



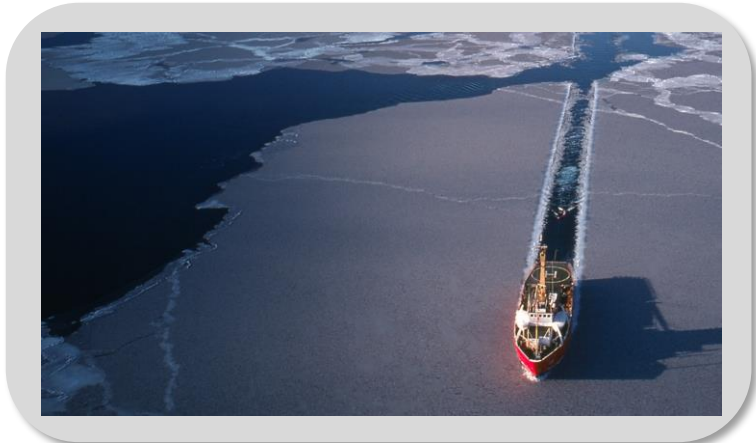
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GENERATIVE AI ON TRIAL: Case and Issues Update

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- The information in these slides and in this presentation is not legal advice and should not be considered legal advice.
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Topics for Today

- Overview of GAI and Current Challenges
- Review of Cases Involving GAI
 - Copyright Law and Use of Copyrighted Materials by GAI Platforms
 - Invasion of Privacy/Data Misappropriation/Defamation
 - Unfair Business Practices/Violation of Consumer Protection Laws
 - Bias/Discrimination
- Operational & Technology Considerations
- Federal and State Legislation
- Best Practices to Avoid or Minimize Exposure
- Trends/Predictions

I. OVERVIEW OF GAI AND DATA COLLECTION

- Definitions – GAI and AI
- Operational Perspective
- AI Governance
- Technology Perspective

I. OVERVIEW OF GAI AND DATA COLLECTION

- “Artificial Intelligence (AI) refers to the computational techniques that simulate human cognitive capabilities. AI will transform most, if not every aspect of humanity, which presents a range of challenges and opportunities.”
- <https://coe.gsa.gov/coe/ai-guide-for-government/introduction/>
- "Generative Artificial Intelligence (GAI) creates content, such as text, images, or music, autonomously, using machine learning models to produce original and creative output."
- ChatGPT's own response to a prompt

I. OVERVIEW OF GAI AND DATA COLLECTION

Generative AI is a type of artificial intelligence (AI) that uses machine learning algorithms to create new and original content like images, videos, text and audio.

1. Forming a Database

A neural network, consisting of various information or media files like images, text, data, sounds, etc. forms the basis of AI.

2. Inputting a Prompt

The user provides the AI with a description or sample of the desired content...



3. Generating Content

...and the AI uses its neural network to generate new examples that are similar to the ones it has trained from.

Prompts can be any user-submitted material like words, numbers or photos.

I. OVERVIEW OF GAI AND DATA COLLECTION

Gen AI – pattern creation – creates new contract clause based on large data set

AI – pattern recognition – returns contract clause examples, abstracts or snippets from clauses

Sources & Training Effectiveness

- Does your source provide accurate, relevant data?
- Garbage in, garbage out?
- Once trained, can it “unlearn” or forget?
- Bias can be / is common?

Challenges

- Data breaches from unauthorized access
- Inappropriate or sensitive (copyright) content submission
- Copyright – Music in the form of ...
- Art in the form of ...

Hallucinations & Deepfakes

- Gen AI is creative – create content, create new contract clause based on data set
- AI returns results – find content, return contract clause examples from clauses

AI May Cheat

- Data provenance
- Chess test
- Trust? Machine learning models and Gen AI search for correlations, not causality



II. GAI On TRIAL: Illustrative Cases

COPYRIGHT LITIGATION

“Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence,” 88 Fed. Reg. 16190 (Mar. 16, 2023),

<https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>:

Summary:

“The Copyright Office issues this statement of policy to clarify its practices for examining and registering works that contain material generated by the use of artificial intelligence technology.”

