Legal and Legislative Developments in AI

Mark Sadler, JD, CIPP/US, CIPP/C
Claims Counsel, Cyber Risk Division[1]

Artificial intelligence is an exciting innovative technology that is increasingly becoming an important part of our business and personal lives.[2] However, despite its potential positive impact, a recent survey revealed that most Americans trust humans over artificial intelligence by a wide margin.[3] The survey and report prepared by the software firm, Krista, observed that "Americans aren't yet willing to allow AI to make decisions or work tasks where the outcome will potentially affect them."[4]

Given the increasing adoption of AI technology[5] and perhaps the apparent caution with which the public is approaching this expanding technology, artificial intelligence has spawned a number of developments in both commercial litigation and legislative activity.

---

[1] Any views or opinions expressed in this paper are the authors' and shall not be construed as legal or professional technical advice; and do not necessarily reflect any corporate position, opinion or view of Great American Insurance Company, or its affiliates, or a corporate endorsement, position or preference with respect to any contractual terms and provisions or any related issues. If you have any questions or issues of a specific nature, you should consult appropriate legal or regulatory counsel to review the specific circumstances involved.

[2] *See*, Fisher Phillips Insights, *The Essential Questions to Ask Your AI Vendor Before Deploying Artificial Intelligence at Your Organization* (November 19, 2024). https://www.fisherphillips.com/en/news-insights/essential-questions-to-ask-ai-vendor-before-deploying-artificial-intelligence.html (last accessed November 21, 2024) (The author(s) note that "[r]ecent studies reflect that more than 75% of companies are either using or exploring the use of AI in their businesses, and more than 80% of employers consider AI a top priority in their future business plans."). *See also*, Derek J. Schaffner, *Decoding the potential, applications, and legal considerations of artificial intelligence in 2024 and beyond*, Conn Kavanaugh Rosenthal Peisch & Ford, LLP (November 20, 2024). ttps://www.connkavanaugh.com/articles-and-resources/unraveling-the-ai-revolution/ (last accessed November 21, 2024) (The author notes that "[t]he rapid rise of artificial intelligence ("AI") is reshaping industries, transforming economies, and presenting profound legal and ethical challenges. In 2024, AI technologies are no longer confined to the realm of science fiction but are actively woven into the fabric of our daily lives—from the recommendation algorithms on streaming platforms to complex predictive models in healthcare and autonomous vehicles. As AI continues its ascent, understanding its potential, its applications, and the legal landscape it influences is essential for businesses, lawyers, lawmakers, and society at large.")

[3] *See*, John Koetsier, *In AI We Do Not Trust: Survey*, Forbes (June 9, 2023). https://www.forbes.com/sites/johnkoetsier/2023/06/05/in-ai-we-do-not-trust-survey/?sh=2ee76a171794 (last accessed November 14, 2024).

[4] *Id*., *citing*, Scott King, *Research Shows While Most Americans Are Aware of AI, Few Pretend to Know How It Works — and Three-Quarters Wouldn't Even Let It Pick Out What They Wear to Work*, Krista Software (2023). https://krista.ai/ai-trust-survey-2023/ (last accessed November 15, 2024).

[5] *See*, S&P Global Press Release, *S&P Global Market Intelligence Foresees Rapid Expansion of Generative AI Software Market by 2028 to $52.2* Billion, (June 6, 2024). https://press.spglobal.com/2024-06-06-S-P-Global-Market-Intelligence-Foresees-Rapid-Expansion-of-Generative-AI-Software-Market-by-2028-to-52-2-Billion (last accessed November 15, 2024). (As noted by S&P Global, "[a]s generative artificial intelligence (AI) technology pivots from research to the monetization and product launch stages, the software part of the generative AI market is now forecast to see significant expansion, reaching $52.2 billion by 2028 with a compound annual growth rate of 58% from 2023, according to S&P Global Market Intelligence.").

Intellectual property and Privacy Rights

The expansion of artificial intelligence technology has led to litigation in a number of areas. While certainly not exhaustive, I will address several categories of litigation that represent recent cases involving AI, including the use of data to train generative AI; copyright of AI generated content; defamation; and other categories of litigation. In addition, I will discuss potential defenses. However, as a number of these cases involve copyright, I start with an overview of basic copyright concepts.

