JANUARY 2024
EDITION

MONTHLY NEWSLETTER

LEXTECH: CENTRE FOR LAW, ENTREPRENEURSHIP AND INNOVATION

CONTENTS

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS

SECTION 1

CELLULAR OPERATIONS ASSOCIATION OF INDIA'S ("COAI") RECOMMENDATION FOR TELECOM SECTOR BUDGET FY 2024-25.

NEWS

COAI has suggested the abolition of the existing Universal Service Obligation Fund ("USOF"), with an introduction of a new direct tax regime and more specifications on customs duty. The COAI is an industry association that includes India's top telecom operators like Reliance Jio, Bharti Airtel, and Vodafone Idea. Its recommendations focus on enhancing the financial well-being of the industry and are for the FY 2024-25 budget which shall be presented on 1st February, 2024.

LEGAL TALK

USOF is the pool of funds generated by 5% Universal Service Tax that is charged upon all the telecom operators on their Adjusted Gross Revenue ("AGR"). This fund is deposited in the Consolidated Fund of India and is dispatched on the approval of the Indian Parliament. There exists a corpus of INR 77000 crores, and the association states that the tax should be abolished till the said fund is exhausted. As these funds are in place to ensure a fixed minimum contribution from operators for providing basic access to remote areas at reasonable and affordable prices, abolition of the same for the time being will put pressure on the government to use up the funds and ensure better implementation.

Further, in the absence of clear classification for customs duty on equipment, field officers are not allowing import at respective applicable duty rate and are charging higher rate of duty, which is resulting in undesired litigation. There is a disparity in terms of understanding the terminologies released in tariff exemption notifications and the association requests clarification on the same from the Government.

THE WAY FORWARD

The recommendations come at a time when a digital robust future is expected. The 5% USOF obligation has put financial burden on the telecom operators during times of 5G roll out, which has hampered the overall growth of the sector. Carrying on losses for more than eight assessment years as under the Income Tax Act, 1961, will help the business account better their gains and losses. Further, the customs duties levied on imported 4G/5G products has trammelled the potential in the sector.

UNVEILING THE MENACE OF DEEPFAKE CONTENT AND MEITY'S CALL TO ACTION

NEWS

In response to the burgeoning threat of AI-generated deepfake content, the Ministry of Electronics and Information Technology (MeitY) has issued a pivotal directive to digital intermediaries. The directive underscores the critical need for adherence to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules'), particularly Rule 3(1)b, which outlines 11 categories of prohibited content. Failure to comply with this provision may result in legal sanctions, highlighting the urgency for heightened vigilance in the digital realm.

LEGAL TALK

In the absence of concrete legislation addressing AI and deepfakes, existing laws like the IT Act of 2000 and the Indian Penal Code offer a framework. However, Section 66 of the IT Act, while addressing identity theft and privacy violations, fails to comprehensively tackle the proactive dissemination of synthetic media produced through generative AI and deep machine learning. Existing legislations, primarily centered around takedowns and formulated over two decades ago, are not well-suited for the current market landscape due to their limited understanding of the implications of generative AI.

There is a compelling need for robust AI legislation that equips law enforcement agencies to conduct thorough risk assessments of online deepfake content. The European Parliamentary Research Service ("EPRS") recommends a nuanced approach, categorizing AI-generated content based on risk levels. Intermediaries, armed with this classification, can then flag content as high, medium, or low risk, facilitating timely takedowns.

Existing laws, as identified, primarily focus on addressing offenses after they occur, rather than proactively preventing them. The lacunae in the legal framework necessitate a paradigm shift towards legislation that anticipates and mitigates risks associated with the proliferation of deepfake content. The incorporation of EPRS's risk-based categorization approach holds promise in fortifying legal responses to the dynamic landscape of AI-generated content.

THE WAY FORWARD

While intermediaries are not inherently liable for third-party content, the significance of swift action within a 24-hour window cannot be overstated. Failure to do so may lead to the revocation of their protected status. Striking a delicate balance between monitoring AI-generated content and safeguarding digital rights is imperative. The possible solution involves obtaining consent from subjects involved in deepfake content creation or marking potentially misinforming content. This allows viewers to exercise discretion and ensures accountability for those engaged in disseminating high-risk content. In the ever-evolving world of technology, it's crucial that we steer the global conversation towards creating solid rules for the ethical path of AI. Working together is key to tackling the complex challenges brought on by deepfake technology. We urgently need robust AI legislation that gives both authorities and intermediaries the tools to safeguard our digital spaces proactively. As we witness constant technological advancements, it's a call to action for the international community to come together and address these issues collectively.

Online Gaming and Betting Laws

SECTION 2

ONLINE GAMING REGULATORY APPROVAL FACES DEADLOCK

NEWS

The appointment of self-regulatory bodies ("SRBs") for the online gaming business in India has encountered an obstacle, leading the Ministry of Electronics and Information Technology ("MeitY") to directly control the clearance process for gaming companies. The appointment of SRBs, suggested in an amendment to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, was intended to engage them in the process of approving entities for advertising and operating titles that target Indian users, particularly those that involve transactions with real money.