COPYRIGHT LAW:

IMPACT ON LEGAL PRACTICE

ADMINISTRATIVE RULINGS

The FTC responded with this submission on Oct. 30, 2023:

https://www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copyright_office.pdf

FTC press release of Nov. 7, 2023: <https://www.ftc.gov/news-events/news/press-releases/2023/11/InCommentSubmittedtoUSCopyrightOfficeFTCRaisesAIrelatedCompetitionandConsumerProtectionIssuesStressingThatItWillUseItsAuthoritytoProtectCompetitionandConsumersinAIMarkets>

- *Re: Zarya of the Dawn (Registration # V Au001480196)*, United States Copyright Office (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>:
 - “Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created.”
- *Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise* (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071 (Copyright Review Board: Feb. 14, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>:
 - “The Review Board of the United States Copyright Office *** has considered Steven Thaler’s (“Thaler’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled ‘A Recent Entrance to Paradise’ *** the Board affirms the Registration Program’s denial of registration.”

BREACH OF PRIVACY / DATA MISAPPROPRIATION / DEFAMATION

Deyerler v. HireVue, Inc., No. 22 CV 1284, 2024 BL 61840, 2024 US Dist Lexis 32211, 2024 WL 774833 (N.D. Ill. Feb. 26, 2024)

- Six Illinois residents filed a putative class action alleging that HireVue, Inc. ("HireVue"), a Utah-based software vendor, violated secs. 15(a-d) of the Illinois Biometric Information Privacy Act ("BIPA") when its interactive software captured and collected their biometric information during virtual job interviews.
- HireVue moved to dismiss the plaintiffs' first amended complaint under FRCP 12(b)(2) and (6). The Court rejected HireVue's lack of personal jurisdiction argument, but granted its motion to dismiss the cause of action based on a violation of sec. 15 (c) of BIPA because plaintiffs failed to alleged sufficient facts showing individual harm from defendant's alleged sale, lease or profiting from their biometric data. The remaining causes of actions were allowed to proceed.

BREACH OF PRIVACY/ DATA MISAPPROPRI ATION

Marilyn Cousart v. OpenAI LP, Civ. Act. No. 23-cv-04557-VC (N.D. Cal. Sept. 5, 2023)

- Plaintiffs filed complaint on September 5, 2023, and first amended complaint on December 29, 2023.
- Plaintiffs allege: California Invasion of Privacy Act, Computer Fraud and Abuse Act, 18 USC 1030, Conversion, Electronic Privacy Communications Act, 18 USC 2510, Intrusion Upon Seclusion, Larceny/ Receipt of Stolen Property, Negligence, Unjust Enrichment
- On May 24, 2024, the court granted the defendants' motion to dismiss, with leave to file a second amended complaint.
- In granting defendants' motion, the court criticized the complaint for being too long (almost 200 pages) with "swaths of unnecessary and distracting allegations making it nearly impossible to determine the adequacy of plaintiffs' legal claims."
- Plaintiffs notified the court that they were not going to amend; judgment was entered; and the case was closed.

DEFAMATION BY HALLUCINATION

Walters v. OpenAI LLC, Ga. Super. Ct., No. 23-A-04860-2 (June 5, 2023)

- A defamation lawsuit filed in Georgia Superior Court in June 2023, is touted as the first defamation lawsuit stemming from ChatGPT's use.
- In *Walters*, a reporter submitted an inquiry to ChatGPT asking it to provide a summary of a complaint filed by the Second Amendment Foundation. In response, ChatGPT stated, among other things, that “[the SAF complaint is] filed...against Mark Walters, who is accused of defrauding and embezzling funds from the SAF....” Walters never worked for SAF and was not a defendant to a lawsuit by SAF, however, and sued OpenAI, asserting that, by generating the fabricated information, OpenAI published libelous matter.
- OpenAI's motion to dismiss filed in early 2024 was denied and the case continues.