Copyright Concepts

According to Black's Law Dictionary, a copyright is, "[t]he right to copy; specifically a property right in an original work of authorship including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings; fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work."[6] Copyright protection arises as soon as a work has been fixed in a tangible form, however, authors may also register their works with the U.S. Copyright Office,[7] which offers procedural and substantiative advantages during enforcement of the right.[8] Under 17 U.S.C. §106, the Copyright Act affords copyright owners the exclusive right of reproduction, adaptation, publication, performance, and display. These rights comprise a "bundle of rights" that are cumulative and may overlap in some cases.[9] Although copyright owners are provided broad protections relative to their works, there are limitations; "[t]he exclusive rights of copyright owners are limited by a number of exceptions and defenses, the most important of which is the fair use privilege. The fair use privilege allows the unauthorized use of copyrighted works in such contexts as educational activities, literary and social criticism, parody and news reporting under certain circumstances."[10]

Use of Data to Train Generative AI (Data Scraping Cases)

There have been a number of lawsuits brought by copyright owners against AI providers complaining of copyright infringement through the use of copyrighted material in training AI platforms without the consent, credit or compensation or the copyright holder. In discussing Trembley, *et al* v. OpenAI,[11] one author explained that "ChatGPT is powered by 'large language models,' which are trained by copying massive amounts of text

---

[6] *Black's Law Dictionary*, 712 (10th Edition 2014).

[7] Roger E. Schechter and John R. Thomas, *Intellectual Property the Law of Copyrights, Patents and Trademarks*, 11 (West 2003) (From a statutory standpoint, "Copyright today is an exclusively federal statutory subject. The governing law is the Copyright Act of 1976, effective for works created on or after January 1, 1976.").

[8] *Id.*

[9] H. Rpt. No. 94-1476, at 61 (1995).

[10] Schechter and Thomas, *supra* note 23 at 12.

[11] Trembley v. OpenAI, Inc., 3:23-cv-03223, (N.D. Cal.).

and other data according to the complaint."[12] The training process has been an early focus in AI related litigation.

A closely watched case in this area is New York Times Company v. Microsoft Corp., *et al*.[13] This case arises from the alleged copying of millions of The Times's copyrighted news articles, in-depth investigations, opinion pieces, reviews, how-to-guides, etc. as part of the training of defendants large language model AI products.[14] Plaintiff claims that the current ChatGPT-4 output has provided "near-verbatim copies" of "significant portions" of the Times' copyrighted material "when prompted to do so" and seeks to hold Microsoft and OpenAI accountable for "billions of dollars in statutory and actual damages" as a result of alleged infringing conduct.[15] In addition to the possibility of significant damages potential, this case has the potential to create new fair use precedent. [16]

Another case that exemplifies this category of cases is Concord Music Group, Inc. v. Anthropic PBC, No. 5:24-cv-03811 (N.D. Cal). In this case, plaintiffs brought an "action to address the systematic and widespread infringement of their copyrighted song lyrics by the artificial intelligence ("AI") company Anthropic. In the process of building and operating AI models, Anthropic unlawfully copies and disseminates vast amounts of copyrighted works—including the lyrics to myriad musical compositions owned or controlled by Publishers."[17] Plaintiff claims that defendants have improperly used song lyrics to train their chatbot, "Claude." It is specifically alleged that "[a]s a result of Anthropic's mass copying and ingestion of Publishers 'song lyrics, Anthropic's AI models generate identical or nearly identical copies of those lyrics, in clear violation of Publishers' copyrights. When a user prompts Anthropic's Claude AI chatbot to provide the lyrics to songs such as "A Change Is Gonna Come," "God Only Knows," "What a Wonderful World," "Gimme Shelter," "American Pie," "Sweet Home Alabama," "Every Breath You Take," "Life Is a Highway," "Somewhere Only We Know," "Halo," "Moves Like Jagger," "Uptown Funk," or any other number of Publishers' musical compositions, the chatbot will provide responses that contain all or significant portions of those lyrics."[18] Plaintiffs allege that "Anthropic directly infringes Publishers' exclusive rights as copyright holders, including the rights of reproduction, preparation of derivative works, distribution, and public display. In addition, because Anthropic unlawfully enables, encourages, and profits from massive copyright infringement by its users, it is secondarily liable for the infringing acts of its users under well-established theories of contributory infringement and

---

[12] Lauren Berg, *ChatGPT is 'Trained' Using Copyrighted Books, Authors Say*, Law360 (June 29, 2023). (The author also notes, citing the Complaint, that "ChatGPA and other generative AI tools work by harvesting information from all over the internet and learning how to use that input coherently, giving them the ability to write essays, have conversations and create impacted, the complaint says."
[13] New York Times Company v. Microsoft Corp., et al, Case No. 1:23-cv-11195 (S.D.N.Y. Dec. 27, 2023).

