

Will the Hot Bot Summer Cool Off This Fall?

Recent Generative AI Developments to Consider this Fall

Overview

- This summer's flurry of activity in the generative AI space, including lawsuits, regulatory challenges, legislative efforts and evolving technological capabilities, has impacted how AI tools are being used in the marketing and communications industry.
- Key principles of responsible and ethical AI emerged, including goals to ensure that data collection is done with authorization, that training data is accurate and sufficiently diverse, that AI use is adequately disclosed and that AI tools do not replace human labor.
- These principles of responsibility, transparency and ethics are likely to drive new AI development into the near future.


While summertime is frequently idealized as a time of relaxation, this past summer did not provide any respite in the dynamic realm of generative artificial intelligence (AI). Instead, the summer hosted an explosion of new AI developments. From grappling with mounting legal and regulatory challenges to responding to proposed legislation and voluntary guidelines, both AI companies and those affected by their technology found themselves navigating a landscape of change – especially those in the marketing and communications industry.




AI Litigation

Following class action lawsuits filed against Stability AI, Midjourney and Deviant Art at the beginning of the year, the summer brought a fresh wave of legal actions targeting prominent players in the generative AI landscape, including OpenAI, Meta and Google. OpenAI, the maker of the immensely popular ChatGPT and DALLE-2 platforms, repeatedly found itself in the crosshairs of multiple class actions and regulatory investigations:

- In June and July, OpenAI was named as a defendant in class action lawsuits filed by various groups of authors, including comedian Sarah Silverman, alleging that the company misused and infringed upon copyrighted literary works to train its large language model (LLM). Silverman's group of plaintiffs also filed a similar complaint against Meta in connection with its own generative AI chatbot. Other prominent authors such as George R.R. Martin and Jodi Picoult filed additional class action lawsuits against OpenAI and other AI companies in September, alleging similar claims.
- OpenAI was also targeted in another set of class action litigations alleging that the company violated the privacy and data protection rights of millions of consumers. The plaintiffs alleged that, by engaging in large-scale scraping of online sources to train its model, including social media and blog pages, OpenAI obtained vast quantities of individuals' personal data in the process, which it used without consent. A similar class action was also filed against Google, alleging that the company misused both the enormous volume of personal data and copyrighted information that it had accessed to train its own LLM.



Meanwhile, an important shift occurred in one of the earliest copyright infringement cases brought by a class action of artists against Stability AI, Midjourney and Deviant Art. During a hearing in July, a federal district judge indicated that he was inclined to grant the defendants' motion to dismiss - allowing the plaintiffs to refile the complaint, but in a narrower and more specific manner. The judge noted that, under the U.S. Copyright Act, the artists would need to point to specific works of art that were previously registered for copyright protection and were infringed by the defendants' generative AI tools. This development may result in the litigation scope narrowing and will undoubtedly impact the more recently filed copyright cases.



A likely result is that plaintiffs will need to assert specific, narrowly focused allegations of copyright infringement by generative AI platforms of registered works, rather than broadly alleged, general claims of infringement of all their works. Meanwhile, AI companies may be emboldened by this development and may be less deterred by new class action litigations as these existing cases progress forward.

Global Regulatory and Legislative AI Updates

United States

Over the summer, the Federal Trade Commission (FTC) opened an investigation into OpenAI concerning its alleged use of individuals' personal data that it scraped from the internet without permission to train its LLM.

The FTC sent OpenAI a 20-page letter indicating it is investigating whether the company "engaged in unfair or deceptive privacy or data security practices or engaged in unfair or deceptive practices relating to risks of harm to consumers." The FTC and its chair, Lina Khan, are focused on holding AI platforms accountable for the information their technologies are trained on, stating during a House Judiciary Committee hearing in July that "there are no checks on what type of data is being inserted into these companies."

OpenAI has historically been secretive about its data collection practices for its generative AI models, but the FTC's investigation could shine a light into these practices and the training methods that OpenAI and similar AI companies utilize. This investigation is the first major regulatory hurdle OpenAI has faced in the United States since introducing its generative AI platforms to the public last year, although the company, and generative AI technology overall, has faced significant scrutiny in other parts of the world.

While generative AI platforms continue to grapple with challenges related to data collection and training, there is a growing consensus within the industry regarding their training methodologies. In July, seven prominent AI companies publicly committed to a set of voluntary guidelines promulgated by the White House under the Biden administration, focused on encouraging the responsible development and deployment of advanced AI technologies. These commitments are intended to provide industry-wide guidance until legislative regulations addressing similar concerns are enacted. They prioritize safety, transparency and societal responsibility during the AI training process.

Despite their laudable goals, these White House guidelines currently lack an enforcement mechanism and apply exclusively to next-generation generative AI models surpassing the capabilities of current industry models. However, the guidelines signify that the executive branch and AI leaders are taking an important step toward acknowledging the necessity and feasibility of governmental regulation and self-regulation. These guidelines will likely continue to serve as a standard to aspire to while legislators in Congress draft and debate various proposals to legislate AI's complex issues.



