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MY AI DID IT: INTERMEDIARY LIABILITY FOR AI?

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More companies are outsourcing their decisions to employ artificial intelligence ("AI"). For example, the market for AI powered facial recognition technology was valued at $3.72 billion in 2020 and is projected to grow to $11.62 billion by 2026.[1] Similarly, the marketplace for the use of AI in assisting consumer spending decisions is slated to grow at a Compound Annual Growth Rate of 34.4% to $19.9 billion by 2027.[2]

This has raised the question in recent litigation of whether "my AI did it" can be an acceptable defense to claims including, among others, privacy violations or even copyright infringement. In some cases, vicarious or secondary liability doesn't apply. This article addresses some more recent case law on the issue involving AI. It also summarizes the Algorithmic Accountability Act of 2022 and its potential effect on liability for reliance on AI-based decision making.

VICARIOUS LIABILITY

A defendant can be vicariously liable for copyright infringement by others under certain circumstances. "[C]ontributory infringement is based upon 'the common-law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor."[3] Thus, a person—even a company—can commit "contributory copyright infringement by 'intentionally inducing or encouraging direct infringement[.]'"[4] In all cases, there must be a predicate act of "direct copyright infringement," or else "secondary liability cannot be maintained."[5]

Similarly, "[a] corporate officer can be held liable under a theory of vicarious copyright infringement where he profits from direct infringement while declining to exercise a right to stop or limit it."[6] A requirement in this analysis is that the officer is a "*moving, active, conscious force* behind the defendant's infringement."[7] Knowledge—either actual or constructive—of the infringement is required. In other words, there is no "ostrich in the sand" defense to vicarious liability for copyright infringement.

Immunity under the Communications Decency Act (a/k/a "Section 230") and the safe harbor provision of the Digital Millennium Copyright Act ("DMCA") are based on the foregoing principles. Under Section

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230, an interactive computer service provider like Twitter is not vicariously liable for defamatory or other potentially unlawful content—save for some statutory exceptions—posted by others so long as the provider doesn't modify the "basic form and message."[8] Once Twitter becomes a "conscious force" in modifying the content of the message, as opposed to merely keeping it up or taking it down, liability under Section 230 can exist. Under the DMCA, "Internet service providers [are exempt] from liability for copyright infringement if the provider is unaware of the infringement *and* acts expeditiously to remove the copyrighted material upon notice."[9] Unlike Section 230, where awareness doesn't confer liability, an internet service provider under the DMCA can be liable for infringing content if they are conscious of it but do nothing.

As we will see below, some federal statutes not only require knowledge or intent for liability to exist—but also lack of remedial conduct, similar to the DMCA. The question arises whether a company's use of AI can change this legal landscape so as to avoid liability.

OUTSOURCING USING AI

Various recent decisions directly or indirectly touch upon this issue. In *Lopez v. Apple,* for example, a class action was filed against Apple in connection with its pre-installed software called "Siri," which is a voice activated "intelligent assistant."[10] This artificial intelligence-based software is supposed to only listen to, record, and share user conversations when they give consent—by saying a "hot word," like "Hey Siri."[11] Save for this "active listening mode," Siri is only supposed "to recognize the clear, unambiguous audio trigger" that the user wants to activate.[12] However, according to a *Guardian* article and as alleged in the complaint, Siri was often triggered by accident.[13] Also, plaintiffs alleged that a "small portion" of Siri recordings, including accidental ones, were sent to contractors—who could then listen to private discussions.[14]

As a result, the plaintiffs alleged that Apple violated, among other statutes, the Federal Wiretap Act ("Wiretap Act"), 18 U.S.C. § 2510, *et. seq*. The Wire Tap act provides that a violation occurs when a person "intentionally intercepts…any wire, oral, or electronic communication" while "*knowing or having reason to know* that the information was obtained through the [unlawful] interception."[15] Apple moved to dismiss on the grounds that it did not "intentionally" intercept any communications given that the activations of Siri were "accidental."[16] The court denied the motion. Apple was alleged to have been "aware of the defect" but took no remedial action.[17] Also, Apple "knows of the accidental Siri triggers and, instead of deleting the resulting messages, send[s] them

to contractors to improve Siri's functioning."[18] The case did not address corporate officer liability because it was not an issue. But this will likely arise in other contexts.

