

AI in the United States: A Regulatory Overview

Ricardo Fischer,

ArentFox Schiff Partner and Trademark and Copyright Practice Leader

Introduction: Key Developments in 2023 & 2024

- Various bodies within the executive branch of the U.S. federal government are working, both independently and collectively, to promulgate standards and guidelines for the development and use of artificial intelligence and machine learning technologies.
- **Executive Orders** related to artificial intelligence create a foundation for a “**coordinated federal government strategy**” on AI, including guiding principles.
- AI regulation primarily overseen by agencies such as the Federal Trade Commission (**FTC**) and the Federal Communications Commission (**FCC**).

Biden Administration October 2022 Blueprint for an AI Bill of Rights

- The Blueprint for an AI Bill of Rights aimed to protect civil rights and promote democratic values in automated systems.
- Five key principles of the Blueprint include:
 - Safe and Effective Systems: Pre-deployment testing, risk mitigation, ongoing monitoring.
 - Algorithmic Discrimination Protections: Preventing unjustified disparity based on protected characteristics.
 - Data Privacy: Emphasizing consent, default privacy settings, protection for sensitive data
 - Notice and Explanation: Ensuring users know when they're interacting with automated systems.
 - Human Alternatives, Consideration, and Fallback: Allowing opt-outs and providing human assistance for problem-solving.

President Biden's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

- President Biden issued the Executive Order on October 30, 2023, building off previous actions including the 2022 “Blueprint for an AI Bill of Rights” and the 2020 Executive Order on Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government.
- The Executive Order aims to guide the development and use of artificial intelligence in a manner that is safe, secure, and trustworthy, while maintaining America's leadership in AI technology. **The order establishes new safety and security standards, protects privacy, advances equity and civil rights, supports workers, promotes innovation and competition, enhances American leadership abroad, and ensures responsible government use of AI. It also calls on Congress to pass bipartisan data privacy legislation.**



US Legislative Efforts

Congress is currently working on a series of proposed bills related to AI.

- Sen. Schumer is leading a bipartisan group to craft AI legislative framework; said Congress is months away from considering any proposed laws.
- Sens. Josh Hawley and R. Blumenthal (on June 14, 2023) proposed a bill to ensure that the immunity online companies have under Section 230 of the CDA doesn't extend to claims based on GenAI.
- 18 US State attorneys general are focused on the importance of accountability and transparency. The AGs have called for the National Telecommunications and Information Administration to develop a “risk-based approach” to regulation of AI like that of the EU AI Act. The state AGs also want to make sure they have concurrent enforcement authority

Bipartisan Framework for U.S. AI Act

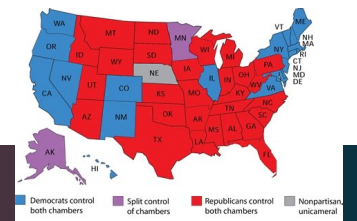
- A Top-Down Legislative and Regulatory Approach
- Establish a Licensing Regime administered by an Independent Oversight Body
- Ensure Legal Accountability for Harms
- Defend National Security and International Competition
- Promote Transparency
- Protect Consumers and Kids



State AI Laws and Proposed Bills

- 30 states have passed more than 50 laws over the last 5 years to address AI in some capacity (i.,e California on autonomous vehicles and NY on AI and employment).
- Several states proposed task forces to investigate AI.
- Several states proposed bills in the current legislative session.

Of note is New York City's AI in employment bill which provides rules for using “automated employment decision tools” in employment decision-making



Conclusion: Where We Are Now

- There is a large body of law that exists now and that regulates AI
 - Consumers generally: FTC Act (Deception, Unfairness), state UDAP law
 - Advertising, privacy, data security
 - Credit context: ECOA
 - Data for credit, employment or insurance decisions: FCRA
 - Employment context: Civil rights laws
 - Business context: Intellectual property law, product liability law
- Issues specific to AI:
 - Transparency, human alternative / intervention, safety, accuracy, reliability

Conclusion: Looking Ahead

- Targeted (e.g., NY AI in employment and use of Automated Employment Decision Tools)
- Comprehensive (e.g., Schumer model; Blumenthal / Hawley model)
- In the meantime...
 - Interesting market developments: Microsoft, Adobe, IBM indemnifying users for copyright violations. Is more like this coming? The market seems to be calling for it. (E.g., privacy-safe training datasets)

Topic: Privacy

- Privacy is one of the key areas of concern for the FTC in its current investigation into OpenAI (focus on inputs: training data sets and data scraping *and* outputs: accuracy of information regarding individuals)
- The companies who met at the White House in July, 2023 identified prioritizing research on societal risks including protecting privacy as part of their voluntary commitment.
- State comprehensive privacy laws in California and Colorado address “dark patterns” which will be a topic of future regulation by the California Privacy Protection Agency.

Topic: Privacy

Privacy Litigation

- Plaintiffs allege that OpenAI, Microsoft, and their respective affiliates violated the privacy rights of millions of internet users through the large-scale scraping of their personal data from social media, blog posts, and other websites, and using those data to train machine learning models.
- Plaintiffs assert that the defendants violated the Computer Fraud and Abuse Act (CFAA) by intentionally accessing protected computers without authorization and obtaining information through ChatGPT plug-ins integrated across various platforms and websites.
- *This is a sweeping new privacy theory, and could result in a market for “privacy-safe” data sets.*