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Dailey LLP

AI UNLEASHED: LITIGATION LIGHTNING ROD IN THE GENERATIVE ERA

Essential Insights for Legal Counsel

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Agenda

- Landscape
  - General Background
  - AI Litigation Areas
  - Notable Cases
- Risks for Businesses Concerning AI Use
- Steps Counsel Can Take to Mitigate AI Risks

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LANDSCAPE

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What is AI?

- The term “artificial intelligence,” or AI, was coined by Stanford University professor emeritus John McCarthy in 1955. He defined it as “the science and engineering of making intelligent machines.”
- Today, AI is understood as computer software programmed to execute certain algorithms which allow the software to recognize patterns in data and thereby make judgments, draw conclusions and predict future patterns and behavior.
- A recent survey by IBM found that about 42% of companies with 1,000+ employees actively use AI in their businesses.

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Skynet or J.A.R.V.I.S.?



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Types of AI

- AI falls into various categories, including:
  - **Machine Learning:** The use of algorithms and statistical models to allow the AI to learn from data, draw inferences and make predictions without following explicit instructions.
    - Examples include ChatGPT and DALL-E.
  - **Natural Language Processing:** The understanding and processing of human language.
    - Examples include Siri, Alexa and Google Translate.
  - **Computer Vision:** The ability of AI to recognize patterns in visual data like humans do.
    - Examples include facial recognition, photo tagging software and autonomous vehicles.

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Types of AI-related Litigation

- Invasion of Privacy
- Copyright and Trademark Infringement
- Misappropriation of Property Rights
- Securities Exchange Act violations
- Breach of Contract
- Tort claims
- Right of Publicity
- Employment Discrimination
- Unfair Competition

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Notable Privacy / Misappropriation Cases

- **J.L. v. Alphabet Inc.** (N.D. Cal. July 2023)
  - Putative class action against Google asserting causes of action for unfair competition, negligence, invasion of privacy, intrusion upon seclusion, larceny, conversion, trespass to chattels, intentional interference, third-party beneficiary breach of contract, unjust enrichment, copyright infringement and violations of California statutes.
  - Plaintiffs allege that Google has been "secretly stealing everything ever created and shared on the internet by hundreds of millions of Americans" including "personal and professional information," in order to build Google chatbot "Bard".
  - Google's motion to dismiss is currently pending with oral argument scheduled for May.
  - The same plaintiff's firm previously filed a putative class action against OpenAI and Microsoft. captioned **P.M. v. OpenAI LP** (N.D. Cal. June 2023)
    - Similar to the allegations against Google, plaintiffs claim that OpenAI stole personal information belonging to millions of people by collecting publicly-available internet data to build and train its generative AI model.
    - The suit was voluntarily dismissed in September 2023.

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Notable Copyright Cases

- **Thomson Reuters v. ROSS Intelligence Inc.** (D. Del. May 2020)
  - In one of the first lawsuits asserting AI copyright infringement, plaintiff claimed defendant trained its competing legal research AI by copying Westlaw's legal database without permission.
- **Doe v. GitHub, Inc.** (N.D. Cal. Nov. 2022)
  - Plaintiffs, software developers, assert that defendants engaged in improper copyright information management by failing to provide the appropriate notice, attribution or license terms when making use of the plaintiffs' code.
- **Andersen v. Stability AI Ltd.** (N.D. Cal. Jan. 2023)
  - Plaintiffs allege that Stability AI and others unlawfully scraped billions of copyrighted images from the internet in order to train their image-generating AI models, allowing defendants to profit from the copyrighted works while depriving the artists of commissions.
- **Tremblay v. OpenAI, Inc.** (N.D. Cal. June 2023)
  - Plaintiffs are authors who filed a putative class action against OpenAI asserting copyright infringement.
  - Other copyright-infringement actions involving authors and writers include two suits brought by Sarah Silverman, Richard Kadrey and Christopher Golden titled **Silverman v. OpenAI, Inc.** (N.D. Cal. July 2023) and **Kadrey v. Meta Platforms, Inc.** (N.D. Cal. July 2023), as well as the recently filed **The New York Times Company v. Microsoft and OpenAI Inc.** (S.D.N.Y. Dec. 2023).

