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Is your use of generative AI systems helping your competitors?

Almost every business today is either already using or exploring their workforce's potential use of generative artificial intelligence tools. These tools can enhance productivity and efficiency, but it is crucial to understand the risks associated with their use so that companies can implement proper AI governance to mitigate them.

Generative AI systems, such as ChatGPT and Bard, are trained on massive datasets, which often include users' inputs to the system (what are referred to as "prompts"), as well as much of the information available on the internet today. The system also learns from tasks it performs so that it continuously improves.

Businesses likely have already considered the risk of not being able to comply with certain privacy laws if personal information is part of a prompt, the risk of losing trade secret protection if a worker uses proprietary information as a prompt in generative AI systems, and the risk of bias in generative AI outputs, among others. The jury is still out as to whether these tools might also give us outputs that infringe third-party intellectual property.

One business risk not so often discussed is that when a worker uses a generative AI tool to perform a task, it can unintentionally train the machine to do the same for others. This risk is particularly acute when using non-proprietary generative AI tools (also called "open systems"), given that, often, the worker's prompts become part of the generative AI tool's training dataset. Once it learns to perform a task, the AI tool can then perform the same task for others in the same manner, possibly helping the business' competitors. To the same extent, the business can also benefit from others' use of the tool. Companies should engage cautiously with these open systems, so that they do not give away more than they intend in the bargain.

Businesses can address this risk by using a closed system (i.e., a proprietary system where the training dataset is not shared with others), in which case, nobody benefits from the worker's training other than their co-workers. This effectively makes the machine better at the job at hand the more the worker interacts with it, and it keeps the machine's improvements exclusively in-house. Of course, this takes more time and effort, so businesses must strike a balance and find the correct approach that fits their needs.

Before deciding to implement open generative AI tools, it would behoove companies to carefully assess the nature of the tasks they intend to have generative AI tools perform. If the data used to prompt the AI tool is proprietary or sensitive, it is always advisable to avoid open AI systems (and instead, use closed systems). Even if the information to be used as prompts is not terribly sensitive, if the task to be performed by the AI tool might result in leveling the playing field for competitors, then perhaps an open system is unadvisable, regardless of the lack of sensitivity of the data being input. Also, be mindful that open AI system terms and conditions are constantly changing, and what might not become part of a training dataset today could very well be added tomorrow.

Generative AI systems offer tremendous potential, but their use demands a thorough understanding of the associated risks and a strategic approach to mitigate them effectively. Our recommended approach is for high-level management – together with the business' risk mitigation, governance and legal teams – to understand those risks well, create a strategy, implement thoughtful governance programs, train the workforce to understand the risks and how to mitigate them, and enforce the rules in the workplace. With a thoughtful approach, generative AI tools can be a boon to businesses, allowing them to compete in ways they could not before the advent of these technologies.

Key Contacts

Your Morrison Cohen technology transactions team is happy to assist in this process and remains at your disposal for any questions.

Jessica L. Lipson
Partner &Co- Chair

D 212.735.8683
jlipson@morrisoncohen.com

Cesar Rodriguez
Associate (pending admission)

D 212.735.8867
crodriguez@morrisoncohen.com