

Framework for Legislating on Artificial Intelligence

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With over 39,000 dues-paying members and well over 1 million followers on social networks, we focus on promoting policies that benefit both creators and users of technology.

Congress is facing a deluge of demand to legislate quickly on artificial intelligence (AI) technologies, but important questions and careful analysis are necessary to protect innovation while promoting benefits for society. EFF does not support the notion that AI regulation is needed to avoid catastrophe. Many of the harms highlighted are often covered by existing laws, and to the extent new harms are created, targeted legislation is appropriate.

Regulate Uses, Not the Technology

EFF supports regulating certain uses of AI technology such as automated decision making in employment, housing, and in the criminal justice system. These particular uses, which have critical civil rights considerations, carry serious implications for those impacted by the decisions. Other harms being highlighted such as an invasive use of images and personal information can be remedied by a completely different law, such as robust comprehensive privacy rules. In that instance the harm to privacy extends beyond the use of AI tools and Congress should instead move personal data legislation to cover the issue. Such comprehensive reform would be beneficial to the development of AI technology because it would provide clarity on what would be the best practice of collecting information given that scraping publicly available data is 1st amendment protected activity.

In each of these cases, EFF cautions against the idea that the technology, which is more properly understood as tools that can provide many valuable uses, is not the appropriate target for regulation. Suggestions that Congress should put blanket limits on computing power or the amount of hardware that can be utilized carries serious consequences for innovation and would be nearly impossible to effectively enforce. Similarly, creating a licensing regime through an AI regulatory commission carries serious risks to small businesses, researchers, and others who wish to develop AI tools but do not belong to a large corporation. If Congress were to create an AI Commission with licensing power, it would likely relegate the development of AI to Big Tech.

Open Source AI Carries Many Benefits

EFF strongly supports open source AI tools. It is important to democratize technology to foster innovation, follow on innovations, and foster public knowledge. The sharing of knowledge will collectively improve society as well as develop expertise over AI tools that are outside the control of major corporations. The added benefit of maintaining a wide field of AI researchers and developers is necessary because oversight by policymakers will be enhanced by increasing the pool of experts. Lastly, there is no inherent danger to open source AI. It is merely a choice by businesses and other entities that weigh a number of considerations on how to pursue developing their tools. Government policy should not

decide the evolution of technology and favor closed systems, which will be much more difficult to audit even for government regulators.

Artificial Intelligence and Copyright Law

Artists are understandably concerned about the possibility that automatic image generators will undercut the market for their work. However, much of what is criticized is already considered a fair use under the copyright law even if done at scale. Efforts to change copyright law to transform certain fair uses into infringement carry serious implications, are likely to interfere with the innovative potential of AI tools, and ultimately do not benefit artists. In fact, use of these tools could expand the capacity of artists to create expressive works. Policymakers should emphasize the importance of human labor and investment in what receives copyright protection to maintain wages and dignity. Artists should be protected from efforts by large corporations to both substitute their labor with AI tools and create a new, unnecessary copyright regime around AI generated art.

Machine Learning is a Fair Use

The process of machine learning for generative AI art is like how humans learn – studying other works – it is just done at a massive scale. Huge swaths of data (images, videos, and other copyrighted works) are analyzed and broken into their factual elements where billions of images for example could be distilled into billions of bytes, sometimes as small as less than one byte of information per image. In many instances the process cannot be reversed because too little information is kept to faithfully recreate a copy of the original work.

The analysis work underlying the creation and use of training sets is like the process to create search engines. Where the search engine process is fair use, it is very likely that processes for machine learning are too. While the act of analysis may potentially implicate copyright, when that act is a necessary step to enabling a non-infringing use, it regularly qualifies as fair use. If the intermediate step were not permitted, fair use would be ineffective. As such, when factual elements of copyright works are studied and processed to create training sets – which, once again, is how we humans learn and are inspired by themes and styles in art and other works – that is likely to be found a fair use.

Passing a Law to Mandate Compensation for Machine Learning Would be Disastrous

Congress must avoid creating new rights in copyright law to force compensation in the development of AI tools. This is a repeat of history where broadcasters believed cable systems owed them compensation for retransmitting free over-the-air television. The Supreme Court disagreed in two cases and the TV broadcaster lobby simply went to Congress to create the retransmission consent regime, which currently stifles content distribution and costs consumers billions in monthly bills.

Similarly, if a compensation regime was mandated on the training sets, it would prevent low-cost AI tools from emerging and may even prevent well established firms from experimenting. AI tools do not consistently churn out high-value outputs. Most outputs are likely to be worth very little to nothing. However, if the inputs needed to create those outputs carries a substantial cost – even a fraction of a penny per image – because some sets train on billions of images it would completely block AI development.

Want more information? Please contact Senior Legislative Counsel Ernesto Falcon at ernesto@eff.org



The Electronic Frontier Foundation is the leading nonprofit defending digital privacy, free speech, and innovation.
Learn More: <https://www.eff.org/issues/ai>