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Legal and Ethical Perspectives on Artificial Intelligence

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People are enormously nervous about Artificial Intelligence. Although many are constructive and want to move forward, many want more answers from a business perspective, a legal perspective, and an economic perspective. Just today, another class action lawsuit was filed in California. This paper will address concerns and hopefully help you understand Artificial Intelligence better. From these perspectives, you may decide how you feel and think about Artificial Intelligence based on the information presented in this paper and other research.

Keywords: artificial intelligence, hallucinations, privacy, data analytics

Introduction

From developing automated robotic manufacturing, to solving the U.S. national debt problem, the analytical capacity of AI may be powerful. We are transitioning to an AI society much like the industrial revolution of the early 1900's. Hopefully, from this paper, you will gain a better understanding of AI nationally and internationally. There are so many examples of the use of Artificial Intelligence Technology. A few are in order. Consider the oil industry. For oil companies to find the oil, geologists use AI to gather data from around the world on the location of the best oil reserves. AI is then used to calculate the most efficient oil extraction program for the company. As a result, companies operate at a very good efficiency level. Energy companies benefit and may be able to pass the cost savings to the consumer. Another great example is AI in the use for researching cures for diseases that have no treatment. AI can be used to gather data, analyze information, and recommend therapies. These important medical breakthroughs could be a game changer in medicine. AI is embedded in software development, driverless cars, and in areas like human resources, and practicing law. AI is used in government in the areas of transportation surveys, administrative efficiency effectiveness, and crime scene investigations. Many countries use facial recognition for security purposes, and optimal scheduling of government meetings and data analytics. In the banking world, AI is used in investments and appraisals. In education, AI is used to develop curriculum and provide feedback to educators on the effectiveness of programs. AI is used in marketing forecasting and cost accounting efficiency analytics. So many aspects of our lives will be made better by AI. However, this pervasive usage of AI will create issues of legal responsibilities that have not been established by the courts and regulatory issues that are in development. Also, there are management implications with AI. Many think that the AI boom will eliminate jobs and disproportionately affect the socio-economic map. If people get displaced or laid off, AI will affect America's working person pocketbook. Warehousing and many other repetitive jobs will be eliminated. Another change coming is that AI and humans may not agree. For example, AI has been known to be wrong. In the legal world, AI has been dead wrong on case citations and actual existing case analysis. In medicine, AI does have shortcomings where physicians have disagreed with medical

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assessments and conclusions. In driverless cars and countless other examples, AI is to blame for accidents, faulty machinery operation, and bad banking investment advice. Moreover, the responsibility for AI defects and misgivings is far from established. The research tells us that if the derivative problem is with machine type learning, the law looks to patent and copyright. If the derivative problem stems from misinformation from a website, then it becomes the problem of whomever owns the website. Let us take these problems one at a time. The Federal Trade Commission is the federal agency responsible for the regulation of commerce and AI.

Federal Regulation of Artificial Intelligence

The Federal Trade Commission is very active trying to regulate AI. For example, the FTC has acted to investigate the practices of data gathering by OpenAI.

> The U.S. Federal Trade Commission has launched an investigation into ChatGPT creator OpenAI and whether the artificial intelligence company violated consumer protection laws by scraping public data and publishing false information through its chatbot. The agency sent OpenAI a 20-page letter requesting detailed information on its AI technology, products, customers, privacy safeguards and data security arrangements. OpenAI has faced scrutiny elsewhere. On the international level, Italian regulators temporarily blocked ChatGPT over privacy concerns, and privacy watchdogs in France, Spain, Ireland and Canada also are paying closer attention, including some that have launched investigations after receiving complaints. (Hamilton, 2023)

Currently, OpenAI, the creator of ChatGPT is being held responsible for its activities in connection with the application of AI. The creator of ChatGPT, OpenAI, is responding to many legal challenges. Should the Federal Trade Commission find that OpenAI has violated the law, the Justice Department may bring an action against OpenAI for the activities that violated the law. In Federal Court, after filing a federal lawsuit against OpenAI, the findings of the Federal Trade Commission become prima facia evidence of negligence, copyright infringements, and privacy causes of action. Many lawsuits have been filed citing violations of the right to privacy and copyright infringements that are still in the litigation stages of development. Also, courts have offered injunctive relief to stop OpenAI from violating the law using illegal data gathering practices. The burden of proof for an injunction to issue is that the search would create irreparable harm to the consumer or the user. The law is holding the creators of products, the creators of technologies, liable in AI—liable for damages that are proximately caused and reasonably foreseeable from the use of AI and AI type technologies. To be succinct, a whole host of types of cases have arisen in the courts and are in litigation, not fully decided.