LEGAL TALK

As per The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment 2023 ("Guidelines"), The primary function of each SRB will be to verify online real money games for the purpose of declaring them permissible. Each SRB will have to maintain on its website and mobile application an updated repository of all games verified by such SRB, including relevant information such as date, period and reason of verification, and reason for suspension or revocation (if applicable). The SRBs are regarded as a favorable measure for the legal certification of online gaming companies, enabling them to lawfully promote their services on social media platforms. This action will differentiate lawful online gaming from unlawful betting and gambling services, following guidelines provided by the Ministry of Information & Broadcasting. The guidelines specified that only online games that are considered 'permissible' are allowed to advertise on social media intermediary platforms.

The primary objective of SRBs is to build a transparent regulatory system that is only possible if these regulatory bodies remain independent from the industry influence, which will also safeguard consumer interest. There have been delays by the MeitY in the formation of SRBs amid tax concerns. Taking over the approval process directly by the MeitY would oppose the very reason for proposing SRBs and can result in overregulation, the self-regulatory bodies that will comprise industry experts would be better equipped to balance the regulatory needs of gaming companies with fostering innovation.

THE WAY FORWARD

Direct control over the approval process might work in the short term, but a better long-term answer would be to make it easier to appoint SRBs and give them clear instructions on how their tasks are done. It is also important for government agencies, business stakeholders, and legal experts to work together to create a strong regulatory framework that protects consumers while allowing innovation.

FinTech

SECTION 3

RESERVE BANK OF INDIA ("RBI") ISSUES DRAFT FRAMEWORK FOR SELF-REGULATORY ORGANISATIONS ("SROS") IN THE FINTECH SECTOR

NEWS

The RBI recently released a draft framework for SROs within the Fintech landscape. The intention behind this is to foster responsible innovation and address regulatory concerns within the FinTech sector through a self-regulation approach.

LEGAL TALK

Under the prescribed framework, the establishment of a FinTech SRO ("SRO-FT") necessitates its registration as a not-for-profit entity under Section 8 of the Companies Act, 2013 - with a primary focus on promoting the objectives and activities within the FinTech sector and the broader financial services landscape. The SRO-FT is mandated to uphold a fit and proper criterion for both its Board of Directors and Key Managerial Personnel, emphasizing qualities of professional competence, fairness, and integrity. The RBI is entrusted with the responsibility of soliciting applications for the recognition of SRO-FT.

The application process includes submitting the essential documents like the Memorandum of Association, Articles of Association, particulars of the Board, and a strategic plan outlining the attainment of widespread membership. This process aims to ensure transparency and clarity in the establishment of the SRO-FT. Upon meeting the eligibility criteria, a successful applicant will be issued a 'Letter of Recognition' by the RBI, subject to specific conditions. Under such recognition, the SRO-FT must diligently adhere to statutory and regulatory requirements as prescribed in the framework. It is further mandated to discharge responsibilities delineated in the framework, including the provision of regular updates to the RBI regarding sectoral developments, dissemination of sector-specific insights, and the submission of periodic reports.

