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So You Think You Want To...
use AI

Artificial intelligence (AI) and machine learning technology is driving important new business opportunities across a growing number of industry sectors, including the consumer goods and retail sector. Many brands are looking into how AI can enhance their business processes and customer interactions and with generative AI and the arrival of ChatGPT, the scope for application is staggering. Here we make recommendations around using AI ethically and responsibly.

What is AI and how is it being used in retail?

The term AI is a general term which can be defined as the science and engineering of creating intelligent machines that work and react like humans. It refers to the simulation of human intelligence processes by machines, especially computer systems. Generative AI is a category of AI algorithms that generate new outputs based on the data they have been trained on. It uses a type of deep learning called generative adversarial networks and has a wide range of applications, including creating images, text and audio.

AI is being utilized by brands in every aspect of a product lifecycle from research & development solutions, manufacturing robotics, supply chain analysis, ESG data collation, demand forecasting and inventory management through to customer engagement, targeted marketing and sale and post-sale interactions. Generated AI is providing even more scope in the by brands sector. For example, the technology can be used to create images, captions, webpages and videos in a cost effective way, and to power a better customer experience through personalized product recommendations.

A common theme in all of these governance regimes are:

Fairness
AI should avoid bias and discrimination, and datasets used in training them should be high-quality and representative.

Privacy
Design principles such as Privacy by Design and Security by Design should be implemented into any AI strategy used from the beginning of its development.

Transparency
Companies making use of AI technology should ensure that their consumers are informed of such use.

Accountability
The accountability and responsibility for AI decisions should be set out between the designers of the AI system and those making use of it, with companies encouraged to create an internal review board to oversee the development and use of the AI system.

Explainability
The reasoning behind decisions, recommendations or predictions made by an AI system should be clear and understandable.

AI budget to meeting regulatory requirements by 2024
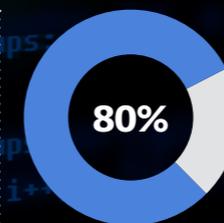
80% of business say they'll commit **10%** or more of their total AI budget to meeting regulatory requirements by 2024.
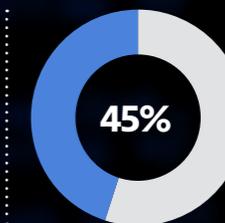
45% are planning to commit at least **20%***

Salesforce Ethical Leadership and Business report

Which jurisdictions are pioneering the implementation of legislation or guidance on AI?

Below is a snapshot of some of AI laws and regulations being considered globally*

Canada
- Directive on use of Automated Decision-Making by Federal Government in effect April 2020
- Artificial Intelligence and Data Act (AIDA) June 2022

United States
- Bot Disclosure Law 2018
- Commercial Facial Recognition Privacy Act of 2019
- Executive Order on Promoting the Use of Trustworthy AI in the Federal Government 2020
- OMB Guidance on Regulation of AI in Private Sector- 2020
- The National AI Initiative Act 2021
- NY automated employment decision tools law 2021
- Blueprint for an AI Bill of Rights
- Algorithmic Accountability Act of 2022
- Draft NIST AI Risk Management Framework 2022
- Federal Trade Commission issues warning Feb 2022

OECD
- Principles on Artificial Intelligence

United Kingdom
- Data Ethics Framework - 2018
- Guidance on use of AI in the Public Sector, updated October 2019
- ICO Regulatory Sandbox 2019
- Guidance understanding artificial intelligence ethics and safety 2019
- National AI Strategy and Standards Hub 2021/2022
- AI Regulation Policy Paper 2021

Norway
- DPA Sandbox on AI - 2020

France
- CNIL creates AI department - Jan 2023

Brazil
- Senate Committee Publishes AI Report and Draft AI Law Dec 2022

Egypt
- National AI Strategy framework 2019

European Union
- High-Level Expert Group on Trustworthy AI 2018
- HLG Recommendations on Trustworthy AI 2019
- Draft EU Regulation on AI 2021
- Review of Product Liability Framework 2021
- Regulation on Machinery Products 2021

China
- Principles on Governing the New Generation of AI: Developing Responsible AI 2019
- New Generation Code of Ethics 2021
- Internet Information Service Algorithmic Recommendation Management 2022
- Regulation on Promoting the Development of Artificial Intelligence Industry (Shanghai, Shenzen) 2022
- Regulation of Algorithmic Recommendation Systems – 2022
- Deep Synthesis Provisions

India
- Exploring AI Principles 2021

Japan
- Social Principles of Human-centric AI, 2019
- AI Governance Guidelines 2022

Singapore
- Model AI Governance Framework 2019 (Updated 2020) + Implementation Self-Assessment Guide
- Trusted Data Sharing Guidance 2019
- A Guide to Job Re-Design in the Age of AI 2020
- MAS Framework for Responsible AI + Veritas Consortium Phase 1 – 2020; Phase 2 - 2021

Australia
- AI Ethics Framework 2019
- Automated Decision Making and AI Regulation Consultation 2022

*Non-exhaustive list as of March 2023.
More information: https://oecd.ai/en/dashboards/overview

Issues to consider

Here are the top nine things you need to know about using AI ethically and responsibly

1 Risk of pricing algorithms

One commonly cited use case for AI by brands is automating pricing in the e-commerce context. Algorithmic pricing depends on an automated system to adjust pricing based on a number of factors. This can include dynamic pricing that may fluctuate depending on volume, demand and market factors, or personalized pricing that tailors prices to the buyer's profile based on purchase or browsing history.