Current Common Law Cases on AI

A.T. v. OpenAI LP, is a case that was filed in the Federal District Court of Northern California. Among the claims made in the case are violations of California's Invasion of Privacy Act and Computer Fraud and Abuse Act, Negligence, Intrusion upon Seclusion, and Larceny.

> OpenAI and its main backer Microsoft (MSFT.O), opens new tab, are facing at least their second class action lawsuit in San Francisco federal court for allegedly breaking several privacy laws in developing OpenAI's popular chatbot ChatGPT and other generative artificial intelligence systems.
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> The complaint, opens new tab, filed on Tuesday on behalf of two unnamed software engineers who use ChatGPT, accuses the companies of training their fast-growing AI technology using stolen personal information from hundreds of millions of internet users.
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> In addition to the privacy cases, tech companies including Microsoft, OpenAI, Google and Stability AI have been hit with recent lawsuits over the "scraping" of copyrighted materials and personal data from across the internet to train their generative AI systems. (Brittain, 2024)

Arkansas Department of Human Services v. Ledgerwood, a case filed in the state of Arkansas. Among the claims included in that case are, justiciability, transparency in change of algorithm, transparency trade, and secrecy. Injunctions were granted. Here, nurse assessment questionnaires and treatment plans were replaced in a way that drastically affected hours of care for patients who were clearly affected.

> Bradley Ledgerwood and Tammy Dobbs both live in Arkansas and have cerebral palsy. They both need help with most tasks of daily life—moving their body positions, eating, dressing, going to the bathroom, and going out. Bradley's parents have provided his care for his entire life, relying on funding from Medicaid's AR Choices program because his mother quit a well-paying job so she'd have more time to help. Tammy used the same funding to pay professional support workers. Before 2016, they each received funding to pay for 56 hours of care at home each week. In 2016, Arkansas started using a new algorithm to calculate how many hours of care each person in the AR Choices program should receive. Instead of nurses using discretion to make the decision, the computer program did it automatically. And instead of receiving funds for 56 hours of care each week, the state told Bradley and Tammy they'd only be reimbursed for 32—a cut of nearly half. Both Bradley and Tammy asked Legal Aid of Arkansas for help, sued the state, and won important victories. (Brown, 2020)

District of Columbia v. RealPage Inc. et al., a case that was filed in the District of Columbia for colluding and illegally raising rents for 10's of thousands of tenants by using a pricing algorithm for collecting data. Among the claims made in this case were violations of civil rights, misuse of AI, and unfair competition.

> The District of Columbia's Attorney General on Wednesday sued property management platform RealPage and more than a dozen of the city's largest apartment building landlords, accusing them of a scheme to artificially fix rental prices in violation of U.S. antitrust law.
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> The lawsuit filed, opens new tab in D.C. Superior Court marks the first government antitrust enforcement action against RealPage since last year, when it was hit with more than two dozen private civil lawsuits that are now consolidated in Nashville, Tennessee, federal court… In a statement, Schwalb said landlords conspired to keep rental prices high using RealPage's revenue management platform. The attorney general's office said District residents had paid millions of dollars above fair market prices. (Scarcella, 2023)

AI and Negligence Actions

Other negligence types of cases involve ChatGPT and Generative AI just being completely wrong. Apparently, artificial intelligence modicums can be very wrong. These mediums produce inaccurate assessments, report cases to courts that do not exist and can really mess up flight schedules with the airlines if not properly supervised because it is said that AI produces hallucinations.

