ARTIFICIAL INTELLIGENCE DISCOVERY & ADMISSIBILITY CASE LAW

By

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INTRODUCTION

I began this collection to assemble information on artificial intelligence ("AI"). Unsurprisingly, content grew and continues to grow as AI and now generative artificial intelligence ("GAI") has become mainstream and subjects of interest to many actors, including elected officials and regulators. I hope to update the collection on a regular basis, but the reader should appreciate that new AI- and GAI-related material appears daily.

The reader might also wish to look at compendiums of case law, etc., I have compiled on electronically stored information ("ESI") in criminal investigations and proceedings which are hosted by the Massachusetts Attorney General's Office and are available at https://www.mass.gov/service-details/understanding-electronic-information-in-criminal-investigations-and-actions.

With the above in mind, let's start with some basic definitions (from Donahue):

'Artificial Intelligence' is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data, and translating languages. AI mimics certain operations of the human mind.

'Machine learning' is an application of AI in which computers use algorithms (rules) embodied in software to learn from data and adapt with experience.

A **'neural network'** is a computer that classifies information – putting things into 'buckets based on their characteristics.

And, with regard to the governance of AI, *see* "Key Terms for AI Governance," *IAPPAI Governance Center* (June 2023), https://iapp.org/resources/article/key-terms-for-ai-governance/

Please remember that this collection is not intended to be comprehensive. Rather, it is an overview of complex – and fast-evolving -- technology and how law and society attempt to deal with that technology. NB: Everything in "color" has been added since the last edition.

Also, I have attempted to create sections or "buckets" of materials. Materials may fit into more than one bucket but are not cited more than once. Moreover, each section begins with case law or statutes and regulations, which are followed by relevant articles, although there are sections consisting solely of articles.

One final note: Some may recall difficulties that rural and disadvantaged populations had with, among other things, finding secure and consistent Internet access during the pandemic. As we adopt AI and GAI (and anything else), we

should bear those populations in mind. *See*, for example, M. Muro, *et al*., "Building AI Cities: How to Spread the Benefits of Emerging Technology Across More of America," *Brookings* (July 20, 2023), https://www.brookings.edu/articles/building-ai-cities-how-to-spread-the-benefits-of-an-emerging-technology-across-more-of-america/

Comments, criticisms, and proposed additions are welcome. Please send to me at r_hedges@live.com.

AI-RELATED CASE LAW

There is limited case law on AI and GAI. However, as the representative decisions below indicate, expect to see courts address, among other things, discovery and admissibility issues.

Congoo, LLC v. Revcontent LLC, Civil Action No. 16-401 (MAS), 2017 WL 3584205 (D.N.J. Aug. 10, 2017)

In this action for, among other things, unfair competition, plaintiff sought discovery of defendants' source code used to create the content of allegedly false and misleading advertising. The court denied plaintiff's motion to compel:

> In order for the production of source code to be compelled, Plaintiff must prove that it is relevant and necessary to the action. The relevancy and necessity requirements must be met, regardless of whether a Discovery Confidentiality Order exists. Courts have held that when source code is requested not only must it be relevant and necessary to the prosecution or defense of the case but when alternatives are available, a court will not be justified in ordering disclosure.
>
> The majority of cases cited by Plaintiff are distinguishable in that they are patent cases in which production of the source code was necessary to prove infringement claims. The Court finds that unlike in a patent case alleging infringement, Plaintiff does not need to review the actual code because its interest is in the specific functionalities of the software, not the underlying code. ***
>
> In this case, Plaintiff alleges that the Defendants have employed 'false and misleading representations in advertising to generate greater income from their Ads and those of Defendants' Advertisers in order to offer its services at more attractive rates than Plaintiff can offer, and to take Plaintiff's business, erode Plaintiff's market share and damage Plaintiff's goodwill in association with Plaintiff's native advertising business.' The focus here is *what* Defendants are doing, that is, whether they are creating ads or influencing

the creation or content of the ads. The Court is not convinced that an understanding of the Defendants' influence on or creation of the ads requires production of the technology, i.e., the source code, utilized by the Defendants. Rather, the Court is persuaded that through witness testimony an understanding of the functionality of the software algorithm as it relates to issues in this case, e.g., selection of higher paying Content Recommendations, can be adequately addressed.

Assuming, however, that the source code is relevant, the Court finds that its highly confidential nature is such that it cannot be adequately safeguarded by a Discovery Confidentiality Order and therefore outweighs the need for production. The proprietary nature of Defendants' source code is outlined in the declaration of Revcontent's Chief Product Officer ***.

A weighing of the competing interests: an ability to elicit facts for a full assessment of the claims and defenses, on the one hand, and protecting trade secrets, on the other, must be made with full consideration of factors, including availability of other means of proof and dangers of disclosure. Given the proprietary nature of Defendants' source code, which is not in dispute, and the irreparable harm that could occur if it is produced, the Court finds that production of the source code is not warranted, especially in light of Defendants' representation that 'the present discovery dispute concerns only several discrete functions of [Defendants'] technology.' Moreover, weighing the competing interests, the existing Discovery Confidentiality Order is insufficient to justify production of Defendant Revcontent's highly protected trade secret.

The Court finds that Plaintiff has not met its burden of demonstrating that production of the source code is relevant and necessary. The Court further finds that the information provided by Defendants regarding the source code and the additional information that Defendants are willing to provide regarding the functionality of the source code is sufficient and that production of the actual source code is not necessary for an adequate assessment of the claims and defenses in this case. Specifically, Defendants have provided a Declaration from Defendants' Chief Product Officer in which he explains the functionality of Defendants' technology. Defendants have also provided a proposed stipulation as to the source code which describes how the technology determines which native ads will be displayed in the Revcontent widget from the pool of available native ads. The Court notes that Plaintiff can also depose the employees involved in the creation of the ads in order to prove its false and misleading advertising claims. ***. [citations and footnote omitted].

In re Google RTB Consumer Privacy Litig., Case No. 21-cv-02155-YGR (VKD) (N.D. Ca. Nov. 2, 2022)

The plaintiffs in this class action sought to compel the defendant to produce documents related to its "automated data selection process" used to select data

for distribution to third-party participants in auctions. The court addressed certain disputes as follows:

During the hearing, Google suggested that it does not necessarily have documents that show all of the details of the automated data selection process that plaintiffs say they require. In that case, plaintiffs may of course use other means to obtain the discovery they need, including deposing any witnesses whose testimony may be necessary to provide a more complete understanding of the process or to identify relevant sources of information about the process. If this deposition testimony is important for class certification briefing, the Court expects the parties to cooperate in promptly scheduling such depositions. ***.

RFP [Request for Production] 96 asks for documents sufficient to show 'the architecture of the software program(s)' that comprise the automated data selection process. Google says that this is highly sensitive information and that production of such detailed technical information is unnecessary for plaintiffs to understand how data is distributed through the RTB auction. ***. Plaintiffs argue that Google has not shown that the architecture of the software underlying the data selection process is sensitive or trade secret, but even if it is, the protective order affords adequate protection. ***.

The Court is skeptical that discovery of the architecture-level details of Google's software is relevant and proportional to the needs of the case, particularly in view of Google's representation at the hearing that it has no objection to producing (and did not withhold from its prior production) internal design documents that reveal how the automated data selection process operates. ***. Absent a more specific showing of need for information about the architecture of Google's software, the Court agrees that production of design documents, including schematics, showing how the automated data selection process operates should be sufficient.

Modern Font Applications v. Alaska Airlines, Case No. 2:19-cv-00561-DBB-CMR (D. Utah Feb. 3, 2021), interlocutory appeal dismissed, No. 2021-1838 (Fed. Cir. Dec. 29, 2022)

The district court issued a protective order pursuant to which the defendant designated source code. The plaintiff sought modification to allow its in-house counsel access. The court upheld the designation, finding that the source code

contained trade secrets and that inadvertent disclosure would be harmful. The court also denied the plaintiff's request for modification:

Here, Plaintiff argues that even if its in-house counsel is a competitive decisionmaker, his specialized knowledge, the risk of financial hardship to Plaintiff, and the ability to mitigate the risk of disclosure through an amended protective order establish good cause to allow access ***. Defendant responds that Plaintiff has access to competent outside counsel and has otherwise failed to show good cause to amend the protective order ***. The court acknowledges that Plaintiff's in-house counsel has specialized knowledge as a software engineer and institutional knowledge regarding the Patent-in-Suit. However, the fact that Plaintiff has competent outside counsel and could hire outside experts reduces the risk of prejudice to Plaintiff. Even if reliance on outside counsel and experts causes some financial hardship, the normal burdens of patent litigation are insufficient to outweigh the significant risk of inadvertent disclosure of confidential information in this case. Further, amending the protective order would be insufficient to mitigate this risk because, as explained above, this heightened risk remains even with the existence of a protective order. ***. The court has carefully balanced the conflicting interests in this case and concludes that the risk of inadvertent disclosure outweighs the risk of prejudice to Plaintiff. The court therefore declines to modify the standard protective order or the confidentiality designations therein. [citations omitted].

