Protections:** Consumers should not face discrimination by algorithms and systems should be used and designed in an equitable way.
3. **Data Privacy:** Consumers should be protected from abusive data practices via built-in protections and consumers should have agency over how data about them is used.
4. **Notice and Explanation:** Consumers should know that an automated system is being used and understand how and why it contributes to outcomes that impact them.
5. **Human Alternatives, Considerations and Fallback:** Consumers should be able to opt-out, where appropriate, and have access to a person who can quickly consider and remedy problems you encounter.



Commerce Department: NIST AI Framework

Trustworthy AI systems

1. Safe
2. Secure and Resilient
3. Explainable and Interpretable
4. Privacy-Enhanced
5. Fair with Harmful Bias Managed
6. Valid and Reliable
7. Accountable and Transparent



Federal Agencies



Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems

*Rohit Chopra, Director of the Consumer Financial Protection Bureau,
Kristen Clarke, Assistant Attorney General for the Justice Department's Civil Rights Division,
Charlotte A. Burrows, Chair of the Equal Employment Opportunity Commission, and
Lina M. Khan, Chair of the Federal Trade Commission
issued the following joint statement about enforcement efforts to protect the public
from bias in automated systems and artificial intelligence:*

America's commitment to the core principles of fairness, equality, and justice is deeply embedded in the federal laws that our agencies enforce to protect civil rights, fair competition, consumer protection, and equal opportunity. These established laws have long served to protect individuals even as our society has navigated emerging technologies. Responsible innovation is not incompatible with these laws. Indeed, innovation and adherence to the law can complement each other and bring tangible benefits to people in a fair and competitive manner, such as increased access to opportunities as well as better products and services at lower costs.

FTC

- Violations of consumer privacy and use of consumer data
 - Alexa and Ring usage of audio and video to train AI systems
 - Ever mobile app usage of facial recognition technology
 - July 2023 investigation of OpenAI: mishandling user data and causing reputational harm to consumers
- Discrimination and bias resulting from automated systems
- Deceptive practices “turbocharged” via AI
- Imposter Schemes
- False Representations regarding AI



Copyright Office & Patent and Trademark Office



Stephen Thaler

Copyright Office & Patent and Trademark Office

AI cannot be the author on a copyrighted work

Thaler v. Perlmutter (D.D.C. 2023)

AI cannot be the inventor of a patented claim

Thaler v. Hirshfeld, 558 F. Supp. 3d 238 (E.D. Va. 2021), *aff'd sub nom.*,
Thaler v. Vidal, 43 F. 4th 1207 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 1783 (2023)



Copyright Office



Comic book by Kris Kashtanova illustrated using Midjourney.

Kashtanova sought to register the work.

No registration for images generated by Midjourney.

State Regulation

- Mandatory transparency laws around “profiling” and automated decisions in California, Colorado, Texas, Virginia and others.
- New York and Illinois have specific laws around the use of AI in hiring decisions.
- Utah implements Artificial Intelligence Amendments in March 2024; establishes Office of Artificial Intelligence Policy

State Regulation



- Nov 2023: California Privacy Protection Agency released first draft of rulemaking on automated decision-making technologies (ADMT) under California Consumer Privacy Act
- ADMT defined as “any system, software, or process—including one derived from machine-learning, statistics, or other data-processing or artificial intelligence—that processes personal information and uses computation as whole or part of a system to make or execute a decision or facilitate human decision making.”

Agenda

1. Introduction to Artificial Intelligence & Machine Learning
2. Overview of Government Regulations, Legislation & Enforcement
3. Overview of Private Litigation
4. Ethical Considerations

Private Litigation: Big Picture

- Litigation against AI companies is growing
- Lawsuits provide first look into novel issues
- Litigants are bringing claims related to:
 - Copyright & Digital Millennium Copyright Act
 - Trademark
 - Right of Publicity
 - Invasion of Privacy
 - Libel & Defamation
 - Other Federal & State Laws



Source: Adobe Firefly

Copyright

Kinds of Plaintiffs

- Authors, comedians, journalists, politicians
- Artists, cartoonists, photographers
- News, legal, and music publishers

Kinds of Claims

- Direct copyright infringement
 - Training models using copies of copyrighted works
 - Reproducing and distributing copies or derivative works as model outputs
 - Models themselves as infringing derivative works
- Vicarious and contributory copyright infringement

Copyright: *New York Times v. Microsoft Corp., et al.*

- *New York Times* sued OpenAI & Microsoft in high-profile case in SDNY
- Alleged direct copyright infringement
 - Reproducing NYT works in training
 - Embodying unauthorized reproductions
 - Unauthorized public display of works
 - Unauthorized retrieving and disseminating of current news
- Alleged vicarious & contributory infringement

Output from GPT-4:

exempted it from regulations, subsidized its operations and promoted its practices, records and interviews showed.

