
ChatGPT: the future of legal assistance? An interview with Patrick Fair

Sharon Givoni GENERAL EDITOR, *LEXISNEXIS INTERNET LAW BULLETIN*

Patrick Fair, the principal of Patrick Fair Associates, has expressed his views on the potential impact of ChatGPT on the legal profession. In an interview with Sharon Givoni, our General Editor, Patrick discussed the potential benefits and drawbacks of artificial intelligence (AI) technology and its evolving nature. He also highlighted two of the main challenges that ChatGPT could present: copyright and legal liability.

Patrick has a wealth of experience in the internet industry and has been involved in the policy and public implications of the internet for over 25 years. He has also lobbied regulators and liaised with industry stakeholders, giving him unique insight into the potential impact of ChatGPT on the day-to-day operations of legal practice.

While there seems to be general consensus that AI and ChatGPT will not replace lawyers completely, it can certainly be used to assist us in our work. By analyzing large volumes of legal documents and getting relevant information quickly, lawyers can save time and focus on more nuanced legal work.

However, there are obvious concerns about the potential drawbacks of AI technology in our profession, such as the accuracy and reliability of the information, and the fact that we are seeing that ChatGPT may not provide accurate or reliable legal advice — not to mention liability issues associated with the use of AI in the legal profession.

In this interview, we will delve deeper into the issues and challenges around ChatGPT, as well as the broader legal implications that the legal profession needs to address.

Can you explain what ChatGPT is and how it is being used in the legal profession?

The letters GPT in ChatGPT stand for Generative Pre-trained Transformer. This phrase describes a type of AI technology that uses layers of related and connected data points to mimic the neural network in the human brain.

Generative refers to the ability of the model to learn underlying patterns, structure of a dataset and create new examples that are similar in style or content to the

original dataset. Pre-trained refers to training the model on a large data set where it extracts useful features and representation of the data. A transformer is a type of AI particularly good for processing sequential data like text or speak and capturing dependencies and context. A good shorthand description of ChatGPT is “autocomplete on steroids”.

Speaking for myself, I am finding it useful for producing a first draft of clauses and documents, and answering general research questions as a fall back or a reference point that sometimes suggests different angles that should be looked into. It is not a reliable research tool.

It is also good for producing summaries and lists that can speed-up legal work. ChatGPT can suggest ways of improving writing and correcting text but so far, the volume limit prevents it from being an effective tool for review of larger documents.

It is useful for the speed with which it produces an answer. For example, if you are on a call or in a meeting and someone mentions a technology or a concept with which you are not familiar, by far the most effective way to get a quick explanation in real time is to ask ChatGPT.

What are some of the main challenges and issues associated with using ChatGPT in legal practice?

The main challenge is that it is often wrong. Sometimes, it is surprisingly accurate when you ask for precise information. Other times it “hallucinates” based on material that it has been trained on, producing an answer which is confidently presented but factually incorrect.

For profile precise facts and information like case names and references, it can be easy to establish whether or not the answer provided is true. However, it is particularly risky to rely on ChatGPT for general assessments or overviews if you do not already have a broad understanding of the topic and the context.

The terms and conditions for use of ChatGPT disclaim all legal liability including accuracy and non-infringement. Accordingly, if you elect to use text generated by ChatGPT you do so at your own risk and

you cannot be sure that it has not produced at least what appears to be a key section of a third-party work giving rise to a potential copyright claim.

As with any online third-party tool, lawyers need to be careful not to provide with confidential client information in the course of questioning or use.

How does ChatGPT affect the day-to-day operations of legal practice?

ChatGPT can do many of the tasks that a junior lawyer would do. It can prepare short contractual documents of a reasonable standard if you give it a sufficiently descriptive prompt or prompts. It can prepare a first draft clause. It can suggest issues that might be included in a contract or addressed in an advice.

Broadly, the impact is to speed up the development of legal work while introducing the need to review and check carefully in a way that you might not if you had a trusted associate preparing the material. In my experience, using ChatGPT as part of your workflow to suggest topics, issues and potential answers to a question can be a helpful addition that results in better work product. It can also be useful in helping to prepare internal and client communications.

What are the implications of ChatGPT for the legal profession in Australia?

The main implication seems to be that it will raise the standard of care and result in a general improvement in work quality. ChatGPT makes it easier to obtain a competent first draft and or a baseline list of issues for consideration/management. In due course, it will be able to assist with review and correction of work product. A law firm that is incorporating ChatGPT into its workflow should be faster and more likely to produce an excellent work product than a law firm that does not make use of it.