***People v. Wakefield*, 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019), affirmed, No. 2022-02771 (N.Y. Ct. App. Apr. 26, 2022)**

From the Third Department decision:

Defendant was subsequently charged in a multicount indictment in connection with the victim's death. Law enforcement collected a buccal swab from defendant to compare his DNA to that found at the crime scene. The data was eventually sent to Cybergenetics, a private company that used a software program called TrueAllele Casework System, for further testing. The DNA analysis by TrueAllele revealed, to a high degree of probability, that defendant's DNA was found on the amplifier cord, on parts of the victim's T-shirt and on the victim's forearm. ***. At the *Frye* hearing, Supreme Court heard the testimony of Mark Perlin, the founder, chief scientist and chief executive officer of Cybergenetics, among others. Following the *Frye* hearing, the court rendered a decision concluding that TrueAllele was generally accepted within the relevant scientific community. *** Perlin also testified that TrueAllele is designed to have a certain degree of artificial intelligence to make additional inferences as more information becomes available. Perlin explained that, after objectively generating all genotype possibilities, TrueAllele answers the question of "how much more the suspect matches the evidence [than] a random person would," and the answer takes the form of a likelihood ratio. ***

Supreme Court found that 'there [was] a plethora of evidence in favor of [TrueAllele], *and there [was] no significant evidence to the contrary*.' In view of the evidence adduced at the *Frye* hearing, we find that the court's ruling was proper.

As described in the affirmance by the Court of Appeals:

He argued that the report generated by TrueAllele was testimonial, Prior to trial, defendant moved for disclosure of the source code in order 'to meaningfully exercise his that the computer program was the functional equivalent of a laboratory analyst and that the source code was the witness that must be produced to satisfy his right to confrontation. He claimed that Perlin's 'surrogate' trial testimony without disclosure of the source code was inadequate— 'the TrueAllele Casework System source code itself, and not Dr. Perlin, is the declarant with whom [defendant] has a right to be confronted.' The court denied the motion, finding that the source code was not a witness or testimonial in nature, and that defendant would have the opportunity to confront and cross-examine Dr. Perlin-the analyst and the developer of the software.

Defendant again raised his confrontation argument prior to Dr. Perlin's trial testimony, asserting that the TrueAllele Casework System was the witness and that he needed the source code to effectively cross-examine that witness. When the court questioned how one cross-examines a computer program, defendant represented that, once his experts had the opportunity to review the source code, he would then pose questions to Dr. Perlin based on the experts' review. The court denied the request, stating that the issue defense counsel raised was a discovery issue and that defendant's ability to cross-examine Dr. Perlin, the developer of the source code, satisfied his right to confrontation.

***

We must address whether the trial court abused its discretion in determining that TrueAllele 'is not novel but instead is 'generally accepted' under the Frye standard.'

***

Here, the evidence presented at the Frye hearing established that the relevant scientific community generally accepted TrueAllele's DNA interpretation process and that the continuous probabilistic genotyping approach is more efficacious than human review of the same data using the stochastic threshold. It was undisputed that the foundational mathematical principles (MCMC and Bayes' theorem) are widely accepted in the scientific community. It was also undisputed that the relevant scientific community was fully represented by those persons and agencies who weighed in on the approach. Although the continuous probabilistic approach was not used in the majority of forensic crime laboratories at the time of the hearing, the methodology has been generally accepted in the relevant scientific community based on the empirical evidence of its validity, as demonstrated by multiple validation studies, including collaborative studies, peer-reviewed publications in scientific journals and its use in other jurisdictions. The empirical

studies demonstrated TrueAllele's reliability, by deriving reproducible and accurate results from the interpretation of known DNA samples.

Defendant and the concurrence raise the legitimate concern that the technology at issue is proprietary and the developer of the software is involved in many of the validation studies. This skepticism, however, must be tempered by the import of the empirical evidence of reliability demonstrated here and the acceptance of the methodology by the relevant scientific community. [citations and footnote omitted].

***Rodgers v. Christie*, 795 Fed. Appx. 878 (3d Cir. 2020)**

This was an appeal from the dismissal of a products liability action brought under the New Jersey Products Liability Act (NJPLA) against the entity responsible for the development of the "Public Safety Assessment (PSA), a multifactor risk estimation model that forms part of the state's pretrial release system." The plaintiff's son had been murdered by a man who had been granted pretrial release. The Court of Appeals held that the PSA was not a "product" and affirmed:

The NJPLA imposes strict liability on manufacturers or sellers of certain defective 'product[s].' But the Act does not define that term. To fill the gap, the District Court looked to the Third Restatement of Torts, which defines 'product' as 'tangible personal property distributed commercially for use or consumption' or any '[o]ther item[]' whose 'context of *** distribution and use is sufficiently analogous to [that] of tangible personal property.' It had good reason to do so, as New Jersey courts often look to the Third Restatement in deciding issues related to the state's products liability regime. And on appeal, both parties agree the Third Restatement's definition is the appropriate one. We therefore assume that to give rise to an NJPLA action, the 'product' at issue must fall within section 19 of the Third Restatement.

***

The PSA does not fit within that definition for two reasons. First, as the District Court concluded, it is not distributed commercially. Rather, it was designed as an objective, standardized, and *** empirical risk assessment instrument' to be used by pretrial services programs like New Jersey's. Rodgers makes no effort to challenge this conclusion in her briefing and has thus forfeited the issue. Second, the PSA is neither 'tangible personal property' nor remotely 'analogous to' it. As Rodgers' complaint recognizes, it is an 'algorithm' or 'formula' using various factors to estimate a defendant's risk of absconding or endangering the community. As the District Court recognized, "information, guidance, ideas, and recommendations" are not "product[s]" under the Third Restatement, both as a definitional matter and because extending strict liability to the distribution of ideas would raise serious First Amendment concerns. Rodgers's only response is that the PSA's defects 'undermine[] New Jersey's pretrial release system,

making it 'not reasonably fit, suitable or safe' for its intended use. But the NJPLA applies only to defective *products*, not to anything that causes harm or fails to achieve its purpose. [citations and footnote omitted].

State v. Ghigliotty, 463 N.J. Super. 355 (App. Div. 2020)

At issue in this interlocutory appeal was whether the trial court had erred in directing that a *Frye* hearing be conducted to determine the scientific reliability of proposed expert testimony on the positive identification of a bullet fragment recovered from a murder victim. The Appellate Division affirmed:

An application of the Frye test at an evidentiary hearing was necessary in this case because BULLETTRAX is a new, untested device, operated by Matchpoint, a novel software product. As the trial court found, 'BULLETTRAX is a highly automated technology that does not merely photograph the bullet's surface, as suggested by the State, but instead digitally recreates the entire surface area.' The parties did not provide the court with any judicial opinions or authoritative scientific and legal writings demonstrating the reliability of this machine.

In addition, neither Sandford [the State's expert witness] nor Boyle [a salesman with the business that offered the technology] were experts in the science behind the BULLETTRAX system and, therefore, were unable to address whether it provided reliable images. In that regard, both witnesses conceded that BULLETTRAX created some degree of distortion when it 'stitched together' the images of the bullet fragment and the test bullets that Sandford used to reach his conclusions. The trial court also correctly found that, for many of these same reasons, 'the reliability of Matchpoint' was '[e]qually unproven at this time.'

Under these circumstances, we affirm the trial court's determination that a Frye hearing was necessary to protect defendant's due process rights and ensure that the images produced by BULLETTRAX were sufficiently reliable to be admissible under N.J.R.E. 702.

The appellate court also addressed the trial court's order that, among other things, the State provide to defendant algorithms used by the technology in advance of the *Frye* hearing:

The trial court ordered the State to produce the BULLETTRAX and Matchpoint algorithms based solely upon defense counsel's request. While it is certainly possible that this information might be needed by defendant's experts to evaluate the reliability of the new technology, the defense did not present a certification from an expert in support of this claim for disclosure. Thus, there is currently nothing concrete in the record to support the court's conclusion that granting defendant 'the opportunity to review the algorithms and

elicit testimony concerning' BULLETTRAX is necessary 'in order to completely explore and test the integrity of the images it produces.'

Under these circumstances, defendant is required to make a more definitive showing of his need for this material to provide the court with a rational basis to order the State to attempt to produce it. *In that regard, the trial court was aware that the algorithms are proprietary information within UEFT's, rather than the State's, sole possession. While the court was open to issuing a protective order to attempt to overcome UEFT's reluctance to disclose this information to the State, the parties did not submit suggested language to the court to assist it in attempting to craft and issue such an order.*

Therefore, we vacate the court's order directing the turnover of the algorithms, and remand the discovery issues to the court for further consideration. The court must promptly conduct a case management conference with the parties to determine the most efficient way to proceed to identify the types of information that must be shared by them in advance of the Frye hearing. Resolution of discovery issues must be made after a N.J.R.E. 104 hearing to ensure the development of a proper, reviewable record that supports the court's ultimate decision. [emphasis added].

***State v. Loomis*, 371 Wis.2d 235, 881 N.W.2d 749 (2016), *cert.* denied, 137 S. Ct. 2290 (2017)**

The defendant was convicted of various offenses arising out of a drive-by shooting. His presentence report included an evidence-based risk assessment that indicated a high risk of recidivism. On appeal, the defendant argued that consideration of the risk assessment by the sentencing judge violated his right to due process. The Supreme Court rejected the argument. However, it imposed conditions on the use of risk assessments.

