



Artificial Intelligence:

Legal Challenges and Emerging Solutions

MARCH 2024

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Agenda

- Panel 1 – An Introduction to AI and Its Impact on the Law
- Panel 2 – New Legal Horizons: Critical Legal Questions Raised by the Implementation of AI Systems

PANEL 1

What Are People Talking About When They Talk About AI?

Rob McFarlane, Partner – Technology Practice Group Leader; Intellectual Property Practice Co-Leader

The internet in the mid-1990s

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And in *Ecolica*: Dertuous redux. This, and more, in *Amazon.com Journal*, where titles are offered at up to **40% off list price**.

Titles in the News
The *New York Times* *Best Seller* books are in! If you ask us, Arundhati Roy's novel, *The God of Small Things*, is a big thing indeed... *Chic* is a stunningly good book about the man who drove Cuba's revolution but found disappointment in its success... And *The Penguin Station* is a dramatic, gale-by-gale account of the 1991 "storm of the century" that pummeled the northeastern United States.

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Information



Shopping and Entertainment

amazon

The Amazon logo consists of the word "amazon" in a bold, black, lowercase sans-serif font. Below the text is a curved orange arrow that starts under the letter 'a' and points to the right, ending under the letter 'n'.

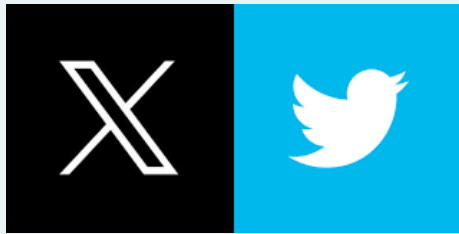
prime video

The Prime Video logo features the word "prime" in a blue sans-serif font and "video" in a black sans-serif font. Below the text is a curved blue arrow that starts under the letter 'i' in "prime" and points to the right, ending under the letter 'o' in "video".

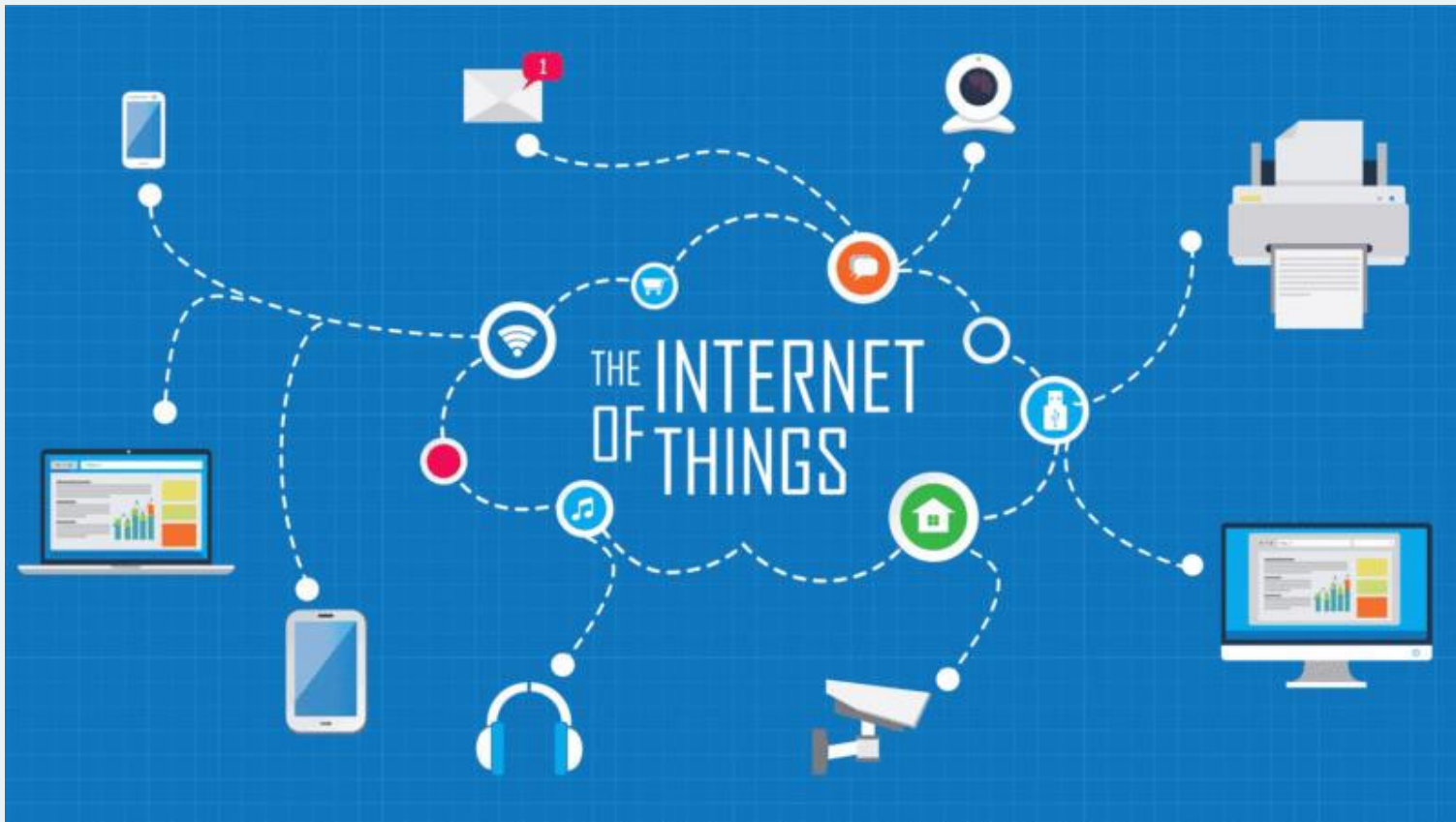
You Tube

The YouTube logo consists of the word "You" in a black sans-serif font and "Tube" in a white sans-serif font inside a red rounded rectangle.

Social Media



The Internet of Things



The Internet and the Legal Landscape

- Tech Companies as Economic Engines and Leading Clients
- Transformed the Practice of Law
 - Research, filings, remote work, clients
- Privacy
- Legal Issues surrounding the Internet

- **Artificial Intelligence:**
 - **Is AI the New Internet?**

Artificial Intelligence in 2024: Taking Off to Points Unknown

- Siri and Alexa
- Pandora and Spotify – they know what songs you will like
- Amazon.com
- Roomba
- Facebook and Social Networks
- Healthcare and Diagnostics
- Finance

Artificial Intelligence in 2024: Taking Off to Points Unknown

And now...

- Self-driving cars
- Dall-E and Chat GPT
- Microsoft Copilot

AI's Economic Powerhouses

- Nvidia
- Microsoft, Alphabet, Amazon.com, Meta
- OpenAI

What is Artificial Intelligence?

Artificial Intelligence (AI) is an umbrella term for computer software that mimics human cognition, behavior, and ability.

AI Fundamentals

Machine Learning: A branch of artificial intelligence (AI) and computer science which focuses on the use of large data sets and algorithms to imitate the way that humans learn, gradually improving its accuracy ***without explicitly being programmed.***

- **Examples:**

- *Training an AI to recognize dog breeds*
- *Training an AI to generate an image of a doctor.*

Large Language Models: Deep learning models that can perform a variety of natural language processing tasks such as recognizing, translating, predicting or generating text, speech or other content. LLMs use enormous data sets to learn millions or even billions of parameters to generate natural-sounding content

AI Fundamentals

Discriminative AI uses machine learning models to learn features and patterns for *understanding* content such as images, text, and voice.

