

Why Companies Need AI Legal Training and Must Develop AI Policies

AI technology is a powerful tool but “with great power comes great responsibility.” If you are developing or using AI technology, it is important to fully understand the legal implications and develop corporate policies to establish AI governance and risk management. The best way to do this is to have a lawyer who focuses on AI deliver a presentation to your board, c-level executives, legal department and/or other stakeholders to help them understand the range of legal issues that companies need to understand to safely use and/or develop AI and the ramifications of not doing so. This should be followed up by working with that attorney to develop AI policies and procedures customized for your company. These policies typically cover employee use of AI, open source issues with AI code generators, responsible develop of AI technology and AI models, vendor use of AI in preparing company deliverables and other topics relevant to the company’s involvement with AI.

Why is this important now? Many companies are still trying to figure out the AI landscape. Some have dived into the deep end of the AI pool. Use of AI technology can give rise to various forms of liability and loss of rights, yet many companies do not yet understand the range of legal issues. Even if you do not formally use AI-driven products as a company, it is likely you have employees or vendors who are *using* AI tools in the performance of their work for you. They may be using these tools to develop software, create images, music, apps, marketing materials or other content. Without appropriate safeguards, your employees’ and vendors’ use of AI tools can lead to liability and loss of rights. If your company is developing AI technology or training AI models, the legal issues are even more complex and the ramifications of not having effective policies can be more severe. A summary of some of the issues is set forth below.

Select Issues to Understand and Consider

Lawsuits Against AI Tools are Increasing

The number of AI lawsuits is rapidly increasing. The lawsuits include allegations of:

- copyright infringement due to training AI models on copyrighted content and generating output that infringes copyright;
- use of other data to train AI models without the right to do so, including where it exceeds the scope of use in the applicable privacy policy or includes biometric privacy information;
- violation of the right of publicity where the models are trained on or the output includes a person’s protected name, image or likeness;
- failure to maintain copyright management information or otherwise comply with open source license obligations when using AI code generators;
- biased and discriminatory results or use of AI; and
- defamation where the output of AI is false and harms a person’s reputation.

Algorithmic Disgorgement

Many companies are sitting on a trove of customer data and are realizing this data can be valuable to train AI models. However, what some companies have not thought through, is whether they can 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.

One of the potential perils is that when companies rush to launch an AI solution, without the proper planning, the result is they are subject to “algorithmic disgorgement.” This is a remedy the FTC has imposed several times (e.g., for improperly using data to train AI models) that requires *deletion of the data and the models and algorithms built using that data*. Algorithmic disgorgement can wipe out the entire value of the multi-million dollar investments made to train the models. This remedy can be imposed, even if the data was properly obtained, albeit without proper disclosure that it would be used for training AI models.

Tainting of Proprietary Software Developed with AI Code Generators

Software developers are increasingly using AI code generators, which assist code developers by using AI models to auto complete or suggest code based on developer inputs. Various legal issues can arise with use of these tools. One of the most severe issues, which can adversely affect a company’s investment in its software, is called “tainting.” Tainting severely devalues software as it requires licensing what you *want* to be proprietary code under an open source license.

The AI models for these tools are typically trained on open source (OS) software. OS software is typically free to use but subject to license conditions. Most OS licenses permit the user to copy, modify and redistribute the OS code. However, the conditions vary by license and can range from simple compliance obligations (e.g., maintaining copyright information) to more onerous, substantive requirements. The more substantive provisions can require that any software that includes or is derived from the OS software must be licensed under the OS license and the source code for that software must be made freely available. This permits others to copy, modify and redistribute the software for free. This is an example of tainting. For companies that develop software to license it for a fee, this can be a huge problem and can cause loss of return on the money invested to develop that software.

Inability to Obtain IP Protection for AI-generated Content

For companies that monetize content, strong IP protection is needed to protect that content. While generative AI (GAI) excels at cost-effectively creating new content, one problem is that little or no copyright protection is available for GAI content. The U.S. Copyright Office ("Office") has published guidance on registering works that contain AI-generated material. It states that copyright can protect only material that is the product of human creativity. If the expressive content is produced by AI, the work lacks human authorship and the Office will not register it. That a user created the prompt to cause the output does not change the result because prompts typically are deemed to be ideas rather than expression. Copyright only covers expression. Where a work containing AI-generated material also contains sufficient human authorship to support a copyright claim, copyright will only protect the human-authored aspects of the work, which are "independent of" and do not affect the copyright status of the AI-generated material itself. Any AI generated content must be disclaimed from a copyright registration.

Applicants who have already received registrations for works containing AI-generated material must check that the information provided to the Office adequately disclosed that material. If not, they need to correct their information so the registration remains effective. Applicants who fail to update the public record after obtaining a registration for material generated by AI risk losing the benefits of the registration. If the Office learns information essential to its evaluation of registrability "has been omitted entirely from the application or is questionable," it may take steps to cancel the registration.

Loss of Valuable Trade Secrets

Employee use of public GAI tools is ubiquitous. What some employees do not realize is that with many such tools, the inputs are not confidential. Even worse, some GAI tools' Terms of Use (TOU) expressly grant the tool provider a license to use that input. If the input includes trade secret or sensitive business information, this can lead to losing trade secrets or at least a diminution in the value of the information. Many employees routinely accept the TOU without reading it, thus they are unaware that they are putting the company's valuable information at risk. Similar issues can result if you use outside contractors to create content. It is important that your contractor agreements address issues with use of

GAI tools on your projects. While many companies have well drafted independent contractor agreements that address the traditional issues that need to be covered under these arrangements, these agreements need to be updated to address some of the GAI-related issues.

Avoiding Bias and Other Issues on the FTC's Watchlist

The Federal Trade Commission (FTC) has been active in enforcements involving various AI-related issues and 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. Boards' obligations to ensure their companies avoid bias is not just good corporate citizenship, it is necessary to avoid illegal conduct. Some companies are not aware of the potential for bias in GAI tools, particularly if they rely on third party tool providers. In such cases, often companies are not aware of the data on which these tools are trained and whether the data contains or results in biased or discriminatory results. The FTC also has cautioned against false advertising by overstating AI capabilities and has taken action where companies use data without authorization to train AI models.

What Employers Need to Know about the White House's Executive Order on AI

In November 2023, President Joe Biden issued an executive order (Order) devised to establish minimum risk practices for use of AI with focus on rights and safety of people, with many consequences for employers. It mandates 150 action items to be taken by various agencies. Many agencies will issue guidance, consider new regulations, and increase enforcement actions to comply with the Order. An overview of the Order is [here](#). For government contractors, it is important to understand the numerous provisions in the Order that relate to use of AI by or for the US Government.

Virginia's Executive Order on AI

On January 18, 2024, Governor Youngkin issued an Executive Order on the *IMPLEMENTATION OF STANDARDS FOR THE SAFE USE OF ARTIFICIAL INTELLIGENCE ACROSS THE COMMONWEALTH*. This order promulgates important safety standards to ensure the responsible, ethical, and transparent use of artificial intelligence technology by state government to protect the rights of Virginians, to provide best-in-class state government services, and to ensure that our students are well prepared for this technology. Virginia companies should be aware of the issues addressed in this order.

Conclusion

For at least these reasons, companies presently need AI legal education and policy development. For more information, contact Jim Gatto (jgatto@sheppardmullin.com), leader of Sheppard Mullin's 110 person [AI Legal Team](#). He has over 20 year of AI legal experience, teaches AI law and holds leading roles in AI committees of legal organizations. He routinely trains companies on AI legal issues and helps them develop their AI policies.