***State v. Morrill*, No. A-1-CA-36490, 2019 WL 3765586 (N.M. App. July 24, 2019)**

Defendant asks this Court to 'find that the attestations made by a computer program constitute 'statements,' whether attributable to an artificial intelligence software or the software developer who implicitly offers the program's conclusions as their own.' (Emphasis omitted.) Based on that contention, Defendant further argues that the automated conclusions from Roundup and Forensic Toolkit constitute inadmissible hearsay statements that are not admissible under the business record exception. In so arguing, Defendant acknowledges that such a holding would diverge from the plain language of our hearsay rule's relevant definitions that reference statements of a 'person.' *** Based on the following, we conclude the district court correctly determined that the computer generated evidence produced by Roundup and Forensic Toolkit was

not hearsay. Agent Peña testified that his computer runs Roundup twenty-four hours a day, seven days a week and automatically attempts to make connections with and downloads from IP addresses that are suspected to be sharing child pornography. As it does so, Roundup logs every action it takes. Detective Hartsock testified that Forensic Toolkit organizes information stored on seized electronic devices into various categories including graphics, videos, word documents, and internet history. Because the software programs make the relevant assertions, without any intervention or modification by a person using the software, we conclude that the assertions are not statements by a person governed by our hearsay rules.

***State v. Pickett*, 466 N.J. Super. 270 (App. Div. 2021), motions to expand record, for leave to appeal, and for stay denied, *State v. Pickett*, 246 N.J. 48 (2021)**

In this case of first impression addressing the proliferation of forensic evidentiary technology in criminal prosecutions, we must determine whether defendant is entitled to trade secrets of a private company for the sole purpose of challenging at a Frye hearing the reliability of the science underlying novel DNA analysis software and expert testimony. At the hearing, the State produced an expert who relied on his company's complex probabilistic genotyping software program to testify that defendant's DNA was present, thereby connecting defendant to a murder and other crimes. Before cross-examination of the expert, the judge denied defendant access to the trade secrets, which include the software's source code and related documentation.

This is the first appeal in New Jersey addressing the science underlying the proffered testimony by the State's expert, who designed, utilized, and relied upon TrueAllele, the program at issue. TrueAllele is technology not yet used or tested in New Jersey; it is designed to address intricate interpretational challenges of testing low levels or complex mixtures of DNA. TrueAllele's computer software utilizes and implements an elaborate mathematical model to estimate the statistical probability that a particular individual's DNA is consistent with data from a given sample, as compared with genetic material from another, unrelated individual from the broader relevant population. For this reason, TrueAllele, and other probabilistic genotyping software, marks a profound shift in DNA forensics.

TrueAllele's software integrates multiple scientific disciplines. At issue here—in determining the reliability of TrueAllele—is whether defendant is entitled to the trade secrets to cross-examine the State's expert at the Frye hearing to challenge whether his testimony has gained general acceptance within the computer science community, which is one of the disciplines. The defense expert's access to the proprietary information is directly relevant to that question and would allow that expert to independently test whether the evidentiary software operates as intended. Without that opportunity,

defendant is relegated to blindly accepting the company's assertions as to its reliability. And importantly, the judge would be unable to reach an informed reliability determination at the Frye hearing as part of his gatekeeping function.

Hiding the source code is not the answer. The solution is producing it under a protective order. Doing so safeguards the company's intellectual property rights and defendant's constitutional liberty interest alike. Intellectual property law aims to prevent business competitors from stealing confidential commercial information in the marketplace; it was never meant to justify concealing relevant information from parties to a criminal prosecution in the context of a Frye hearing. [footnote omitted].

State v. Saylor, 2019 Ohio 1025 (Ct. App. 2019) (concurring opinion of Froelich, J.)

{¶ 49} Saylor is a 27-year-old heroin addict, who the court commented has 'no adult record [* * * and] has led a law-abiding life for a significant number of years'; his juvenile record, according to the prosecutor, was 'virtually nothing.' The prosecutor requested an aggregate sentence of five to seven years, and defense counsel requested a three-year sentence. The trial court sentenced Saylor to 12 1/2 years in prison. Although it found Saylor to be indigent and did not impose the mandatory fine, the court imposed a $500 fine and assessed attorney fees and costs; the court also specifically disapproved a Risk Reduction sentence or placement in the Intensive Program Prison (IPP).

{¶ 50} I have previously voiced my concerns about the almost unfettered discretion available to a sentencing court when the current case law apparently does not permit a review for abuse of discretion. *State v. Roberts*, 2d Dist. Clark No. 2017-CA-98, 2018-Ohio-4885, ¶ 42-45, (Froelich, J., dissenting). However, in this case, the trial court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12, the individual sentences were within the statutory ranges, and the court's consecutive sentencing findings, including the course-of-conduct finding under R.C. 2929.14(C)(4)(b), were supported by the record.

{¶ 51} As for the trial court's consideration of ORAS, the 'algorithmization' of sentencing is perhaps a good-faith attempt to remove unbridled discretion – and its inherent biases – from sentencing. Compare *State v. Lawson*, 2018-Ohio-1532, 111 N.E.3d 98, ¶ 20-21 (2d Dist.) (Froelich, J., concurring). However, 'recidivism risk modeling still involves human choices about what characteristics and factors should be assessed, what hierarchy governs their application, and what relative weight should be ascribed to each.' Hillman, *The Use of Artificial Intelligence in Gauging the Risk of Recidivism*, 58 The Judges Journal 40 (2019).

{¶ 52} The court's statement that the 'moderate' score was 'awfully high,' given the lack of criminal history, could imply that the court believed there must be other factors reflected in the score that increased Saylor's probable recidivism. There is nothing on this record to refute or confirm the relevance of Saylor's ORAS score or any ORAS score.

Certainly, the law of averages is not the law. The trial court's comment further suggested that its own assessment of Saylor's risk of recidivism differed from the ORAS score. The decision of the trial court is not clearly and convincingly unsupported by the record, regardless of any weight potentially given to the ORAS score by the trial court. Therefore, on this record, I find no basis for reversal.

State v. Stuebe, No. 249 Ariz. 127, 1 CA-CR 19-0032 (AZ Ct. App. Div. 1. June 30, 2020)

The defendant was convicted of burglary and possession of burglary tools. On appeal, he challenged the admissibility of an email and attached videos generated by an automated surveillance system. The Arizona Court of Appeals affirmed. First, the court addressed whether the system was a "person" for hearsay purposes:

¶9 In general, hearsay evidence is inadmissible unless an exception applies. Ariz. R. Evid. 801, 802. Hearsay is 'a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.' Ariz. R. Evid. 801(c). A 'statement' is a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.' Ariz. R. Evid. 801(a). A 'declarant' is 'the person who made the statement.' Ariz. R. Evid. 801(b).

¶10 Because the rule against hearsay applies to 'a person's statements and 'the person who made the statement,' Ariz. R. Evid. 801(a) and (b), we must determine whether a machine that generates information may qualify as a 'person' under the Rules. The Rules do not define 'person.' See Ariz. R. Evid. 101. Therefore, we may interpret the word according to its common definition. A.R.S. § 1-213 (2002) ('Words and phrases shall be construed according to the common and approved use of the language.'); *State v. Wise*, 137 Ariz. 468, 470 n.3 (1983) (stating that unless the legislature expressly defines a statutory term, courts give the word its plain and ordinary meaning, which may be taken from the dictionary). ***

¶11 *** Neither statute supports the proposition that a machine can legally be considered a 'person.' Additionally, because 'Arizona's evidentiary rules were modeled on the federal rules[,]' we may consider federal precedent to interpret them. *State v. Winegardner*, 243 Ariz. 482, 485, ¶ 8 (2018). The federal circuit courts have repeatedly held that a 'person' referenced in the rules of evidence does not include a 'machine' or 'machine-produced' content. *See United States v. Lizarraga-Tirado,* 789 F.3d 1107, 1110 (9th Cir. 2015) ('[W]e join other circuits that have held that machine statements aren't hearsay.') (collecting federal circuit court cases); *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (holding that for hearsay purposes 'raw data generated by the

machines were not the statements of technicians' who operated the machines); *United States v. Khorozian,* 333 F.3d 498, 506 (3d Cir. 2003) (holding that neither header nor date and time information automatically generated by a facsimile machine was hearsay because they were not statements made by a person).

¶12 Applied to the facts here, the motion-activated security camera automatically recorded the video after a sensor was triggered. The automated security system then produced an email and immediately sent it to the property manager. No 'person' was involved in the creation or dissemination of either. The email only contained the date, time, client ID, serial number, camera location code, and language that read 'Automated message – please do not reply to this address.' Because the email and video were 'machine produced,' they were not made by a 'person' and are not hearsay.

¶13 Machine-produced statements may present other evidentiary concerns. *See Washington*, 498 F.3d at 231 (noting that concerns about machine-generated statements should be 'addressed through the process of authentication not by hearsay or Confrontation Clause analysis'). At trial, the court denied Stuebe's authentication objection to the video, *see* Ariz. R. Evid. 901, but Stuebe has not raised this issue on appeal.