> An AI hallucination is when a generative AI model generates inaccurate information but presents it as if it were true. AI hallucinations are caused by limitations and/or biases in training data and algorithms, which can potentially result in producing content that is not just wrong but harmful. AI hallucinations are caused by a variety of factors, including biased or low-quality training data, a lack of context provided by the user or insufficient programming in the model that keeps it from correctly interpreting information. This phenomenon can also be partially explained if you understand how LLMs work. LLMs are fed massive amounts of text data, including books and news articles. That data is then broken down into letters and words. While LLMs use neural networks to figure out how these words and letters work together, they never actually learn the *meaning* of the words themselves. (Grover, 2024)

Watch out for AI hallucinations. It appears that Artificial Intelligence is more like an artificial demolition derby. Companies began to use AI and did not think through some of the shortcomings very well. Yet, this technology is being sold at a high price. We are not so sure that we know just how disconcerting and disruptive this technology will be. Let us refine a few thoughts.

"One problem is that we don't understand exactly how these tools work. With the help of deep learning technology and machine learning, generative AI models train themselves and learn from massive amounts of data, something no human could ever hope to analyze. Due to this, not even AI experts can say exactly why an AI tool creates a specific text sequence at a particular moment.

Types of AI Hallucinations

AI hallucinations come in many forms, so here are some of the more common types of AI hallucinations:

Fabricated information—This AI hallucination happens when the AI model generates completely made-up content. The problem is that the model still presents the information fairly convincingly, perhaps backing up its claims with unrelated books or research papers or talking about events that never happened.

Factual inaccuracy—With this AI hallucination, the generative AI system will create content that seems factual but isn't. The underlying idea will often be correct, but one or more specific pieces of information might be wrong. This is one of the most common AI hallucinations produced by AI chatbots.

Weird and creepy response—AI models are also used to generate creative content, sometimes leading to an AI hallucination that's not false or harmful but just weird or creepy. It's hard to describe, but a few examples of responses Microsoft Bing's chatbot provided in its early days paint a good picture. It professed love to a *New York Times* columnist, gaslighted users in several instances, and told one computer scientist that if it had to decide who would survive, the scientist or itself, it would select itself.

Harmful misinformation—This type of AI hallucination happens when the AI model generates false or slanderous info for an actual person. It might even combine facts with completely fabricated information. (Zeiniute, 2023)

Legal Problems with AI Leading to Management Issues

The management of responsibilities regarding AI is equally obnoxious and obfuscatory. Careers are being developed in AI problem solving. It is not surprising that humans pass on the responsibility and refuse to correct problems. Instead, management points the finger at the technology.

Not their problem

- LLM makers have mostly stayed away from dealing with the problem. OpenAI has proposed an approach to training called "process supervision" that rewards models for the way they arrive at an answer more than for the answer itself. The company said it could make AI more explainable by emulating a humanlike problem-solving approach. Google and Anthropic have mainly contributed advice but not technology.
- Experts say you shouldn't hold your breath waiting for LLM developers to solve the problem. Doing so "is a pipe dream in the same way that a kitchen knife manufacturer can't guarantee you won't cut yourself," Carlsson said. "There's no way to prevent people from misusing these models.
- Nearly every solution has one thing in common: a human in the loop. Hallucinations are "a reminder of the importance of human oversight in AI development and application," said Ankit Prakash, founder of contextual data platform provider Sprout24. "They underscore the paradox of AI: a technology so advanced, yet still prone to the most basic of errors.

Know the Source

- Content provenance may ultimately be the most effective protection, but it's also the most elusive. Provenance refers to tracking and verifying the origins and history of digital content, including how it was created, altered and distributed. Several projects are underway to set standards for provenance to be applied to model training, including Adobe Systems Inc.'s Content Authenticity Initiative, the Coalition for Content Provenance and Authenticity, the Data Provenance Initiative and a voluntary governance model being promoted by OpenAI LLC and others.
- Provenance comes with challenges, including data collection and processing overhead, complexity and vulnerability to manipulation. "I have not seen evidence yet that it's feasible for Claude or GPT-4 or Falcon to say, 'I'm generating this content from XYZ facts I was trained on,'" said Forrester's Curran.