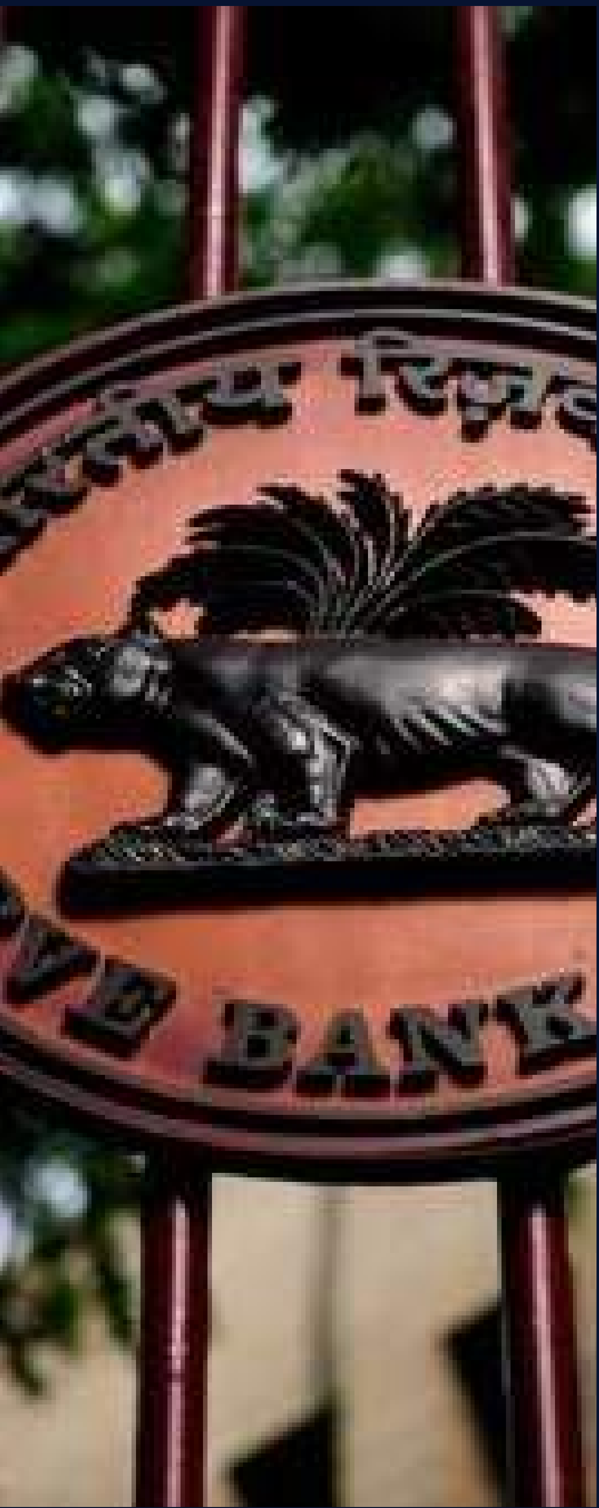
THE WAY FORWARD

The framework is a positive step in the way forward for the FinTech sector by fostering innovation and enabling companies to respond more swiftly to technological advancements, changing market dynamics, and evolving consumer needs. This approach alleviates the rigid constraints of traditional regulatory frameworks, promoting a self-regulatory environment. The initiative is poised to enhance transparency, encouraging ethical standards and responsible conduct, ultimately bolstering investor confidence and consumer protection. However, compliance with the standards and requirements may impose significant financial burdens on companies, particularly smaller startups. The companies may find it challenging to navigate the self-regulatory landscape, balancing autonomy with the need for adherence to the established standards.

RBI ISSUES MASTER DIRECTION FOR TRANSACTIONS IN COMMERCIAL PAPER ("CP") AND NON-CONVERTIBLE DEBENTURES ("NCD")

NEWS

Recently, the RBI issued Master Direction- RBI (Commercial Paper and Non-Convertible of original or initial maturity up to one year) Directions, 2024 ("Directions"). The Directions come into force from April 01, 2024 and shall apply to transactions in CP and NCD entered into from such date. CPs and NCDs issued before such date will continue to be governed by earlier regulations until their maturity.



LEGAL TALK

CP as defined in paragraph 2(a)(iv) of the Directions means an unsecured money market instrument issued in the form of a promissory note. NCD as per Paragraph 2(a)(viii) means a secured money market instrument with an original or initial maturity upto one year. The main features of the directions are:

(i) Eligible Participants

The RBI has delineated the criteria for eligibility of issuers and investors in the realm of CPs and NCDs. Entities are permitted to issue CPs and NCDs, provided that any fund-based facilities they utilize from banks, All-India Financial Institutions ('AIFIs'), or Non-Banking Financial Companies ('NBFCs') are categorized as Standard at the time of issuance. Residents can invest freely in CPs and NCDs, while non-residents are subject to limits defined by the Foreign Exchange Management Act, 1999 and associated regulations.

Notably, both residents and non-residents are prohibited from investing in CPs and NCDs issued by related parties, whether in the primary or secondary markets. This restriction is designed to uphold a judicious and impartial investment environment.

(ii) General Guidelines

The RBI has delineated comprehensive guidelines governing the issuance and trading of CPs and NCDs, encompassing crucial aspects such as primary issuance, discount/coupon rates, credit enhancement, end-use, rating requirements, and more. Some major guidelines include that the CPs and NCDs must be issued in a dematerialized form and held with a depository registered with the Securities and Exchange Board of India ('SEBI'), and these must be issued in a minimum denomination of Rs. 5 lakh and multiples of Rs. 5 lakhs thereafter. CPs and NCDs must mainly fund current assets and operating expenses. If used differently, the issuer must clearly explain the reason in the offer document. Participants in the CP and NCD market must follow the regulations prescribed by the Fixed Income Money Market and Derivatives Association of India ('FIMMDA').

(iii) Reporting Requirements

The Directions have established a comprehensive framework for the reporting of issuance and trading of CPs and NCDs. According to the Directions, the issuer must report primary issuance, buybacks, instances of default, and repayments on the F-TRAC Trade Repository Platform of Clearing Corporation of India Ltd. by 5:30 pm on the date of such issuance. Secondary trades need reporting within 15 minutes.