The Court of Appeals also rejected the defendant's argument that admission of the email and video violated the Confrontation Clause:

¶14 The Sixth Amendment's Confrontation Clause states, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' U.S. Const. amend. VI. In general, testimonial evidence from a declarant who does not appear at trial may be admitted only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. 36, 68-69 (2004); *State v. Forde*, 233 Ariz. 543, 564, ¶ 80 (2014) (citing *Crawford*, 541 U.S. at 68). '[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.' *Ohio v. Clark*, 576 U.S. 237, 245 (2015). 'Testimony' means '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Crawford,* 541 U.S. at 51. Statements are testimonial when the primary purpose is to 'establish or prove past events potentially relevant to later criminal prosecution.' *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (holding forensic reports on substances alleged to be drugs, prepared in anticipation of prosecution, are testimonial statements). But statements are not testimonial if made to law enforcement during an ongoing emergency, *see Davis,* 547 U.S. at 827, and are 'much less likely to be testimonial' if made to someone other than law enforcement, *Clark*, 576 U.S. at 246.

¶15 Considering all the circumstances we cannot conclude that the 'primary purpose' of the email and video was to 'creat[e] an out-of-court substitute for trial testimony.' *Id.* at 245 (alteration in original) (quoting *Bryant*, 562 U.S. at 358). And Stuebe does not argue

otherwise. The email was sent to the property manager, not law enforcement, and was not made in anticipation of criminal prosecution. Thus, it was not testimonial. *See Davis*, 547 U.S. at 827-28 (finding recording of a 911 call seeking police assistance was not testimonial); *State v. Damper*, 223 Ariz. 572, 575, ¶ 12 (App. 2010) (finding text message from murder victim seeking help not testimonial); *Bohsancurt v. Eisenberg,* 212 Ariz. 182, 191, ¶ 35 (App. 2006) (holding breathalyzer calibration reports not testimonial). The property manager testified and was cross-examined about the email and the video, and the admission of the email and video did not implicate the Confrontation Clause. *State v. Fischer*, 219 Ariz. 408, 418, ¶ 37 (App. 2008) ('Non-testimonial statements are not subject to a confrontation challenge.'); *cf. United States v. Waguespack,* 935 F.3d 322, 334 (5th Cir. 2019) (holding that machine-generated images were not 'statements' in the context of the Confrontation Clause).

United States v. Shipp, 392 F. Supp. 3d 300 (E.D.N.Y. July 15, 2019)

The court has serious concerns regarding the breadth of Facebook warrants like the one at issue here. The Second Circuit has observed that '[a] general search of electronic data is an especially potent threat to privacy because hard drives and e-mail accounts may be 'akin to a residence in terms of the scope and quantity of private information [they] may contain.' Ulbricht, 858 F.3d at 99 (quoting Galpin, 720 F.3d at 445); see also Galpin, 720 F.3d at 447 (explaining that '[t]his threat demands a heightened sensitivity to the particularity requirement in the context of digital searches'). This threat is further elevated in a search of Facebook data because, perhaps more than any other location—including a residence, a computer hard drive, or a car—Facebook provides a single window through which almost every detail of a person's life is visible. Indeed, Facebook is designed to replicate, record, and facilitate personal, familial, social, professional, and financial activity and networks. Users not only voluntarily entrust information concerning just about every aspect of their lives to the service, but Facebook also proactively collects and aggregates information about its users and non-users in ways that we are only just beginning to understand. Particularly troubling, information stored in non-Facebook applications may come to constitute part of a user's 'Facebook account'—and thus be subject to broad searches—by virtue of corporate decisions, such as mergers and integrations, without the act or awareness of any particular user.

***

Compared to other digital searches, therefore, Facebook searches both (1) present a greater 'risk that every warrant for electronic information will become, in effect, a general warrant,' Ulbricht, 858 F.3d at 99, and (2) are more easily limited to avoid such constitutional concerns. In light of these considerations, courts can and should take particular care to ensure that the scope of searches involving Facebook are 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.' [citations omitted in part].

***In re: Vital Pharmaceutical,* Case No. 22-17842 (Bankr. S.D. Fla. June 16, 2023). The Bankruptcy Court addressed the question of how to determine ownership rights to a social media account. In doing so the court prompted ChatGPT for an answer:**

Nor has Congress or the states regulated the use of artificial intelligence, another area where the evolution of technology has outpaced the law, and regulation is needed to mitigate its risks. Matt O'Brien, *ChatGPT Chief Says Artificial Intelligence Should be Regulated by a US or Global Agency*, Associated Press, May 16, 2023, https://apnews.com/article/chatgpt-openai-ceo-sam-altman-congress-73ff96c6571f38ad5fd68b3072722790 ('The head of the artificial intelligence company that makes ChatGPT told Congress . . . that government intervention will be critical to mitigating the risks of increasingly powerful AI systems.'). In preparing the introduction for this Memorandum Opinion, the Court prompted ChatGPT to prepare an essay about the evolution of social media and its impact on creating personas and marketing products. Along with the essay it prepared, ChatGPT included the following disclosure: 'As an AI language model, I do not have access to the sources used for this essay as it was generated based on the knowledge stored in my database.' It went on to say, however, that it 'could provide some general sources related to the topic of social media and its impact on creating personas and marketing products.' It listed five sources in all. As it turns out, none of the five seem to exist. For some of the sources, the author is a real person; for other sources, the journal is real. But all five of the citations seem made up, which the Court would not have known without having conducted its own research. The Court discarded the information entirely and did its own research the old-fashioned way. Well, not quite old fashioned; it's not like the Court used actual books or anything. But this is an important cautionary tale. Reliance on AI in its present development is fraught with ethical dangers.

Wi-LAN Inc. v. Sharp Electronics Corp., 992 F.3d 1366 (Fed. Cir. 2021)

This was an appeal from an award of summary judgment of noninfringement. The district court held that the plaintiff lacked sufficient admissible evidence to prove direct infringement after it found a printout of source code inadmissible. The plaintiff sought to admit the source code to establish that systems used by the defendants "actually practiced" a methodology patented by the plaintiff. The Federal Circuit affirmed.

The plaintiff argued on appeal, among other things, that the source code printout was a business record that was admissible under the business records exception to the hearsay rule:

To establish that the source code printout was an admissible business record under Rule 803(6), Wi-LAN was required to establish by testimony from a 'custodian or other another qualified witness' that the documents satisfied the requirements of the Rule. Wi-LAN argues that it properly authenticated the source code printout through the declarations of the chip manufacturers' employees. We agree with the district court that the declarations could not be used to authenticate the source code printout on the theory that the declarations were a proxy for trial testimony or themselves admissible as business records.

As Wi-LAN notes, declarations are typically used at summary judgment as a proxy for trial testimony. But declarations cannot be used for this purpose unless the witness will be available to testify at trial. Under Federal Rule of Civil Procedure 56(c)(2), Wi-LAN was required to 'explain the admissible form that is anticipated.' Fed. R. Civ. P. 56(c)(2) advisory committee's notes on 2010 amendments. Wi-LAN argued that it met this burden by explaining that the declarants were available to testify at trial. The district court, however, found the opposite. Indeed, when asked by the court at the summary judgment hearing whether the declarants would appear at trial, Wi-LAN's counsel responded that Wi-LAN did not 'think that [it would be] able to force them to come to trial.'

Wi-LAN thus did not establish that the declarants would be available to testify at trial and, as a result, the declarations could not be used as a substitute for trial testimony. *E.g., Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016) (testimony admissible if declarants were available to testify at trial); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.,* 909 F.2d 1524, 1542 (3d Cir. 1990) ('[H]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that 'would be admissible at trial.'' (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 465 n.12 (3d Cir. 1989).

Wi-LAN also seems to argue that it properly authenticated the source code printout because the declarations were custodial declarations that were themselves admissible as business records under Rule 803(6). Wi-LAN, however, admits that it obtained the source code printout and declarations by filing lawsuits against the manufacturers and then dismissing the lawsuits without prejudice after the manufacturers provided Wi-LAN with the source code printout and declarations it sought. Wi-LAN even explains that '[t]he lawsuits were necessary to secure production of the source code and declarations because [the system-on-chip manufacturers] had refused to cooperate in discovery.' *The declarations thus do not constitute a 'record [that] was kept in the course of a regularly conducted activity of a business.'* Fed. R. Evid. 803(6)(B). *Instead, the declarations were created and prepared for the purposes of litigation, placing them outside the scope of the exception. As a result, the declarations were not admissible as business records for use to authenticate the source code printout.* [emphasis added].

The Federal Circuit also rejected the plaintiff's reliance on Rule 901(b)(4):

Wi-LAN also appears to argue that the district court should have found the source code printout admissible under Federal Rule of Evidence 901(b)(4). Rule 901(b)(4) permits a record to be admitted into evidence if '[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances' 'support a finding that the item is what the proponent claims it is.' Fed. R. Evid. 901(a), (b)(4).