[14] *Id.*
[15] Zachary Valentine, *New York Times vs. Open AI: Fair Use Fight with Billions at Stake*, Darrow Everett, LLP (January 22, 2024)
[16] *Id.* (The author notes that the Times has registered the copyright for its print edition on a daily basis for the past 100+ years and they own the exclusive rights of reproduction, adaptation, publication, performance and display of Times content under the Copyright Act.)
[17] Concord Music Group, Inc. et al v. Anthropic PBC, 3:23-cv-01092 (M.D. Tenn. Oct 18, 2023)
[18] *Id.* at 5.

vicarious infringement."[19] Recovery is sought under theories of direct copyright infringement, contributory infringement, vicarious infringement and removal or alteration of copyright management information, and plaintiffs seek relief, including an order requiring Anthropic to pay statutory damages arising from alleged willful violations of the Copyright Act of up to $150,000 per work infringed or in the alternative, at Publishers' election, actual damages and Anthropic's profits arising from the infringement.

At the time of this writing, the court is addressing plaintiffs' preliminary injunction motion and Anthropic's motion to dismiss. Despite the ongoing litigation, Anthropic, an organization involved in AI safety and research, has had no difficulty attracting investors. On November 22, 2024, it was reported that Amazon is investing an additional $4 billion in Anthropic, bringing its total investment in the company since 2023 to $8 billion.[20]

A case that addresses whether defendants' use of copyrighted material constitutes copyright infringement and is subject to the fair use defense is Andersen v. Stability AI, et al.[21] In this case, plaintiffs are asserting that defendants use of their data is insufficiently transformative from their existing, protected works and as such constitute unauthorized derivative works. As stated by one expert commenting on the applicability of the fair use defense, "[i]n each of these cases, the legal system is being asked to clarify the bounds of what is a 'derivative work' under intellectual property laws and depending upon the jurisdiction, different federal circuit courts may respond with different interpretations. The outcome of these cases is expected to hinge on the interpretation of the fair use doctrine, which allows copyrighted work to be used without the owner's permission 'for purposes such as criticism (including satire), comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,' and for a transformative use of the copyrighted material in a manner for which it was not intended."[22] As of August 2024, the court had granted motions to dismiss from several defendants but was allowing the case to proceed against Stability AI under a direct copyright infringement theory of liability.

Another recent case filed by fiction writer Christoper Farnsworth alleges that Meta wrongfully used hundreds of thousands of copyrighted books, in violation of his copyrights and without compensation of the copyright owner, in order to build and train a commercial large language model called Llama 1."[23] This case was only recently filed and is in the early stage of litigation in federal court.

Can AI Generated Content be Copyrighted?

---

[19] *Id*. at 6.

[20] *See*, Alyssa Lukpat, *Amazon Invests an Additional $4Billion in Anthropic, an OpenAI Rival*, Wall Street Journal (November 22, 2024).

[21] Andersen v. Stability AI, Ltd., 3:23-cv-00201 (N.D. Cal.)

[22] Gil Appel, Juliana Neelbauer, and David A. Schweidel, *Generative AI Has an Intellectual Property Problem*, Harvard Business Review, 3 (April 7, 2023). https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem (last accessed November 15, 2024).

[23] Christopher Farnsworth, individually and on behalf of others similarly situated, v. Meta Platforms, Inc., 3:34-cv-06893 (N.D. Cal).

Another intellectual property issue that has arisen in the context of AI is the question of whether content generated by artificial intelligence is subject to copyright protection. The issue was the subject of litigation in the matter of <u>Thayler v. Perlmutter</u>.[24] This dispute arose as a result of the rejection of a copyright registration by the U.S. Copyright Office ("USCO"); specifically, "in August 2019 the USCO rejected Thaler's copyright application, citing the absence of human authorship — a decision that was upheld through internal appeals. Thaler subsequently filed a lawsuit under the Administrative Procedure Act, challenging the USCO's actions as arbitrary and not in accordance with the law. Thaler contended that the AI algorithm, operating on the *Creativity Machine*, was the true author of the work."[25] "He claimed copyright ownership on the basis of being the machine's owner. The USCO consistently rejected registration, maintaining that the work lacked the necessary human authorship."[26] A legal issue arose around the question of whether, under existing copyright law, a work autonomously generated by an AI system can be found to be copyrightable, given a lack of human authorship.[27] The District Court ultimately affirmed the USCO decision to refuse to register the AI generated work, emphasizing the longstanding principle that copyright law protects only works of human creation.[28] As observed by the Center for Art Law, "[t]his case highlights the fascinating intersection of law, technology, and creativity. The court's decision seems grounded in a longstanding legal tradition that views human authorship as a prerequisite for copyright protection. The emphasis on incentivizing human creativity, as reflected in constitutional principles and historical copyright acts, aligns with the court's ruling."[29]