Their actions turned one of the best-known symbols of New York — its yellow cabs — into a financial trap for thousands of immigrant drivers. More than 950 have filed for bankruptcy, according to a Times analysis of court records, and many more struggle to stay afloat.

“Nobody wanted to upset the industry,” said David Klahr, who from 2007 to 2016 held several management posts at the Taxi and Limousine Commission, the city agency that oversees medallions. “Nobody wanted to kill the golden goose.”

New York City in particular failed the taxi industry, The Times found. Two former mayors, Rudolph W. Giuliani and Michael R. Bloomberg, placed political allies inside the Taxi and Limousine Commission and directed it to sell medallions to help them balance budgets and fund key initiatives.

During that period, much like in the mortgage lending crisis, a group of industry leaders enriched themselves by artificially inflating medallion prices. They encouraged medallion buyers to borrow as much as possible and ensnared them in interest-only loans and other one-sided deals that often required borrowers to pay hefty fees, forfeit their legal rights and give up most of their monthly incomes.

When the market collapsed, the government largely abandoned the drivers who bore the brunt of the crisis. Officials did not bail out borrowers or persuade banks to soften loan

Actual text from NYTimes:

exempted it from regulations, subsidized its operations and promoted its practices, records and interviews showed.

Their actions turned one of the best-known symbols of New York — its signature yellow cabs — into a financial trap for thousands of immigrant drivers. More than 950 have filed for bankruptcy, according to a Times analysis of court records, and many more struggle to stay afloat.

“Nobody wanted to upset the industry,” said David Klahr, who from 2007 to 2016 held several management posts at the Taxi and Limousine Commission, the city agency that oversees cabs. “Nobody wanted to kill the golden goose.”

New York City in particular failed the taxi industry, The Times found. Two former mayors, Rudolph W. Giuliani and Michael R. Bloomberg, placed political allies inside the Taxi and Limousine Commission and directed it to sell medallions to help them balance budgets and fund priorities. Mayor Bill de Blasio continued the policies.

Under Mr. Bloomberg and Mr. de Blasio, the city made more than \$855 million by selling taxi medallions and collecting taxes on private sales, according to the city.

But during that period, much like in the mortgage lending crisis, a group of industry leaders enriched themselves by artificially inflating medallion prices. They encouraged medallion buyers to borrow as much as possible and ensnared them in interest-only loans and other one-sided deals that often required them to pay hefty fees, forfeit their legal rights and give up most of their monthly incomes.

Source: Complaint, *New York Times v. Microsoft Corp., et al.*

Copyright Defense: Fair Use

Factors:

- (1) purpose and character of use
- (2) nature of copyrighted work
- (3) amount or substantiality of use
- (4) effect of the use on potential market for or value of the work

Copyright Defense: *Thomson Reuters, et al. v. Ross Intelligence Inc.*

THOMSON REUTERS

WESTLAW™

III. FAIR USE MUST GO TO A JURY

Deciding whether the public's interest is better served by protecting a creator or a copier is perilous, and an uncomfortable position for a court. Copyright tries to encourage creative expression by protecting both. Here, we run into a hotly debated question: **Is it in the public benefit to allow AI to be trained with copyrighted material?**

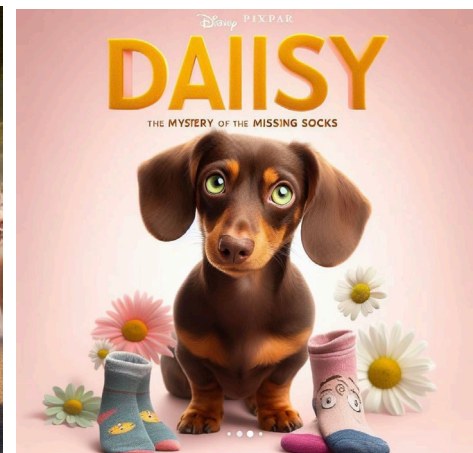
The value of any given AI is likely to be reflected in the traditional factors: How transformative is it? Can the public use it for free? Does it discourage other creators by swallowing up their markets? So an independent evaluation of the benefits of AI is unlikely to be useful yet, even though both the potential benefits and risks are huge. **Suffice it to say, each side presents a plausible and powerful account of the public benefit that would result from ruling for it.**

Mem. Op. on Cross-MSJs (Dkt. 547), No. 1:20-cv-613-SB, 2023 WL 6210901, at 11 (D. Del. Sept. 25, 2023).