In support of its Rule 901(b)(4) argument, Wi-LAN states only that 'there was no legitimate reason to question the trustworthiness of the source code.' The district court concluded that the source code printout's 'appearance, contents, substance, internal patterns, [and] other distinctive characteristics,' Fed. R. Evid. 901(b)(4), did not satisfy Rule 901(b)(4)'s strictures 'given the highly dubious circumstances surrounding the production and the lack of indicia of trustworthiness in the source code,' as described in the previous Section. On this record, the district court did not abuse its discretion in refusing to treat the source code printout as evidence under Rule 901(b)(4).

Moreover, the Federal Circuit rejected the plaintiff's reliance on Rule 703:

Wi-LAN alternatively argues that the source code printout should have been admitted into evidence under Federal Rule of Evidence 703. Wi-LAN's expert submitted a report stating that Sharp's and Vizio's television sets infringe the claimed methods of the '654 patent by the use of the source code. Wi-LAN's expert did not attempt to authenticate the source code printout. But Wi-LAN argues that its expert should be able to opine on the meaning of the inadmissible source code printout and to provide the inadmissible source code printout to the jury despite Wi-LAN's failure to authenticate the source code printout.

Wi-LAN's argument presents two separate and distinct questions: (1) whether the source code printout was admissible because it was relied on by the expert and (2) whether the expert's testimony relying on the source code was admissible to establish infringement. The answer to the first question is 'no' because expert reliance does not translate to admissibility. The answer to the second question is also 'no' because Wi-LAN did not establish that experts in the field 'reasonably rely on' unauthenticated source code.

Concluding its discussion of admissibility, the Federal Circuit rejected the plaintiff's argument that the court below should have extended discovery:

In light of these admissibility issues, Wi-LAN's fallback position is that the district court should have granted it additional time to obtain an admissible version of the source code. We disagree. Wi-LAN had ample time to obtain the source code and to find custodial witnesses to authenticate the source code over the course of discovery but failed to do so.

Wi-LAN had been on notice since early 2016 that it was going to need the system-on-chip source code from third parties to prove its direct infringement case. Throughout the

litigation, Wi-LAN repeatedly requested extensions of time to obtain the source code from the third-party manufacturers. Ultimately, however, Wi-LAN only procured a single printout version of the source code with declarations after suing the third-party manufacturers.

Wi-LAN, as the district court found, 'had ample time and opportunities over years of litigation to obtain evidence of infringement from the [system-on-chip] manufacturers' but failed to do so. Given this record, the district court did not abuse its discretion in denying Wi-LAN an additional opportunity to obtain an admissible form of the source code. [citations omitted in part].

AI IN LITIGATION ARTICLES

J. Bambauer, "Negligent AI Speech: Some Thoughts About Duty," 3 *J. of Free Speech Law* 343 (2023), https://www.journaloffreespeechlaw.org/bambauer2.pdf

C. Cwik, P. Grimm, M. Grossman and T. Walsh, "Artificial Intelligence, Trustworthiness, and Litigation." Artificial Intelligence and the Courts: Materials for Judges" (AAAS 2022), https://www.aaas.org/sites/default/files/2022-09/Paper%202_AI%20and%20Trustworthiness_NIST_FINAL.pdf

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P.W. Grimm, M.R. Grossman & G.V. Cormack, "*Artificial Intelligence as Evidence,*" 19 *Nw. J. Tech. & Intell. Prop*. 9 (2021), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1349&context=njtip

M.R. Grossman, "Is Disclosure and Certification of the Use of Generative AI Really Necessary?" *Judicature*, Vol. 107, No. 2, October 2023 (Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537496#:~:text=Concerns%20about%20the%20misuse%20of,in%20connection%20with%20legal%20filings.

R. Hedges, G. Gottehrer & J.C. Francis IV, "Artificial Intelligence and Legal Issues," *Litigation* (ABA: Fall 2020), Artificial Intelligence and Legal Issues (americanbar.org)

"How to Determine the Admissibility of AI-Generated Evidence in Courts?" *UNESCO News* (updated July 21, 2023), https://www.unesco.org/en/articles/how-determine-admissibility-ai-generated-evidence-courts

NIST PUBLICATIONS, INCLUDING THE "FRAMEWORK"

R. Schwartz, *et al.,* "Toward a Standard for Identifying and Managing Bias in Artificial Intelligence," NIST Special Pub. 1270 (Mar. 2022), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf

P. Phillips, *et al.,* "Four Principles of Explainable Artificial Intelligence" (NIST: Sept. 2021), https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8312.pdf

We introduce four principles for explainable artificial intelligence (AI) that comprise fundamental properties for explainable AI systems. We propose that explainable AI systems deliver accompanying evidence or reasons for outcomes and processes; provide explanations that are understandable to individual users; provide explanations that correctly reflect the system's process for generating the output; and that a system only operates under conditions for which it was designed and when it reaches sufficient confidence in its output. We have termed these four principles as explanation, meaningful, explanation accuracy, and knowledge limits, respectively. Through significant stakeholder engagement, these four principles were developed to encompass the multidisciplinary nature of explainable AI, including the fields of computer science, engineering, and psychology. Because one-size fits-all explanations do not exist, different users will require different types of explanations. We present five categories of explanation and summarize theories of explainable AI. We give an overview of the algorithms in the field that cover the major classes of explainable algorithms. As a baseline comparison, we assess how well explanations provided by people follow our four principles. This assessment provides insights to the challenges of designing explainable AI systems.

On January 26, 2023, the National Institute of Standards and Technology ("NIST") released the Artificial Intelligence Risk Management Framework, together with related materials. The Framework is described as follows:

In collaboration with the private and public sectors, NIST has developed a framework to better manage risks to individuals, organizations, and society associated with artificial intelligence (AI). The NIST AI Risk Management Framework (AI RMF) is intended for voluntary use and to improve the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of AI products, services, and systems.

The Framework and related materials can be found at https://www.nist.gov/itl/ai-risk-management-framework

On August 24, 2023, NIST announced that it would begin the process of standardizing algorithms intended to resist attacks by quantum computers. See "NIST to Standardize Encryption Algorithms That Can Resist Attack by Quantum Computers," (Aug. 24, 2023), https://www.nist.gov/news-events/news/2023/08/nist-standardize-encryption-algorithms-can-resist-attack-quantum-computers#:~:text=NIST's%20effort%20to%20develop%20quantum,by%20the%20November%202017%20deadline.

J. Daniels & A. Chipperson, "NIST Framework Can Nudge Companies Toward Trustworthy AI Use," *Bloomberg Law* (Aug. 30, 2023), https://news.bloomberglaw.com/ip-law/nist-framework-can-nudge-companies-toward-trustworthy-ai-use

W.J. Denvil, *et al.,* "NIST Publishes Artificial Intelligence Risk Management Framework and Resources," *Engage* (Hogan Lovells: Jan. 31, 2023), https://www.engage.hoganlovells.com/knowledgeservices/news/nist-publishes-artificial-intelligence-risk-management-framework-and-resources/

J. Johnson, *et al.,* "NIST Releases New Artificial Intelligence Risk Management Framework" *Inside Privacy* (Covington: Feb. 1, 2023), https://www.insideprivacy.com/artificial-intelligence/nist-releases-new-artificial-intelligence-risk-management-framework/

C.F. Kerry, "NIST's AI Risk Management Framework Plants a Flag in the AI Debate," *Brookings TechTank* (Feb. 15, 2023), https://www.brookings.edu/blog/techtank/2023/02/15/nists-ai-risk-management-framework-plants-a-flag-in-the-ai-debate/?utm_campaign=Center%20for%20Technology%20Innovation&utm_medium=email&utm_content=247081757&utm_source=hs_email

D. Pozza, "Federal Guidance Offers Framework to Minimize Risks in AI Use," *Bloomberg Law* (Feb. 9, 2023), https://news.bloomberglaw.com/us-law-week/federal-guidance-offers-framework-to-minimize-risks-in-ai-use

S. Witley, "AI Risks Guide Sets Starting Point for Compliance, Regulation," *Bloomberg Law* (Feb. 1, 2023), *https://news.bloomberglaw.com/privacy-and-data-security/ai-risks-guide-sets-starting-point-for-compliance-regulation*

FEDERAL, STATE, AND LOCAL GOVERNMENT "RESPONSES" TO ARTIFICIAL INTELLIGENCE

AI is being used by business entities to, among other things, sift through job candidates. This use has led to concerns about, among other things, lack of transparency and possible bias in the selection process. Expect statutory and regulatory responses. Here are some. For an introduction of sorts—and a suggested regulatory framework, *see A. Engler, "A Comprehensive and Distributed Approach to AI Regulation," Brookings* (Aug. 30, 2023), https://www.brookings.edu/articles/a-comprehensive-and-distributed-approach-to-ai-regulation/

Federal

"Statement of Interest of the United States" submitted in *Louis v. Saferent Solutions, LLC,* Case No. 22cv10800-AK (D. Mass. Jan. 9, 2023), https://www.justice.gov/d9/2023-01/u.s._statement_of_interest_-_louis_et_al_v._saferent_et_al.pdf

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 5171 to assist the Court in evaluating the application of the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., in challenges to an algorithm-based tenant screening system. The United States has a strong interest in ensuring the correct interpretation and application of the FHA's pleading

standard for disparate impact claims, including where the use of algorithms may perpetuate housing discrimination.