However, secondary liability was lacking for Google, Facebook, and Twitter for posted ISIS recruiting messages pushed by algorithms. The plaintiff in *Gonzalez v. Google* alleged that the defendants were secondarily liable for various attacks perpetrated by ISIS.[19] The theory was that by permitting ISIS related content on their sites, defendants aided and abetted ISIS's acts that violate the Anti-Terrorism Act, 18 U.S.C. § 2333. *Id*. The Ninth Circuit dismissed this theory on the grounds that defendants were protected by Section 230. The majority reasoned that the algorithms "function like traditional search engines that select particular content for users based on user inputs."[20] In other words, search engines using AI are entitled to Section 230 immunity "because they provide content in response to user inquires 'with no direct encouragement to perform illegal searches or to publish illegal content.'"[21] However, whether and to what extent corporate officer liability could exist for such algorithmic conduct was not addressed.

The dissenting opinion in *Gonzalez* argued that the algorithms in question "suggest new connections between people and groups and recommend long lists of content, targeted at specific users."[22] As

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such, "targeted recommendations and affirmative promotion of connections and interactions among otherwise independent users are well outside the scope of traditional publication [under Section 230]."[23] Such publication functions, in Judge Berzon's view, never included "selecting the news…or classified ads to send to each individual reader based on guesses…the one reader might like to exchange messages with other readers."[24] Nonetheless, the algorithm, in the majority's view, was "content-neutral"—not generating the options, but steering users to their desired ones.[25] The court was careful to qualify that it was not holding "machine-learning algorithms can *never* produce content within the meaning of Section 230."[26]

PROPOSED REGULATION

As a result of some of the uncertainty surrounding liability for companies' reliance on algorithms in decision making, the Algorithmic Accountability Act of 2022 was introduced into Congress on February 3, 2022.[27] The bill requires "covered entities" to perform an impact assessment of "any deployed automated decision system that" will be used "in an augmented critical decision process."[28] "Covered entities" include companies that, among other things, have greater than $50,000,000.00 in average annual gross receipts in the preceding 3-taxable-year period.[29] Certainly, this would include the tech companies mentioned above. The impact assessment should include its impact on consumers.[30] Whether and to what extent such legislation, if passed, will have an effect on decisions like the foregoing remains to be seen. At the very least, the Act would make the practical consequences of decisional AI outsourcing more clear to the public and potentially advantageous for evidentiary use in litigation against corporate or individual defendants.

CONCLUSION

The AI market is growing. So, too, will related legal issues concerning its implementation. Some of the current rules of the road concerning vicarious liability will apply. But there are likely to be many uncertainties that arise. Courts or legislatures will need to fill in the missing gaps as technologies—and their applications—become more complex.

The views expressed in this article are personal to the author and do not necessarily represent or reflect the views of the author's firm, the Executive Committee of the Intellectual Property Law Section, the California Lawyers Association, or any colleagues, organization, or client.

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Notes:

1. *See* https://www.mordorintelligence.com/industry-reports/facial-recognition-market.

2. *See* https://www.globenewswire.com/news-release/2022/01/19/2369195/0/en/Artificial-Intelligence-in-Retail-Market-Worth-19-9-billion-by-2027-Market-Size-Share-Forecasts-Trends-Analysis-Report-with-COVID-19-Impact-by-Meticulous-Research.html.

3. *Roberts v. Broadwayhd LLC,* 518 F. Supp. 3d 718, 730 (S.D.N.Y. 2021).

4. *Id.*

5. *Id.*

6. *Id.* at 728.

7. *Id.* (Emphasis added).

8. *See* https://plus.pli.edu/Details/Details?fq=id:(321454-ATL1)&referrer= (citing *Batzel v. Smith,* 333 F.3d 1018, 1032 (9th Cir. 2003)).

9. *Barret v. Rosenthal,* 40 Cal. 4th 33, 48 (Cal. 2006) (emphasis added).

10. 519 F. Supp. 3d 672, 679 (N.D. Cal 2021).

11. *Id.*

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 683.

16. *Id. at* 684.

17. *Id.*

18. *Id.*

19. 2 F.4th 871, 880 (9th Cir. 2021).

20. *Id*. at 896.

21. *Id*. (citing *Fair v. Roomates*, 521 F.3d 1157, 1175 (9th Cir. 2008)).

22. *Id*. at 915.

23. *Id*.

24. *Id*.

25. *Id*. at 896.

26. *Id*. (emphasis in original)

27. *See* https://www.congress.gov/bill/117th-congress/house-bill/6580/text?r=1&s=1.

28. *Id*. at § 3(b)(1)(A)(i).

29. *Id*. at § 2(7)(A)(i)(I).

30. *Id*. at § 2(12).

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