Defamation Arising from AI Content

Defamation or related claims are common in business litigation. The increased adoption of artificial intelligence by business may accelerate this trend. As stated by one expert, "[a]s the pressure to compete pushes more businesses to incorporate generative AI into their content-creation processes, it is important to be mindful of the different ways a libel lawsuit might arise. This applies to text, images, video, audio, and all other types of content and information."[30] It is expected that AI based defamation claims may potentially fall into one of four categories: "(1) Libel by juxtaposition: This can result where truthful information about two different

---

[24] <u>Thayler v. Perlmutter, et al</u>, 1:22-cv-01564-BAH ((D.D.C.).

[25] Audrey Zhang Yang, *Can AI-Generated Output Be Protected Under Intellectual Property Law?* Richmond Journal of Law and Technology (May 17, 2024). https://jolt.richmond.edu/2024/05/17/can-ai-generated-output-be-protected-under-intellectual-property-law/ (last accessed November 15, 2024) (The author notes that "Some believe that since AI systems are tools programmed by humans, the programmers are entitled to authorship rights. Also, when someone instructs AI to solve a problem, that person might qualify as an investor if she formulates a problem in a manner that requires inventive skill. However, laws on intellectual property, patent, and copyright were not originally passed with AI in mind. Therefore, there is no law specifically addressing AI-generated invention in any jurisdiction.)

[26] Atreya Mathur, *Case Review: Thaler v. Perlmutter 2023*, Center for Art Law (December 11, 2023). https://itsartlaw.org/2023/12/11/case-summary-and-review-thaler-v-perlmutter/#:~:text=Conclusion,U.S.%20Patent%20and%20Trademark%20Office. (last accessed November 15, 2024).

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] Rachel Matteo-Boehm, Eric Schroeder and Bryan Underwood, *AI & Your Business: Libel Risks*, Bryan Cave Insights (November 15, 2024).

individuals or entities is juxtaposed as part of generative AI output, making it seem like the output is about the same person or entity. (2) Libel by hallucination: the AI output text is simply not true. (3) Libel by omission: In this scenario, the AI output is true, but a missing fact changes its meaning. (4) Libel by misquote: When generative AI output gets a quote wrong (even by a word or two), or misattributes a quote to the wrong person, the result can be a libel lawsuit."[31]

An early case arising from alleged libel by hallucination is <u>Walters v. OpenAI, LLC.</u>[32] In this matter, it is alleged that when a journalist asked ChatGPT to provide a summary of an unrelated complaint, [AI] responded by falsely reporting that the legal complaint had accused Mr. Walters of defrauding and embezzling funds. Mr. Walters states that he was not a party to the original lawsuit in question and that every statement in the summary provided by ChatGPT pertaining to him was false and defamatory. So far, in response to the complaint, OpenAI has relied upon its disclaimers and suggested that its outputs cannot be considered factual assertions. After removal to the federal court and remand back to the state court, an initial motion to dismiss was denied and the case proceeded into discovery;[33] the defendant OpenAI, LLC., has recently filed a motion for summary judgment contending in part<u>, that</u> the Plaintiff, a radio talk show host of Armed America Radio, cannot meet his burden of showing "actual malice" required to support his defamation case.[34]

A case exemplifying libel by Juxtaposition is <u>Battle v. Microsoft Corp.</u>[35] In this matter, plaintiff, "allege[d] that Microsoft has defamed and harmed him, because internet searches on Microsoft's Bing search engine and its generative artificial intelligence chatbot, Microsoft <u>Copilot</u>, yield results that conflat[e] Mr. Battle with a person of a similar name . . . who is a convicted terrorist.'"[36] The federal court has recently granted the Defendants motion to compel arbitration and stayed the court proceedings pending resolution of the matter in the arbitration process.

Other Liability Issues

The practice of law and the workplace present the potential for AI to significantly increase productivity, but also hold the potential for legal disputes related to the use of AI technology.

