



Podcast Transcript

Artificial Intelligence: Risks and Rewards

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Lee: The pitfalls of modern technology have become clearer with the advent of generative artificial intelligence, requiring companies to adopt AI usage policies. This year, our attorneys have seen noteworthy growth in requests for counsel involving the legal consequences of AI technology, increasingly integrated with the development, management, and protection of intellectual property. In BakerHostetler's inaugural Intellectual Property Perspectives thought leadership piece, the Intellectual Property Practice Group highlights myriad IP-related topics that are at the forefront of industry developments inspired by client wins and current challenges and trends. I'm Leeann Lee, and you're listening to BakerHosts.

On today's episode, we discuss using IP to improve AI, using AI to protect IP and create IP, and mitigating AI infringement risks. To provide us with insight into this topic, we have Chad Rutkowski, a partner in the Intellectual Property Group at BakerHostetler. Chad is the co-leader of the firm's Technology and IP Transactions and Outsourcing team and Digital Transformation and Data Economy team. Chad has an extensive background in AI and presents and writes on the topic frequently. Welcome to the show, Chad.

Rutkowski: Thanks for having me, Leeann.

Lee: So, to start us off, AI seems to be grabbing all the headlines these days. So why is there all this attention on AI so suddenly?

Rutkowski: Yeah, it is funny. AI has been around 10 years or more, mostly by way of predictive analytics. I mean, you think of your Alexa, natural language processing, you think of the way that Amazon or other companies will recommend products to you. That is all based on a type of artificial intelligence known as machine learning, and it basically detects patterns in how people purchase things or when you're speaking, natural language processing, what the words might mean, and suggests results based on predictions. That technology, for years, that we've been trying to harness that pattern prediction, that predictive power in also generating content and predicting, well, perhaps you would like this sentence to say this or a paragraph to say this. You think of autocomplete on your text messages or in Word or other places. Well, that same kind of technology has been built up massively in these large AI systems called large language models to create things like ChatGPT, where you're now creating entire textual works.

It's also been happening in image generation. Things like DALL-E, where you're using it to create art and to create images. It is the same kind of technology. It is just what we call generative AI has really grabbed people's attention and for good reason. ChatGPT got 13 million users in about three months in the beginning of 2023. By the beginning of this year, they were at about 180 million users. So, it is not just that the new technology is super interesting and kind of fun, the widespread adoption both by individual users and by enterprises, by companies, has been unprecedented. So, AI is here. Everybody realizes it now, and everybody needs to pay attention to it.

Lee: Great summary. So, what are some of the legal issues that face clients adopting new AI technologies?

Rutkowski: There are a whole hatful of legal issues. AI, as robust as it is, as interesting as it is, as operational as it's become, has a number of problems with it. It can be used. It can be misused to mislead. You have things like deep fakes, right? Where people intentionally manipulate AI to make videos or images look like something happened when it didn't. It can be used for fraud, mimicking your voice to authorize a payment or something like that.

It can make mistakes. There is a notion called hallucination where AI, in wanting to be helpful, in the generative AI in wanting to be helpful, will just make stuff up, will make facts up. So, you need to make sure humans are in the loop and checking against it. And what happens if you rely on an AI recommendation that was just simply wrong?

There's worries about disparate impacts. Can the AI be used to promote bias in loan decisions and employment decisions? AI is trained on data, data is selected by people, and people are flawed. Sometimes the demographics that selected the data have biases they may not even realize they had, and it can have disparate impacts on different races, different genders. And there could be

privacy issues in that same bucket that there could be use of people's medical conditions or use of their Social Security numbers or any number of different things that there could be leakage.

There are intellectual property issues. AI, a lot of these services are trained on billions of pieces of textual information that were scraped off the Internet. Some of that is exchanges on the Internet, Reddits, different communications on the Internet. Some of it is books. Some of it is photographs, images, artwork, and the copyright owners whose work has been used aren't always happy about it. There is a lot of class actions trying to shut down some of these services, and it raises issues as to whether or not the users of these services are also infringing the rights of the folks whose stuff was used to train the AI.

And then there's IP loss issues. If you put in a trade secret into some of these services in order to do some research and development for example, well, that trade secret could end up back into that same cauldron of artificial intelligence, of data that is used to provide answers to others. And your trade secret might be gone if you put it into that system without certain protections. You might not own what the artificial intelligence creates. There's issues right now, for example, over whether output of AI can be copyrighted. So, if you are using it to create source code, if you're using it to create images for movies, if you're using it for different business publications, you might not own the copyright in what the AI outputs.

