SheppardMullin

FTC Warns About Changing Terms of Service or Privacy Policy to Train AI on Previously Collected Data

By: James Gatto

In a prior article Training AI Models – Just Because It's "Your" Data Doesn't Mean You Can Use It, we addressed how many companies are sitting on a trove of customer data and are realizing that this data can be valuable to train AI models. We noted that what some companies have not thought through, is whether they can actually use that data for this purpose. Sometimes this data is collected over many years, often long before a company thought to use it for training AI. A potential problem is that the privacy policies in effect when the data was collected may not have considered this use. The use of customer data in a manner that exceeds or otherwise is not permitted by the privacy policy in effect at the time the data was collected could be problematic. As companies think through these issues, some have updated (or will update) their Terms of Service (TOS) and/or privacy policy to address this. Before companies do this, it is critical to make sure they do not jump out of the frying pan and into the fire.

In recent guidance, AI (and other) Companies: Quietly Changing Your Terms of Service Could Be Unfair or Deceptive ("Guidance"), the FTC warned:

> It may be unfair or deceptive for a company to adopt more permissive data practices—for example, to start sharing consumers' data with third parties or using that data for AI training—and to only inform consumers of this change through a surreptitious, retroactive amendment to its terms of service or privacy policy.

The guidance further explains that the FTC believes that companies face a potential conflict of interest in that "they have powerful business incentives to turn the abundant flow of user data into more fuel for their AI products, but they also have existing commitments to protect their users' privacy [e.g., privacy and data security policies] to protect their users' privacy." The FTC notes that companies might be tempted to resolve this conflict by simply changing the terms (e.g., their privacy policy) surreptitiously so that they are no longer restricted in the ways they can use their customers' data. The FTC further warns that market participants should be on notice that *any firm that reneges on its user privacy commitments risks running afoul of the law*.

Simply put, according to the FTC guidance, a business that collects user data based on one set of privacy commitments cannot then unilaterally renege on those commitments after collecting users' data.

The guidance provides examples of cases where the FTC challenged what it believed to be deceptive and unfair practices in connection to a company's privacy policy that affect the promises the company previously made to consumers (see, e.g., Gateway Learning Corporation and 1Health.io). The FTC further warned that it will continue to bring actions against companies that engage in unfair or deceptive practices—including those that try to switch up the "rules of the game" on consumers by surreptitiously re-writing their privacy policies or terms of service to allow themselves free rein to use consumer data for product development.

Managing the use of data of any type for training AI can implicate a number of legal considerations, as we have previously discussed in The Need for Generative AI Development Policies and the FTC's Investigative Demand to OpenAI. Companies that train AI models are strongly advised to develop policies to address the many legal issues that can arise. Companies that develop AI technology should adopt policies and procedures to ensure responsible use of AI and mitigate any liabilities. This includes developing 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.

The best way to get started on developing policies is to start with a presentation on the legal 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 work with counsel to 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.

For further details, please contact:

James Gatto
Artificial Intelligence Team Co-Leader
bio
202.747.1945
jgatto@sheppardmullin.com

James Gatto is a partner in the D.C. office of Sheppard Mullin and is Co-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.