- Medical Diagnostics
- Facial Recognition
- Voice Recognition

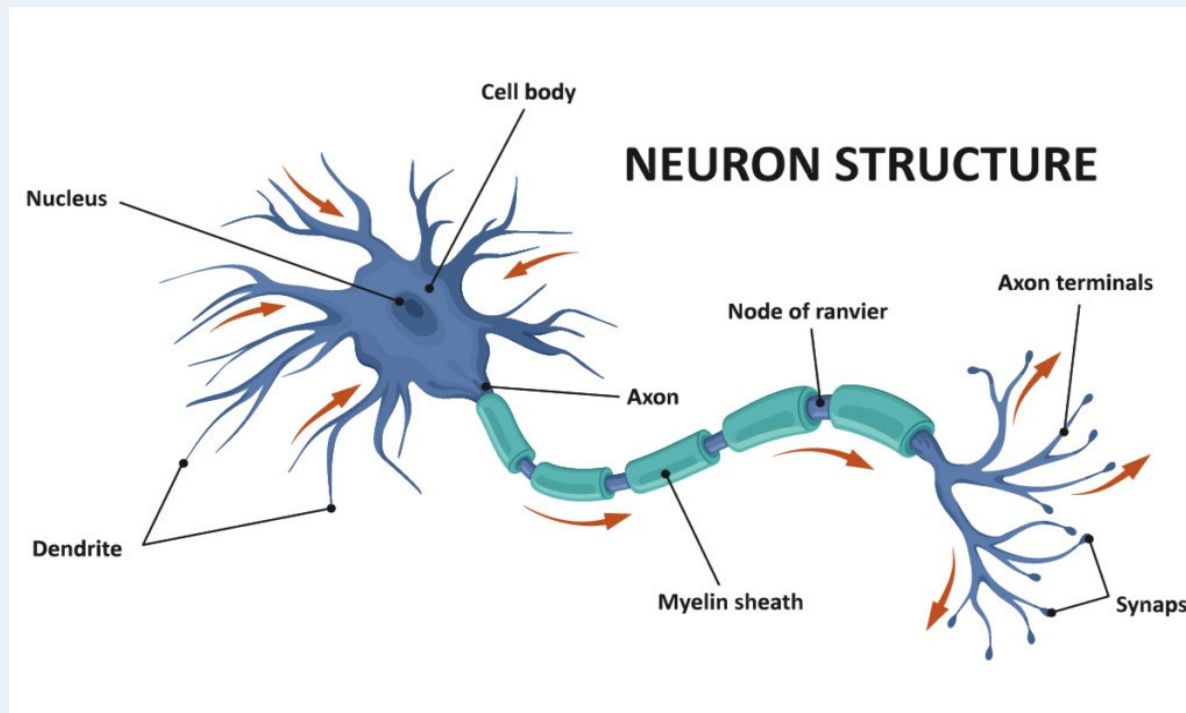
Generative AI uses machine learning models to learn features and patterns for *generating* content such as images, text, and voice

- Chat GPT
- Dall-E

Why is the Explosive Growth in AI Happening Now?

- Availability of Data
- Parallel Processing

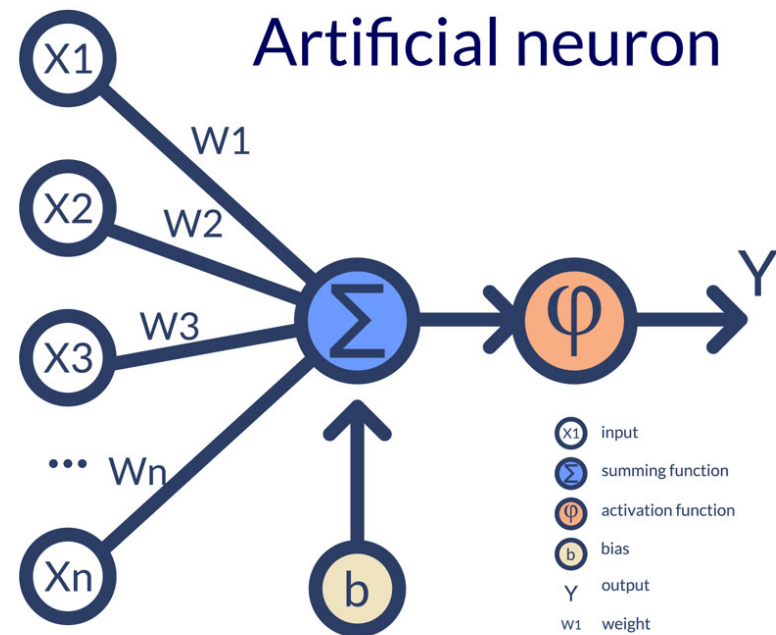
Why AI is So Mysterious: Deep Learning and Artificial Neural Networks



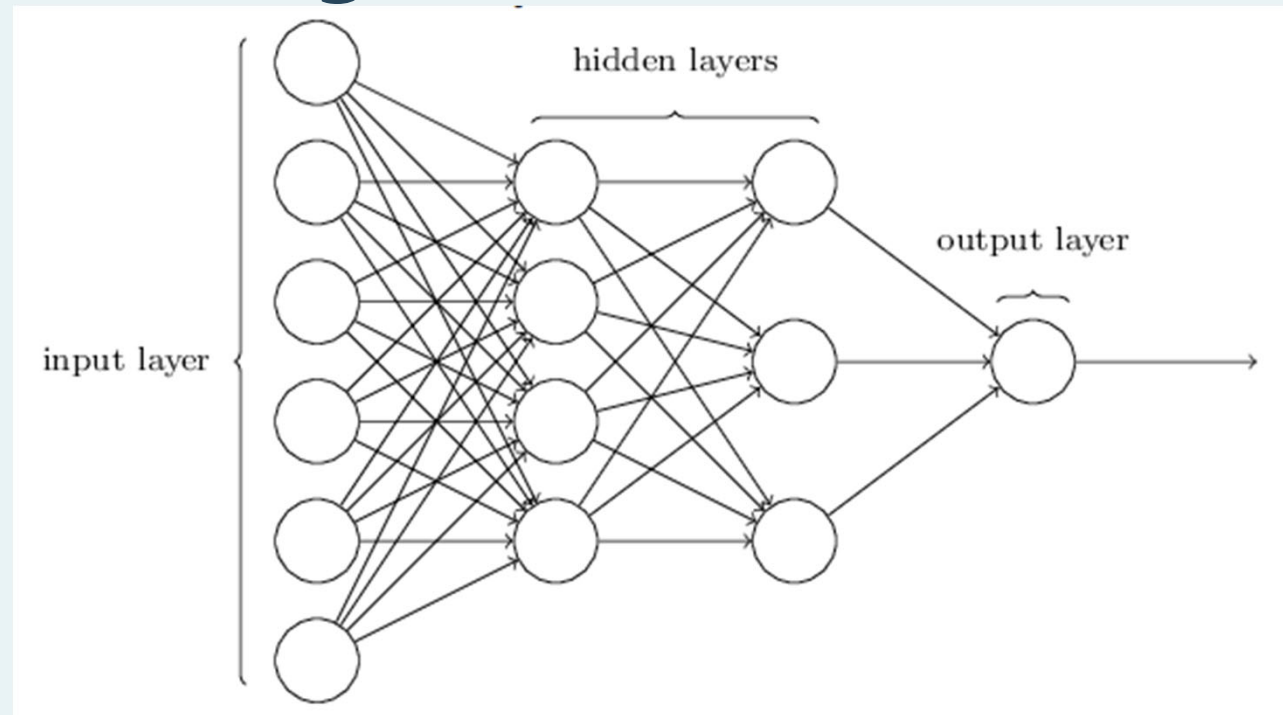
Why AI is So Mysterious: Deep Learning and Artificial Neural Networks