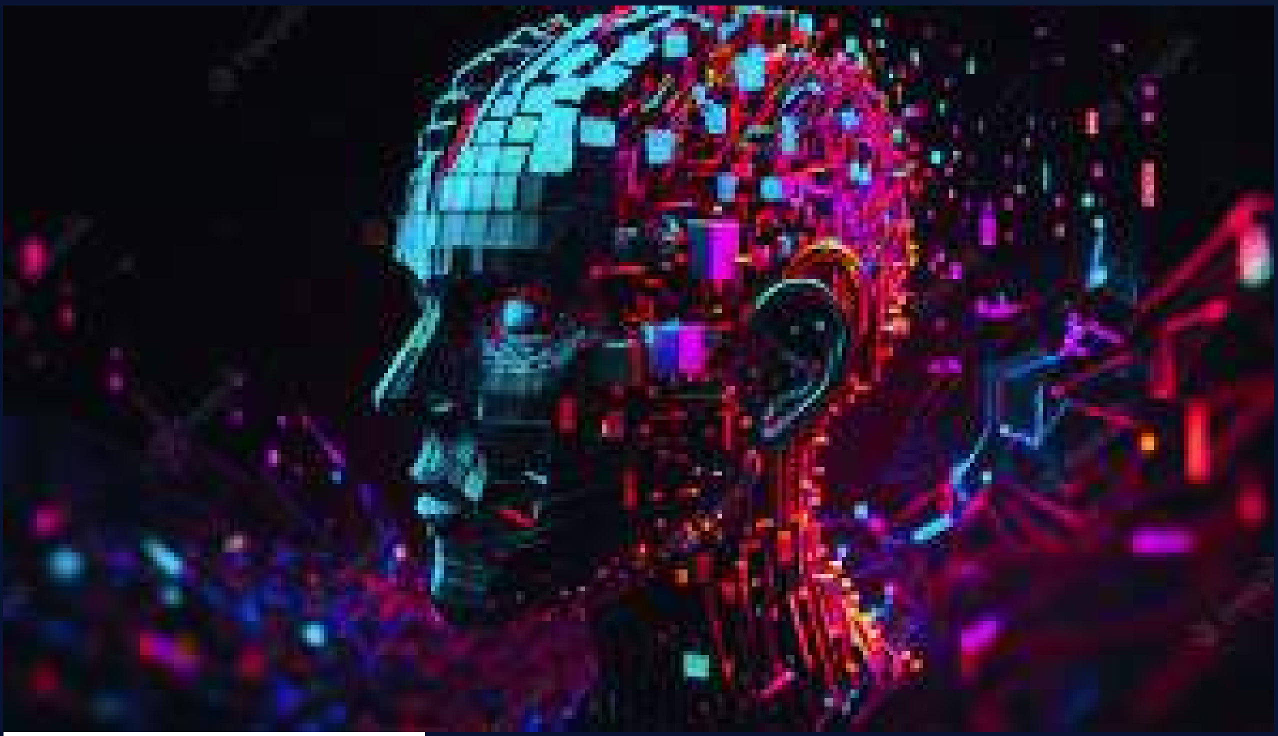
(iv) Roles and Responsibilities

The Directions also mention the roles and responsibilities of the Issuing and Paying Agent ("IPA"), Debenture Trustee and Credit Rating Agency ("CRA"). According to the Directions, IPA must ensure the issuer's compliance with CP/NCD issuance, verify documents, and issue certificates. Debenture Trustees must adhere to regulations, report on NCDs, and will face consequences for violations. CRAs must rate CPs/ NCDs, follow SEBI guidelines, and CRAs will also face penalties for non-compliance.

THE WAY FORWARD

The Directions will help in ensuring transparency and compliance in India's financial markets. By mandating dematerialized forms, strict reporting requirements, and limitations on related party investments, the framework will also enhance investor confidence. However, the minimum denomination of Rs. 5 lakh might limit retail participation in primary issuances, leading to a greater institutional presence. Additionally, CRAs and IPA might face operational challenges while adapting to these Directions.