UNFAIR COMPETITION

- ❑ The FTC- is very active and has made this an enforcement priority. For example, in July 2023 launched an investigation against Open AI (creator of ChatGPT) concerning unfair or deceptive practices that harm consumers
- ❑ USA v. Realpage, Inc. Case No. 1:24-cv-00710 (M. D. N. C. Aug. 23, 2024) The Justice Department along with other states' Attorneys Generals filed a civil antitrust lawsuit against RealPage Inc. alleging that its pricing algorithm violates antitrust law.
- ❑ Gibson v. Cendyn Group LLC, No. 2:23-CV-00140-MMD-DJA (D. Nev. Jan. 25, 2023) On May 8, 2024, the court dismissed with prejudice a putative class action alleging that hotel operators engaged in a price-fixing conspiracy by using the same software provider's products/algorithm for hotel room pricing recommendations. A notice of appeal to the 9th Cir. was filed on June 4, 2024
- ❑ Cornish-Adebiyi, et al. v. Caesars Entertainment, Inc., et al., No. 1:23-CV-02536-KMW-EAP (D. N.J. May 9, 2023) Relying on the court's decision in *Gibson*, on September 30, 2024, the court dismissed plaintiffs' claims of algorithmic hotel price-fixing, where the alleged co-conspirators, among other reasons, were not obligated to accept the algorithm's pricing recommendations.

See Sara Benson, Kenneth Racowski, David C. Kully, "Gibson Decision Hands Atlantic City Casino-Hotels Dismissal of Price-Fixing Claims," Holland & Knight Antitrust Blog, Oct. 4, 2024;
<https://www.hklaw.com/en/insights/publications/2024/10/gibson-decision-hands-atlantic-city-casino-hotels-dismissal>

BIAS / DISCRIMINATION : AI-RELATED TOOLS LEADING TO WRONGFUL ARREST

Reid v. Bartholomew, Civ. Act. No. 1:23-cv-04035 (N.D. Ga. Sept. 8, 2023)

- Plaintiff alleges wrongful arrest and imprisonment, violation of Fourth Amendment rights because he was misidentified by an AI-driven facial recognition system used by the Jefferson Parish, (Louisiana) Sheriff's Department. As a result, Plaintiff was arrested and held without bond for six days. Motion to dismiss was filed on Aug. 28, 2024

Murphy v. Essilorluxottica USA and Macy's, No. 202403265-7 (Harris County, Texas Jan. 18, 2024)

- A Texas man sued Macy's and the parent company of Sunglass Hut over their alleged use of an AI-driven facial recognition system that misidentified him as an armed robber. This lead to his wrongful arrest.

See [GW Law ETI AI Litigation Database](https://blogs.gwu.edu/law-eti/ai-litigation-database-search/case-detail-page/?pid=127). <https://blogs.gwu.edu/law-eti/ai-litigation-database-search/case-detail-page/?pid=127>

BIAS / DISCRIMINATION : AI-RELATED TOOLS LEADING TO DIGITAL REDLINING

United States v. Meta, Civil Act. No. 1:22-cv-05187(SDNY June 21, 2022)

- The DOJ alleges that Meta's housing ad system (Facebook and Instagram) discriminated against consumers by excluding some users from receiving certain housing ads based on their FHA-protected characteristics.
- A Settlement Agreement and Trial Judgment was filed on June 27, 2022 that required Meta, among other things, to stop using its noncompliant advertising tool, and to create a new system for housing ads to address the bias caused by its personalization algorithms. Also, the settlement required a third party to conduct compliance oversight over Meta through June 27, 2026.

Williams v. Wells Fargo Bank, Civil Act. No (N.D. Cal. Feb. 17, 2022)

- Six separate class-actions were consolidated against Wells Fargo alleging algorithm-driven discrimination concerning residential mortgage and refinance practices.