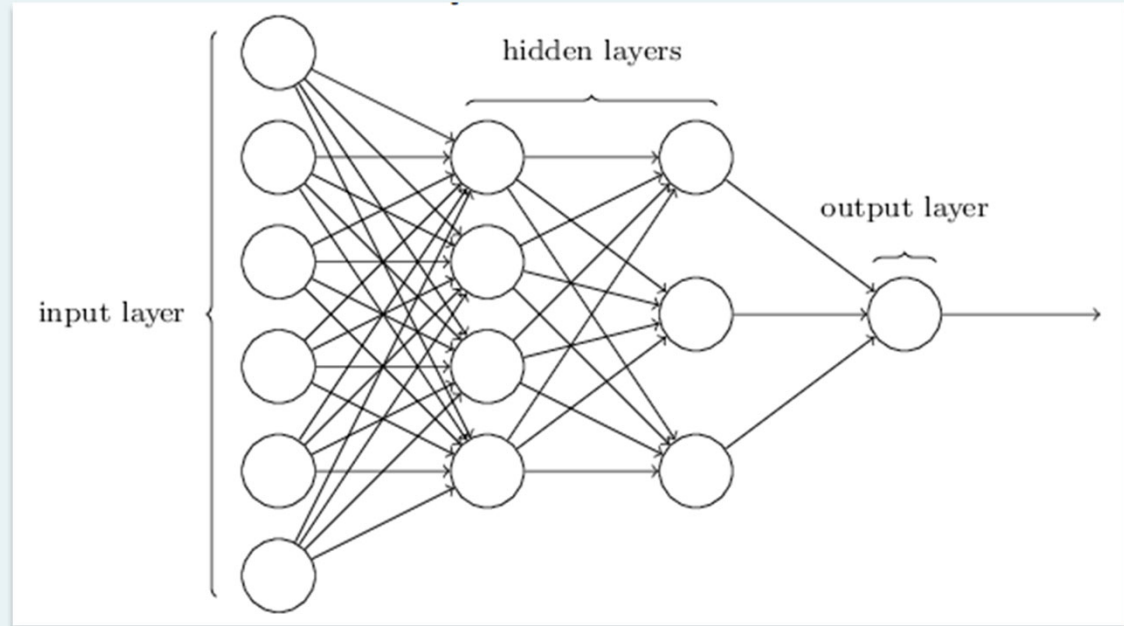
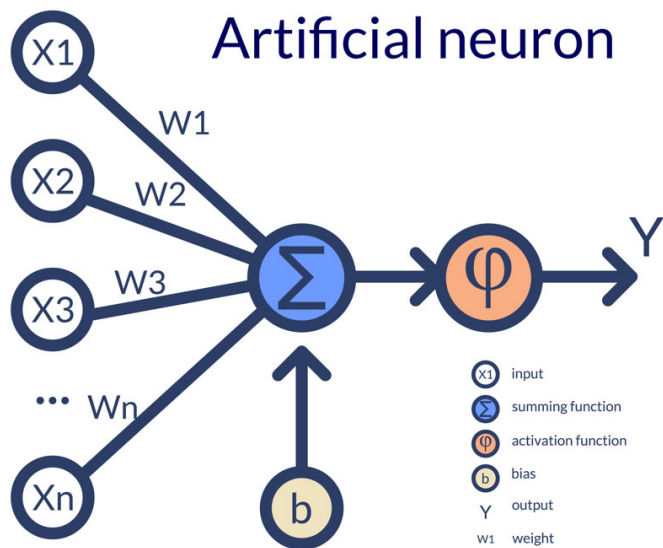
Artificial Neural Networks and Deep Learning



Artificial Neural Networks and Deep Learning



Training and Back Propagation



What is Chat GPT Doing?

- Large Language Model
- Chat GPT-3 trained on 570 GB of data (300 billion words) scraped from internet, Wikipedia, Reddit, digitized books)
- Does NOT know what it is saying or if it is correct.

The Tank in a Forest:

An Urban Legend and the Limits of “Intelligence” in AI



What Does Artificial Intelligence Mean for Intellectual Property?

Rob McFarlane, Partner – Technology Practice Group Leader; Intellectual Property Practice Co-Leader


Recent Questions (and some answers)

- To what extent can AI-generated inventions be patented?
- To what extent can AI-generated content be copyrighted?
- Does training AI models on copyrighted material give rise to liability for copyright infringement?
- Do Generative AI outputs infringe existing copyrights?

The Requirement of Human Authorship



- *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018)



Artificial Intelligence as the Creator: DABUS and the Quest for Inventorship

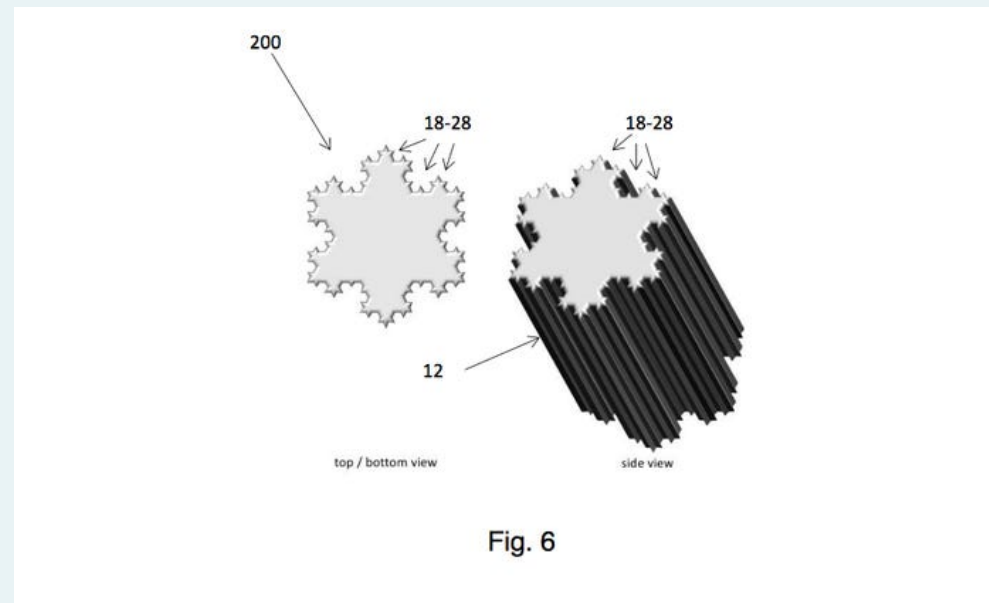
Inventorship

- 35 U.S.C. §101
 - **Whoever** invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