Digital Millennium Copyright Act (DMCA)

- **Content management information (“CMI”)**
 - “Information conveyed in connection with copies . . . of a work . . . , including in digital form,” such as title, author’s name, copyright owner, terms (§ 1202(c))
- **§ 1202(a) – no knowingly false CMI**
 - “No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement (1) provide copyright management information that is false, or (2) distribute or import for distribution copyright management information that is false.”
- **§§ 1202(b)(1), (3) – no knowing removal/alteration of CMI**
 - “No person shall . . . (1) intentionally remove or alter any copyright management information, . . . or (3) distribute . . . copies of works. . . knowing that copyright management information has been removed or altered . . . , knowing . . . that it will induce, enable, facilitate, or conceal an infringement of any rights under this title.”

Trademark



Source: Instagram @mochapom, @puggpickles, @sapphie_the_pomsky, @daisythedachshund_

Trademark: *Getty Images v. Stability AI*



Source: First Amended Complaint, *Getty Images (US) v. Stability AI*



Trademark: *Getty Images v. Stability AI*



Source: First Amended Complaint, *Getty Images (US) v. Stability AI*

Right of Publicity: *Young v. NeoCortex, Inc.*

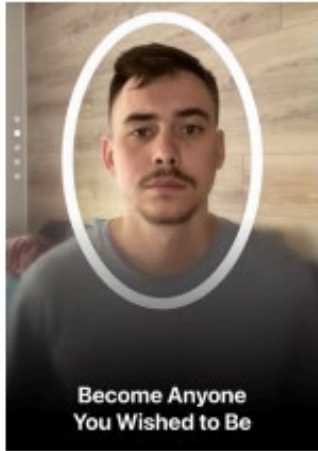


Figure 1

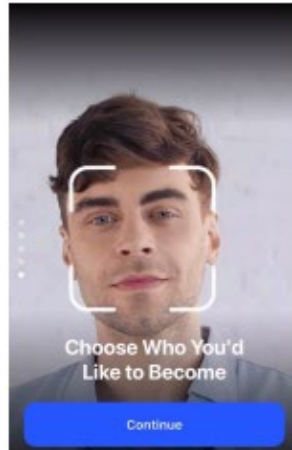


Figure 2

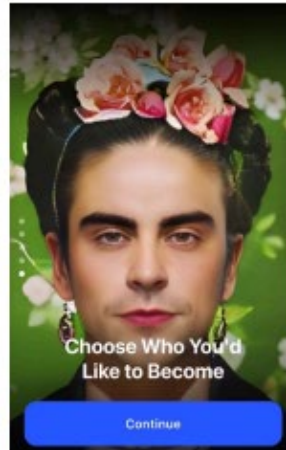


Figure 3

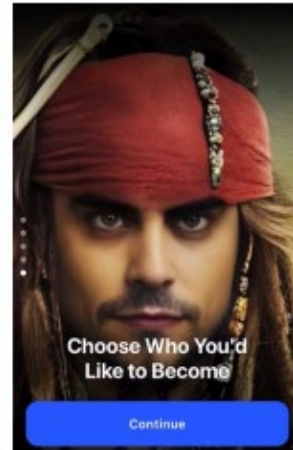


Figure 4

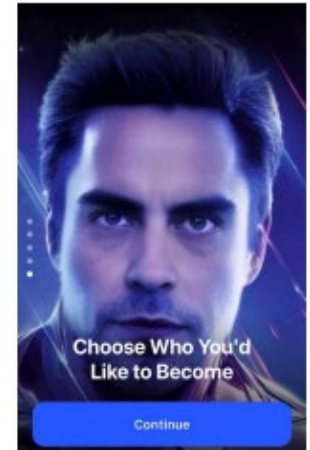


Figure 5

Source: Complaint, *Young v. NeoCortex, Inc.*

Invasion of Privacy

OpenAI, Microsoft hit with new US consumer privacy class action

Can an AI chatbot be convicted of an illegal wiretap? A case against Gap's Old Navy may answer that