Brands must be wary of relying purely on such algorithms to set prices. While setting prices based solely on data such as supply and demand may lead to price-surging during times of high demand, it can also lead to a loss of trust and goodwill among consumers if it results in pricing some out of the market entirely. Brands should also be aware of the risk where the pricing mechanism offers an unusually low price which is then accepted by the consumer. Consumers may lose trust in a brand if the price of goods are noticeably different day-to-day. It is therefore essential for brands to balance the use of such algorithms with human oversight to avoid pricing algorithms becoming too extreme in practice. Some have also raised concerns over the potential for pricing algorithms to facilitate an anticompetitive environment, whether intentional or not, as the algorithms may lead to higher prices even in the absence of collusion or monopolies.

2 AI predictive tools leading to racial profiling or other bias

Any AI system must be considered for potential bias or prejudice. Although such systems may appear to be objective as they are based purely on data, that data itself must be examined for potential biases. An AI based on flawed or biased data will produce flawed or biased results, but may nonetheless be perceived as impartial due to its "objective" analysis. It is therefore essential for those making use of AI to have as much visibility of the data used to train it as possible, so as to avoid creating systems that will produce biased results by eliminating problematic data within datasets. Avoiding such biased systems is a key reasoning behind the AI governance principles of transparency and explainability.

3 Managing data and protection against cyber attacks

As AI generally involves processing a large amount of data, brands will be subject to data protection requirements. Moreover, with cyberattacks and data breaches becoming an international daily occurrence, it has never been more necessary for brands to maintain well-managed and secure databases.

AI systems introduce new kinds of complexities not found in traditional IT systems as they may rely on third party relationships with suppliers and must be integrated with existing AI systems. Brands will need to be aware of the security of both their existing consumer data as well as the data used to train their AI systems to avoid creating new entry points for hackers to attack, as well as ensuring that any sensitive personal data contained within datasets is subject to additional levels of protection. The required security of this training data is twofold – companies must be able to ensure not only that the data cannot be stolen or accessed by unauthorized parties, but also that it cannot be added to by unauthorized parties to ensure the continued integrity of the AI's decision-making.

Then again, AI may also present a solution to the increased need for cybersecurity as its ability to analyze and catalogue large volumes of data may allow it to identify breaches in network security or deviations from standard network traffic can allow businesses to prevent or stop breaches as early as possible.

4 E-commerce recommendation systems, targeted marketing, and risks associated with hyper-personalization

E-commerce has undoubtedly become an increasingly personal experience. As personal data protection remains a key area of global regulation, brands have been incentivized to move away from methods of personalized marketing such as tracking cookies to engage potential consumers. AI can fill in this marketing gap as it may be used to analyze social, historical and behavioral data to identify classes of consumer and provide relevant advertising. Brands can therefore create a consumer profile based on this data and use AI to provide more personalized advertising as well as to analyze the consumer's receptiveness to such advertising campaigns.

While consumers may be receptive to the convenience associated with personalized marketing, the collection of such large amounts of personal data carries with it a vastly increased data protection obligation and risk. Additionally, it is possible that hyper personalization of marketing may backfire if the consumer finds themselves receiving advertisements that demonstrate a deep knowledge of the consumer's life – this may erode consumer trust by feeling invasive to their privacy. Issues such as these highlight the need for both transparency of AI's data collection and analysis, as well as an opt-out for consumers who do not wish to participate.

5 **Increasing inclusion in the AI ecosystem and expanding AI's benefit to underserved groups (and potential anti-competitive associations)**

Diversity and inclusion should be considered from the design phase of any AI system. Failure to include these considerations can lead to such issues as digital redlining and discrimination, as well as a loss of trust in these systems as a result. This can be seen in facial or voice recognition uses, where the use of AI systems to identify either individuals or groups can result in racist or sexist labelling of those individuals or group, while the context of such use may have unforeseen social consequences such as potentially unethical profiling of certain consumer groups.

Fairness is one of the cornerstones of generally accepted principles of AI governance, and principles of diversity and inclusion lie at the heart of achieving this. By ensuring good quality datasets and being aware of an AI's decision making process and potential consequences of these decisions, brands may ensure that any AI that they make use of meets this requirement.