Perhaps at some time in the future, it will put lawyers out of business. However, at this stage, the main impact will be to help lawyers do their work more effectively and efficiently.

How does the Copyright Act 1968 (Cth) deal with machine-generated written works?

Australian copyright law requires that copyright works have a human author. This is not stated in the Copyright Act but is implied by ss 33, 34 and 129 of the Copyright Act (see Kean CJ, Perram and Yates JJ in *Telstra Corp Ltd v Phone Directories Co Pty Ltd*).¹

The concept of an “author” is central to determining who owns the copyright in a particular work and also because protection automatically arises upon the creation of an original work, and the owner of that

copyright is typically the author of the work, subject to certain exceptions such as works created in the course of employment or commissioned works. It has always been taken as given that a work created during the course of employment and/or commissioned will have a human author.

A work will only have a human author if a human expends intellectual effort creating the relevant work. This might involve having the idea for the work and exercising control over its execution.

Accordingly, for subject matter that is a “work” under the Copyright Act, the test is whether the work was generated by the machine or whether the intellectual effort expended by the person using the machine was sufficient to make them the author. This can give rise to some challenging questions.

What sort of problems arise when most of the intellectual effort is expended by AI?

If, for example, ChatGPT had a “surprise me” button (as do some of the visual generative tools), a work created by pressing that button probably does not have any copyright subsisting because there is no human author. On the other hand, if the AI creates a complicated and sophisticated report in response to a relatively short question, there could be a dispute as to whether or not the author of the question expended sufficient intellectual effort to claim copyright in the resulting output where the machine could not have done it on its own.

Interestingly, copyright in subject matter other than works does not require a human author. This means that someone could broadcast or make a sound recording or a film comprising wholly or in part machine-generated content with no author, and copyright would still subsist in the producer of the film and/or the maker of the broadcast or sound recording.

So that means written works that are totally machine-generated can be owned by humans?

In a way, subject matter that are works (literary, dramatic, musical and artistic works) that are totally machine-generated may well have no copyright protection — but if they form part of a cinematograph film, a broadcast or a sound recording, the owner of the film, broadcast or sound recording will own copyright in the usual way.

What suggestions do you have for lawyers using ChatGPT, especially when it comes to giving prompts?

ChatGPT is particularly good at writing text if you tell it who the audience is, how long you would like it to be and what level of sophistication the audience is

expected to have in relation to the subject. The more you tell it, the more likely it will produce something which satisfies your requirements.

On the other hand, do not accept any information that it provides to you in response to a legal or other factual question without checking original source material. It will make up case names, the content of statutory provisions and even judges' opinions.

I have had cases where it has provided a concise summary of the right answer quickly and other cases where the answer provided was pure fiction. For example, it was able to identify the statutory provisions that gives the Australian Criminal Intelligence Commission powers to access the meta-data collected from your use of a mobile phone. However, when asked if there is a case regarding whether a search warrant served outside the jurisdiction would be enforceable under Australian domestic law, it made up a case name, case reference and a summary.

It is also useful for directing you to a section of an Act that you know exists but cannot quite remember. I have found it useful when starting a matter to ask it what issues should be considered in addressing a broadly described problem or transaction. I have also found it useful at suggesting a summary of processes and procedures in a new subject area as a starting point.

Can ChatGPT assist with legal reviews or legal implications of a practice or process, especially with new matters?

Yes, see my previous answer.

What checks and balances will need to be in place when lawyers are using ChatGPT?

It is important for lawyers using ChatGPT to maintain within a legal practice complete transparency regarding how it has been used and the extent to which any output that is proposed to form part of work product that might be published or given to a third party contains content produced by ChatGPT. A record should be kept of how it has been checked and verified.

On legal issues and where [ChatGPT] provides an overview or summary of a position or topic, it will be important for supervising partners to know when they are looking at material that is being produced by ChatGPT to ensure that any output included in an advice or document to be released to the client has been carefully checked and attributed.

There is a particular risk of lawyers going outside their area of expertise by using ChatGPT to assist them with matters not in their area of general practise. At the moment, the technology is not sufficiently accurate and dependable to safely guide a novice through a complicated new legal topic or process.

What does it mean when people say that ChatGPT is "hallucinating", and to what extent do lawyers need to check the information?