See [GW Law ETI AI Litigation Database](https://blogs.gwu.edu/law-eti/ai-litigation-database-search/case-detail-page/?pid=127). <https://blogs.gwu.edu/law-eti/ai-litigation-database-search/case-detail-page/?pid=127>

BIAS / DISCRIMINATION : AI-RELATED TOOLS LEADING TO HIRING DISCRIMINATION

- ❑ In a June 14, 2024 report to Congress, the EEOC outlined the risks of discriminatory hiring that AI and algorithms pose.
- ❑ *Mobley v. Workday, Civil Act. No. 23-cv-00770-RFL* (N.D. Cal. Feb. 21, 2023).
 - Plaintiff Mobley, an African-American man over the age of 40, alleges violations of Title VII, the ADEA and the ADA because Workday's AI-driven employment systems and screening tools rely on algorithms and inputs that discriminate against job applicants based on race, age and or disability.
 - Workday moved to dismiss the amended complaint on a number of grounds, one of which was that it was not an employer. However, the court's July 12, 2024 decision allowed the amended complaint to proceed under an agency theory of liability.
 - The court's decision potentially lays the groundwork for expanding the scope of liability for AI-vendors.



V. BEST PRACTICE TIPS

BEST PRACTICES FOR GAI

1. Figure out how to prompt it in a way that gives the best result.
2. Use it for appropriate projects.
3. Do not feed it confidential information – the user cannot control what it does with that information.
4. Always verify what it gives you is accurate – “trust but verify.”
5. Do diligence to ensure that the response it gives you is not plagiarized.
6. Include appropriate notices and disclaimers about the item being produced with ChatGPT.
7. Develop a policy concerning scope of use and implement training on the policy

<https://www.foley.com/insights/publications/2023/03/ip-lawyer-vs-chatgpt-top-10-legal-issues-ai-work/>

BEST PRACTICES FOR GAI

- Can the company's confidential information, sensitive information, or trade secrets be prevented from entering the vendor's AI tools?
- If not, what measures does the vendor have in place to protect this information?
- How are ownership rights protected in any AI-generated output that includes or is based upon the company's data?
- How are answers generated by the AI tool verified to ensure accuracy and completeness?
- Does the company's technical team understand how the AI tool works, including what objectives it does or doesn't meet, what training or calibration is required, and what ability exists to oversee the implementation of the tool?

(M. White & J. Daniels, "Using AI in Cyber Incident Response Demands a Total Safety Check," *Bloomberg Law* (Nov. 14, 2023),

<https://news.bloomberglaw.com/us-law-week/using-ai-in-cyber-incident-response-demands-a-total-safety-check?source=newsletter&item=headline®ion=digest>

BEST PRACTICES FOR GAI

Key Questions

Questions for AI vendors of cybersecurity and incident response solutions:

- What AI tools does the vendor use to analyze or modify your data?
- Were the vendor's AI tools developed in conjunction with experienced incident response professionals?
- Within any solutions, to what extent are results generated by AI versus traditional analysis methods?
- What are the sources of data that the vendor used to train and develop any AI tools, and how extensive were those datasets?
- Does the provision of data to a vendor (and for this purpose) comply with applicable privacy laws and/or confidentiality obligations?
- What restrictions are imposed on the vendor's ability to use (or further use) any data provided?

VI. Trends and Predictions



TRENDS AND PREDICTIONS

- GAI is here to stay
- AI and GAI use cases will expand and evolve as technology becomes more sophisticated
- Laws and regulations are expanding in order to address issues and provide guidance; additional federal and state laws are on the horizon
- Be mindful that change in presidential administration may have impact
- Refinement/guidance on evidentiary/litigation/trial issues involving AI and GAI
- Stakeholders must be committed on an on-going bases to creating, advancing and using AI responsibly
- Expect more scrutiny from the EEOC, DOJ and other federal, state and local regulators
- Expanding emphasis on data privacy, cybersecurity, vendor agreements and insurance coverage
- Employers should:
 - Determine if they are using AI for employment purposes within the meaning of the applicable laws and, if so, comply with the laws' requirements
 - Conduct on-going bias audits of the AI-related employment tools
 - Prepare and distribute required notices and postings

QUESTIONS?

