Volume 5, No. 6 | November–December 2022

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THE JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE & LAW (ISSN 2575-5633 (print) /ISSN 2575-5617 (online) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. Copyright 2022 Fastcase, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact Fastcase, Inc., 711 D St. NW, Suite 200, Washington, D.C. 20004, 202.999.4777 (phone), 202.521.3462 (fax), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: Morgan Morrissette Wright
Production Editor: Sharon D. Ray
Cover Art Design: Juan Bustamante

Cite this publication as:

The Journal of Robotics, Artificial Intelligence & Law (Fastcase)

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A Full Court Press, Fastcase, Inc., Publication

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711 D St. NW, Suite 200, Washington, D.C. 20004
https://www.fastcase.com/

POSTMASTER: Send address changes to THE JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE & LAW, 711 D St. NW, Suite 200, Washington, D.C. 20004.

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202.999.4777 (phone)
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ISSN 2575-5633 (print)
ISSN 2575-5617 (online)

Artificial Intelligence Briefing

Agencies Release Guidance on Employer Use of AI Systems

Scott M. Kosnoff, Bennett B. Borden, Amanda L. Shelby, Jane E. Blaney, Mitchell S. Noordyke, Hannah M. Reichenbach, and Kacey E. Stotler*

Significant new guidance from the U.S. Department of Justice ("DOJ") and the Equal Employment Opportunity Commission ("EEOC") advises employers that use of artificial intelligence ("AI") and algorithmic decision-making systems in employment-related decisions may violate the Americans with Disabilities Act.

In other AI news, automated decision-making and algorithmic bias became focal points at three major industry conferences held recently, as industry leaders work to get ahead of the rising tide of regulations targeting AI.

Regulatory, Legislative, and Litigation Developments

Federal Agencies Address Using AI Technology in Employment-Related Decisions

The DOJ and the EEOC have issued separate guidance focusing on how employers using AI and algorithms may adversely impact individuals with disabilities and violate the Americans with Disabilities Act. The documents also provide best practices that should be top of mind for employers using technology in personnel decisions or performance evaluations.

Congressional Hearing Highlights the Importance of Confronting Algorithmic Bias

The House Financial Services Committee's Task Force on Artificial Intelligence recently convened a hearing entitled "Keeping Up with the Codes—Using AI for Effective RegTech."[1] Deputy

Robotics, Artificial Intelligence & Law / November–December 2022, Vol. 5, No. 6, pp. 429–433.
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ISSN 2575-5633 (print) /ISSN 2575-5617 (online)

Comptroller for Operational Risk Policy Kevin Greenfield testified[2] regarding the Office of the Comptroller of the Currency's regulatory and compliance expectations for banks using AI. He noted that "AI may perpetuate or even amplify bias," and that the "potential for unintended or illegal outcomes increases the importance of enhanced understanding, monitoring and review of AI systems that are used for customer-focused activities such as credit underwriting."

Confirmation of FTC Commissioner

The Senate's confirmation of Alvaro Bedoya to the Federal Trade Commission ("FTC") gives Democrats a 3-2 majority that may pave the way for rules governing the use of AI and algorithmic decision-making.

Facial Recognition Company Reaches Settlement With ACLU

The facial recognition software company Clearview AI has agreed to a permanent, nationwide ban on making its database of 20 billion facial photos available to most businesses and other private entities. The ban is part of a settlement[3] between Clearview AI and the American Civil Liberties Union ("ACLU") and other groups that alleged the company had violated the Illinois Biometric Information Privacy Act ("BIPA").

BIPA was enacted in 2008 to ensure that Illinois residents would not have their biometric identifiers (such as fingerprints, faceprints, and retinal scans) captured and used without their knowledge and permission.

Clearview AI will remain free to sell its database to most federal and state agencies.

Industry Activity

17th Annual Insurance Public Policy Summit Touches on Issues Related to Algorithmic Decision-Making by Insurers

The conversation was part of a far-ranging discussion on how to promote innovation and protect consumers. Maryland Insurance

Commissioner Kathleen Birrane, who chairs the NAIC's Innovation, Cybersecurity and Technology (H) Committee, discussed plans for the H Committee's Collaboration Forum and its focus on algorithmic bias. Among other things, Commissioner Birrane highlighted the concern about data sources that may be predictive of loss but also are highly correlated with protected class status.

Indiana State Representative Matt Lehman (R-IN), who serves as majority floor leader in the Indiana House of Representatives and is the immediate past president of the National Council of Insurance Legislators ("NCOIL"), focused on the challenges that insurance scores pose for agents and consumers. Representative Lehman discussed his proposed Insurance Underwriting Transparency Model Act, which NCOIL is considering.

Geneva Association Conference Holds Session on Responsible Use of Data, AI, and Algorithms

The Geneva Association, an international insurance think tank, recently held its second annual New Technologies and Data Conference. During a session entitled "Using Data Responsibly for Innovation—How Can Insurers Strike the Right Balance?," panelists discussed ways in which insurers can use data responsibly, including in AI and algorithms. Chaouki Boutharouite, from AXA, noted the importance of having an AI governance framework in place and the need for human control and oversight of how/what data is collected and how models are trained, used, and perform. He also said identifying and eliminating biases continues to be a challenge that companies are focused on, but there's no one-size-fits-all solution. However, at this stage, Boutharouite believes the best way to fight against bias is making sure the data is diverse, mature, and collected in the right way.

AI Takes Center Stage at International Association of Privacy Professionals ("IAPP") Global Privacy Summit

The global gathering of privacy professionals featured a keynote from FTC Chair Lina Khan, in which she confirmed her belief that the FTC has the existing enforcement and rulemaking tools to address various privacy concerns, including harms that can result from "powerful cloud storage services and automated decision-making systems" that enable "stunningly detailed and

comprehensive user profiles that can be used to target individuals with striking precision."

Khan also highlighted recent enforcement actions by the FTC. These actions require deletion of ill-gotten data and disgorgement of any algorithms trained with that data. They also prohibit individual executives from participating in certain industries following an enforcement action.

Khan's comments, while short on specific priorities, confirmed that the FTC is likely to be an active regulator and rulemaker regarding data practices and the use of algorithms. Her comments are with the backdrop of the FTC providing notice to the Office of Management and Budget in the fall that it is exploring rulemaking options to, in part, "ensure that algorithmic decision-making does not result in unlawful discrimination." "What's at stake," Chair Khan said, "with these business practices . . . is one's freedom, dignity, and equal participation in our economy and society."

IAPP Global Privacy Summit Also Features Discussion of European Commission's 2021 Artificial Intelligence Act (the "Act")

The Act,[4] which speakers expect to be finalized no later than mid-2023, would be a significant development in the regulation of AI. The pending regulation includes:

- A prohibition on AI manipulation leading to decontextualized or unjustifiably detrimental social scoring;
- Design obligations (e.g., human oversight or risk assessment, etc.) for credit scoring or AI used in critical infrastructure;
- Transparency obligations for deep fake, or emotion recognition, technology; and
- Voluntary codes of conduct for residual impacts.

Notes

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