Notable Copyright Cases

- **Thomson Reuters v. ROSS Intelligence** – *Summary judgment motion pending*
- **Doe v. GitHub** – *Hearing on motion to dismiss set for May 2024*
- **Andersen v. Stability AI** – *Hearing on motion to dismiss set for May 2024*
- **Tremblay v. OpenAI** – *Amended Complaint filed in March 2024*
- **Silverman v. OpenAI** – *Consolidated with Tremblay in February 2024 along with related matter, Chabon v. OpenAI*
- **Kadrey v. Meta** – *Motion to dismiss argued in November 2023, awaiting ruling; consolidated with Chabon v. Meta in December 2023*
- **NYT v. Microsoft and OpenAI** – *Motion to dismiss filed in March 2024*

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Securities-related litigation

- **D'Agostino v. Innodata Inc.** (D.N.J. Feb. 2024)
  - Plaintiff shareholder filed a putative class action alleging that defendants lacked a reasonable basis for their positive statements about Innodata's business and financial outlook.
  - Asserts violations of Sections 10(b) & 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5.
  - Claims defendants made false and misleading statements and/or failed to disclose:
    - that defendant did not have "viable AI technology";
    - that the AI platform was "a rudimentary software developed by just a handful of employees";
    - that it was not going to utilize AI to any significant degree for new Silicon Valley contracts; and
    - it was not effectively investing in research and development for AI.

Securities-related litigation

- **In the Matters of Delphia (USA) Inc. & Global Predictions, Inc.**
  - In March 2024, the SEC announced settlement of charges against two investment advisers, Delphia (USA) Inc. and Global Predictions Inc., for making false and misleading statements about their purported use of AI.
  - Charges stem from alleged "AI washing" whereby companies "mislead the public by saying they are using an AI model when they are not." Per the SEC:
    - Global Predictions falsely claimed to be the "first regulated AI financial advisor" and misrepresented that its platform provided "[e]xpert AI-driven forecasts." The company agreed to pay a civil penalty of $175,000.
    - Delphia claimed that it uses AI to "predict which companies and trends are about to make it big and invest in them before everyone else," but in reality, it lacked the AI and machine learning capabilities it claimed. The company agreed to pay a civil penalty of $225,000.

Other litigation

- **Breach of Contract:** Lokken vs. UnitedHealthCare, Inc. (D. Minn. Nov. 2023)
  - Putative class action plaintiffs allege that UnitedHealthcare, the largest health insurance company in the U.S., uses a flawed AI model to unreasonably deny plaintiffs coverage "without an adequate individualized investigation," thereby breaching their insurance agreement with plaintiffs.
  - Defendant moved to dismiss; Plaintiffs to file an Amended Complaint in April 2024.

- **Negligence:** Nilsson v. General Motors LLC (N.D. Cal. June 2018)
  - Plaintiff, a motorcyclist, was injured when he was struck by an autonomous vehicle.
  - Plaintiff pled one count of negligence (not product liability); case settled after pleadings phase.
  - Claimed GM breached its duty of care "in that its Self-Driving Vehicle drove in such a negligent manner that it veered into an adjacent lane of traffic without regard for a passing motorist…."
  - Case raises questions regarding how foreseeability is determined when AI acts on its own.

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Other litigation

- **Right of Publicity:** Young v. NeoCortext, Inc. (C.D. Cal. Apr. 2023)
  - Plaintiff, a television personality, filed a class action complaint against the defendant claiming its AI product allowing users to digitally "swap" their faces with celebrities and public figures violates the right of publicity.
  - Defendant's motions to dismiss and strike were denied in September 2023, prompting interlocutory appeal and stay of district court proceedings while the Ninth Circuit weighs in.
- **Libel:** Walters v. OpenAI (N.D. Ga. June 2023)
  - Plaintiff, a radio host, claims OpenAI committed libel when it generated a fictitious summary for a journalist in which it falsely claimed there was a civil lawsuit against the plaintiff for fraud and embezzlement.
  - Motion to dismiss denied in January 2024 following remand to Gwinnett County Superior Court.
- **Employment discrimination:** Mobley v. Workday Inc. (N.D. Cal. Feb. 2023)
  - Putative class action alleging that a Workday platform to screen job candidates discriminates based on race, age, and disability in violation of Title VII of the Civil Rights Act of 1964 and other federal laws. The lead plaintiff claimed he had been rejected from more than 100 jobs he applied for using Workday's platform.
  - Motion to dismiss filed in March 2024.

AI Risks

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Risks

- Inaccuracy or bias of output data
  - Source information may be outdated
  - Source information may be misinterpreted
  - Output may be derived from biased sources
  - Inputs may be based on false premise
- Depending on use of generated data, may result in exposure to claims including for breach of contract, discrimination, libel and/or malpractice

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Risks

- Infringement and/or misappropriation
  - Source information may include material protected by copyright laws or other legal protections
  - Potential liability exposure to the extent the business publishes or otherwise uses legally protected content
- Unchecked use of AI-generated material could raise plagiarism concerns

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Risks

- Inputted information may be retained and used by AI companies
  - Potential waiver of privilege/confidentiality protections
  - Potential disclosure of confidential business information
  - Potential breaches of contractual duties of confidentiality
  - Exposure to cybersecurity risks in the event of a security breach

