U.S. Department of Justice Signals Tough Stance on Crimes Involving Misuse of Artificial Intelligence

By Kara M. Sacilotto, Nick Peterson, Megan L. Brown and Duane C. Pozza

Deputy Attorney General (DAG) Lisa O. Monaco recently delivered remarks[1] at the University of Oxford in the United Kingdom on "the Promise and Perils of AI." Her remarks focused on the use by the U.S. Department of Justice (DOJ) of artificial intelligence (AI) in its enforcement efforts and DOJ's position on prosecution of those who misuse AI. DAG Monaco's remarks come on the heels of other Biden administration actions to address potential fraudulent use of AI.

DOUBLE-EDGED SWORD

In her remarks, DAG Monaco highlighted that AI is "a double-edged sword" that may be "the sharpest blade yet." On the promises of AI to assist DOJ with its enforcement mission, DAG Monaco said that AI has been deployed: "[t]o classify and trace the source of opioids and other drugs"; to assist DOJ with "triage and understand[ing] the more than one million tips submitted to the FBI by the public every year"; and "to

The authors, attorneys with Wiley Rein LLP, may be contacted at ksacilotto@wiley.law, npeterson@wiley.law, mbrown@wiley.law and dpozza@wiley.law, respectively.

synthesize huge volumes of evidence collected in some of our most significant cases, including January 6."

On the other side of the "sword," DAG Monaco noted that AI also can accelerate risks to national security, amplify biases and discriminatory practices, expedite creation of harmful content, accelerate disinformation, and create new opportunities for cyber-related criminal conduct. She also referenced the misuse of AI in elections "from Chicago and New Hampshire to Slovakia." Her reference to New Hampshire refers to robocalls made in January with AI-generated voices, impersonating President Biden, that discouraged people from voting in the state's primary election. Shortly after those calls came to light, on February 8, 2024, the Federal Communications Commission (FCC) issued a declaratory ruling[2] stating that AI-generated voice calls will be governed as "artificial or prerecorded voice" calls regulated under the Telephone Consumer Protection Act.

DAG Monaco noted that the United States is at an "inflection point" on AI, and referencing the Biden administration's executive order on AI,[3] must move quickly to leverage the positive promises of AI while minimizing its risks. Following the directives of the executive order, DAG Monaco stated that DOJ, with other

federal agencies, will create guidance on its own use of AI to ensure that DOJ uses AI responsibly. Consistent with guidance from the Office of Management and Budget,[4] DOJ appointed its first chief AI officer in January to coordinate its efforts. DOJ is also coordinating its law enforcement and civil rights teams, along with other AI experts, to form an Emerging Technology Board that will advise DOJ on how it can use AI responsibly and ethically. Furthermore, DAG Monaco announced "Justice AI," which will convene individuals across academia, science, industry, and foreign counterparts to ensure that DOJ accelerates "AI's potential for good while guarding against its risks."

ENFORCEMENT

With respect to enforcement, her remarks noted that existing laws can be applied to misuse of AI without need for separate AI laws: "Discrimination using AI is still discrimination[;] [p]rice fixing using AI is still price fixing[; and] [i]dentity theft using AI is still identity theft." This statement aligns with similar announcements by other agency leaders, including in a joint statement[5] by the heads of the Federal Trade Commission (FTC), Consumer Financial Protection Bureau, Equal Employment Opportunity Commission, and the Assistant Attorney General for the DOJ's Civil Rights Division, that they will enforce existing legal authorities against discrimination and bias in AI.

> **All of these efforts send powerful messages to companies using AI about the potential pitfalls of the use of this technology and need to closely monitor compliance.**

DAG Monaco further noted that the criminal justice system "has long applied increased penalties" for certain crimes, such as those involving firearms, and "[l]ike a firearm, AI can also enhance the danger of a crime." Thus, going forward, DOJ will seek tougher sentences for offenses "made significantly more dangerous by the misuse of AI." If existing sentencing guidelines do not allow for such enhancements, DOJ will seek to modify those guidelines to "close the gap." This approach, she noted, "will deepen accountability and exert deterrence."

DOJ's intention to seek tougher sentences for criminal offenses involving the misuse of AI could portend a similarly hardline approach by the Government towards civil and administrative issues arising from a company's use (or rather misuse) of AI. Companies should review their current AI use policies and periodically revisit such policies to ensure they are appropriate and adequately cover how AI is actually used within companies. With DOJ's latest stance on AI use, the failure to get AI use policies right could expose companies to even greater risk.

Notably, the DAG's remarks and DOJ's emphasis on AI's potential for misuse are part of the broader Administration and Congressional interest in AI. These efforts also include the declaratory ruling of the FCC, discussed above, and the FTC's February 15, 2024 supplemental notice of proposed rulemaking,[6] which seeks to expand the agency's newly-adopted rule against impersonation of businesses and government, including to address AI impersonation of individuals. The FTC has also launched a "voice cloning challenge"[7] to encourage the development of multidisciplinary approaches aimed at protecting consumers from AI-enabled voice cloning fraud. All of these efforts send powerful messages to companies using AI about the potential pitfalls of the use of this technology and need to closely monitor compliance.

CONCLUSION

Misuse of AI may be used as an aggravating consideration by the DOJ in its criminal prosecutions. Importantly, this approach may also extend to civil and administrative actions.

Notes

1. https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-university-oxford-promise-and.
2. https://docs.fcc.gov/public/attachments/FCC-24-17A1.pdf.
3. https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.
4. https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf.
5. https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.
6. https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-proposes-new-protections-combat-ai-impersonation-individuals.
7. https://www.ftc.gov/news-events/contests/ftc-voice-cloning-challenge.

Wolters Kluwer