---

[31] *Id*.

[32] <u>Mark Walters v. OpenAI LLC</u>, 23-A-04860-2, Sup. Ct of Gwinnett County, State of GA (June 5, 2023)

[33] Isaiah Poritz, *OpenAI Fails to Escape First Defamation Suit From Radio Host,* Bloomberg Law (Jan. 16, 2024). https://news.bloomberglaw.com/ip-law/openai-fails-to-escape-first-defamation-suit-from-radio-host. (last accessed November 15, 2024). *See also*, Matteo-Boehm, Schroeder and Underwood, *supra*, note 42.

[34] *See* Madison Arnold, <u>OpenAI Says Ga. Defamation Suit Fails Without 'Actual Malice,'</u> Law360 (November 15, 2024).

[35] <u>Battle v. Microsoft Corp.,</u> 1:23-CV-01822 (D. MD).

[36] *Id.* (In his complaint, plaintiff asserts theories of liability including claims against Microsoft for: (1) Assault (Count I), (2) Libel—Defamation (Count II); (3) Negligence (Count III); (4) Gross Negligence (Count IV); (5) Intentional Disregard (Count V); (6) Strict Product Liability (Count VI); and (7) Product Liability (Count VII).)

It has been observed that "[e]ven though AI is rapidly developing, the technology has already proven to be incredibly useful, rather than ruinous, to various professions – including the legal field."[37] One area with potential is the practice of document review in connection with electronic discovery, where Technology Assisted Review of eDiscovery has the potential to positively impact a function previously reserved to junior associates and contract lawyers. In addition, AI can be used to generate documents, drafts and data in a fraction of the time it would take a human. However, the technology is not without its pitfalls; as observed, "the unbridled use of generative AI in the legal profession poses significant ethical concerns that, without proper understanding create dire consequences for clients and in the courtrooms."[38] The case of New York lawyer Steven Schwartz, who fell victim to a ChatGPT hallucination, offers a cautionary tale. As explained by one expert, "[i]n the case of Robert Mata v. Avianca, Inc.,[39] Schwartz cited six cases generated by ChatGPT during his legal research. A legitimate citation followed each case; however, it was soon discovered by opposing counsel and the court that these cases, and citations, did not exist."[40] In responding to the Courts Order to Show Cause, it is reported that Mr. Schwartz admitted to using ChatGPT and promised not to use it again without proper independent verification of the data. A $5,000 penalty was assessed.[41]

On July 29, 2024, the American Bar Association issued Formal Opinion 512 to define ethical issues arising from the use of generative artificial intelligence tools. The opinion outlines specific areas of concern, including ABA Model Rules of Professional Conduct No.11, 1.6, 1.5 and 1.4.[42] As stated by one commentator, "[c]entral to the opinion is recognizing [Generative AI's] growing prominence in legal practice, particularly in domains such as electronic discovery, contract analysis, and legal research. This opinion specifically addresses the unique challenges posed by GAI tools that can generate new content, thus emphasizing the need for lawyers to have a foundational understanding of this technology's capabilities and limitations. While not mandating GAI expertise, the opinion underscores the duty of competent representation, which requires lawyers to appreciate the potential benefits and risks of GAI, including data privacy and fee implications."[43]

In the context of the workplace, there are reports of job applicants using ChatGPT to write resumes and cover letters and increased use by employers of advanced AI technology and tools to augment their efforts in screening candidates and in interviewing and hiring; some have observed that this may ultimately lead to a

---

[37] Marc E. Williams and Anna J. Williams, *The Implications of Artificial Intelligence on the Civil Defense Lawyer*, In-House Defense Quarterly, 12 (Fall 2023). https://www.nelsonmullins.com/insights/insights/the-implications-of-artificial-intelligence-on-the-civil-defense-lawyer-2 (last accessed November 15, 2024).

[38] *Id*. at 13.

[39] Mata v. Avianca, Inc., 1:22-cv-01461 (SD NY 2023).

[40] Marc E. Williams and Anna J. Williams, *supra* note 49, at 13.

[41] *Id.*

[42] *See* American Bar Association, *ABA issues first ethics guidance on a lawyer's use of AI tools* (July 29, 2024). https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/ (last accessed November 20, 2024).

[43] Frank Young, *Quick Summary of ABA Formal Opinion 512*, RIPS Law Librarian Blog (August 23, 2024). https://ripslawlibrarian.wordpress.com/2024/08/23/quick-summary-of-aba-formal-opinion-512/ (last accessed November 20, 2024).