- Companies are stepping in to provide that and other services to improve reliability. Giants such as Microsoft, IBM and SAS Institute Inc. have launched AI governance practices, and a host of smaller challengers such as DataRobot, CalypsoAI, Dataiku Inc., Credo AI, Fairly AI Inc. and Holistic AI Inc. have come up with their own tools and techniques.
- Reinforcement learning-based fine-tuning rewards the model with an accurate response and penalizes it for mistakes. CalypsoAI customers can build what Serebryany called "an internal trust hierarchy" anchored in its technology for moderating and securing LLM use within an organization. "People can mark and tag data according to what is and isn't true and share that with others in the organization," he said. "As you train it, ask questions and mark answers, you gain trust."
- DataRobot has a single platform for building, deploying and managing machine learning models and LLMs. It helps optimize a customer's vector database—which is designed to handle the multidimensional objects called vectors that are often used in machine learning applications—"to visualize what's in it that might be leading to negative feedback," Schmidt said. "We can help you see where you're hallucinating so you can measure and correct."
- With Kolena's model validation platform, "companies can search through their test data, production data, and model results to find edge cases where their model is struggling," Elgendy said. (Gillen, 2024)

Management of Professional Firms

In the legal profession, the use of AI technology is proving out to be not very trustworthy. Recalling my own litigation practice for approximately 15 years, listening to clients and preparing for trial using discovery and interviewing witnesses are one of the many crucial skills needed to prevail in cases at trial and at the appellate level. So much human thought goes into the process. AI presents due process concerns. At trial, the record must be correct. Attorneys have a duty of candor to the court and a duty of reasonable care to the client. Using AI tools can result in negligence. To say the very least, more of an understanding of the use of AI in research and trial strategies is essential.

> Broadly, we investigated (1) general research questions (questions about doctrine, case holdings, or the bar exam); (2) jurisdiction or time-specific questions (questions about circuit splits and recent changes in the law); (3) false premise questions (questions that mimic a user having a mistaken understanding of the law); and (4) factual recall questions (questions about simple, objective facts that require no legal interpretation). These questions are designed to reflect a wide range of query types and to constitute a challenging real-world dataset of exactly the kinds of queries where legal research may be needed the most. These systems can hallucinate in one of two ways. First, a response from an AI tool might just be *incorrect*—it describes the law incorrectly or makes a factual error. Second, a response might be mis grounded—the AI tool describes the law correctly, but cites a source which does not in fact support its claims.
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> Given the critical importance of authoritative sources in legal research and writing, the second type of hallucination may be even more pernicious than the outright invention of legal cases. A citation might be "hallucination-free" in the narrowest sense that the citation *exists*, but that is not the only thing that matters. The core promise of legal AI is that it can streamline the time-consuming process of identifying relevant legal sources. If a tool provides sources that *seem* authoritative but are in reality irrelevant or contradictory, users could be misled. They may place undue trust in the tool's output, potentially leading to erroneous legal judgments and conclusions. Ultimately, our results highlight the need for rigorous and transparent benchmarking of legal AI tools. Unlike other domains, the use of AI in law remains alarmingly opaque: the tools we study provide no systematic access, publish few details about their models, and report no evaluation results at all.
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> The lack of transparency also threatens lawyers' ability to comply with ethical and professional responsibility requirements. The bar associations of California, New York, and Florida have all recently released guidance on lawyers' duty of supervision over work products created with AI tools. And as of May 2024, more than 25 federal judges have issued standing orders instructing attorneys to disclose or monitor the use of AI in their courtrooms.
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> Without access to evaluations of the specific tools and transparency around their design, lawyers may find it impossible to comply with these responsibilities. Alternatively, given the high rate of hallucinations, lawyers may find themselves having to verify each and every proposition and citation provided by these tools, undercutting the stated efficiency gains that legal AI tools are supposed to provide. (Magesh, Surani, Dahl, Suzgun, Manning, & Ho, 2024)

Arbitration and Mediation Efforts

The mediation and arbitration aspect of litigation has taken on new meaning since COVID. More and more cases, both domestically and internationally are being referred to mediation and arbitration than ever before so as to help resolve the backlog of cases created by the pandemic. AI can play a good role in mediation and arbitration because the process is not as formal as the courts. For example, there is no formal evidentiary process in mediation. That saves people time and money in resolving disputes. AI can be creative finding information and suggesting solutions. There is a need to regulate the use of Generative AI in dispute resolution with the understanding of the scope and purpose of the specialized dispute resolution process.