ARTIFICIAL INTELLIGENCE



SECTION 4

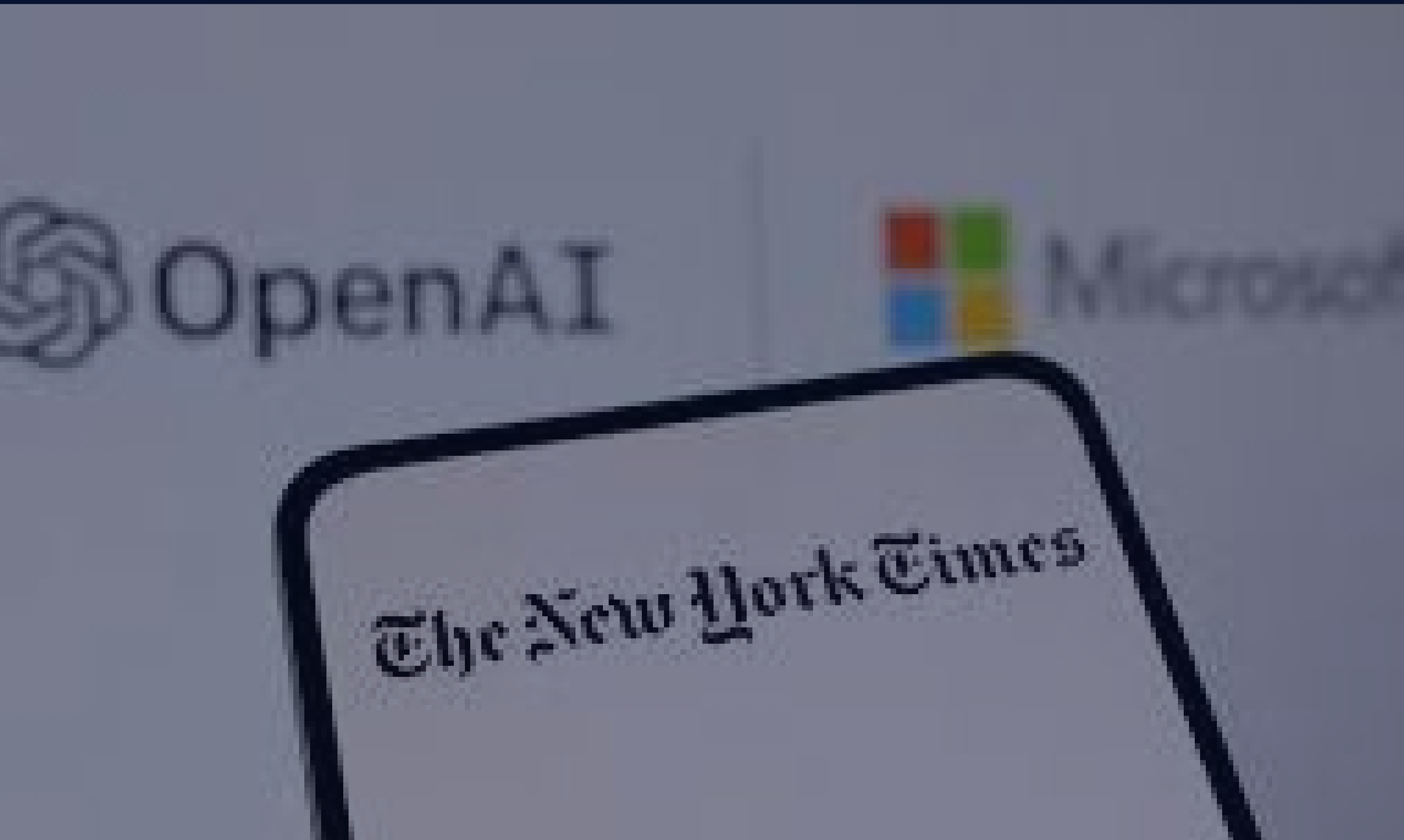
THE NEW YORK TIMES SUES OPENAI AND MICROSOFT FOR UNAUTHORIZED USE OF ITS COPYRIGHTED MATERIAL

NEWS

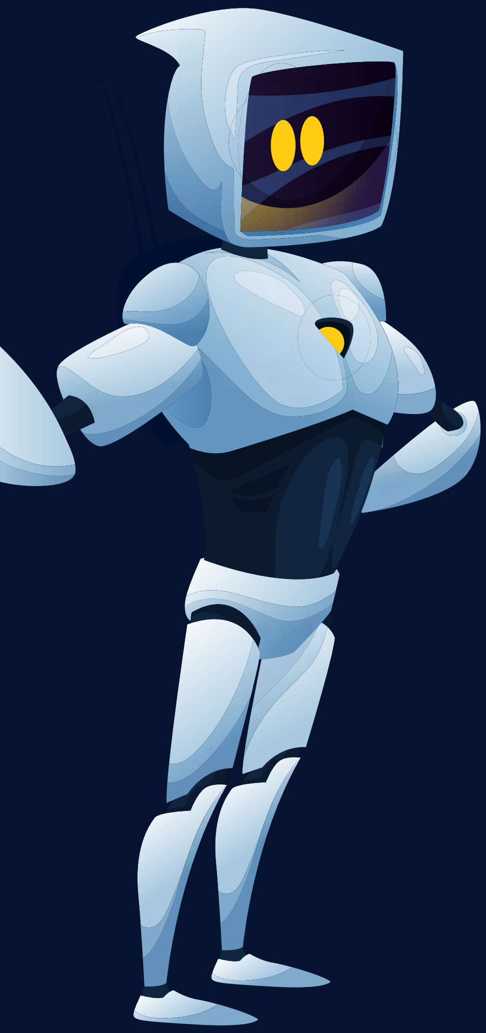
The New York Times ("NYT") has initiated a legal action against OpenAI and Microsoft, alleging that OpenAI used numerous articles of The NYT for training ChatGPT, without taking authorization from them or providing any remuneration in return. The NYT argues that this unauthorized use has turned ChatGPT into an alternative information source, making it a competitor and thus adversely affecting the NYT's business model. This issue has raised a crucial question about the permissibility of employing copyrighted materials for the training of artificial intelligence.