"battle between AI tools" in the context of hiring.[44] Concerns have also been raised that the use of AI in the hiring process raises the potential for bias or adverse discrimination.[45]

Other workplace issues identified may include the (i) the need for appropriate affirmation on application portals for applicants to affirm that they did not have technological or AI assistance in completing an application or providing requested documents, and (ii) appropriate oversight of employee's use of AI in performing their jobs.[46]

There have also been regulatory developments pertaining to potential false advertising in connection with AI services (a/k/a "AI Washing"). Specifically the U.S. Securities and Exchange Commission ("SEC") has pursued actions against organizations for "making false and misleading statements about their purported use of artificial intelligence (AI)."[47] As noted by Gurbir S. Grewal, Director of the SEC's Division of Enforcement ,"[a]s more and more investors consider using AI tools in making their investment decisions or deciding to invest in companies claiming to harness its transformational power, we are committed to protecting them against those engaged in 'AI washing,'"[48]

For example, an SEC press release specifically detailed an action against Delphia (USA) Inc, a Toronto-based investment firm that it was claimed made false and misleading statements in its SEC filings, in a press release, and on its website from 2019 to 2023, regarding its purported use of AI and machine learning that incorporated client data in its investment process.[49] According to the SEC, "[w]ithout admitting or denying the SEC's findings, Delphia and Global Predictions [another organization under investigation] consented to the entry of orders finding that they violated the Advisers Act and ordering them to be censured and to cease and desist from violating the charged provisions. Delphia agreed to pay a civil penalty of $225,000, and Global Predictions agreed to pay a civil penalty of $175,000."[50]

Potential Defenses

Although AI poses potential for new and developing liability exposures, defendants have asserted defenses, including lack of legal standing, applicability of the fair use doctrine and an assertion that data scraping, if at issue, does not constitute an invasion of privacy.

---

[44] Christopher Deubert and Amanda Novak, *Anticipating What ChatGPT Means for the Workplace*, Law360 (March 2, 2023).

[45] *Id*. (the authors observe that the American Civil Liberties Union has noted that "AI is built by humans and deployed in systems and institutions that have been marked by entrenched discrimination . . . bias is in the data used to train the AI . . . and can rear its head throughout the AI's design, development, implementation and use.")

[46] *Id*.

[47] U.S. Securities and Exchange Commission*, SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence*, Press Release (March 18,2024). https://www.sec.gov/newsroom/press-releases/2024-36 (last accessed December 8, 2024).

[48] *Id*.

[49] *Id*.

[50] *Id*.

In considering the issue legal standing, it has been argued that "if plaintiffs are unable to demonstrate that their specific information or work product was improperly used by the [AI] model in question, their claims must fail for failure to establish injury-in-fact [as required to establish legal standing]"[51]

Fair use also raises potential defenses for AI developers and other defendants. As noted by practitioners in the field, "[f]air use is a defense to claims of infringement when copyrighted material is used in a 'transformative' way. Transformative use can occur when copyrighted material is used to serve different market 'functions' or expand the 'utility' of the copyrighted work. The doctrine appears particularly appropriate for the AI training process, which does not involve the traditionally impermissible copying and commercial reproduction of copyrighted work and, instead, only analyzes copyrighted material to detect patterns in an effort to develop a new 'function' or 'application,' namely, a large language model or other generative AI product."[52]

Finally, defendants may argue that the practice of scraping publicly available data does not necessarily constitute an invasion of privacy as there is a distinction between publicly available data and data marked private, and accessing publicly available data does not constitute access without authorization unless the data has been marked "private."[53]

Legislative Developments

As an emerging technology, artificial intelligence has also received considerable attention from a legislative standpoint. The legislative activity started in the European Union and has spread to several states in the United States.