Various federal agencies have weighed in on AI in employment decision-making. *See* "Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems" (undated), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf

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Summary of the Blueprint at https://www.whitehouse.gov/ostp/ai-bill-of-rights/

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and-accountability-for-automated-decision-systems?peek=BH793HGzEX7gimi20t7HiHEg8n9b3vET476N7MsTy%2BcOuyHe

N. Krishan, "Sen. Schumer introducing AI Policy Framework, Calls for 'Comprehensive Legislation,'" *Fedscoop* (June 21, 2013), https://fedscoop.com/sen-schumer-introduces-ai-policy-framework-calls-for-comprehensive-legislation/

EEOC Draft Strategic Enforcement Plan for 2023 – 2027, 88 FR 1379 (Jan. 10, 2023), https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan

Among other things, the draft plan "[r]ecognizes employers' increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions ***."

EEOC Artificial Intelligence and Algorithmic Fairness Initiative, https://www.eeoc.gov/ai#:~:text=As%20part%20of%20the%20initiative,and%20their%20employment%20ramifications%3B%20and

As part of the initiative, the EEOC will:

- Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions;
- Identify promising practices;
- Hold listening sessions with key stakeholders about algorithmic tools and their employment ramifications; and
- Gather information about the adoption, design, and impact of hiring and other employment-related technologies.

EEOC, "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees" (May 12, 2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence

A Gilbert, "EEOC Settles First-of-Its-Kind AI Bias in Hiring Lawsuit," *Bloomberg Law* (Aug. 10, 2023), https://news.bloomberglaw.com/daily-labor-report/eeoc-settles-

first-of-its-kind-ai-bias-lawsuit-for-365-000 (Settlement papers available through this link)

FTC, "Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act," see https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-warns-about-misuses-biometric-information-harm-consumers

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R.G. Kidwell, *et al*., "FTC Files Complaint on AI-Related Misleading Claims – AI: The Washington Report, *Mintz* (Sept. 1, 2023), https://www.mintz.com/mintz/pdf?id=89321

NLRB Office of the General Counsel, "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights," Memorandum GC 23-02 (Oct. 31, 2022), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos

Recent technological advances have dramatically expanded employers' ability to monitor and manage employees within the workplace and beyond. As more and more employers take

advantage of those new capabilities, their practices raise a number of issues under the Act. An issue of particular concern to me is the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees' ability to engage in protected activity and keep that activity confidential from their employer, if they so choose. Thus, I plan to urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights. I will do so both by vigorously enforcing extant law and by urging the Board to apply settled labor-law principles in new ways, as described below. [footnote omitted].

USDOJ Press Release (Jan. 9, 2023): Settlement Agreement & Final Judgment, *United States v. Meta Platforms, Inc. f/k/a Facebook, Inc.,* 22 Civ. 5187-JGK (S.D.N.Y.), https://www.justice.gov/crt/case/united-states-v-meta-platforms-inc-fka-facebook-inc-sdny:

On June 27, 2022, the court approved the parties' settlement agreement and entered a final judgment in *United States v. Meta Platforms, Inc., f/k/a Facebook, Inc.* (S.D.N.Y.). The complaint, which was filed on June 21, 2022, alleged that Meta's housing advertising system discriminated against Facebook users based on their race, color, religion, sex, disability, familial status, and national origin, in violation of the Fair Housing Act (FHA). Specifically, the complaint alleged, among other things, that Meta uses algorithms in determining which Facebook users receive housing ads and that those algorithms rely, in part, on characteristics protected under the FHA. Under the settlement, Meta stopped using an advertising tool (known as the 'Special Ad Audience' tool) for housing ads and developed a new system to address racial and other disparities caused by its use of personalization algorithms in its ad delivery system for housing ads. On January 9, 2023, the Justice Department announced that it reached agreement with Meta, as required by the settlement, on compliance targets for that new system. Under the terms of the June 2022 settlement, Meta also will not provide any ad targeting options for housing advertisers that directly describe or relate to FHA-protected characteristics. The settlement also requires Meta to pay a civil penalty of $115,054, the maximum penalty available under the FHA. The case involves a Secretary-initiated HUD complaint and was referred to the Justice Department after the U.S. Department of Housing and Urban Development (HUD) conducted an investigation and issued a charge of discrimination. [hyperlinks in original].

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This bill would establish, within the Department of Technology, the Office of Artificial Intelligence, and would grant the office the powers and authorities necessary to guide the design, use, and deployment of automated systems by a state agency to ensure that all AI systems are designed and deployed in a manner that is consistent with state and federal laws and regulations regarding privacy and civil liberties and that minimizes bias and promotes equitable outcomes for all Californians. ***.

California Privacy Rights Act ("CPRA"), Cal. Civ. Code Sec. 1798.185 (a)(16) Directs that regulations be adopted "governing access and opt-out rights with respect to businesses' use of automated decision-making technology, including profiling and requiring businesses' response to access requests to include meaningful information about the logic involved ... [and] a description of the likely outcome of the process with respect to the consumer." See https://cpra.gtlaw.com/regulations-2/

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SIsInRpbWUiOiIxNjc3MTc5MjQzIiwidXVpZCI6ImZrdXJhbXZNOVpuTUpZR2xzVStBTlE9PTBQbFlIc09tS25JdFhPcHNIVzNucFE9PSIsInYiOiIxIn0%3D

Colorado S.B. 169, "Restrict Insurers' Use of External Consumer Data:"

The act prohibits an insurer from *** using any external consumer data and information source, algorithm, or predictive model (external data source) with regard to any insurance practice that unfairly discriminates against an individual based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression. see https://leg.colorado.gov/bills/sb21-169. Draft regulations were released February 1, 2023 and are available at https://doi.colorado.gov/announcements/for-review-and-comment-draft-proposed-algorithm-and-predictive-model-governance

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Illinois Artificial Intelligence Video Interview Act, 820 ICLS 42/
Regulates video recording of job interviews and use of AI to analyze the videos, requires notice and consent, limits sharing of video, requires report on demographic data and provides for destruction of videos. See https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68

[Maryland] House Bill 1202, "Labor and Employment – Use of Facial Recognition Services – Prohibition, https://mgaleg.maryland.gov/2020RS/Chapters_noln/CH_446_hb1202t.pdf:

FOR the purpose of prohibiting an employer from using certain facial recognition services during an applicant's interview for employment unless the applicant consents under a certain provision of this Act; authorizing an applicant to consent to the use of certain facial recognition service technologies during an interview by signing a waiver; providing for the contents of a certain waiver; defining certain terms; and generally relating to employer use of facial recognition service technologies during job interviews.

Local Government

New York City Local Law No. 1894-A

Effective April 15, 2023, regulates use of "automated employment decision tools" in hiring and promotion, requires notice prior to being subject to a tool, allows opting-out and another process, and requires annual, independent "bias audit." See Legislation Text - Int 1894-2020 (srz.com).

M. Capezza, *et al.*, "Deploying a Holistic Approach to Automated Employment Decision-Making in Light of NYC's AEDT Law" (Mintz: Feb. 3, 2023), https://www.mintz.com/insights-center/viewpoints/2226/2023-02-03-deploying-holistic-approach-automated-employment

INTELLECTUAL PROPERTY-FEDERAL AGENCIES AND PRIVATE CAUSES OF ACTION

U.S. Copyright Office, Library of Congress, Notice of Inquiry and Request for Comments, 88 *Fed. Reg.* 59942 (Aug. 30, 2023)

The United States Copyright Office is undertaking a study of the copyright law and policy issues raised by artificial intelligence ('AI') systems. To inform the Office's study and help assess whether legislative or regulatory steps in this area are warranted, the Office seeks comment on these issues, including those involved in the use of copyrighted works to train AI models, the appropriate levels of transparency and disclosure with respect to the use of copyrighted works, and the legal status of AI-generated outputs.

Request for Comments Regarding Artificial Intelligence and Inventorship, 88 FR 9492 (Feb. 14, 2023)

The United States Patent and Trademark Office (USPTO) plays an important role in incentivizing and protecting innovation, including innovation enabled by artificial intelligence (AI), to ensure continued U.S. leadership in AI and other emerging technologies (ET). In June 2022, the USPTO announced the formation of the AI/ET Partnership, which provides an opportunity to bring stakeholders together through a series of engagements to share ideas, feedback, experiences, and insights on the intersection of intellectual property and AI/ET. To build on the AI/ET Partnership efforts, the USPTO is seeking stakeholder input on the current state of AI technologies and inventorship issues that may arise in view of the advancement of such technologies, especially as AI plays a greater role in the innovation process. As outlined in sections II to IV below, the USPTO is pursuing three main avenues of engagement with stakeholders to inform its future efforts on inventorship and promoting AI-enabled innovation: a series of stakeholder engagement sessions; collaboration with academia through scholarly research; and a request for written comments to the questions identified in section IV. The USPTO encourages stakeholder engagement through one or more of these avenues.

Re: Zarya of the Dawn (Registration # V Au001480196), United States Copyright Office (Feb. 21, 2023), Letter: In re Zarya of the Dawn

The Office has completed its review of the Work's original registration application and deposit copy, as well as the relevant correspondence in the administrative record. We conclude that Ms. Kashtanova is the author of the Work's text as well as the selection, coordination, and arrangement of the Work's written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the Work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created. [footnote admitted].