As mentioned above, a generative pre-trained transformer is only a sophisticated tool for generating new content based on what it has already seen. It does not have a model of the world. It does not know what is true or false except the extent that the provider may have put "guardrails" around what it can do or say.

The term "hallucinating" is used to describe false output generated using this methodology. From a computer science point of view, the output is perfectly fine as a rational prediction of an answer based on the information in which the machine has been trained. However, for a human who knows what is true and false, the output is wrong. The term hallucinating seems to attempt to bridge these two positions by giving some credit to the machine for doing what it is told.

Are there any other implications of ChatGPT for lawyers that have not been covered yet in the above questions that you can talk about?

As far as I know, it has not yet been made available by open AI, but one of the business models for use of tools like ChatGPT is to make them available as a platform to each business and have them trained on the information resource of the relevant business. Consider, for example, that a law firm could use ChatGPT trained on its library of advices, transactions and precedents to produce advices and documents that are consistent with previous advice given and tailored to the firm's unique character.

Will there always be a need to have a real lawyer to have input in matters and drafting, or will ChatGPT take over?

At this stage, lawyers are required. ChatGPT needs someone to ask the right questions and review output with the benefit of legal training, general legal knowledge and experience. ChatGPT cannot interact/negotiate with counterparties, government and/or the courts. Humans also have an advantage when providing advice because we know how to consider the needs and circumstances of the client. That said, it seems quite likely that AI technologies could be trained to do more than is currently possible. If the AI is trained in the right tools and given the right guardrails, it seems quite conceivable that it might efficiently provide legal advice much more efficiently than a lawyer might.

What will be the lawyer's role in the era of ChatGPT, and how might it change?

If we take the technology as it stands today, the lawyer's role will change because we will be spending more time making sure that we have asked the right questions and reviewing and checking the information received.

Our general legal research requirements might be expedited and replaced with a more targeted checking and review process in order to ensure that the information provided by the AI is accurate and usable. ChatGPT output is not currently ready to use.

As the technology develops, I think our role will become more about design and support of the AI system, supervision of its output and management of client relationships. I think it will be some time before AI systems can interact with each other and administer legal work including such tasks as marketing, explaining fees, maintaining systems and paying costs as well as improving systems to adjust to changes in the law.

Can ChatGPT be used to analyse documents that lawyers draft, and to what extent can it be relied upon to review whether a legal contract has the right clauses in it?

I have not been successful in using ChatGPT for this kind of work. The interface does not accept more than a relatively short document. It can improve drafting and produce a workable summary of information which is presented but I have concluded that it is not capable of producing even a first draft of a legal analysis of an average sized contract at this stage.

How does ChatGPT impact copyright law, specifically as it is being trained on other people's material?

There are at least three legal actions underway in the US arising from the owners of copyright works asserting that the use of their work to train generative AI was not authorised and constituted an infringement of their copyright. The question of whether or not the use of the copyright work for training was authorised may be answered differently in the US than it would be in Australia, because US copyright has an exception for "fair use" which encompasses transformative uses which do not damage the commercial interests of the owner. Australian law only has specific fair dealing exceptions which do not allow reproduction of works for the purpose of training AI without the permission of the copyright owner. It may be that analysing an image using generative AI in order to help develop the software engine is permitted under US law.

The cases also raise a different question of interest. If the AI produces output that looks substantially the same

as information on which it was trained, is the output infringing of the original work? This is an interesting question because (at least on one view) the original work is not stored in the AI. Instead, the AI uses the original work to extract information about elements and relationships. When the AI produces output, it makes a new work using its trained systems. Accordingly, the owner of the AI might argue that the new work has been made from scratch. Seeing the original work was not copied, the new work should be regarded as not infringing even if it looks the same.

Is this question being tested in the courts?

One of the actions taking place in the US involves software programmers suing GitHub for allowing their work to be used to train an AI engine. I understand that the claimants will rely in part on the fact that the trained AI is producing code which is identical to some of the code on which it was trained. It may be that the code produced by the AI is simply the most logical solution and has been developed by the AI independently based on its training. The owners of the AI will argue that the machine did not copy the original work and therefore could not reproduce it.

What happens if ChatGPT produces work that is not original, and others use it but do not own it?

See my answer to the question above. It may be that the output of ChatGPT is not an infringing copy even of an identical work on which it was trained. However, I doubt whether the copyright owner in the original work will feel that way. Accordingly, if you use output from ChatGPT and that output appears to be an infringing copy of a third-party work, the owner of the third-party work may draw you into an interesting test case.