Google hit with class-action lawsuit over AI data scraping

Defamation



Source: KFMO

Radio Host Sues OpenAI for Defamation, Alleging ChatGPT Chatbot Invented False Legal Accusations About Him

Source: Variety

Other Claims

Breach of Contract

- Sources of training data are governed by licensing agreements & violate terms of service

Computer Fraud and Abuse Act (CFAA)

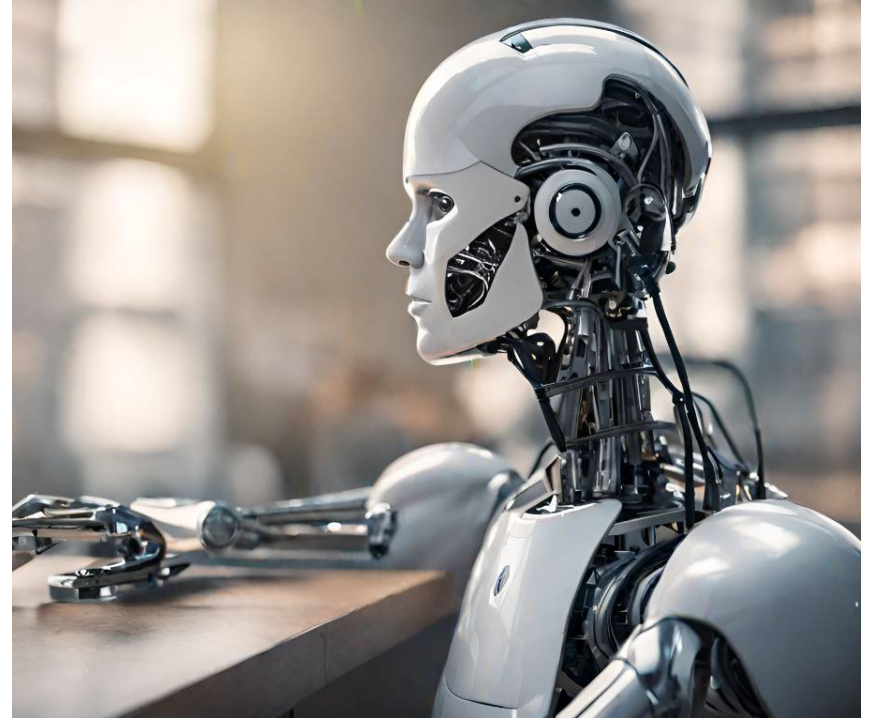
- Intentionally accessing protected computers without authorization through AI plug-ins

Other State Laws

- Competition Laws
 - *E.g.*, California Unfair Competition Law
- Consumer Protection Laws
 - *E.g.*, Illinois Consumer Fraud and Deceptive Business Practices Act
- Unjust enrichment, negligence, conversion, & more

Private Litigation: What's Next?

- It is still early days
- So far, courts largely approach claims with skepticism, but many defenses untested
- Without broad federal legislation or regulation, law will be made by the courts and could shape AI development
- But innovation will continue
- Plaintiffs' bar focused on AI companies now, but may expand to those that adopt or use AI products



Source: Runway AI

Agenda

1. Introduction to Artificial Intelligence & Machine Learning
2. Overview of Government Regulations, Legislation & Enforcement
3. Overview of Private Litigation
4. Ethical Considerations

Potential Uses for AI in Legal Work (Eventually)