Lee: So clearly, there are a number of issues and challenges that are coming at clients at a fast pace. How can companies best manage addressing all of these issues?

Rutkowski: So, our firm has put together something that we call The Definitive One-Size-Fits-All AI Policy Guidelines. And that title is a little cheeky. It is a little bit of a joke. When all of this started really getting serious in the beginning of last year, clients would ask us, so can you just give me a one-pager to explain AI to my stakeholders? And the answer to that is, oh goodness gracious, no. This is a super complex set of issues where the type of AI that you're using, there are big differences between using AI to create source code, versus using AI to create marketing materials, versus using AI to help make employment decisions, and a whole different set of legal issues depending on what you're talking about. There are issues with where you sit in the AI ecosystem. Are you doing the training of the data? Are you trying to deploy the AI?

So, what we've done with our guardrails is really created a three-tier system where we ask, what is the AI that you're using? Who within your organization is using the AI? And where in this sort of artificial intelligence ecosystem do you sit? And framing it up and understanding the technology, breaking it out that way and creating AI guidelines, AI policies, has become an essential step. And we're going to talk about this in a second, but it is going to become a necessary step if you're doing business with the federal government, for example.

Lee: Well, that is a good spot to change direction. So, are legislators and regulators getting ahead of these AI issues?

Rutkowski: They sure are trying, but it's been very piecemeal, and some would say scattershot. The most robust attempt that we have is coming from the European Union. We've got the passage of the EU AI Act that breaks AI into different type of risk categories and creates obligations depending on where you sit in those risk categories.

Now, U.S. companies theoretically may or may not be subject to the EU AI Act, but what we expect to see here in the states is something we call the Brussels effect. We've seen that with privacy laws. They'll, like the GDPR, where companies, especially with an international footprint, just follow the most restrictive regime so that their operations can be uniform across the company. So, even though the EU AI Act at first blush might seem to have narrow application, we do expect it to have a major impact here in the United States.

In the U.S., there's been a number of different attempts to legislate around AI. At the federal level, especially deep fakes in elections right now actually may have some traction, but largely those bills don't seem to be getting any traction in any leeway. States are getting ahead of it. Sometimes cities are getting ahead of it. New York City has an AI Act around employment decisions that impact New York City residents. And what you're seeing is almost legislation also by fiat. The White House issued an executive order, the Biden executive order, ordering a vast array of federal agencies to review AI issues and make recommendations. And that is all coming to a head all throughout this year, and that is happening iteratively. So, you're going to see a lot of federal agencies sort of issuing AI edicts and guidelines that may not actually be legislation, but they will certainly drive industry behavior and company behavior.

Lee: So, along those same lines, are there ways that clients can influence how AI is governed, and are we involved in any policy efforts?

Rutkowski: We sure are. So, we have a great government affairs team led by my colleague Peter Roskam, partner in our Washington, D.C. office. And now is really the time to get involved with lobbying efforts, as these different federal agencies are reviewing these issues and putting things out for public comment. And being active in those public comment period is essential.

I personally am focused on IP. I'm a copyright technology lawyer, so I helped clients respond in the fall to what is known as a Notice of Inquiry that was issued by the U.S. Copyright Office. And they're going to be putting out a series of papers, policy recommendations on how AI and copyright should be managed and handled, including this issue as to whether you should be able to own things that AI outputs. So, we're seeing that now in the United States Patent and Trademark Office, their active comment periods around inventorship for patents and use of AI. So now really is the time to get involved to try to influence this policy, and our firm has a lot of experience in doing that and are actively engaged in that right now.

Lee: Great. And just one more question for you before we go. How do you see legal issues surrounding AI getting resolved in the next several years?

Rutkowski: I see it the way that Ernest Hemingway described bankruptcy, which was very slowly and then all at once. So, we have a lot of cases out there right now involving the legality of training the AI using content. We expect to get some decisions in piecemeal fashion, but they'll start coming out within the next year. The EU AI Act is being implemented as we speak, so companies need to begin conforming their practices to that act now. We're going to see the Biden executive order policy things take shape throughout this year. So, I think by this time next year, we'll actually have better guidelines, better practices as to how this should be handled. We just won't realize, oh my goodness, it happened so slowly but then all at once.

Lee: Well, thank you, Chad. This has been a fantastic conversation.

Rutkowski: Thank you, Leeann. It's been a lot of fun.

Lee: If you have any questions for Chad, his contact information is in the show notes. For more information on our thought leadership piece on intellectual property, we encourage you to download the document on [bakerlaw.com](https://www.bakerlaw.com). As always, thanks for listening to BakerHosts.

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