Europe

The European Union adopted a rigorous approach to regulating generative AI, centered primarily on its application of the General Data Protection Regulation (GDPR). The GDPR mandates that EU citizens must provide consent before their data can be used by any company.

Under certain GDPR interpretations, the practice of scraping data from across the web – a fundamental way generative AI companies have historically acquired training data – may be deemed unlawful. Indeed, this interpretation was a key factor behind Italy's decision to ban ChatGPT from operating in that country in April. However, the ban was subsequently lifted after OpenAI agreed to incorporate an "opt-out" mechanism into the service, allowing users to retain control over their data and bringing its operation into closer alignment with GDPR requirements.

This summer saw swift progress on the proposed EU Artificial Intelligence Act, which is expected to be passed into law by the end of the year. The EU AI Act would regulate various types of AI use depending on the degree of risk they pose, from "unacceptable risk" to "low risk." It would also require that AI training processes adhere to EU laws (such as GDPR) and that AI-generated outputs be identified as such. Importantly, this AI Act would apply to all AI tools used in the EU, even if they are created and operated outside of the EU – meaning that AI companies based in the United States and elsewhere should remain aware of this law and its impending adoption.

China

Even China, which strictly controls which foreign technology companies are allowed to operate within its borders and initially banned ChatGPT from operating within its country, issued new regulatory guidelines around the acceptable use of AI tools over the summer. China's regulations impose detailed requirements on AI companies seeking to operate in the country, including obligations to moderate content created using AI technologies; ensure training data is accurate, non-biased, trustworthy and properly obtained from authorized sources without violating intellectual property or privacy rights; and tag AI-generated content in the interest of transparency.



Industry Shifts in Response to AI Legal and Regulatory Challenges

This summer saw AI tools undergo notable transformations and adaptations, while businesses impacted by AI technology considered new operational measures and best practices to navigate this evolving legal and regulatory landscape.

Enhanced Transparency

Many AI companies responded to the legal and regulatory pressures by redefining their terms of use and consumer product offerings. These changes aim to provide users with greater control over their data. Many AI providers now offer users the choice to opt out of data collection, ensuring their data won't be used for AI training without explicit consent. Further, some AI companies are offering assurances about the origin of their training data, in some instances by licensing training data from various online sources, calming concerns about unauthorized data scraping.

Publishers' Data Protection Measures

Major publishers, such as *The New York Times*, Reddit and *The Associated Press*, responded proactively to concerns around AI platforms making unauthorized use of their content by adjusting their terms of use and implementing accessibility features to thwart data scraping. These measures effectively prevent AI companies from using content found on those webpages without permission. Indeed, *The Associated Press* took this idea one step further in July, entering into a licensing agreement with OpenAI that allows the AI company to have controlled access to AP's extensive archive dating back to 1985.

Norms for AI Disclosure

Across the marketing and communications industry, there is a growing trend toward establishing new norms for AI disclosure. Industry associations and individual agencies have developed guidelines and proposals to mandate disclosures around various uses of generative AI tools, including the use of AI-generated influencers and content. Hashtags such as #poweredbyAI and #createdwithAI are becoming more prevalent. This shift emphasizes the importance of transparency and encourages the adoption of disclosures when AI technologies are employed, ensuring that consumers are informed when AI is in use. Such transparency considerations and recommendations around disclosure have become an integral part of responsible AI development and use.

Creative Professionals' Concerns

The entertainment industry, including Hollywood unions like the Writers Guild of America (WGA) and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), was propelled into the spotlight over the summer due to lengthy WGA and SAG-AFTRA strikes following contentious labor negotiations involving, in part, concerns raised over the possibility of generative AI replacing creative human labor. This concern sparked intense debates across entertainment and artistic disciplines about the ethics of AI tools supplanting human artistry and performance.

The recent agreement between WGA and Hollywood studios that ended this summer's writers' strike specified that generative AI tools are not people and therefore cannot be writers, and included other protections around minimum compensation and credits for writers even when working with material generated using AI tools. The adoption and implementation of this new collective bargaining agreement and the related discussions around the value of human artistry and the ethics of using technology in place of human labor have the potential to reshape the future of creative work.

Outside of union obligations, performers and creative professionals, including writers and artists, are increasingly seeking to protect their rights under contract by demanding assurances that their work will not be used to train AI algorithms or produce AI-generated content. Companies should consider whether they are able to satisfy these terms and may need to implement technological safeguards and website terms of use, similar to those adopted by leading publishers, to guard against AI platforms scraping their online data – which may include talent performances or other creative deliverables.

Looking Forward

The pace of the generative AI evolution is unrelenting. It seems that, as soon as a new technology is announced, it is followed by think pieces, petitions, lawsuits, regulatory investigations, legislative reactions and, finally, new technological adjustments to respond to the outcry. This cycle is likely to continue for the foreseeable future until the emergence of a standardized set of norms, perhaps resulting from judicial decisions, and possibly codified into consistent laws and regulations.

For More Information

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