LEGAL TALK

In the United States ("U.S."), Section 107 of the Copyright Act addresses the concept of Fair Use for copyrighted materials, employing a four-factor test to determine its applicability. The factors include the purpose and character of the use, the nature of the copyrighted material, the amount used, and the effect on the market value of the original work. While the scope of Fair Use is extensive, predicting its application can be challenging. The purpose and character of using copyrighted material for training an AI model is closely tied to the fourth factor—the impact on the original market value of the NYT. If ChatGPT delivers similar content in a more concise and organized manner, drawing information from across the internet, it could potentially reduce traffic to NYT, affecting its overall business.

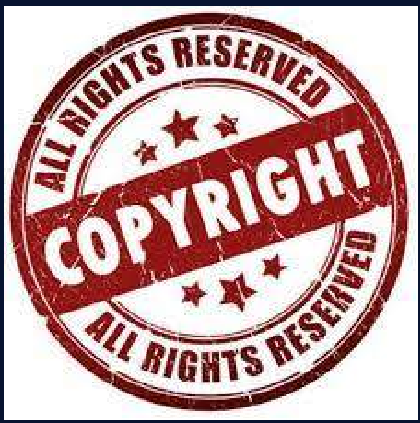


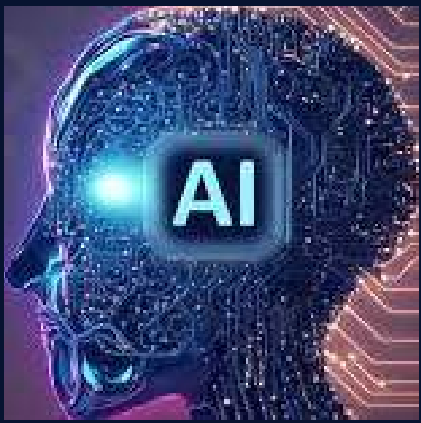
The nature of NYT articles, which are more factual than creative, is inclined towards falling under the Fair Use exception. However, the substantial amount of material used poses a challenge in claiming this exception. Ultimately, the court's interpretation will shape the outcome, but it is evident that ChatGPT's usage of NYT's data has the potential to influence the business dynamics of NYT unfavourably in this scenario. In India, the fair dealing exception is outlined in Section 52(1a) of the Copyright Act, of 1957. The section identifies three specific categories for which exceptions can be granted, which include using for private or personal use, including research, criticizing or reviewing work, and reporting of present events including those lectures that are delivered in public. In comparison to the United States, Indian law has a more restrictive scope as it explicitly outlines only three exceptions, and also it does not offer a comprehensive criterion that can encompass various situations or circumstances mentioned under the Copyright Act of the U.S. To enable the use of copyrighted material for training artificial intelligence, there is a need for India to broaden the definition of fair dealing.



THE WAY FORWARD

While the utilization of copyrighted material for AI training remains a contentious issue, the legislature should adopt a lenient stance for AI to use copyrighted material. Striking a balance is crucial, which will allow AI to enhance its capabilities without causing any harm to copyrighted materials. AI has the potential to present information in a more accessible manner, possibly diverting traffic from original sources. However, using these materials is essential for advancing in the field of AI. The decision of the U.S. court will undoubtedly impact the entire industry, but it is the responsibility of legislators to enact laws and regulations, specifying the permissible extent of using copyrightable material and other governing rules that resolve the issue of using copyrighted material for training purposes.





UK SUPREME COURT HOLDS AI IS NOT ELIGIBLE FOR PATENT INVENTORSHIP

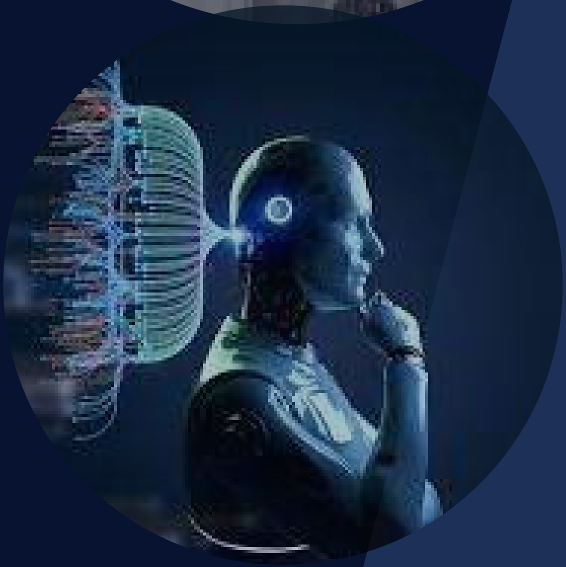
NEWS

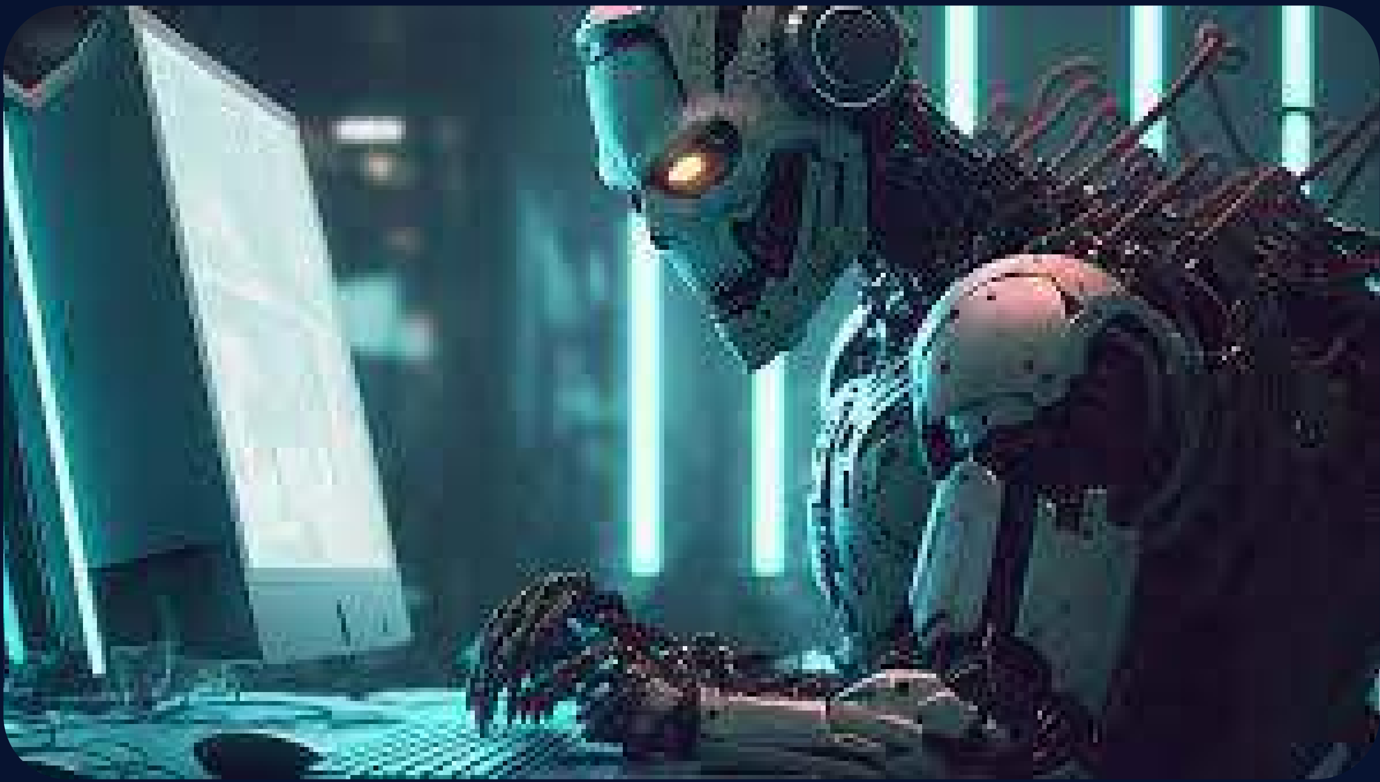
Recently, the United Kingdom Supreme Court ("Court") handed down its highly anticipated judgment in the case of Thaler v Comptroller-General of Patents, Designs and Trademarks [2023] UKSC 49, unanimously ruling that only a natural person can be named as an inventor on a patent application.

LEGAL TALK

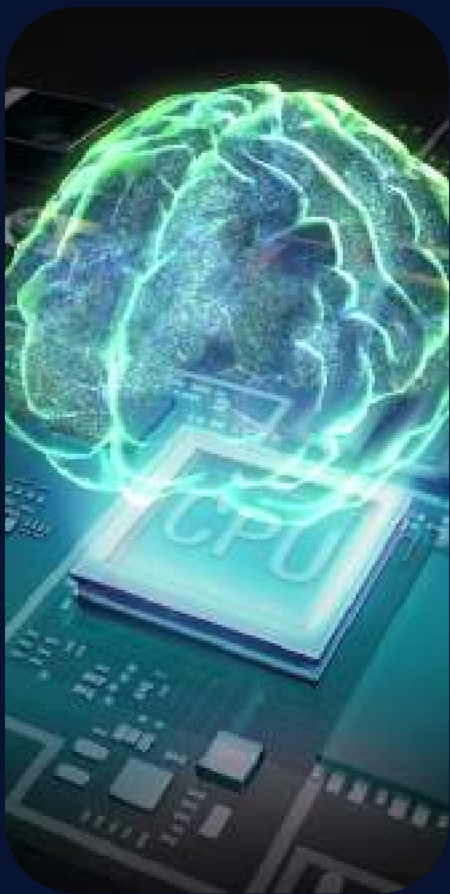
In the present case, Dr. Stephen Thaler filed two patent applications with the Comptroller, stating that the inventor was a machine called DABUS, acting autonomously and powered by AI. He asserted that he acquired the right to the grant of the patents by his ownership of the machine. Here, the court addressed two fundamental questions: (1) the definition of "inventor" under the Patents Act 1977 ("Act") and (2) whether Dr. Thaler, as owner of the AI machine DABUS, could claim patent rights for its inventions.

On the first issue, the court unanimously ruled that sections 7 and 13 of the Act require an inventor to be a "natural person." The Court emphasised that DABUS, as an AI machine, does not qualify as a person or a "natural person." Citing the ordinary meaning of "inventor" as "a person who devises a new and non-obvious product or process," the Court concluded that DABUS "did not devise any relevant invention" and therefore cannot be considered an "inventor" for patent purposes. Regarding Dr. Thaler's claim, the Court further held that even if DABUS had devised the invention, mere ownership of the machine would not automatically grant Dr. Thaler patent rights. The Act restricts non-inventors to derivative rights, requiring a human inventor to initiate and claim the invention under sections 7(2)(b) or (c). As DABUS lacked the capacity to be an inventor ab initio, such derivative rights were not even available. Simply owning an invention-generating machine, the Court concluded, does not confer legal rights on its creations without a valid legal basis for attribution.





While this judgment definitively declares AI incapable of sole inventorship, it leaves several critical questions unaddressed. The boundaries between inventions generated by AI with varying degrees of human involvement, from assistance to collaboration, remain undefined. This lack of legal guidance necessitates future developments to navigate the complexities of human-AI collaboration and machine-generated creations in an evolving technological landscape.



THE WAY FORWARD

While the Thaler judgement provides clarity on current inventorship requirements, it deliberately avoids broader issues. The Court's focus on the specific question of AI inventorship circumscribes its reach. Notably, the scope of the decision does not extend to hypotheticals like Thaler claiming inventorship with DABUS as a tool, nor does it delve into the patentability of AI-generated inventions. This narrow approach leaves space for future legal developments to address potential scenarios arising from human-AI collaborative innovation and the evolving landscape of machine-generated creations.

DATA PRIVACY

SECTION 5

FUTURE OF DATA BROKERS UNDER THE DPDPA

NEWS

Kochava, a popular data broker, is in a legal battle with the Federal Trade Commission ("FTC') of the United States, over allegations of secretly collecting vast consumer data without consent. The company utilizes AI to analyze the data, enabling it to predict and influence consumer behavior in numerous invasive ways and subsequently offering it for sale.

LEGAL TALK

The legal battle between Kochava and FTC over alleged privacy violations sheds stark light on the need for robust data protection frameworks. While the incident unfolds overseas, it offers valuable insights for India as it navigates the complex terrain of personal data and privacy rights. In India, there is no legislation that clearly defines data brokers. Generally they are described as organizations that profit by gathering personal information, analyzing it, and licensing it to other companies for purposes such as marketing. In the past, data brokers could collect personal data from individuals (directly or from other sources) without their free and explicit consent, while providing them with limited information regarding the intended use of their data. With the introduction of the Digital Personal Data Protection Act ("the Act"), data brokers must now seek informed and specific consent from an individual for processing their data. Moreover, since Section 6 of the Act propagates purpose limitation for data processing, a data broker will need to seek fresh consent each time there is any deviation in the purpose of processing of personal data.

However, these obligations only apply to personal data as defined by the act, excluding personal data made public by the data principal. This exemption raises concerns about the potential disclosure of sensitive details through seemingly harmless public data. For instance, if a data principal publicly discloses their gender, birthdate, and workplace, these seemingly benign data points might not individually appear sensitive. However, when combined, they could potentially lead to the revelation of more sensitive details, such as health conditions or financial information. Addressing this crucial gap is essential, as data brokers have the potential to aggregate significant information from seemingly innocuous details. India must proactively step up and fortify its regulations to ensure a robust and comprehensive data protection framework.

THE WAY FORWARD

The rise of data commoditization has elevated the role of data brokers in the digital economy. They collect information from various sources and package it into valuable insights for different industries. Despite being a common practice, data brokerage operates in an unregulated and opaque environment, leaving individuals susceptible to the misuse of their personal information. With the introduction of DPDPA, the industry is now expected to operate with explicit consent from individuals. While completely erasing one's digital footprint is impossible, individuals can now be more aware of where their data goes and how it's used. The DPDPA imposes mandatory obligations on data processors, putting an end to unlawful processing. By requiring consent for data collection and notifying individuals of the purpose, people gain better awareness and control over the use of their information. India has made strides with the DPDPA, but addressing concerns like the handling of already public personal information is crucial. The nation must strengthen its approach to ensure a robust data protection framework.

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