COMMENTS?

THANK YOU!

Appendix

Topics for Today

content

COPYRIGHT LAW: REVIEW OF LITIGATION

- Decision of Copyright Office on *Second Request* affirmed in *Thaler v. Perlmutter*, Case 1:22-cv-01564-BAH, ___ WL ___ (D.D.C. Aug. 18, 2023), appeal pending, Case No. 23-5233 (D.C. Cir.)
- Has the Supreme Court “signaled” in *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, No. 22-148, ___ S. Ct. ___ (June 8, 2023) how will go when it addresses data scraping and copyright infringement?
- Data scraping and copyright infringement decisions:
 - *Compulife Software Inc. v. Newman*, 599 F.3d 1288 (11th Cir. 2020)
 - *Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc.*, No. 1:20-cv-613-SB, ___ WL ___ (D. Del. Sept. 25, 2023)

Examples of GAI vs. copyright litigation:

- *Tremblay v. OpenAI, Inc.*, No.23-cv-03223 (N.D. Cal. June 28, 2023) (copyright infringement action alleging that ChatGPT’s machine learning training dataset comes from books and other texts that are “copied by OpenAI without consent, without credit, and without compensation.”)
- *P.M. v. OpenAI LP*, No. 3:23-cv-03199 (N.D. Cal. June 28, 2023) (putative class action alleging that the defendants’ use of “scraped” data of non-consenting consumers to train ChatGPT and other artificial intelligence models constituted misappropriation)

Andersen v. Stability AI LTD., Case No. 21-cv-00201 (N.D. Ca. Oct. 30, 2023) (Order on Motions to Dismiss and Strike):

- Putative class action challenging creation or use of “Stable Diffusion, an artificial intelligence *** software product.” Plaintiffs alleged that the product was trained on their works of art to product images “in the style” of various artists.
- “Plaintiffs are given leave to amend to provide clarity regarding their theories of how each defendant separately violated their copyrights, removed or altered their copyright management information, or violated their rights of publicity and plausible facts in support.”

Kadrey v. Meta Platforms, Inc., Case No. 23-cv-03417-VC (N.D. Ca. Nov. 20, 2023) (Order Granting Motion to Dismiss):

- “Meta has moved to dismiss all claims except the one alleging that the unauthorized copying of the plaintiffs’ books for purposes of training LLaMA constitutes copyright infringement. The motion is granted. ***
- 1. The plaintiffs allege that the ‘LLaMA language models are themselves infringing derivative works’ because ‘the models cannot function without the expressive information extracted’ from the plaintiffs’ books. This is nonsensical. ***.”
- And, “related” to copyright but different: *Thaler v. Vidal*, 44 F.4th 1207 (Fed. Cir. 2022), cert. denied, 143 S. Ct. 1783 (2023) (“We *** conclude that the Patent Act requires an ‘inventor’ to be a natural person ***.”)

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- C. Cwik, P. Grimm, M. Grossman and T. Walsh, “Artificial Intelligence, Trustworthiness, and Litigation.” *Artificial Intelligence and the Courts: Materials for Judges*” (AAAS 2022), [https://www.aaas.org/sites/default/files/2022-09/Paper%20 AI%20and%20Trustworthiness NIST FINAL.pdf](https://www.aaas.org/sites/default/files/2022-09/Paper%20AI%20and%20Trustworthiness%20NIST%20FINAL.pdf)

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- Press Release, “Justice Department Sues RealPage for Algorithmic Pricing Scheme that Harms Millions of American Renters,” Aug. 23, 2024; <https://www.justice.gov/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters>