



## The Need For Generative AI Development Policies and the FTC's Investigative Demand to OpenAI

By: James Gatto

The Federal Trade Commission (FTC) has been active in enforcements involving various AI-related issues. For an example, see [Training AI Models – Just Because It's "Your" Data Doesn't Mean You Can Use It](#) and [You Don't Need a Machine to Predict What the FTC Might Do About Unsupported AI Claims](#). The FTC has also issued a [report](#) to Congress (Report) warning about various AI issues. The Report outlines significant concerns that AI tools can be inaccurate, biased, and discriminatory by design and can incentivize relying on increasingly invasive forms of commercial surveillance. Most recently, the FTC instituted an investigation into the generative AI (GAI) practices of OpenAI through a 20 page [investigative demand letter](#) (Letter).

These enforcements, the Report and the Letter highlight some reasons why companies developing AI need comprehensive policies and procedures to guide that development. Examples of some of the FTC-related issues that companies should include in their policies and corporate governance can be gleaned from topics about which the FTC asks in the Letter, including:

- What is the company's corporate governance model?
- The accuracy and reliability of outputs generated by their AI products
- How the company retains or uses information collected by users of the AI products?
- Disclosures and representations made by the company about the AI products
- The data used to train its models, how it is obtained, the sources of the data, whether it is derived from public websites, the extent to which the company assesses or reviews the data and other data related questions
- The individuals or departments responsible for training the models
- The policies and procedures the company follows to assess risk and safety before the company releases a new model or product based thereon, including the risks considered
- The policies and procedures relating to privacy and security of personal information including steps taken to prevent personal information from being used in the training data or outputting personal information or false or disparaging information about a person and how users or other individuals can to opt out of having their personal information used

- The process and circumstances under which the company retrains their models, including to remediate hallucinations or the revelation of personal information
- And many more

As should be apparent from these examples, if the company faces an FTC investigation and does not have the appropriate policies and procedures in place to address these and other questions, that will be an unpleasant experience.

Another compelling reason for adopting AI development policies and procedures is that many lawsuits have been filed against AI tool developers and more will undoubtedly follow. Many steps can be taken to minimize the likelihood of getting sued, provide better defenses if you do get sued and mitigate the damages if you lose.

Companies that develop AI technology should adopt policies and procedures to ensure responsible use of AI and mitigate any liabilities. This includes policies and procedures on the collection and use of data to train the AI models, the assessment of risk and safety issues before releasing a new model or product based thereon, prevention of personal information from improperly being used in the training data or the output of personal information or false or disparaging information about a person, among others.

One way to approach the adoption of such policies is to start with a presentation of the issues to the relevant stakeholders in the company by a knowledgeable AI attorney to ensure a solid understanding of the issues that need to be addressed and the ramifications of not doing so. From there, the company can develop effective policies and procedures.

If you have questions on such a presentation or developing relevant policies and procedures, contact me at [jgatto@sheppardmullin.com](mailto:jgatto@sheppardmullin.com).

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James Gatto is a partner in the D.C. office of Sheppard Mullin and is Leader of its Artificial Intelligence Team. For over 35 years he has been a thought leader on legal issues with emerging technologies and business models, including over 20 years of experience with AI and open source. He provides strategic advice on all IP, tech transactions and tech regulatory issues. He is an adjunct professor at Ole Miss Law School where he teaches Legal Issues with AI. He has been an invited speaker for the US Copyright Office Listening Session on AI Authorship and the USPTO Listening Session on AI Inventorship Issues. He is an appointed member of the AI/Machine Learning Task Force of the American Bar Association's IP Section. He is also a member of the AI committees of the American Intellectual Property Law Association (AIPLA) and the International Technology Law Association.

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