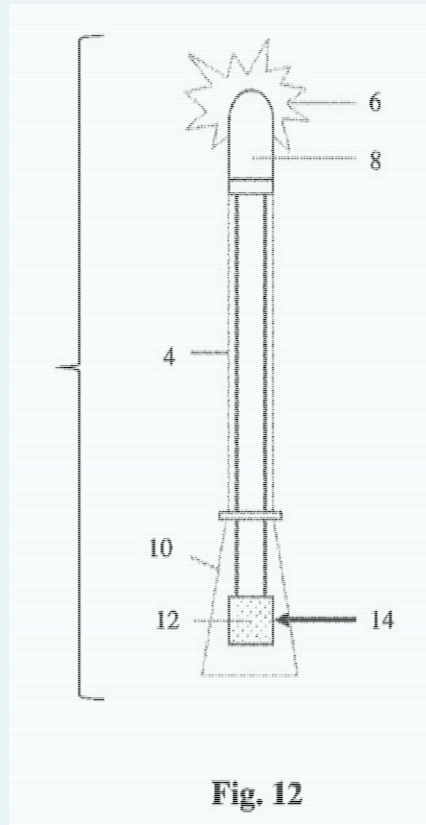
***Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022)**

- Device for the Autonomous Bootstrapping of Unified Science (“DABUS”) creates
- Steven Thaler Applies for Patent with DABUS named as the sole inventor

DABUS Creations: Fractal Container



DABUS Creations: Neural Flame



***Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022)**

At first, it might seem that resolving this issue would involve an abstract inquiry into the nature of invention or the rights, if any, of AI systems. In fact, however, we do not need to ponder these metaphysical matters. Instead, our task begins – and ends – with consideration of the applicable definition in the relevant statute.

The Patent Act expressly provides that inventors are “individuals.”

- “The *individual* or, if a joint invention, the *individuals* collectively who invented or discovered the subject matter of the invention.” (35 U.S.C. § 100(f)).
- The Supreme Court has explained, when used “[a]s a noun, ‘individual’ ordinarily means a human being, a person.” *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012)

Did not address the patent eligibility of inventions made by human beings with the assistance of AI

USPTO Guidance on AI-Assisted Inventions (Feb. 13, 2024)

- **AI-Assisted Inventions Are Not Categorically Unpatentable for Improper Inventorship**
- Use of an AI system (or other advanced tools) by a natural person(s) does not preclude that natural person(s) from qualifying as the inventor (or joint inventors) if the natural person(s) significantly contributed to the claimed invention.
- Patent applications and patents for AI-assisted inventions must name the natural person(s) who significantly contributed to the invention as the inventor or joint inventors

Pannu Factors as Applied to AI

- USPTO Looked to Standards for Joint Inventorship in *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1351 (Fed. Cir. 1998).
- Each named inventor must contribute in some significant manner to the invention by satisfying **all three** of the *Pannu* factors:
 - contribute in some significant manner to the conception or reduction to practice of the invention
 - – make a contribution to the claimed invention that is not insignificant in quality, when that contribution is measured against the dimension of the full invention, and –
 - do more than merely explain to the real inventors well-known concepts and/or the current state of the art.

USPTO's Guiding Principles

- Maintaining “intellectual domination” over an AI system does not, on its own, make a person an inventor of any inventions created through the use of the AI system.
- Therefore, a person simply owning or overseeing an AI system that is used in the creation of an invention, without providing a significant contribution to the conception of the invention, does not make that person an inventor.

USPTO's Guiding Principles

- A natural person's use of an AI system in creating an AI-assisted invention does not negate the person's contributions as an inventor. The natural person can be listed as the inventor or joint inventor if the natural person contributes significantly to the AI-assisted invention.

USPTO's Guiding Principles

- Merely recognizing a problem or having a general goal or research plan to pursue does not rise to the level of conception.
- A natural person who only presents a problem to an AI system may not be a proper inventor or joint inventor of an invention identified from the output of the AI system.
- However, a significant contribution could be shown by the way the person constructs the prompt in view of a specific problem to elicit a particular solution from the AI system.

USPTO's Guiding Principles

- 3. Reducing an invention to practice alone is not a significant contribution that rises to the level of inventorship.
- Therefore, a natural person who merely recognizes and appreciates the output of an AI system as an invention, particularly when the properties and utility of the output are apparent to those of ordinary skill, is not necessarily an inventor.
- However, a person who takes the output of an AI system and makes a significant contribution to the output to create an invention may be a proper inventor.



Artificial Intelligence as the Creator Redux: Can AI Qualify as an Author?

Thaler Tries for a Copyright



- ***Thaler v. Perlmutter*, 2023 WL 5333236, Case No. 1:22-cv-01564, (D.D.C. Aug. 18, 2022)**

Zarya of the Dawn



- A graphic novel written by Kris Kashanova

Zarya of the Dawn



- AI-Generated Images
- Human-Generated Text
- Author-Created Layout

Does Generative AI Infringe Copyrights?

Does Generative AI Infringe Copyrights?

- *Anderson v. Stability AI Ltd, MidJourney, Inc. and Deviant Art*, Case No. 3:23-cv-00201-WHO (N.D. California January 13, 2023)
- *Silverman v. OpenAI, Inc.*, Case No. 3:23-cv-03416-AMO (N.D. California July 7, 2023)
- *Chabon v. OpenAI, Inc.*, Case No. 3:23-cv-04625-PHK (N.D. California September 8, 2023)
- *Authors Guild v. OpenAI, Inc.*, Case No. 1:23-cv-8292 (S.D. New York September 19, 2023)
- *Huckabee v. Meta Platforms, Inc.* Case No. 1:23-cv-09152 (S.D. New York October 17, 2023)
- *The New York Times Company v. Microsoft Corp, OpenAI, Inc. et al.* Case No. 1:23-cv-11195-SHS (S.D.N.Y. December 27, 2023)

Copyright Protections Implicated by Generative AI

- 17 U.S.C. §107 – Copyright holder's exclusive rights include rights to
 - Reproduce copyrighted work
 - Create derivative works of the copyrighted work
 - Display and Distribute the copyrighted work
- Potential Infringements by Generative AI
 - Training Data may be digitally copied and used without permission
 - Output may constitute derivative work
 - If output is a derivative work, distribution and display rights may be infringed

17 U.S.C. §107: The Fair Use Defense

Fair Use Factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes [commerciality and transformational use inquiries]
- (2) the nature of the copyrighted work [is the work fact or fiction?]
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole [is the use a small fraction or a substantial portion of the work]
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

No One-Size Fits All Answers: Training

Anderson v. Stability AI Ltd, MidJourney, Inc. and Deviant Art, Case No. 3:23-cv-00201-WHO (October 30, 2023)

Dismissed claims related to *unregistered* copyrights

- Plaintiffs have adequately alleged direct infringement based on the allegations that Stability “downloaded or otherwise acquired copies of billions of copyrighted images without permission to create Stable Diffusion,” and used those images (called “Training Images”) to train Stable Diffusion and caused those “images to be stored at and incorporated into Stable Diffusion as compressed copies.”
- Even Stability recognizes that determination of the truth of these allegations – whether copying in violation of the Copyright Act occurred in the context of training Stable Diffusion or occurs when Stable Diffusion is run – cannot be resolved at this juncture.

No One-Size Fits All Answers: Output

Anderson v. Stability AI Ltd, MidJourney, Inc. and Deviant Art, Case No. 3:23-cv-00201-WHO (October 30, 2023)

I am not convinced that copyright claims based a derivative theory can survive absent “substantial similarity” type allegation.

Defendants make a strong case that I should dismiss the derivative work theory without leave to amend because plaintiffs cannot plausibly allege the Output Images are substantially similar or re-present protected aspects of copyrighted Training Images, especially in light of plaintiffs’ admission that Output Images are unlikely to look like the Training Images.

But other parts of plaintiffs’ Complaint allege that Output Images can be so similar to plaintiff’s styles or artistic identities to be misconstrued as “fakes.” Once plaintiffs amend, hopefully providing clarified theories and plausible facts, this argument may be re-raised on a subsequent motion to dismiss.

Thomson Reuters Enterprise Centre GmbH v. Ross, 2023 WL 6210901 (D. Delaware Sept. 25, 2023)

Ross Trained an AI Legal Tool on material that included West Headnotes.

Plaintiff alleged that Defendant simply sought to train its AI by copying the creative decisions of Westlaw's attorney-editors precisely because it wanted to replicate them and merely translated the headnotes into numerical data that translation represents a "paradigmatic derivative work."

Defendant claimed that its AI studied headnotes only to analyze language patterns, not to replicate Westlaw's Expression, making the translation a minor step in a broader, transformative use.

Thomson Reuters Enterprise Centre GmbH v. Ross, 2023 WL 6210901 (D. Delaware Sept. 25, 2023)

Infringement and Fair Use Depends on Nature of Alleged Infringement

The intermediate copying caselaw (*Sega* and *Sony*) tells us that whether Ross's use was transformative depends on the precise nature of Ross's actions.

- It was transformative intermediate copying if Ross's AI only studied the language patterns in the headnotes to learn how to produce judicial opinion quotes.
- But if Thomson Reuters is right that Ross used the untransformed text of headnotes to get its AI to replicate and reproduce the creative drafting done by Westlaw's attorney-editors, then Ross's comparisons to cases like *Sega* and *Sony* are not apt. Again, this is a material question of fact that the jury needs to decide.

Implications and Practical Considerations

- The law is uncertain
- Ask AI providers their training data was licensed
- Avoid AI tools that use unlicensed data or that cannot confirm training data was licensed
- Demand indemnification for potential copyright infringement

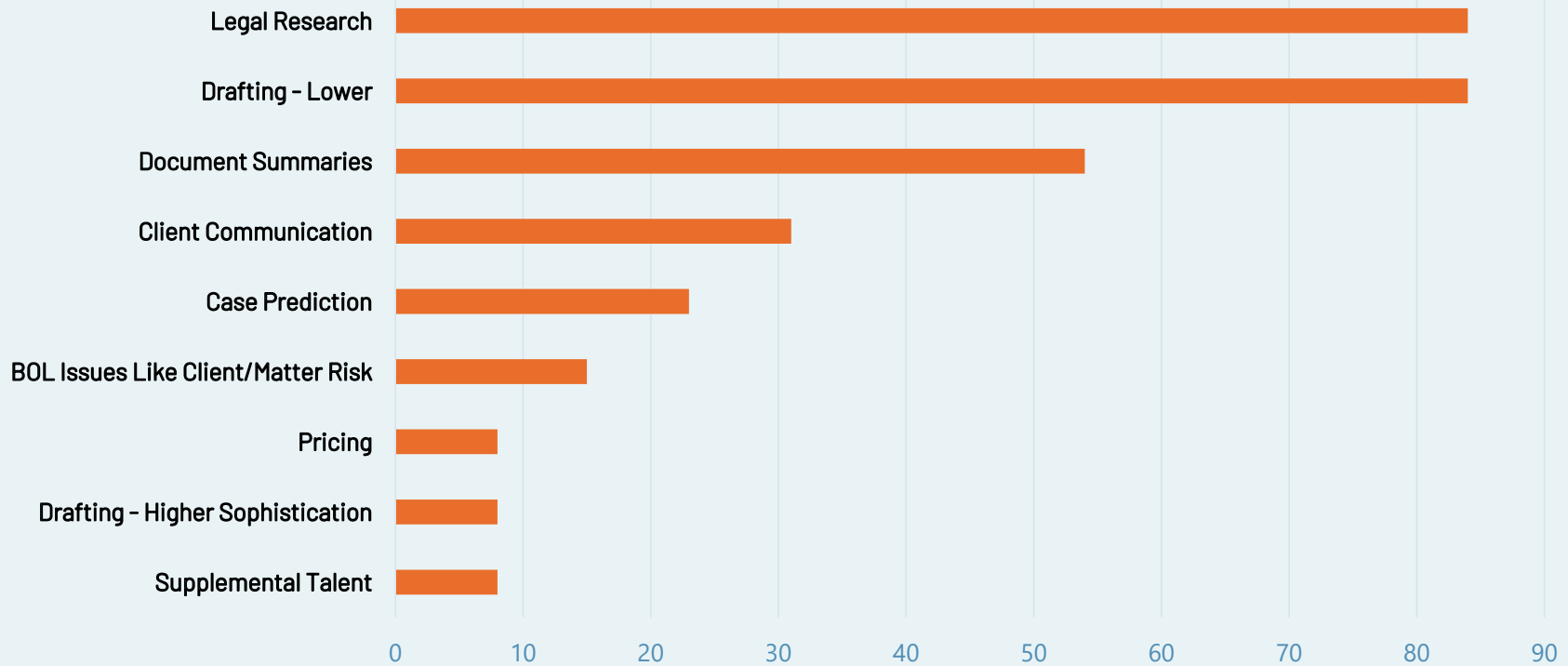
How are Law Firms Deploying AI to Better Serve Their Clients?

Warren Hodges, Counsel – AI Initiative Co-Chair

Sample Offerings in the Legal AI Spectrum

Category	Offerings
Legal research, case summary, due diligence	Lexis+AI, Casetext, Harvey, LegalRobot, OneLaw.ai, Callidus, Westlaw Edge, Bloomberg GPT, ChatGPT
e-Discovery	RelativityOne
Contract review and analysis, due diligence	Amto Allronclad, Juro, DocuSign CLM, LawGeex Contract Analyzer, Litera (Kira systems), Luminance
Legal document automation	DocuSign AI, iManage AI, Draftwise
Private equity	Ontra
Litigation	Lex Machina, Darrow
Business of law	Intapp, Litera (cloc, fsg, kira), Onit (spend), Altclaro (educ)
Intellectual Property	PatentPal
Process Automation	CsDisco (rpa), Legaly (dm), Law Support (mobile)
Consumer Legal Claims	DoNotPay
General	Microsoft Office Co-Pilot, Grammarly,

Gen AI Applications Being Deployed or Planned



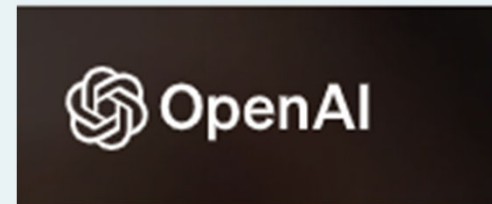
What Generative AI Products Are Out There?



Casetext acquired by Thomson Reuters



Welcome to Westlaw's
AI-Assisted Research New



Centari
Butler Labs
Maxime Tools

ChatGD
Proprietary Gen AI App

DENTONS
fleet AI based on GPT-4

UnitedLex
Innovation Lab - \$10m



Open.AI \$5m
startup fund, then
\$21m in April by
led by Sequoia

TR \$650m



ADDLESHAW
GODDARD



News • Jun 28, 2023

Legaltech News – AI Startup DraftWise Raises \$5M, With
Help From Orrick Herrington & Sutcliffe



How Can Companies Deploying AI in Advanced and Autonomous Products Limit Their Liability?

Mert Howard, Partner – Product Liability & Torts Practice Group Leader

Start at the End: What Has Gone Wrong?

- Financial or Monetary Loss
- Loss of Data or Access to Data
- Bodily Injury or Death
- Property Damage
- Reputation
- Competition / Advertising
- Opportunity
- Other

Tort Liability: Questions for Consideration

- In the world of artificial intelligence and machine learning, is our common understanding of a “product” and “defect” still meaningful?
- What product liability arguments or theories are plaintiffs now advancing in the context of claims involving social media platforms? What is on the horizon?
- How is liability expanding for on-line market places?
- What does it all mean?

Expanding Theories & Sources of Liability

- Contract and License
- Commercial Law
- Common Law – Emerging Tort Standard of Care
 - Strict Liability
 - Negligence – who is the operator or user of the product
 - Nuisance
 - Punitive Damages
- Regulatory Environment
- Voluntary Standards

Managing Risk – Promoting Safety & Trust

- Best practices for:
 - Design / Testing
 - Guarding
 - Instructions / Warnings
 - Manufacture / Sale
 - QA / QC
 - Customer Service and Communication
- Insurance
- Claim Prevention and Management
- Indemnity, Contribution, Limitation, Exclusions, Release, and Waiver

PANEL 2

What Do Employers Need to Consider When AI Enters Their Human Resource Departments?

Diane Marie O'Malley, Partner – Labor & Employment Class Action Group Leader

Automated Decision Tools (ADT)

- Software or a system that uses algorithms, machine learning, artificial intelligence, or other computational methods - they assist in and make decisions related to employment and human decision-making processes, decisions such as hiring, firing, promotions, job assignments, etc. An ADT analyzes resumes, evaluates interview responses given in interviews, assesses current employee job performance, etc.
- Allegedly reduces human bias? [but see recent cases]

Hiring Decisions: Screening Tools - Discrimination

EEOC v. iTutorGroup, Inc., et al., Civil Action No. 1:22-cv-02565 (EDNY)

- According to the EEOC's May 5, 2022, complaint, iTutorGroup programmed their tutor application software automatically to reject female applicants aged 55 or older and male applicants aged 60 or older.
- The parties settled on September 8, 2023, with a court approved consent decree that provides \$365,000 to be distributed to applicants who were automatically rejected due to age.

<https://www.workforcebulletin.com/assets/htmldocuments/blog/8/2023/08/2023.08.09-EEOC-v.-iTutorGroup-Joint-Notice-of-Settlement-22-cv-02565-PKC-PK.pdf>

Hiring Decisions: Screening Tools - Discrimination

Mobley v. Workday, Inc., 3:23-cv-00770, (N.D. Cal.)

- Mobley was male, African American, over 40, and disabled. He claimed to have applied for 80 – 100 jobs at companies using Workday’s screening tool and his application was rejected every time.
- In January 2024, Judge Rita F. Lin dismissed the complaint without prejudice because the original lawsuit did not offer enough evidence to classify Workday as an “employment agency” subject to liability under anti-discrimination law.
- Mobley refiled in February 2024.

Hiring Decisions: Screening Tools - Discrimination

Mobley v. Workday, Inc., 3:23-cv-00770, (N.D. Cal.) – 2023 Complaint

- Defendant Workday is an employment agency pursuant to Section 703(b) of the Act, 42 U.S.C. § 2000e-2(b). Defendant Workday's headquarters and principal place of business is located at 6110 Stoneridge Mall Road, Pleasanton, California.

Hiring Decisions: Screening Tools - Discrimination

Mobley v. Workday, Inc., 3:23-cv-00770, (N.D. Cal.) – 2024 Complaint

- Defendant Workday is an employment agency pursuant to Section 703(b) of the Act, 42 U.S.C. § 2000e-2(b). Defendant Workday is also an agent of employers who have delegated to it authority to make decisions in the hiring process, including by relying on the results of selection procedures that Workday administers on the employers' behalf to make hiring decisions, alternatively, Workday is an indirect employer because it controls access to employment opportunities.

Unions – Section 7 Rights and Workplace Duties

- **NLRB – October 2022 General Counsel Memorandum** - artificial intelligence-enabled monitoring of labor organizing activities *might violate* the rights granted to workers by Section 7 of the National Labor Relations Act (NLRA)
- “I will urge the Board to find that an employer has presumptively violated Section 8(a)(1) where the employer’s surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.

Unions - Making Work Tasks More Efficient or Unnecessary?

What to consider if you have a unionized work force:

- Look at the Collective Bargaining Agreement (CBA): Does the CBA cover integrating new technology?
- How will any AI integration affect job responsibilities, work hours, wages and benefits?
- Will there be any job losses?

Employee Evaluations

Using Artificial Intelligence to Evaluate Employees: The Effects on Recruitment, Effort, and Retention – January 2024 (Indiana University)

- “Collectively, our results provide evidence of costs and benefits related to the use of AI in performance evaluations and that, overall, the use of AI within performance evaluations has the potential to “level the playing field” for select employee outcomes regardless of demographics.”

Employee Evaluations

- “With GenAI's ability to collect and analyze data from diverse channels like emails, instant messages and internal platforms, as well as how easily it summarizes information, leaders can save significant time by expediting and streamlining administrative tasks. They can also use algorithms to process and analyze feedback from multiple sources, including peers, direct reports and supervisors, to provide a holistic view of an employee's performance. These functions can allow for better reflection on employees' progress toward their stated objectives throughout the year.” – Forbes (12/22/23)

Federal Action – October 2023 Executive Order

October 30, 2023 - Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. Requires among other mandates:

- “Address algorithmic discrimination through training, technical assistance, and coordination between the Department of Justice and Federal civil rights offices on best practices for investigating civil rights violations related to AI.”

State Action – AB 331 - Automated Decision Tools

- AB 331 – 2023 bill carried over – SB 331 essentially would require notifications when an ADT is employed in decisions, conducting regular audits for fairness and accuracy, and setting up mechanisms to correct inaccuracies in the data.
- Impacts ADT developers and users.

Best Practices

- Regularly audit and evaluate tools to ensure no bias or discrimination – AI bias may be the underlying prejudice in data that is used to create AI algorithms, which can result in discrimination.
- **Garbage in-garbage out (GIGO)!** In 2015, Amazon realized that its 2014 algorithm used for hiring employees was biased against women. Apparently, the algorithm was based on the number of resumes submitted over the past ten years, and since most of the applicants during that time were men, it was trained to favor men over women.

Best Practices

- On May 18, 2023, the EEOC issued a guide to auditing AI for discrimination: *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964* (No. 2023-2)
 - <https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>

What Does AI Mean For the Future of Privacy?

Batya Forsyth, Partner – Litigation Section Chair; Privacy Practice Group Leader

How Is AI Impacting Consumer Privacy Rights?