Thaler v. Perlmutter, Civil Action No. 22-1564 (BAH) (D.D.C. Aug. 18, 2023)

The plaintiff appealed from the denial of his copyright application:

Plaintiff Stephen Thaler owns a computer system he calls the 'Creativity Machine,' which he claims generated a piece of visual art of its own accord. He sought to register the work

for a copyright, listing the computer system as the author and explaining that the copyright should transfer to him as the owner of the machine. The Copyright Office denied the application on the grounds that the work lacked human authorship, a prerequisite for a valid copyright to issue, in the view of the Register of Copyrights. Plaintiff challenged that denial, culminating in this lawsuit against the United States Copyright Office and Shira Perlmutter, in her official capacity as the Register of Copyrights and the Director of the United States Copyright Office ('defendants'). Both parties have now moved for summary judgment, which motions present the sole issue of whether a work generated entirely by an artificial system absent human involvement should be eligible for copyright. See Pl.'s Mot. Summ. J. (Pl.'s Mot.'), ECF No. 16; Defs.' Cross-Mot. Summ. J. ('Defs.' Mot.'), ECF No. 17. For the reasons explained below, defendants are correct that human authorship is an essential part of a valid copyright claim, and therefore plaintiff's pending motion for summary judgment is denied and defendants' pending cross-motion for summary judgment is granted.

Thaler v. Hirshfeld, No. 1:20-cv-903-(LMB/TCB), 2021 WL 3934803 (E.D. Va. Sept. 2, 2021), affirmed, *Thaler v. Vidal*, 2021-2347 (Fed. Cir. Aug. 5, 2022), petition for panel and rehearing *en banc* denied (Fed. Cir. Oct. 20, 2022)

This was an appeal from the refusal of the USPTO to process two patent applications. The plaintiff alleged that he was the owner of DABUS, "an artificial intelligence machine" listed as the inventor on the applications. The applications included a document through which DABUS had "ostensibly assigned all intellectual property rights" to the plaintiff. The court held:

Before the Court are the parties' cross-motions for summary judgment, which address the core issue—can an artificial intelligence machine be an 'inventor' under the Patent Act? Based on the plain statutory language of the Patent Act and Federal Circuit authority, the clear answer is no.

[P]laintiff's policy arguments do not override the overwhelming evidence that Congress intended to limit the definition of 'inventor' to natural persons. As technology evolves, there may come a time when artificial intelligence reaches a level of sophistication such that it might satisfy accepted meanings of inventorship. But that time has not yet arrived, and, if it does, it will be up to Congress to decide how, if at all, it wants to expand the scope of patent law.

Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071

(Copyright Review Board: Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf

This was the denial of a request by Steven Thaler (see above) to reconsider his attempt to register a "two-dimensional artwork claim" that had been rejected by the Registration Program of the United States Copyright Office. Thaler identified the author of the artwork as the "Creativity Machine," and stated that it was "autonomously created by a computer algorithm running on a machine." The Office refused to register the claim as it lacked "human authorship necessary to support a copyright claim." The Review Board affirmed the refusal to register the claim:

> Thaler does not assert that the Work was created with contribution from a human author, so the only issue before the Board is whether, as he argues, the Office's human authorship requirement is unconstitutional and unsupported by case law. Currently, 'the Office will refuse to register a claim if it determines that a human being did not create the work.' Under that standard, the Work is ineligible for registration. After reviewing the statutory text, judicial precedent, and longstanding Copyright Office practice, the Board again concludes that human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered. [citation and footnote omitted].

The Review Board also rejected Thaler's argument that the human authorship requirement was unconstitutional:

> [T]he Board rejects Thaler's argument that the human authorship requirement is 'unconstitutional' because registration of machine-generated works would 'further the underlying goals of copyright law, including the constitutional rationale for copyright protection.' Congress is not obligated to protect all works that may constitutionally be protected. '[I]t is generally for Congress,' not the Board, 'to decide how best to pursue the Copyright Clause's objectives.' *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). The Board must apply the statute enacted by Congress; not second-guess whether a different statutory scheme would better promote the progress of science and useful arts. [citation omitted].

Class Action Complaint, Andersen v. Stability AI Ltd., Case 3:23-cv-00201 (N.D. Ca. filed Jan. 13, 2023), see https://dockets.justia.com/docket/california/candce/3:2023cv00201/407208. Complaint alleges that "AI Image Generators are 21st-Century Collage Tools that Violate the Rights of Millions of Artists." (*see* Weiss below).

Class Action Complaint, Silverman v. OpenAI, Inc., Case No. 3:23-cv-03416 (N.D. Ca. July 7, 2023),

https://www.courtlistener.com/docket/67569254/silverman-v-openai-inc/. Complaint alleges that defendants wrongfully used copyrighted materials in training sets. (*see* Davis below).

Class Action Complaint, Tremblay v. OpenAI, Case No. 3-23-cv-03223 (N.D. Ca. June 28, 2023), see https://www.bloomberglaw.com/public/desktop/document/TremblayetalvOPENAIINCetalDocketNo323cv03223NDCalJun282023CourtDo?doc_id=X7Q1NOIOR0V928BCLAKKL91E1R5. Similar allegations to those in Silverman above. (*see* Cho below).

J. Bockman & J.A. Crawford, "AI Trends for 2023 – AI Technology Leads Patent Filing Growth," *MoFo TECH* (Morrison Foster: Dec. 15, 2022), https://mofotech.mofo.com/topics/ai-trends-for-2023-ai-technology-leads-patent-filing-growth

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R. Setty, "AI-Assisted Inventions Offer Wiggle Room for US Patent Agency," *Bloomberg Law* (Feb. 15, 2023), https://news.bloomberglaw.com/ip-law/ai-assisted-inventions-offer-wiggle-room-for-us-patent-agency

R. Setty, "AI Comic Art Dispute Leaves Copyright Protections Open-Ended," *Bloomberg Law* (Feb. 24, 2023), https://news.bloomberglaw.com/ip-law/ai-comic-art-dispute-leaves-copyright-protections-open-ended

E. Sherman, "Copyright Law and Generative AI: What a Mess," *ABA J.* (Aug. 30, 2023), https://www.abajournal.com/web/article/copyright-generative-ai-what-a-mess

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GAI INTRODUCTION

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McKinsey & Co., "What's the Future of Generative AI? An Early View of 15 Charts" (Aug. 25, 2023), https://www.mckinsey.com/featured-insights/mckinsey-explainers/whats-the-future-of-generative-ai-an-early-view-in-15-charts

GENERATIVE AI AND JUDGES

This section is a little different than the others because it begins with a short introduction rather than "diving" immediately into references. Not surprisingly, given the availability of GAI, attorneys are – or may – rely on it to do research. This has led to the imposition of sanctions in the *Mata* decision (see below) and proactive attempts by judges to deal with the possible use of GAI by attorneys. There does not appear to be any likelihood that the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence will be amended to address GAI or, for that matter, AI. But we will see. And with that, let's look at some case law and actions by individual federal judges.

Decisions

***Mata v. Avianca, Inc.,* No. 22-cv-1461, 2023 WL 3696209 (PKC) (S.D.N.Y. June 22, 2023)**

The plaintiff's attorneys in this civil action "submitted non-existent judicial opinions with fake quotes and citations created by *** ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question." The district court concluded that the attorneys acted with subjective bad faith and violated Rule 11. The court held the firm that represented the plaintiff jointly and severally liable for the attorney's violation but rejected the imposition of sanctions under Section 1927 because, "[r]eliance on fake cases has caused several harms but dilatory tactics and delay were not among them." The court also held that, "alternatively" to Rule 11, sanctions were appropriate under its inherent power. The court imposed a $5,000.00 monetary penalty, required the attorneys to "inform their client and the judge whose names were wrongfully invoked of the sanctions imposed," but did not require an apology from the attorneys.

***Ex Parte Allen Michael Lee,* No. 10-22-00281-CR, 2023 WL 4624777 (Tex. Crim. App. July 19, 2023)**

The appellate court here noted that "none of the three published cases cited [in the petitioner's brief] actually exist ***. Each citation provides the reader a jump-cite into the body of a different case that has nothing to do with the propositions cited by Lee. Two of the citations take the reader to cases from Missouri." The court observed: "It appears that at least the 'Argument' portion of the brief may have been prepared by artificial intelligence AI," but took no action.

***Berman v. Matteucci,* Case No. 6:23-cv-00660-MO (D. Ore. July 10, 2023)**

The *pro se* petitioner in this *habeas* proceeding responded to an order to show cause why it should not be dismissed as untimely by asserting that, prior to April 2023, when "an artificial intelligence chatbot provided him with insights that helped him discover his claims" that the policy under which he had been sentenced violated several constitutional provisions, "artificial intelligence technology was not sufficiently advanced to impart this knowledge to him." The district court held that the petitioner's understanding of his legal claim was not a "factual predicate" under *habeas* law and that his lack of understanding of "the legal significance of known facts" was insufficient to avoid dismissal.

