# AI and M&A Transactions

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# Introductory Remarks

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In the legal industry, law firms already use AI in M&A transactions → Current usage areas of AI in the M&A context include the following:

→ Due diligence

→ Contract drafting

→ Legal research

Emerging use cases in M&A practice include:

→ Quantitative analysis of deal terms

→ Enhanced risk analysis

→ Success predictions
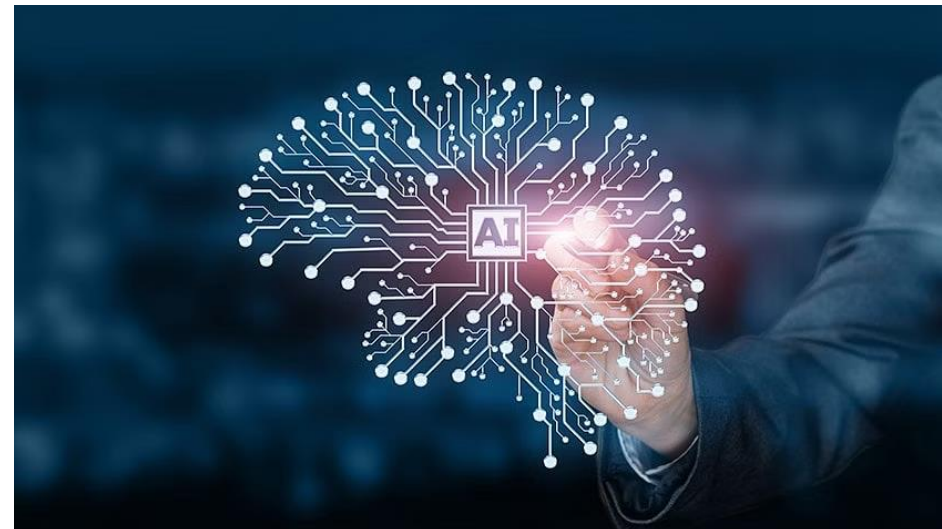
→ Post-acquisition integration

# What is AI?

# What is AI?

"It (AI) is the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable."
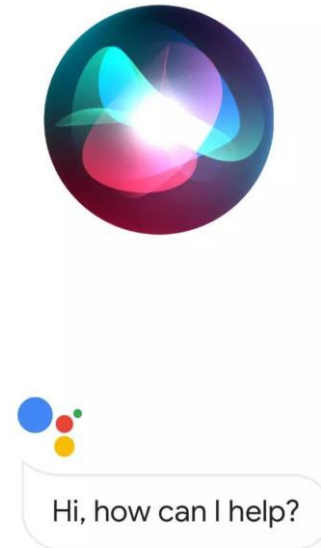
John McCarthy, 2004

# Types of Artificial Intelligence – weak AI

**Weak/narrow AI:** AI trained and focused to perform specific tasks. Weak AI drives most of the AI that surrounds us today

E.g. Siri, Alexa, autonomous vehicles

Hi, how can I help?

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# Types of Artificial Intelligence – strong AI

**Strong AI:** AI is made up of Artificial General Intelligence (AGI) and Artificial Super Intelligence (ASI)

- Artificial general intelligence (AGI) = theoretical form of AI where a machine would have an intelligence equalled to humans; it would have a self-aware consciousness that has the ability to solve problems, learn, and plan for the future

- Artificial Super Intelligence (ASI) = AI that would surpass the intelligence and ability of the human brain

**However**: Strong AI is still theoretical with no practical examples
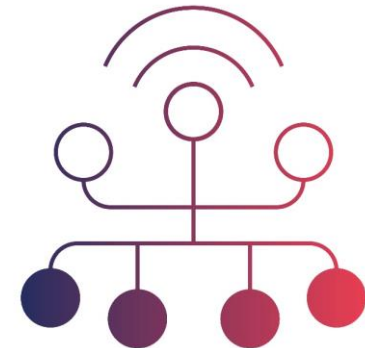
# Specific Legal Topics in Connection with AI

# Intellectual Property

– Generative ML technologies train on big data - e.g., text, audio, images, software codes and videos - scraped from the internet, frequently without permission from their copyright owners

– In many jurisdictions copyright protection can only be granted to a human being, not a machine

– Notably, human authorship is not required for copyright protection in many other countries, including U.K., Ireland, India, all of which may grant copyright protection for computer generated work, thereby requiring careful proactive legal counsel, setting the stage for forum shopping and a conflicts-of-law imbroglio

# Copyright

- Plaintiff copyright owners typically assert that AI outputs are derivative works of their contents used as training data

- However, since AI technologies ingest colossal amounts of training data, plaintiffs may struggle to identify the allegedly infringing works

- The EU's proposed AI Act indicates that the creators of generative AI technologies may need to disclose the copyrighted materials used to train their AI technologies → Such disclosure requirement may provide copyright holders an opportunity to receive portions of the work's profits

# Liability

Who bears the liability for harm caused by AI will majorly impact the commercial, use, and adoption potential for AI

The extent of liability of generative AI platform outputs are yet to be determined → Cases will likely turn the level of control, involvement and direction of the AI company and the actions and the responsibility of the users

For example:

- Supreme Court case *Twitter v. Taamneh:* Failure of the defendants (Twitter, Google and Facebook) to remove ISIS content from their platforms is not the same as intentionally providing substantial aid to ISIS under the Antiterrorism Act
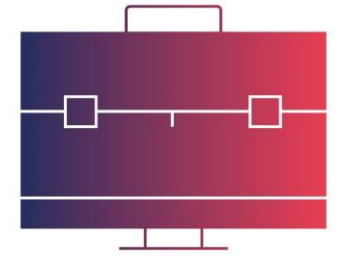
# Data Protection

– Other major AI concerns include privacy, civil rights and algorithm bias

– In the US, the currently stalled federal American Data Protection and Privacy Act (ADPPA) could provide rules on use of personal data

– The EU's proposed AI Act also covers bans on intrusive and discriminatory uses of AI, such as predictive policing systems based on profiling and biometric surveillance

– Brazil and China for example are also working on their own regulatory bills

# Focus during Due Diligence

# Due Diligence

– Analysis of target company's AI technology or products

– Employment: skills and expertise of team developing or implementing AI solutions

– How has the target company's AI has been developed, tested and deployed?