6 **Ensuring transparency and explainability – with the added bonus of building consumer trust**

The OECD AI Policy Observatory highlights transparency and explainability as key elements for ensuring that consumers trust an AI system's insights, understand when they are engaging with an AI, and can challenge the outcomes and decisions of the AI system. Accordingly, the focus for brands making use of AI that interacts with consumers should first be on disclosing when AI is being used – for example whether it is being used in a prediction, recommendation or decision, or interacting directly with an AI-powered program such as a chatbot – and to be prepared to explain, in non-technical terms, any automated and algorithmic decisions and any associated data driving those decisions.

By ensuring transparency and explainability in their AI systems, brands will also decrease the risk of error and misuse, as the need to explain an AI's process reduces the risk of faulty reasoning or mistakes being hidden within a black box that would remain unexamined.

7 Navigating AI related disputes and investigations

Traditional AI systems have been used in commerce for many years, with applications ranging from advertising to virtual chat assistants, and more recently with generative AI such as ChatGPT. Where traditional AI systems are based on pattern recognition and predictions, generative AI is able to generate content based on the datasets used to train it.

As with all emerging technologies, AI comes with its own set of concerns and disputes. With generative AI in particular comes legal uncertainty and there are already several ongoing disputes around IP infringement. There is also a predicted increase in liability disputes around the use and implementation of AI as AI gets incorporated into more and more business functions and processes.

8 Future proofing for Generative AI

Generative AI refers to a type of artificial intelligence-based technology that can produce various types of new content such as text, images and music. There are numerous applications for generative AI ranging from creative designs and trend analysis to personalized product recommendations and automated inventory management.

Generative AI tools include Dall-E, MidJourney, and ChatGPT, which garnered over 100 million users shortly after being launched. ChatGPT is a generative AI chatbot that can perform natural language processing tasks and has the ability to have fluid and natural conversations with users. This could revolutionize customer engagement with chatbots, which are typically restricted to a limited set of recognisable phrases.

As the use of generative AI continues to surge globally and integrate seamlessly into business, society, and our personal lives, we can also expect a new regulatory climate to take shape. As such, it is important for brands to consider at an early stage not only the potential use cases of generative AI tools, but also to understand the associated legal and practical risks and assess how best to mitigate them. This could be addressed, for example, by ensuring there are internal governance measures and policies regarding use of AI – when the use of generative AI is permitted, if the output should be subject to human review – and keep those policies under review as this remains a developing area.
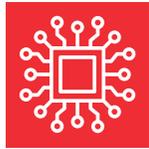
9 Staying on top of the evolving intellectual property ownership landscape

The huge surge in press and public interest in generative AI tools and the emergence of new commercial use cases for these tools, has generated a parallel surge in interest in IP ownership and exploitation issues. There is a new urgency to questions around IP ownership and infringement – can content or inventions made by AI tools be protected by IP rights and, if so, who owns them? If the source material is protected by IP, are those rights infringed; either by use of the source material to develop, train and run an AI tool, or by its output?

To date much of the focus has been on whether an AI tool can create and own IP in its own right. In most (although not all) jurisdictions, under the current law, the answer is no. However, this isn't the only issue, or even the most important one. Most AI creations are AI-assisted, involving a level of human input, and determining whether IP rights are created or infringed in an AI context will still require consideration of traditional legal tests like originality for copyright works or inventiveness for patents. Determining the IP position therefore requires courts and IP offices to apply concepts developed in the world of human intelligence, such as creativity, originality and inventiveness, to the developing world of AI.

There is also huge scope in this space for legislative, policy and technological developments. The winds of change can blow rapidly – for example, the UK took a pro-AI stance in August 2022 with a proposal to adopt a broad exception to copyright for text and data mining (TDM), which would facilitate the use of copyright-protected content in AI training datasets, but by February 2023 had apparently dropped those proposals, citing the difficulty of striking the right balance between the creative, digital and AI sectors.

Practical takeaways

Brands that use, or plan to use, AI, should take a moment to consider whether using AI, including generative AI, is appropriate and take the necessary steps, including:

- Updating or establishing **internal governance and policies** regarding use of AI, such as circumstances when use of AI is permitted, whether use of generative tools is permitted and under what circumstances, or whether AI output should be subject to human review.

- Revising **employee policies**, including prohibiting any sharing of personal data or confidential information when using generative AI tools and providing employee training on the topic.

- Performing an **impact assessment** to help identify and minimise data protection risks associated with the use of AI, including assessing the likelihood and severity of any data breach/use impact on employees and customers.

- Considering whether to add protection to **third party supplier contracts** such as requiring suppliers to disclose use of generative AI tools, limiting or prohibiting the use of AI-generated output without your knowledge, and/or requiring suppliers to comply with your policies around the use of AI.

- Conducting **IP clearance searches** to ensure any AI-generated output that is sought to be used does not infringe third parties' rights.

- Keeping abreast of **developments** in this space, as it remains a developing area and regulatory or governmental intervention is likely to follow.

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