

Lawyer Insights

Pay Attention To Contract Law Tenets Amid AI Incorporation

By Jeffrey Harvey and Sharon Harrington
Published in Law360 | December 4, 2023



Professor Stephen Hawking said that the "development of full artificial intelligence could spell the end of the human race."

While it is likely premature to determine whether Hawking will be proven correct, legal practitioners should not kill off basic elements of contract law along the way.

As providers of information technology products and services rush to market with various generative AI-based solutions, many find that their existing terms and conditions are insufficient to protect against the nuanced, but not necessarily new, risks posed by the incorporation of generative AI into their solutions.

As a result, certain providers are ignoring basic tenets of contract law and attempting to unilaterally amend existing agreements with their customers or otherwise strong-arm their way into more provider-friendly terms. Among other tactics, providers are:

- Sending notices to customers indicating that the incorporation of generative AI into an existing solution will result in any number of benefits to the customer, and the customer need only sign and return the notice, which includes additional legal terms and conditions, to reap those benefits. Depending on how the notice is drafted, it may actually serve as an amendment to the underlying agreement between the parties upon execution by the customer.
- Sending notices to customers indicating that the provider has a contractual right to incorporate generative AI into an existing solution, whether or not they do, but noting that generative AI and resulting outputs are not covered by the provider's existing indemnity obligations or the existing allocation of intellectual property rights.
- Sending proposed amendments to customers indicating simply that an amendment must be signed because the provider has incorporated generative AI into an existing solution. These amendments typically address key areas that are often implicated by generative AI-based solutions, including intellectual property provisions, privacy provisions, warranties, disclaimers, indemnity obligations and limitations of liability.
- Sending offers to include generative AI solutions within the scope of existing indemnities for an additional fee even if the indemnities are already written to include any modifications to the underlying solution, including the addition of generative AI technology.

Upon receipt by a customer of any of these communications, the customer should review the underlying agreement. In most cases, the agreement will specify requirements that must be met in order to amend it.

This article presents the views of the authors, which do not necessarily reflect those of Hunton Andrews Kurth LLP or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article. Receipt of this article does not constitute an attorney-client relationship. Prior results do not guarantee a similar outcome. Attorney advertising.

Pay Attention To Contract Law Tenets Amid AI Incorporation

By Jeffrey Harvey and Sharon Harrington

Published in Law360 | December 4, 2023

While not the norm in most agreements, it is not unusual for cloud and as-a-service solutions themselves to be subject to modification without the consent of the customer; however, the same is not true of the contractual terms and conditions.

The general rule is that the terms and conditions of a technology service agreement cannot be amended without both parties executing a formal amendment. Legal teams should review the underlying agreement, including the boilerplate, and focus on the distinctions between modifying the solution and amending the agreement.

While these attempts by providers to amend their agreements to reflect the incorporation of generative AI into their solutions may ultimately fall flat, customers can be sure that any renewals or new product or services purchased will include terms and conditions relating directly to the risks associated with generative AI.

Contracting for generative AI may require the parties to define AI and, in doing so, differentiate generative AI from other AI tools that may already be deployed, such as rules-based functions, algorithms and even machine learning. Contractual definitions and distinctions likely require case-by-case review, but key features of generative AI typically are a machine-based system designed to operate with at least some level of autonomy, and to generate outputs such as predictions, recommendations or decisions that will influence courses of actions or real or virtual environments.

Therefore, it is important for a customer to consider, among other things:

- The various use cases involving any proposed generative AI solution;
- The customer's expectations with respect to the data used to train the solution, whether the data is owned by the customer, the provider or one or more third parties;
- Responsibility for the data used to train the solution and whether the customer will provide its own data to further customize the solution;
- Ownership expectations and risk allocation associated with the outputs;
- The risk of so-called hallucinations, i.e., fabrications where no relevant data exists within the solution, if the solution has not been trained on a sufficient quantity and quality of data;
- Bias in output, particularly if it may result in discrimination if the solution is designed to make decisions that impact individuals; and
- The potential impact of removing the subjective nature of humans from the elements of the solution.

Finally, customers can employ some of the very same tactics being employed by providers of generative AI and take a proactive approach to generative AI.

While customers are in a rush to contract for generative AI and realize the potential value in many use cases involving generative AI, they should also consider whether there are aspects of their business in

Pay Attention To Contract Law Tenets Amid AI Incorporation

By Jeffrey Harvey and Sharon Harrington

Published in Law360 | December 4, 2023

which generative AI does not belong and seek representations and warranties from providers that generative AI will not be employed in the provision of certain services.

A primary example may be various types of professional services agreements, consulting agreements and agreements for any type of creative content.

In such agreements, customers may wish to proactively seek representations and warranties either that generative AI will not be used, or that any use of generative AI by the provider is subject to robust internal policies of the customer or provider regarding the provider's use of generative AI.

Given that best practices and industry standards for the use of generative AI remain in flux at the moment, parties may wish to specify what the scope of such policies include, such as requiring the provider to have a committee or office for the use of generative AI and provide training on a regular basis to employees on the use of generative AI.

***Jeffrey Harvey** is a partner in the firm's Global Technology, Outsourcing & Privacy group in the firm's Richmond office. Jeff is chair of the firm's global outsourcing and technology practice group. Jeff's practice focuses on information technology, business processes, sourcing and system integration / implementation, e-commerce, commercial contracting and various intellectual property matters. He can be reached at +1 (804) 788-8505 or jharvey@HuntonAK.com.*

***Sharon Harrington** is counsel in the firm's Global Technology, Outsourcing & Privacy group in the firm's Richmond office. Sharon advises companies in complex commercial and technology transactions and assists her clients in related disputes. She can be reached at +1 (804) 788-8629 or sharrington@HuntonAK.com.*

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.