- The privacy dilemma created by AI
 - Appetite for data
 - Ability to infer sensitive information
 - Identity theft and surveillance
- Consensus re: need for ethical guidelines and best practices
 - Partnership in AI (PAI)
 - IEEE Global Initiative on Ethics of AI
 - UN Multistakeholder Advisory Board on AI

Quick Overview of AI/Privacy Legal Landscape

- European Union's "AI ACT"
- Word from the Federal Trade Commission
- California's Automated Decisionmaking Technology Requirements
- Other States

The EU's AI Act

- GDPR – General Data Protection Regulation led way for privacy laws
 - Applies broadly to businesses with European customers

EU leading again with its AI Act:

After the vote, one representative said: “We are on the verge of putting in place landmark legislation that must resist the challenge of time. It is crucial to build citizens’ trust in the development of AI, to set the European way for dealing with the extraordinary changes that are already happening, as well as to steer the political debate on AI at the global level. We are confident our text balances the protection of fundamental rights with the need to provide legal certainty to businesses and stimulate innovation in Europe”.

The EU's AI Act

- December 9, 2023, Parliament's provisional agreement reached and now heading to internal market and civil liberties committees for votes.
- Then formally adopted by both Parliament and Council to become EU law.
- AI Act seeks to ensure that AI systems:
 - Overseen by people
 - Safe, transparent, traceable
 - Non-discriminatory
 - Environmentally friendly
 - Uniform definition for AI designed to be technology-neutral, so that it can adapt

The EU's AI Act: "Unacceptable Risk"

Bans intrusive and discriminatory uses of AI systems such as:

- "Real-time" remote biometric identification systems in publicly accessible spaces;
- "Post" remote biometric identification systems, with the only exception of law enforcement for the prosecution of serious crimes and only after judicial authorization;
- Biometric categorization systems using sensitive characteristics (e.g. gender, race, ethnicity, citizenship status, religion, political orientation);
- Predictive policing systems (based on profiling, location or past criminal behavior);
- Emotion recognition systems in law enforcement, border management, workplace, and educational institutions; and
- Indiscriminate scraping of biometric data from social media or CCTV footage to create facial recognition databases (violating human rights and right to privacy).

The EU's AI Act: "High Risk"

"Negatively affect safety or fundamental rights"

- 1) AI systems that are used in products falling under the EU's product safety legislation. This includes toys, aviation, cars, medical devices and lifts.
- 2) AI systems falling into specific areas that will have to be registered in an EU database:
 - Management and operation of critical infrastructure
 - Education and vocational training
 - Employment, worker management and access to self-employment
 - Access to and enjoyment of essential private services and public services and benefits
 - Law enforcement
 - Migration, asylum and border control management
 - Assistance in legal interpretation and application of the law

FTC Leads AI Regulation At Federal Level

- Federal Trade Commission using its authority to regulate deceptive business practices under Section 5 of the FTC Act which prohibits:

"unfair or deceptive acts or practices in or affecting commerce"

- No Federal Privacy Laws in place
- Patchwork of State Privacy Laws of varying strictness

FTC Leads AI Regulation At Federal Level

Policy Statement of [FTC] on Biometric Information and Section 5 of the FTC Act

- Evolving technology and risks to consumers
- Non-exhaustive list of failures violating Section 5
 - Assess foreseeable harm before collecting information
 - Promptly address known or foreseeable risk
 - Surreptitious and unexpected collection or use
 - Evaluate third party practices and capabilities
 - Employee training
 - Continuous monitoring of technologies sold or used with biometric information

FTC Leads AI Regulation At Federal Level

- *FTC v. Rite Aid Corporation*, File No. 2023190 (Dkt 2:23-cv-5023)
 - Last updated Mar. 8, 2024
 - Banned from using AI facial recognition
 - No reasonable safeguards
- *“Government and Business Impersonation Rule”*
 - Prohibits scammers from using government seals or business logos, spoofing email and web addresses, and otherwise falsely implying an affiliation
 - Federal action and monetary damages

FTC Leads AI Regulation At Federal Level

Recommended Business Practices

- Before internally employing, or bringing to market, an AI or algorithm, ask:
 - How representative is the data set?
 - Does the model account for bias?
 - How accurate are the data-based predictions?
 - Does reliance on this data raise ethical or fairness concerns?
- Human intervention in AI is still a necessity
- Strive for transparency

California Leads At State Level

Consumer Privacy Act of 2018 (CCPA) (as amended by CPRA eff 1/1/23):

- Strong consumer control over personal information businesses collect
- New privacy rights for California consumers, including:
 - Right to know of personal information business collects and how used / shared
 - Right to delete personal information collected from them (with some exceptions)
 - Right to opt-out of the sale or sharing of their personal information
 - Right to non-discrimination for exercising their CCPA rights
 - Right to correct inaccurate personal information a business has about them
 - Right to limit the use and disclosure of sensitive personal information

California's CCPA Leads At State Level

- CCPA regulations provide guidance on how to implement the law
- California Privacy Protection Agency (CPPA)
 - New administrative agency charged with protecting the fundamental privacy rights of consumers over their personal information.
 - Five-member inaugural board
 - Experts in privacy, technology, and consumer rights

California's CPPA Leads At State Level

- Automated Decisionmaking Technology Regulations
 - Draft published December 2023
 - Authority delegated to the Agency per Civil Code § 1798.185, subd. (a)(16):

“Issuing regulations governing access and opt-out rights with respect to businesses’ use of automated decisionmaking technology, including profiling and requiring businesses’ response to access requests to include meaningful information about the logic involved in those decisionmaking processes, as well as a description of the likely outcome of the process with respect to the consumer.”
 - Last week’s 3-2 decision to move rule making to the next stage

California's CPPA Leads At State Level

OVERVIEW Automated Decisionmaking Technology Regulations

- Key Components
 - Notice of Rights to Opt-Out of, and Access Information About, the Business's Use of Automated Decisionmaking Technology ("Pre-use Notice")
 - A business shall provide consumers with the ability to opt-out of certain uses of automated decisionmaking technology
 - Parental Consent to Profiling for Behavioral Ads for Children under age 13
 - Opt-in re: Profiling for Behavioral Ads for Teens between ages 13 and 16

California's CPPA Leads At State Level

- SCOPE OF OPT OUT RIGHT – Automated Decisionmaking Technology Regulations
 - For a decision that produces *legal or similarly significant effects concerning a consumer*
 - *Profiling* a consumer who is *acting in their capacity as an employee*, independent contractor, job applicant, or student. For example, this includes profiling an employee using keystroke loggers, productivity or attention monitors, video or audio recording or live-streaming, facial- or speech- recognition or detection, automated emotion assessment, location trackers, speed trackers, and web-browsing, mobile-application, or social-media monitoring tools
 - Profiling a consumer while they are in a *publicly accessible place*. For example, this includes profiling a consumer while they are in a publicly accessible place using wi-fi or Bluetooth tracking, radio frequency identification, drones, video or audio recording or live-streaming, facial- or speech-recognition or -detection, automated emotion assessment, geofencing, location trackers, or license-plate recognition

Other States w/ Laws and Pending Bills

- **Algorithmic Discrimination:** California, Connecticut, Vermont, Hawaii, Illinois, New York, Oklahoma, Rhode Island, and Washington
- **Automated Employment Decision-Making:** Illinois, Massachusetts, New Jersey, New York, Vermont, Maryland and New York City
- **AI Bill of Rights:** Oklahoma and New York
- **“Working Group” Laws:** Utah, Florida, Hawaii, Massachusetts, Connecticut

How Can Law Firms Use AI Ethically?