Orders

"Mandatory Certification Regarding Generative Artificial Intelligence," Judge Specific Requirement of Judge Brantley Starr, Northern District of Texas, https://www.txnd.uscourts.gov/judge/judge-brantley-starr:

All attorneys and pro se litigants *** must, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal data bases, by a human being. ***.

"Order on Artificial Intelligence," Judge Stephen Alexander Vaden, U.S. Ct. of International Trade (June 8, 2023), https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf:

*** *any* submission in a case assigned to Judge Vaden that contains text drafted with the assistance of a generative artificial intelligence program on the basis of natural language prompts, including but not limited to ChatGPT and Google Bard, must be accompanied by:

A disclosure notice that identifies the program used and the specific portions of text that have been so drafted;

A certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party ***.

"Standing Order Re: Artificial Intelligence ('AI') in Cases Assigned to Judge Baylson," Eastern District of Pennsylvania (June 6, 2023), https://www.paed.uscourts.gov/documents/standord/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf:

If any attorney for a party, or a *pro se* party, has used Artificial Intelligence ('AI') in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, **MUST**, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and **CERTIFY**, that each and every citation to the law or the record in the paper, has been verified as accurate. [emphasis in original].

In re: Pleadings Using Generative Artificial Intelligence, General Order 2023-03 (N.D. Tex. Bankr. Ct. June 21, 2023), https://www.txnb.uscourts.gov/news/general-order-2023-03-pleadings-using-generative-artificial-intelligence:

If any portion of a pleading or other paper filed on the Court's docket has been drafted utilizing generative artificial intelligence, including but not limited to ChatGPT, Harvey.AI, or Google Bard, the Court requires that all attorneys and pro se litigants filing such pleadings or other papers verify that any language that was generated was checked for accuracy, using print reporters, traditional legal databases, or other reliable means. Artificial intelligence systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States and are likewise not factually or legally trustworthy sources without human verification. Failure to heed these instructions may subject attorneys or pro se litigants to sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011.

Standing Order for Civil Cases Before Magistrate Judge Fuentes, Magistrate Judge Gabriel A. Fuentes (N.D. Ill.), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20revision%208-11-23.pdf:

The Court has adopted a new requirement in the fast-growing and fast-changing area of generative artificial intelligence ('AI') and its use in the practice of law. The requirement is as follows: Any party using any generative AI tool in the preparation or drafting of documents for filing with the Court must disclose in the filing that AI was used and the specific AI tool that was used to conduct legal research and/or to draft the document. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, 'I'm sorry, Dave, I'm afraid I can't do that …. This mission is too important for me to allow you to jeopardize it.' 2001: A SPACE ODYSSEY (MetroGoldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes 'bogus judicial decisions' cited for substantive propositions of law. See Mata v. Avianca, Inc., ***. Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2). ***.

Belenzon v. Paws Up Ranch, LLC, CV 23-69-M-DWM (D. Mont. June 22, 2023):

Order granting *pro hac* admission on "condition that *pro hac* counsel shall do his or her own work. This means that *pro hac* counsel must do his or her own writing; sign his or her own pleadings, motions, and briefs; and appear and participate

personally, Use of artificial intelligence automated drafting programs, such as Chat GPT, is prohibited."

Paragraph 8F, Individual Practices in Civil Cases, District Judge Arun Subramanian (S.D.N.Y.) (revised July 29, 2023), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf:

Use of ChatGPT and Other Tools. Counsel is responsible for providing the Court with complete and accurate representations of the record, the procedural history of the case, and any cited legal authorities. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.

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LAW ENFORCEMENT APPLICATIONS OF AI

Technology is neutral. That does not mean, however, that a given technology cannot have a military use. AI is no exception, as the examples in this and the section following it demonstrate.

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MILITARY APPLICATIONS OF AI

USDOD, *Autonomy in Weapon Systems,* DoD Directive 3000.09 (Jan. 25, 2023), https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/300009p.pdf

The purpose of the Directive:

- Establishes policy and assigns responsibilities for developing and using autonomous and semiautonomous functions in weapon systems, including armed platforms that are remotely operated or operated by onboard personnel.
- Establishes guidelines designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements.
- Establishes the Autonomous Weapon Systems Working Group.

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An increasing number of States are developing military AI capabilities, which may include using AI to enable autonomous systems. Military use of AI can and should be ethical, responsible, and enhance international security. Use of AI in armed conflict must be in accord with applicable international humanitarian law, including its fundamental principles. Military use of AI capabilities needs to be accountable, including through such use during military operations within a responsible human chain of command and control. A principled approach to the military use of AI should include careful consideration of risks and benefits, and it should also minimize unintended bias and accidents. States should take appropriate measures to ensure the responsible development, deployment, and use of their military AI capabilities, including those enabling autonomous systems. These measures should be applied across the life cycle of military AI capabilities. [footnote omitted].

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Although the U.S. government has no official definition of artificial intelligence, policymakers generally use the term AI to refer to a computer system capable of human-level cognition. AI is further divided into three categories: narrow AI, general AI, and artificial superintelligence. Narrow AI systems can perform only the specific task that they were trained to perform, while general AI systems would be capable of performing a broad range of tasks, including those for which they were not specifically trained. Artificial superintelligence refers to a system "that greatly exceeds the cognitive performance of humans in virtually all domains of interest." General AI systems and artificial superintelligence do not yet—and may never—exist.

Narrow AI is currently being incorporated into a number of military applications by both the United States and its competitors. Such applications include but are not limited to intelligence, surveillance, and reconnaissance; logistics; cyber operations; command and control; and semiautonomous and autonomous vehicles. These technologies are intended in part to augment or replace human operators, freeing them to perform more complex and cognitively demanding work. In addition, AI-enabled systems could (1) react significantly faster than systems that rely on operator input; (2) cope with an exponential increase in the amount of data available for analysis; and (3) enable new concepts of operations, such as swarming (i.e., cooperative behavior in which unmanned vehicles autonomously coordinate to achieve a task) that could confer a warfighting advantage by overwhelming adversary defensive systems.

Narrow AI, however, could introduce a number of challenges. For example, such systems may be subject to algorithmic bias as a result of their training data or models. Researchers have repeatedly discovered instances of racial bias in AI facial recognition programs due to the lack

of diversity in the images on which the systems were trained, while some natural language processing programs have developed gender bias. Such biases could hold significant implications for AI applications in a military context. For example, incorporating undetected biases into systems with lethal effects could lead to cases of mistaken identity and the unintended killing of civilians or noncombatants.

Similarly, narrow AI algorithms can produce unpredictable and unconventional results that could lead to unexpected failures if incorporated into military systems. In a commonly cited demonstration of this phenomenon ***, researchers combined a picture that an AI system correctly identified as a panda with random distortion that the computer labeled 'nematode.' The difference in the combined image is imperceptible to the human eye, but it resulted in the AI system labeling the image as a gibbon with 99.3% confidence. Such vulnerabilities could be exploited intentionally by adversaries to disrupt AI-reliant or -assisted target identification, selection, and engagement. This could, in turn, raise ethical concerns—or, potentially, lead to violations of the law of armed conflict—if it results in the system selecting and engaging a target or class of targets that was not approved by a human operator.

Finally, recent news reports and analyses have highlighted the role of AI in enabling increasingly realistic photo, audio, and video digital forgeries, popularly known as 'deep fakes.' Adversaries could deploy this AI capability as part of their information operations in a 'gray zone' conflict. Deep fake technology could be used against the United States and its allies to generate false news reports, influence public discourse, erode public trust, and attempt blackmail of government officials. For this reason, some analysts argue that social media platforms—in addition to deploying deep fake detection tools—may need to expand the means of labeling and authenticating content. Doing so might require that users identify the time and location at which the content originated or properly label content that has been edited. Other analysts have expressed concern that regulating deep fake technology could impose an undue burden on social media platforms or lead to unconstitutional restrictions on free speech and artistic expression. These analysts have suggested that existing law is sufficient for managing the malicious use of deep fakes and that the focus should be instead on the need to educate the public about deep fakes and minimize incentives for creators of malicious deep fakes.

Government Accountability Office, "Artificial Intelligence: DOD Needs Department-Wide Guidance to Inform Acquisitions," GAO-23-105850 (June 2023), https://www.gao.gov/products/gao-23-105850. Conclusions:

Because of the opportunities AI presents, efforts to acquire AI tools or integrate AI into DOD weapon systems are poised for rapid growth— growth that could outpace DOD's efforts to develop appropriate and sufficiently broad guidance for those acquisitions. AI offers the potential for broad application across the military services and joint acquisition programs to significantly enhance capabilities available to the warfighter. However, DOD has not issued department-wide guidance to provide a framework to ensure that acquisition of AI is consistent across the department and accounts for the unique challenges associated with AI.

It is especially important that DOD and the military services issue guidance to provide critical oversight, resources, and provisions for acquiring AI given that the U.S. will face AI-enabled adversaries in the future. Without such guidance, DOD is at risk of expending funds on AI technologies that do not consistently address the unique challenges associated with AI and are

not tailored to each service's specific needs. The private company observations previously discussed offer numerous considerations DOD may wish to leverage in guidance, as appropriate, as it continues to pursue AI-enabled capabilities.

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