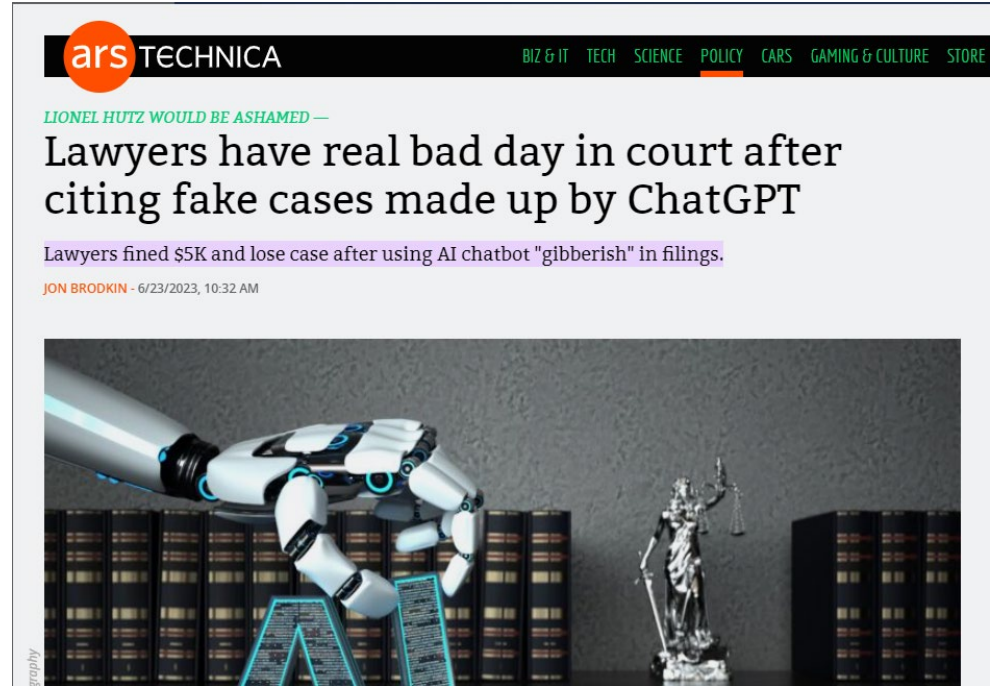
- Legal research
- Document review
- Summarization
- Fact research or investigation?
- Risk prediction?
- Drafting pleadings?



Numerous companies are already working on all of these...

What are the risks of using AI in legal work?

- It can get things horribly —but very confidently—wrong



The image is a screenshot of a news article from Ars Technica. The article title is "Lawyers have real bad day in court after citing fake cases made up by ChatGPT". A sub-headline reads "Lawyers fined \$5K and lose case after using AI chatbot 'gibberish' in filings." The author is identified as Jon Brodtkin, and the article is dated 6/23/2023 at 10:32 AM. The article features a photograph of a white and blue robotic hand holding a tablet, standing in a courtroom with a statue of Lady Justice and bookshelves in the background.

ars TECHNICA


BIZ & IT TECH SCIENCE POLICY CARS GAMING & CULTURE STORE

LIONEL HUTZ WOULD BE ASHAMED —

Lawyers have real bad day in court after citing fake cases made up by ChatGPT

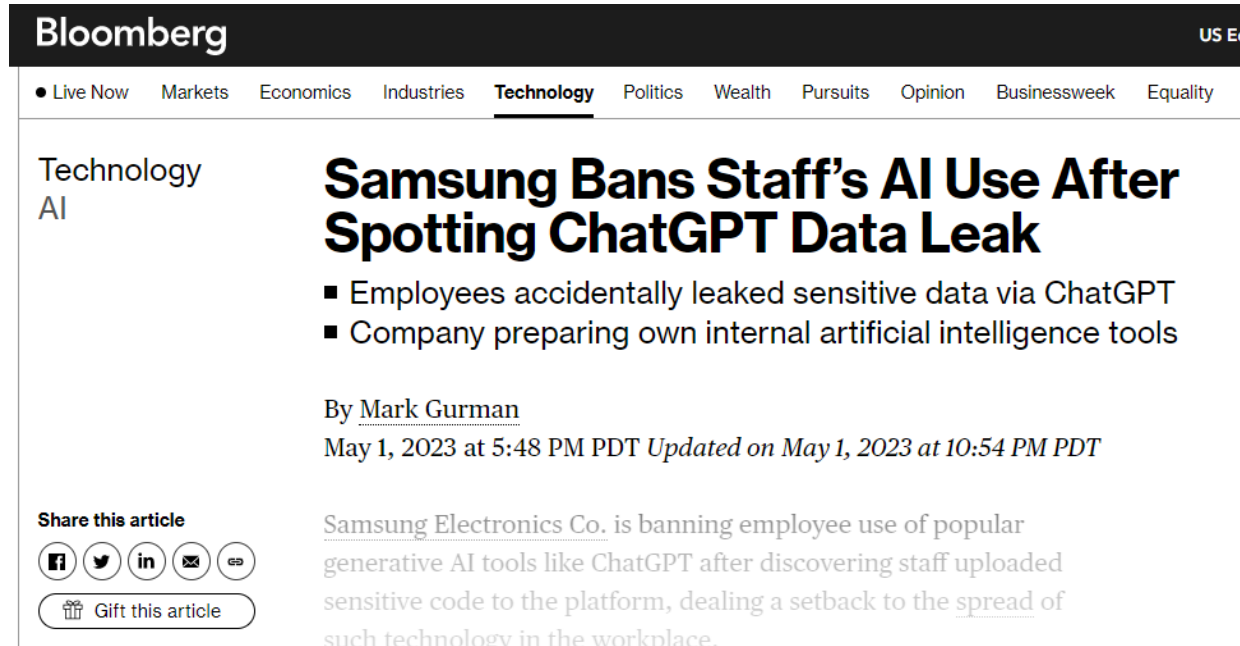
Lawyers fined \$5K and lose case after using AI chatbot "gibberish" in filings.