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OpenAI Research API ChatGPT Safety Company

Personal Information You Provide: We collect Personal Information if you create an account to use our Services or communicate with us as follows:

- *Account Information:* When you create an account with us, we will collect information associated with your account, including your name, contact information, account credentials, payment card information, and transaction history, (collectively, "Account Information").
- *User Content:* When you use our Services, we collect Personal Information that is included in the input, file uploads, or feedback that you provide to our Services ("Content").
- *Communication Information*: If you communicate with us, we collect your name, contact information, and the contents of any messages you send ("Communication Information").
- *Social Media Information*: We have pages on social media sites like Instagram, Facebook, Medium, Twitter, YouTube and LinkedIn. When you interact with our social media pages, we will collect Personal Information that you elect to provide to us, such as your contact details (collectively, "Social Information"). In addition, the companies that host our social media pages may provide us with aggregate information and analytics about our social media activity.

- Plus: log and usage data, device information, cookies and other information provided by users

Source: https://openai.com/policies/privacy-policy



Research API ChatGPT Safety Company

2. How we use personal information

We may use Personal Information for the following purposes:

- To provide, administer, maintain and/or analyze the Services;
- To improve our Services and conduct research;
- To communicate with you; including to send you information about our Services and events;
- To develop new programs and services;
- To prevent fraud, criminal activity, or misuses of our Services, and to protect the security of our IT systems, architecture, and networks;
- To carry out business transfers; and
- To comply with legal obligations and legal process and to protect our rights, privacy, safety, or property, and/or that of our affiliates, you, or other third parties.

- OpenAI “may” aggregate or de-identify personal information to protect users’ identities.
- Privacy policy also lists certain circumstances in which the company “may provide your Personal Information to third parties without further notice to you, unless required by the law.”

Source: https://openai.com/policies/privacy-policy

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Steps Counsel Can Take to Mitigate AI Risks

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Steps Legal Counsel Can Take

- Draft Clear Policies and Procedures
  - Help create or review company-wide AI policies, ensuring that these documents clearly define roles, responsibilities and protocols.
  - Make employees aware of how input prompts may be used.
  - Specify purposes for which AI may be used through an “acceptable use” policy, identifying:
    - Areas where AI can be used to improve efficiency;
    - Areas where AI use may pose risks and areas where it is prohibited.
  - Restrict the use of personal, client-related or other confidential information in input prompts.
  - Develop a compliance strategy to include protocols, such as for obtaining third-party consent and addressing consumer/individual opt-outs and complaints.

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Steps Legal Counsel Can Take

- Update Existing Policies
  - Update privacy policies, employee handbooks, training materials, and notices and disclosures to address AI use to comply with applicable laws and promote transparency.
- Regular Assessments
  - Require employees to disclose use of AI for business purposes.
  - Collaborate with IT team to assess and audit AI practices.
- Employee Training
  - Advocate for and help design training programs for employees to raise awareness about AI use and risks, including designating individuals to manage or train employees on AI use.

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Steps Legal Counsel Can Take

- De-Identification
  - To the extent practical, require de-identification of data before it is used in input prompts.
  - Ensure that de-identification standards of applicable privacy laws are satisfied.
- Insurance
  - Review and advise on policies to ensure they provide adequate coverage based on the company's AI risk profile. Understand the terms, conditions and any exclusions in the policy.
- Contractual Protections
  - Include clauses that specify AI standards and practices contracting parties must adhere to.
  - Clearly define what is considered confidential or proprietary information and restrict the use of your business's confidential or proprietary information in input prompts.

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Steps Legal Counsel Can Take

- Contractual Protections (con't)
  - Require disclosure of extent of AI use in providing services.
  - Require that service providers use AI at their own risk and such use does not affect the responsibilities of the parties or standard for performance under the contract.
  - Require that AI use comply with applicable laws and regulations.
  - Consider adding indemnification clauses or limitations of liability related to AI use.
  - Consider requiring that the other party bear the costs of conducting infringement searches or confirming that AI use does not violate laws or create liability exposure.
  - Consider requiring that tech E&O insurance be provided as part of transaction to protect against AI-related liability, naming your business as an additional insured.

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Key Takeaways

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Key Takeaways

- AI is here to stay, offering a competitive advantage to businesses that embrace it.
- AI litigation is exploding, and liability theories regarding AI use are plentiful.
- Assess and audit your company's AI use through the lens of potential claims.
- Create and update internal policies to mitigate risk.
- Promote employee training on AI use to mitigate risk.
- Assuming your company has bargaining power, secure protections against AI liability exposure in contracting with third parties.

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