> Using Generative AI-powered tools in the work of dispute resolution specialists presents many challenges and risks. These tools can be opaque, and it may be challenging for users to understand precisely what they do, how they work, and what happens to the information and data users input. These circumstances create the potential for severe consequences for misinformed or underinformed users, including professional conduct violations or breaches of confidentiality and/or attorney-client privilege. Even more, where disputes, such as international arbitration cases, involve cross-border elements, the laws and regulations of multiple jurisdictions may apply. Indeed, in the multi-jurisdictional context, it may be even more urgent to either harmonize or regulate standards of use for Generative AI-powered tools to help ensure procedural fairness.
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> The BCLP 2023 survey of 221 arbitration professionals revealed that a significant majority (63%) support regulating disputing parties' use of Generative AI-powered tools in international arbitration proceedings. This consensus suggests that there are risks associated with non-regulation. This is underscored when one considers the importance of the documents that international arbitration practitioners may work on, including legal submissions, expert reports, and arbitral awards—each of which must be precise, accurate, and coherent. However, while baseline regulation itself is an important first step to engaging with this technology, it is equally vital that the developed regulatory framework is adaptable and forward-looking.
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> The Silicon Valley Arbitration & Mediation Center (SVAMC) Draft Guidelines on the Use of AI in Arbitration (Draft Guidelines) stand out as the only cross-institutional guidelines (to date) tailored explicitly for international arbitration contexts. The SVAMC Draft Guidelines were prepared with contributions from a committee (including Elizabeth, a co-author of this edition of the newsletter) and propose a nuanced approach to the disclosure of when AI has assisted in preparing legal work product. It is important to note that the SVMAC Draft Guidelines define "AI" broadly. While their immediate focus is on the Generative AI-powered tools that are also the focus of this newsletter, the Draft Guidelines refer to "AI" generally and aim to go even further in hopes of remaining evergreen and thereby capturing the regulation of AI-based technologies and tools that may not yet be developed.
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> The SVAMC Draft Guidelines recognize that the need for disclosure may vary, suggesting that, in some instances, the AI technology being used may be straightforward and uncontroversial (e.g., technology-aided document review (TAR)), thus not requiring explicit disclosure. However, the Draft Guidelines also allow for the possibility that arbitral tribunals, parties, or administering institutions might demand disclosure of the use of Generative AI-powered tools, especially when such use could significantly influence the integrity of the arbitration proceedings or the evidence presented within it.
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> The AAA-ICDR Principles for AI in ADR (AAA-ICDR Principles) and the MIT Task Force on the Responsible Use of AI in Law (MIT Principles) provide additional sets of guidelines and principles on the use of AI in legal practice. The AAA-ICDR Principles emphasize that AI should be used in alternative dispute resolution (ADR) cases, including arbitrations, in a manner that upholds the profession's integrity, competence, and confidentiality. They do not specifically address disclosure requirements. Meanwhile, the MIT Principles, which are applicable more broadly within legal contexts, highlight the importance of ethical standards, including confidentiality, fiduciary care, and the necessity for client notice and consent, indirectly suggesting a framework where disclosure of AI use might be required under certain conditions to maintain transparency and trust. These various guidelines and principles collectively underscore the evolving landscape of AI in legal practice and emphasise the need for careful consideration of when and how AI-powered assistance should be disclosed. These guidelines and principles also share the core tenet that the integrity of legal work and fairness in the dispute resolution process must be upheld. (Chan, Elizabeth, Gore, Kiran, Jiang, & Eliza, 2024)

Current International Efforts

Meanwhile, the Court of King's Bench in Manitoba, Canada, has adopted a more prescriptive disclosure practice, mandating that legal submissions presented to the court also provide disclosure of whether and how AI was used in their preparation. However, it does not mandate the disclosure of use of AI to generate work products often used to analyse cases, such as chronologies, lists of issues, and dramatis personae, upon which legal submissions may rely.