In March of 2024, the European Parliament passed the European AI Act, which is formally known as the *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence*. The proposal sets forth a broad regulatory framework for artificial intelligence in the EU.[54] As noted, "[t]he [European Union] AI Act generally adopts a risk-based approach to the deployment and use of AI systems. AI systems deemed to pose an 'unacceptable' level of risk are outright banned and other AI systems are placed within a risk tier – with corresponding levels of compliance obligations. The obligations vary depending on whether the business is a provider (developer) or deployer of the system, with the majority

---

[51] Christopher J. Valente, Michael J. Stortz, Amy Wong, Michael W. Meredith and Peter E. Soskin, *Recent Trends in Generative Artificial Intelligence Litigation in the United States*, K&L Gates (September 5, 2023). https://www.klgates.com/Recent-Trends-in-Generative-Artificial-Intelligence-Litigation-in-the-United-States-9-5-2023 (last accessed November 15, 2024).
[52] *Id*.
[53] *Id*.
[54] Joan Stewart, Duane C. Pozza and Lauren N. Lerman, *EU Adopts World's First Comprehensive AI Regulation*, Wiley (March 15, 2024). https://www.wiley.law/alert-EU-Adopts-the-AI-Act-The-Worlds-First-Comprehensive-AI-Regulation (last accessed November 15, 2024).

of obligations falling on providers."[55] The Act "generally provides rules for General Purpose AI ("GPAI") models with enhanced requirements for GPAI models that pose 'systemic risks.'"[56]

In May of 2024 Colorado enacted AI focused legislation titled "*Concerning Consumer Protections in Interactions with Artificial Intelligence Systems*."[57] The law applies to *developers* (i.e., technology companies creating the AI) and *deployers* (i.e., the AI system users) that do business in Colorado. Generally, the "law's obligations apply to 'high-risk' AI systems that, when deployed, make, or are a substantial factor in making, a consequential decision. Consequential decisions include those pertaining to education, employment, financial or lending services, essential government services, healthcare, housing, insurance, or legal services."[58]

The law requires developers to share information with deployers, including but not limited to harmful or inappropriate uses of the high-risk AI system, limitations of the system and risk mitigation measures.[59] The Colorado Act also requires "deployers to adopt a risk management policy and program overseeing the deployment of the high-risk AI system, such as the National Institute of Standards and Technology's Artificial Intelligence Risk Management Framework and the International Organization for Standardization's Standard ISO/IEC 42001."[60]

The Colorado Act contains several exemptions, including certain insurers, banks and credit unions that are regulated by state and federal authorities, and covered entities under the Health Insurance Portability and Accountability Act.[61]

In March of 2024, Utah enacted the *Utah Artificial Intelligence Policy Act* which took effect May 1, 2024. Some key provisions of the Act include disclosure of requirements for entities using generative artificial intelligence with their customers; limits on an entity's ability to blame generative AI for statements that violate consumer protection laws; and creation of an Office of Artificial Intelligence Policy to administer a state AI

---

[55] *Id*.

[56] *Id*. (The Act defines a General Purpose AI model as an "AI model, including when trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable to competently perform a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications.")

[57] Arsen Kourinian, Amber C. Thomson, Vikram Sidhu and Lauren N. Williams, *Colorado Governor Signs Comprehensive Ai Bill*, Mayer Brown (June 4, 2024). https://www.mayerbrown.com/en/insights/publications/2024/06/colorado-governor-signs-comprehensive-ai-bill (last accessed November 15, 2024).

[58] *Id*.

[59] *Id*.

[60] *Id*. (The author notes that "[t]he law requires deployers of a high-risk AI system to complete an impact assessment for their system, an annual impact assessment for any system that is deployed, and an impact assessment within 90 days of an "intentional and substantial modification" to the system.")

[61] *Id*.

program.[62] Under the Act, the Utah Division of Consumer Protection may impose fines of up to $2,500 per violation.[63]

In <u>March of 2024</u>, Tennessee enacted AI-related related legislation directed at providing safeguards for the voices of songwriters, performers, and celebrities from artificial intelligence and deepfakes. The law, known as the *Ensuring Likeness Voice and Image Security* or "ELVIS Act" was signed into law <u>on March 21</u>, 2024.[64] The act, was widely supported by the entertainment industry and creates three separate legal causes of action applicable to those who violate the act.[65]

In <u>September of 2024</u>, California enacted "a generative artificial intelligence ("AI") law[66] that requires developers to post information on their websites regarding the data used to train their AI systems."[67] The law generally applies to applies to AI developers, which include a person, government agency, or entity that develops an AI system or service or "substantially modifies it," which includes adding "a new version, new release, or other update to a generative artificial intelligence system or service that materially changes its functionality or performance, including the results of retraining or fine tuning."[68] The law requires developers to post a notice on their website discussing the data used to train the system or service.[69] California has also enacted other laws that address several other aspects of the use of AI in a commercial context.[70]

In <u>August of 2024</u>, Illinois amended the *Illinois Human Rights Act* to address the risks associated with AI use in the employment context.[71] As noted, the new Illinois law "covers AI that has the effect of discriminating against

---

[62] Arsen Kourinian, Amber C. Thomson, Vikram Sidhu and Lauren N. Williams, *Utah Enacts AI-Focused Consumer Protection Bill*, Mayer Brown (May 13, 2024). https://www.mayerbrown.com/en/insights/publications/2024/05/utah-enacts-ai-focused-consumer-protection-bill (last accessed November 15, 2024).

