

# DODGING AI'S LEGAL LANDMINES

Businesses may feel like they're walking on shifting sands as they navigate new risks with AI. Elaine Burke seeks sure-footed guidance from two technology lawyers, writes **Elaine Burke**

**T**he artificial intelligence (AI) industry is facing legal battles on numerous fronts since the dawn of generative technologies. Meanwhile, regulators around the world are weighing up how to handle this growing tech sector.

According to the Database of AI Litigation kept by George Washington University law students, there have been 212 legal complaints to date. These date back to the days before generative AI (GenAI), but there's been a significant uptick in filings since such tools were publicly launched. In many cases pertaining to claims of copyright infringement – such as that of the New York Times versus Microsoft and OpenAI – the creators of models that have scoured the web for text and image resources which are then used to generate 'new' outputs, claim this kind of content scraping is 'fair use' under US copyright law.

The UK government appears to agree with this notion as it has openly encouraged creators to allow AI models to train on copyrighted works for free, and even proposed changing copyright law to allow it. Unsurprisingly, this has drawn the rancour of the UK's creative industries, prompting the release of a silent album from more than 1,000 artists, including the likes of Kate Bush, in protest.

Any business today opting to use GenAI to produce creative works instead of artists might think twice in light of the backlash, but would they also be in danger of any legal kickback?

According to Victor Timon, a partner at Byrne Wallace Shields, there's a low risk that end users could be caught up in the current copyright legal drama, simply because there would be too many people to effectively level claims against. (Though, he concedes, "It's possible that a high-profile user could be singled out.")

Decisions in the major legal cases might start rolling in this year, bringing the lie of the land in terms of AI and copyright into sharper relief, but there will likely be appeals that will protract these proceedings, at which point these tools will have been in use for a number of years.

And if copyright-holders are successful in the courts, this could dramatically change the future landscape of GenAI. "If the New York Times is successful, can [OpenAI] take all that data out of the tool? I don't know if that would now be technically possible with all the deployments," says Timon. "But in the future, they won't, you would think, go scraping there again. So there may be less sources of data for them."

## KNOWN UNKNOWNNS

Regulation is also set to shape the AI landscape of the future. The UK has signalled its preference for a soft regulatory environment to appease the tech tinkerers, while the EU has been an early mover with its AI Act, which has yet to be tested in practice. "We'll only see



The New York Times is suing OpenAI and Microsoft  
Bloomberg

if the rules work properly as they get tested," says Deirdre Kilroy, a partner at Bird & Bird. "We have a lot of our clients now asking very logical questions to which the answers are not that clear-cut in the legislation. That's not comfortable, but that's where we're at."

This confusion over where the AI law stands is aggravated by its introduction amid a flurry of new legislation which the EU itself has called the "digital decade".

Kilroy says: "There are a lot of new laws to digest and map onto business models. Compliance often means changing the way you do business, changing your approach to a product or a service, or standing up new teams."

That said, there are existing EU regulations that come to bear on AI, which is a data-heavy technology. It's GDPR that saw Apple and Meta delay AI rollouts in the EU, and it was the Irish Data Protection Commission's proceedings against X that prompted it to suspend its processing of the personal data of EU users for its chatbot, Grok.

With the AI Act, the EU has taken a risk-based approach, which Kilroy likens to product liability legislation. Timon says businesses need to assess their use and not just the tools in terms of determining their risk categorisation. For example, a chatbot might be designated as 'limited risk', but if you use it in HR programmes to assess people, that can change things. "Now you may suddenly be in a high-risk category," he says.

Human resources (HR), in particular, is an area in which to tread carefully with AI. "You can use it, but you've got to tell people that



Victor Timon,  
partner at Byrne  
Wallace Shields  
LLP  
Fergal Phillips

you're using it and you've got to be able to explain the outcome," says Timon. This could mean explaining to a candidate that your system declined their application because they didn't match well with previous people successful in that role – and if you haven't understood how bias and past prejudices can be encoded into such a system, you could find yourself in a world of trouble when that explanation comes to light.

This is why Timon recommends all business users, not just technical teams, must understand the systems they're deploying. "There's an overall requirement for users to be AI literate," he says. "Because it won't be the guy in IT who installed it who will be answering the questions."

### CAVEAT EMPTOR

Buyers should be wary when shopping for AI suppliers, and evaluating these add-ons will be a continuous process. "It is complicated," says Kilroy. "You have to go through a compliance cycle in terms of reviewing an AI product; if you make a significant change to an AI system you may transform it, triggering additional compliance activities."

Kilroy is seeing this come to bear on contracts as they are updated to account for the AI Act. "It's not unusual to have a much longer set of clauses."

Timon recommends buyers seek indemnity cover for AI services. Or, if you can't secure indemnities, establish escape clauses to terminate a contract if there's a material change in the T&Cs.

"Some suppliers now are willing to do that," he says, though it can be harder for small businesses to advocate for themselves. "You're not going to say, please OpenAI, I'm a small business in Ireland, will you change this indemnity and change that warranty? It's just not going to happen. But if you are buying from a smaller supplier, the chances are you will be able to do that negotiation in respect of their own tool."

If you do secure indemnities in your contract, make sure they're not coming from what Timon calls "a man of straw: a company that's got no assets or anything of value to back them up". With so many companies building on top of others' models in AI, they can't truly indemnify you against what another company does. "In reality, other than in respect of their own tool, it's probably not worth the paper it's written on."

It all comes down to doing your due diligence in vetting suppliers. And speaking of due diligence, AI usage can present new challenges for M&As. "Now you're looking at the value of the company and saying, well, we have a lot more regulatory questions and risks to assist," says Kilroy. "That's a really strong indicator that the cost of compliance is going up."

How your company uses AI is likely to come up in any due diligence questionnaire, similarly to how GDPR changed how a company's data handling was assessed for risk. "It's almost replicating that in an AI scenario," says Timon.

And if it's discovered that your AI use is in high-risk areas, "alarm bells go off... Those kinds of contingent liabilities can be building up in terms of M&A transactions".

Any missteps here could devalue your company. "If I'm the purchaser, I will try and get the price down because I can see big risks for me in the way they've procured the AI and deployed it," Timon warns.



Sam Altman,  
CEO of  
OpenAI

### GETTING ON WITH IT

An upside of all this complexity is that legal teams can carve out a new vertical for their industry. "I keep getting asked do we do AI governance," says Kilroy. "It's a bit like 2018 and the gold rush around GDPR."

Whether they seek legal counsel on AI or not, businesses should at least cover their bases with policy updates that anticipate changes in their operations under AI. "You'll probably see a lot of privacy policies being reviewed the more that AI is deployed," says Timon.

"The tools change, the regulations change. You just need to keep on top of it. If you have a process, then that's half the battle because nothing can come in without it going through you. There are ways of controlling it so that you know exactly what's deployed, who's using it,

what circumstances, what checks and balances you built in."

Ultimately, when it comes to the legal ramifications of AI, there's a long road ahead.

"We're at the beginning of a journey," says Kilroy. "You can't wait until the journey completes to do business. People are having to get on with it and just keep taking an informed position."

This means staying on top of an evolving situation. "It does mean more vigilance, more monitoring and more time at the moment," she says. "We can't regard this as being done, tick box, finish, move on."

In summation, Kilroy's advice is: "Take a position, review, adjust, and be agile as you go along." ■



Deirdre Kilroy,  
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