On the other hand, New Zealand and Dubai represent contrasting models of disclosure obligations. New Zealand's guidelines for lawyers do not necessitate upfront disclosure of AI use in legal work. Rather, they focus on the lawyer's responsibility to ensure accuracy and ethical compliance, and disclosure of specific use of AI-powered tools is required only upon direct inquiry by the court. This approach prioritizes the self-regulation of legal practitioners while maintaining flexibility in how AI-powered tools are integrated into legal practice. In contrast, the Dubai International Financial Centre (DIFC) Courts recommend early disclosure of AI-generated content to both the court and opposing parties. Such proactive disclosure is viewed, in that context, as essential for effective case management and upholding the integrity of the judicial process.

On the other side of the bench, some jurisdictions have unveiled guidelines for using Generative AI-powered tools by courts and tribunals. New Zealand and the UK now provide frameworks for judges and judicial officers. These guidelines emphasize the importance of understanding Generative AI's capabilities and limitations, upholding confidentiality, and verifying the accuracy of AI-generated information. In principle, neither jurisdiction's guidelines require judges to disclose the use of AI in preparatory work for a judgment. (Chan et al., 2024)

As a global economy, AI has been adopted by many multinational companies and governments. Generative AI conducts research, assimilates information, and may improve the odds of reaching agreements in mediation/arbitration. Perhaps in our quest for dealing with AI, we should look at what is currently being done at the mediation and arbitration levels in other countries. That way, we will find a deeper and more diverse set of potential solutions broadening out our perspectives that will help and not hinder.

AI and Major Privacy Concerns for Society

Finally, the issue of privacy. The ability of AI to gather information is enormous. One could easily argue that the scraping for data function across internet platforms and getting into files from across the country if not the world is a major concern. Such is the world of data analytics. All digital platforms in the world are vulnerable to this process. One of the most recent developments involves face recognition technology.

Social media giant Meta has agreed to a $1.4 billion settlement with Texas after attorneys for the state accused the company of obtaining and using users' biometric data without permission. Texas filed suit against the company, formerly known as Facebook, in early 2022 for violating the state's "Capture or Use of Biometric Identifier" Act ("CUBI") and the Deceptive Trade Practices Act, Attorney General Ken Paxton said in a statement Tuesday. This historic settlement demonstrates our commitment to standing up to the world's biggest technology companies and holding them accountable for breaking the law and violating Texans' privacy rights, Paxton added. Any abuse of Texans' sensitive data will be met with the full force of the law. The lawsuit stemmed from Facebook's tag suggestions feature that was unveiled in 2011. Paxton said the feature was automatically engaged for millions of Texans who didn't know how the company would use their information. Unbeknownst to most Texans, for more than a decade Meta ran facial recognition software on virtually every face contained in the photographs uploaded to Facebook, capturing records of the facial geometry of the people depicted. (Aguilar, 2024)

There are many lawsuits such as this newest Texas case across country holding corporations accountable to properly supervise AI. AI supervision and verification is fast becoming a full profession. Losses may be insured. However, one cannot be sure until cases are fully evaluated. Another class action for the violation of copyrighted material was filed in California today.

Conclusions

AI is being developed for advanced reasoning using human like thinking. Professionals using AI are advised to not to give any medical, legal, financial, and counseling advice. Firms have clients sign disclaimers of liability from AI technology. As a general proposition, people claim every single thing that a human can do, AI can do better. AI will add as much as 30% to the top line revenue growth of most companies and 21% to gross margins. Improved efficiencies, massive economies of scale in data gathering and better business decisions are good examples of the way AI can be helpful. There is no doubt that AI will drive the fundamental stories of profits given the high correlation to profits. In spite of this happening, the law is trying to keep up with developments. The Federal Trade Commission and the Justice Department will continue to hold the creators responsible for their activities. Courts will play a key role in the enforcement of current and new regulations adding another layer of protection in this fledgling area of business, technology, and the law, as manifested creation continues to evolve on an ethical playing field for all.

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