– Focus on data protection – AI systems are trained with massive amount of data

– Does target adhere to an AI governance model and other regulatory topics?

– Proper AI-specific risk allocation in Customer and Supplier contracts?

– Cybersecurity, performance and sector-specific risks

Focus when preparing Purchase Agreement

# Purchase and other Agreements
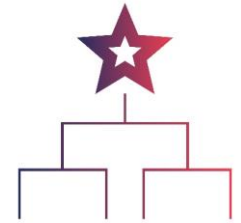
- Regulatory Scrutiny:

  - Antitrust

  - Foreign Direct Investment (FDI) Review

- Representations and warranties (R&W):

  - R&W within an agreement are intended to mitigate risks

  - for any agreements governing transactions involving artificial intelligence (AI), R&Ws should be carefully drafted following a thorough due diligence assessment of the target AI where the due diligence assessment should identify the AI technologies and the relevant legal and contractual relationships

- Assess warranty and indemnity insurance policies

# Due Diligence Checklist

# Supplemental AI Due Diligence Checklist

Contributed by H. Rubin, M. Park and K. Levi from Kramer Levin Naftalis & Frankel LLP

| Requested Item | Provided | N/A | Comments |
| --- | --- | --- | --- |
| 1. Identify any AI technology (including generative AI) used by the target company in any form or for any purpose. | | | |
| 2. A list of any AI licenses or authorizations provided to, or obtained by, the target company and the terms under which such licenses were provided to or obtained by the target company.<br>(a) For each of the licenses, describe how and for what purposes the AI is used, whether (i) internally or (ii) to generate outputs which are provided to or used by clients or other recipients. | | | |

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| Requested Item | Provided | N/A | Comments |
|---|---|---|---|
| 3. Describe the nature of the ownership (e.g., intellectual property) or identify the owner of the AI technology, inputs and outputs provided to the target company by a third-party provider.<br>(a) Identify any contractual terms governing the ownership of the AI technology (if any), inputs or outputs. | | | |
| 4. Describe the nature of the ownership and/or identify the owner of the AI outputs provided to clients or other recipients by the target company. | | | |
| 5. Copies of the target company or AI provider's contracts, agreements and terms and conditions regarding the ownership of the information inputted into the AI technology by the target company's clients/users and the content generated by the AI technology in response to those inputs. | | | |

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| Requested Item | Provided | N/A | Comments |
|---|---|---|---|
| 6. Identify any AI technology that the target company develops, such as machine learning, deep learning or any others that may reasonably be considered as AI technology. (b) List and describe how each of these AI technology types work. | | | |
| 7. Describe any type of data/information (content) used by the target company to train AI technology (i.e., training data). (a) A list of the sources of the training data | | | |
| 8. A list of any licenses obtained from owners of the training data used by the target company to train AI technology. | | | |
| 9. Describe how the target company obtains the training data, whether through lawful web scraping or otherwise. (a) Copies of any applicable web terms and conditions that are reviewed to ensure compliance. | | | |

| Requested Item | Provided | N/A | Comments |
|---|---|---|---|
| 10. Copies of, and information on, any legal claims, suits, judgements, threats, fines or penalties against the target company for the unauthorized use of training data, violation of applicable laws, judgements or legal claims or suits arising from or relating to the company's use of AI. | | | |
| 11. A list of any laws, rules, regulations and judicial decisions that apply to the target company's collection, use and processing of training data.<br>(a) Describe how the target company ensures compliance with said laws, rules and regulations. | | | |
| 12. Describe any known instances of past or ongoing unauthorized use of or access to the target company's AI. | | | |

| Requested Item | Provided | N/A | Comments |
|---|---|---|---|
| 13. Describe any known or suspected violations of applicable laws and regulations by the use of the company's AI. | | | |
| 14. Describe the material performance of the target company's AI as compared to its specifications and intended purpose.<br>(a) Identify any material errors, defects, failures, or interruptions in the AI. | | | |
| 15. A list of any commercially reasonable and industry conforming security safeguards and controls used by the target company, including proper access controls for the AI. | | | |

| Requested Item | Provided | N/A | Comments |
|---|---|---|---|
| 16. Copies of any commercially reasonable insurance coverage held by the target company for claims or losses pertaining to AI. | | | |
| 17. Describe and provide evidence of any steps taken by the target company to detect and remediate algorithm biases. | | | |

# Conclusions

# Conclusions

1. AI is the new workstream in M&A transactions

2. Understand the target's technology – otherwise no risk assessment and mitigation is possible

3. IP transactional lawyers play just as an an important role as M&A lawyers – translating and explaning technology and the related risks

4. More conversations with clients, management teams, R&D experts and sector specialists during the entire M&A process will be necessary

# Thank you for your attention! Questions?



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