[63] *Id.*

[64] Ashley Harbin and Jim Yoshikowa, *ELVIS Act Becomes Law; Tennessee Safeguards Against AI Deepfakes*, Adams and Reese, LLP (April 15, 2024). https://www.adamsandreese.com/news-knowledge/elvis-act-tennessee-safeguards-against-deepfakes. (last accessed November 15, 2024).

[65] *Id.*

[66] Nisha Talagala, *California's New AI Laws – What You should Know*, Forbes (October 14, 2024). https://www.forbes.com/sites/nishatalagala/2024/10/14/californias-new-ai-lawswhat-you-should-know/ (last accessed October 14, 2024) (detailing other significant laws that California has passed dealing with artificial intelligence).

[67] Arsen Kourinian, *California Passes New Generative Artificial Intelligence Law Requiring Disclosure of Training Data*, Mayer Brown (September 30, 2024). https://www.mayerbrown.com/en/insights/publications/2024/09/california-passes-new-generative-artificial-intelligence-law-requiring-disclosure-of-training-data (last accessed November 15, 2024).

[68] *Id.*

[69] *Id.*

[70] Some of the other more significant new AI-related laws include: SB-896 (requiring the California Office of Emergency Services to conduct a risk analysis on potential AI dangers); AB-3030 (requiring the disclosure of the use of generative AI to [patients when it is used by healthcare providers); AB-1120 (providing limits on the automation of healthcare services); AB-1008 (extending existing privacy laws to cover generative AI); and SB-942 (requiring the embedding of data in the metadata of content generated by AI systems).

[71] Arsen Kourinian, Kyla Miller, Charles E. Harris, II, *Illinois Passes Artificial Intelligence (AI) Law Regulating Employment Use Cases*, Mayer Brown (September 9, 2024). https://www.mayerbrown.com/en/insights/publications/2024/09/illinois-passes-artificial-intelligence-ai-law-regulating-employment-use-cases (last accessed November 15, 2024).

employees based on protected characteristics, regardless of whether the discrimination was intentional. Employers are also required to notify employees if the employers use AI for the purposes mentioned above. While the law does not specify the exact form this notice must take, the Illinois Department of Human Rights will adopt rules to define the circumstances and conditions that would trigger a notice requirement, a timeline for the same, and a means of providing that notice."[72]

Finally, in <u>April of 2024</u>, New York enacted a new ordinance relating to the use of AI-driven hiring tools. The new ordinance, *Local Law 144*, "prohibits employers or employment agencies from using an automated employment decision tool ("AEDT") to make an employment decision unless the tool is audited for bias annually; the employer publishes a public summary of the audit; and the employer provides certain notices to applicants and employees who are subject to screening by the tool."[73] The law has drawn sharp criticism since its inception. As noted in the MIT Technology Review, "Public interest groups and civil rights advocates say it isn't enforceable and extensive enough, while businesses that will have to comply with it argue that it's impractical and burdensome."[74]

Conclusion

The technical and legal environment of artificial intelligence is rapidly changing, and new products are evolving as organizations increasingly adopt this new technology. However, like any new technology, there are potential benefits and drawbacks. This paper has endeavored to provide an overview of technical landscape and the legal environment that is quickly emerging in response to the technology.

---

[72] *Id.*

[73] Jim Paretti, Niloy Ray, Eli Freedberg, and Ellie McPike, *New York City Adopts Final Regulations on Use of AI in Hiring and Promotion, Extends Enforcement Date to July 5, 2023*, Littler Mendelson, P.C. (April 13, 2023). https://www.littler.com/publication-press/publication/new-york-city-adopts-final-regulations-use-ai-hiring-and-promotion (last accessed November 15, 2024).

[74] Tate Ryan-Mosley, *Why is everyone is mad about New York's AI hiring law?* MIT Technology Review (July 10, 2023). https://www.technologyreview.com/2023/07/10/1076013/new-york-ai-hiring-law/ (last accessed November 15, 2024).