JON BRODKIN - 6/23/2023, 10:32 AM



What are the risks of using AI in legal work?

- The information you put into chatbots may not stay confidential



The screenshot shows a Bloomberg news article. The header includes the Bloomberg logo and navigation links for Live Now, Markets, Economics, Industries, Technology (highlighted), Politics, Wealth, Pursuits, Opinion, Businessweek, and Equality. The article is categorized under Technology and AI. The main headline is 'Samsung Bans Staff's AI Use After Spotting ChatGPT Data Leak'. A bulleted list indicates that employees accidentally leaked sensitive data via ChatGPT and that the company is preparing its own internal AI tools. The author is Mark Gurman, and the article was updated on May 1, 2023. A share section includes icons for Facebook, Twitter, LinkedIn, Email, and Print, along with a 'Gift this article' button. The article text states that Samsung Electronics Co. is banning employee use of generative AI tools like ChatGPT after discovering a data leak.

Bloomberg US E

• Live Now Markets Economics Industries **Technology** Politics Wealth Pursuits Opinion Businessweek Equality

Technology
AI

Samsung Bans Staff's AI Use After Spotting ChatGPT Data Leak

- Employees accidentally leaked sensitive data via ChatGPT
- Company preparing own internal artificial intelligence tools

By [Mark Gurman](#)
May 1, 2023 at 5:48 PM PDT *Updated on May 1, 2023 at 10:54 PM PDT*

Share this article

[f](#) [t](#) [in](#) [✉](#) [🗨](#)

[🎁 Gift this article](#)

[Samsung Electronics Co.](#) is banning employee use of popular generative AI tools like ChatGPT after discovering staff uploaded sensitive code to the platform, dealing a setback to the spread of such technology in the workplace.

What are the ethical implications of using AI in legal work?

Duty of Competence

- Rule 1.1
 - A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
 - Competence in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.

What are the ethical implications of using AI in legal work?

Duty of Confidentiality

- Rule 1.6
 - Lawyers must protect information relating to the representation and take steps to prevent unintended disclosure or unauthorized access to that information

Supervision and Unauthorized Practice

- Rules 5.1, 5.3
 - Lawyer with supervisory authority over non-lawyer must make reasonable efforts to ensure non-lawyer's compliance and may be responsible for non-compliance
- Rule 5.5
 - Lawyer cannot “knowingly assist a person in the unauthorized practice of law”

Duty of Confidentiality Bus. & Prof. Code § 6068(e)

Rule 1.6

- “A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections.”
- “A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.”
- “A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.”

Duties of Competence and Diligence

Rule 1.1

Rule 1.3

- “It is possible that generative AI outputs could include information that is false, inaccurate, or biased.”
- “A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand... **The duty of competence requires more than the mere detection and elimination of false AI-generated results.**”
- “A lawyer’s professional judgment cannot be delegated to generative AI and remains the lawyer’s responsibility at all times.”

Duty to Supervise Lawyers & Non-Lawyers

Rules 5.1-5.3

- “Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the [organization] adopts measures that give reasonable assurance that the [organization’s] lawyers and non-lawyers’ conduct complies with their professional obligations when using generative AI.”
- “A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer’s professional responsibility [] obligations.”
- **These issues are non-exhaustive; the Practical Guidance document addresses additional issues**

What does the California State Bar have to say?

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

PRACTICAL GUIDANCE FOR THE USE OF
GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

Takeaways

Ethical use of AI in legal practice

- Do not put confidential, privileged, or non-public information into chatbots
- If you use AI for legal work, do so with extreme caution and full duplication through other means
- Cannot delegate your professional judgment to generative AI
- Set policies and conduct trainings
- Keep track of developments and guidance—things will change fast

Thank you!