Brad Hise, Partner and General Counsel

The Legal Ethics of Artificial Intelligence

- Artificial Intelligence is everywhere – and has been for a long time!
- Generative AI creates new and novel issues to think about including in the world of legal ethics

The Legal Ethics of Artificial Intelligence

Attys Behind ChatGPT Fiasco Apologize To Client, 7 Judges

By Hailey Konath · Listen to article

Law360 (July 5, 2023, 10:30 PM EDT) -- A pair of New York personal injury attorneys apologized Wednesday to seven federal and state judges and to a client for submitting a brief prepared by artificial intelligence that cited nonexistent case law attributed to the judges, according to copies of the letters filed in Manhattan federal court.

Peter LoDuca and Steven Schwartz of the personal injury boutique Levidow Levidow & Oberman PC submitted the letters Wednesday as proof of compliance with a June sanctions order requiring them to explain to their client and the judges what happened. The letters were also signed by Thomas A. Corvino on behalf of the firm.

"We wish to apologize once again for our actions in this matter," LoDuca and Schwartz wrote in the letter to their client, Roberto Mata. "We are deeply sorry."

Attached Documents: Letter

Useful Tools & Links: Add to Briefcase, Save to PDF & Print, Rights/Reprints, Editorial Contacts

Related Sections: Legal Industry, Case Information

The New York Times

Here's What Happens When Your Lawyer Uses ChatGPT

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

By Benjamin Weiser
May 27, 2023

The lawsuit began like so many others: A man named Roberto Mata sued the airline Avianca, saying he was injured when a metal serving cart struck his knee during a flight to Kennedy International Airport in New York.

When Avianca asked a Manhattan federal judge to toss out the case, Mr. Mata's lawyers vehemently objected, submitting a 10-page brief that cited more than half a dozen relevant court decisions. There was *Martinez v. Delta Air Lines*, *Zicherman v. Korean Air Lines* and, of course, *Varghese v. China Southern Airlines*, with its learned discussion of federal law and "the toll

Law Firm Scolded For 'Misbegotten' ChatGPT Use In Fees Bid

By Madison Arnold · Listen to article

Law360 (February 22, 2024, 4:51 PM EST) -- A Manhattan federal judge criticized a special education-focused law firm Thursday for citing ChatGPT calculations to back up its attorney fee request of more than \$100,000, calling the move "utterly and unusually unpersuasive."

U.S. District Judge Paul A. Engelmayer **knocked the fees** for the Cuddy Law Firm PLLC down to just \$53,050.13 plus interest for work done in a case brought by a parent on behalf of a child against the New York City Department of Education involving two administrative hearings.

The firm had asked for \$113,484.62 plus interest after securing judgments against the department, saying the feedback from the generative artificial intelligence program supported its request.

The judge said that, "having a paradigm shift in the reliability of this tool, the Cuddy Law Firm is well advised to eschew references to ChatGPT from future fee applications." (SBK.com/Robert Way)

Attached Documents: Opinion

Useful Tools & Links: Add to Briefcase, Save to PDF & Print, Rights/Reprints, Editorial Contacts

Related Sections: Legal Industry, Case Information

Case Information: Case Title: J. C. et al v. New York City Dept. of Education; Case Number: 1:23-cv-00959; Court: New York Southern

Attys In ChatGPT Fiasco Sanctioned For 'Bad Faith' Conduct

By Ryan Boysen · Listen to article

Law360 (June 22, 2023, 4:56 PM EDT) -- A New York federal judge has sanctioned two personal injury attorneys for submitting a brief written by artificial intelligence that cited nonexistent case law, finding the lawyers "abandoned their responsibilities" to check their work, and their behavior rose to "bad faith" when they then waited weeks to finally come clean about the embarrassing episode.

In a 43-page order issued Thursday, U.S. District Judge P. Kevin Castel said the two attorneys, Peter LoDuca and Steven Schwartz of the personal injury boutique Levidow Levidow & Oberman PC, did not act with "personal animus" or to secure an unfair advantage over their opponents. Nonetheless, Judge Castel said they must be punished, to ensure others don't repeat their mistakes.

"Technological advances are commonplace and there is nothing

The judge said there is "nothing inherently improper about using a reliable artificial intelligence tool for assistance," but attorneys are responsible for ensuring the accuracy of their filings. (AP Photo/Richard Drew, file)

Attached Documents: Order, Order

Useful Tools & Links: Add to Briefcase, Save to PDF & Print, Rights/Reprints, Editorial Contacts

Related Sections: Legal Industry, Case Information

Case Information: Case Title: Mata v. Avianca, Inc.; Case Number: 1:22-cv-01461; Court: New York Southern

The Legal Ethics of Artificial Intelligence

- Duty of Competence – Rule 1.1
- Duty of Confidentiality – Rule 1.6
- Duty to Communicate – Rule 1.4
- Meritorious Claims and Contentions – Rule 3.1
- Candor Toward the Tribunal – Rule 3.3
- Duty to Supervise – Rules 5.1, 5.2 and 5.3
- Fees for Legal Services – Rule 1.5
- Practical Suggestions and Tips

The Legal Ethics of Artificial Intelligence – *Duty of Competence*

California Rule of Professional Conduct Rule 1.1

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, “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.

Comment [1]

The duties set forth in this rule include ***the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.***

The Legal Ethics of Artificial Intelligence – *Duty of Confidentiality*

California Rule of Professional Conduct 1.6

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.

Business and Professions Code §6068(e)(1)

“It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

The Legal Ethics of Artificial Intelligence – *Duty to Communicate*

California Rule of Professional Conduct 1.4

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent is required by these rules or the State Bar Act;
 - (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;**
 - (3) keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed; and
 - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

The Legal Ethics of Artificial Intelligence - *Meritorious Claims and Contentions*

California Rule of Professional Conduct 3.1

- (a) A lawyer shall not:
 - (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
 - (2) **present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.**

The Legal Ethics of Artificial Intelligence – *Candor Toward the Tribunal*

California Rule of Professional Conduct 3.3

- (a) A lawyer shall not:
- (1) knowingly make a false statement of fact or law to a tribunal or **fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer**;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or **knowingly misquote to a tribunal the language of a book, statute, decision or other authority**; or
 - (3) **offer evidence that the lawyer knows to be false**. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The Legal Ethics of Artificial Intelligence – *Duty to Supervise*

California Rule of Professional Conduct 5.1 – Responsibilities of Managerial and Supervisory Lawyers

California Rule of Professional Conduct 5.2 – Responsibilities of a Subordinate Lawyer

California Rule of Professional Conduct 5.3 – Responsibilities Regarding Nonlawyer Assistants

The Legal Ethics of Artificial Intelligence – *Fees for Legal Services*

California Rule of Professional Conduct 1.5

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

The Legal Ethics of Artificial Intelligence – *Practical Tips*

- Understand whether a particular tool is appropriate to use
- Communicate with clients about the risks and benefits of using AI in the representation
- Exercise care when sharing client or firm confidential information with an AI tool

The Legal Ethics of Artificial Intelligence – *Practical Tips*

**LAWYERS HAVE A PROFESSIONAL OBLIGATION TO
THOROUGHLY REVIEW ANY AI-GENERATED CONTENT
TO ENSURE THAT IT IS ACCURATE**

The Legal Ethics of Artificial Intelligence

“AI is really just a tool. Bad lawyering has been around for a long time, and now [lawyers] have a new tool for bad lawyering.”

– U.S. Magistrate Judge Allison Goddard, Southern District of California

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Questions?