What sort of liability do lawyers need to be wary of when it comes to using ChatGPT, particularly partners supervising younger lawyers who may not realise its dangers?

As you know, the lawyer with the unrestricted practising certificate (and their partners) is responsible for legal work issued under their name no matter how the work is generated. In the case of an incorporated legal practice, the managing solicitor has responsibility for legal advice produced by the incorporated legal practice no matter how that advice might be generated. Accordingly, the main risk exposures are those already mentioned: that the advice may be factually wrong, or a summary/view generated by the AI may be inaccurate and the lawyer does not know to check, does not see how it could be wrong, or misses it due to time or other pressures.

In this context, the views of Lawcover and other practice insurers will be worth exploring.

In your experience, and overall, what are some positive and negative aspects of using ChatGPT in legal practice?

Benefits

A rapid start — quick backgrounding in a new area; short first draft letters and short documents; and, supporting research as a sanity and/or completeness check provided you also find and verify the sources, lists of issues and checklists. It is also good for refining English and expression. Overall, the benefit is the potential to increase the speed, quality and completeness of legal output.

Costs

Going down a rabbit hole on an issue that has been hallucinated; risk that checking was wrong, incomplete or not actually done; reliance on ChatGPT risking credibility, brand and client relationships; the terms on which ChatGPT is made available include no warranties and an indemnity to OpenAI for costs/risk associated with your use of output; and, the challenge of giving new lawyers the skills they need to be great lawyers when many tasks that help with learning are automated.

Will ChatGPT make lawyers obsolete?

AI scientists talk about ChatGPT as the beginning of a major transformation in information-based work practices. Some argue that the technology will not be truly useful until it also maintains a model of the world it can use to test its answers against authoritative knowledge. It has already been announced that WolframAlpha is implementing ChatGPT as a natural language interface for its amazing technical computing platform. Jade is testing Jasmine which enables a search of the Jade cases and statutes with a natural language query.

With this in mind, it seems conceivable that in the not too distant future, a version of ChatGPT will be capable of analysing the input from a client, asking questions, isolating issues and providing advice in just the same way that a lawyer can. It is also conceivable that such a machine would be capable of communicating with third parties and interface with clients in a way that will eliminate the need for a personal lawyer.

If humans have a cause for hope, it is that the General Data Protection Regulation² provides the right to not be subject to a decision based solely on automated process-

ing that significantly affects oneself. Also, the EU's proposed AI Act sets out a carefully considered framework aimed at protecting the community from potentially harmful applications of the technology. The current privacy review discussion paper also contains proposed rules regarding the use of automated systems. It is also hard to imagine how a machine delivering legal advice could operate without a human taking responsibility, working on improvements, and updating it to take account of new information and new technologies.



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General Editor's comment

As Patrick Fair has noted in his interview, there are concerns about the accuracy and reliability of the information generated by ChatGPT, as well as potential liability issues associated with relying on AI technology to provide legal advice. These issues raise questions around the ethical and professional responsibilities of lawyers in using AI technology in their practice.

In addition, the use of AI technology in the legal profession also raises broader societal questions about the role of technology in the justice system, and whether the use of AI in decision-making could potentially undermine human rights and freedoms.

Overall, while the use of ChatGPT in the legal profession has the potential to bring benefits, there are still many questions that need to be answered and challenges that need to be addressed before the technology can be widely adopted by lawyers. I am sure that this will be the subject of many articles and thought pieces to come in this Bulletin.

Footnotes

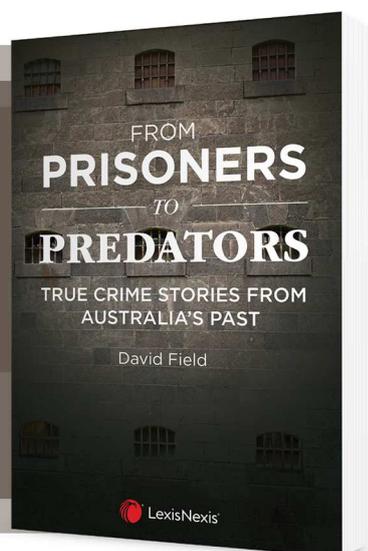
1. *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142; 273 ALR 725; [2010] FCAFC 149; BC201009581 at [134].
2. "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)" (2016) *OJ L* 119/1 recital 71 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&qid=1689901535434>.

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