IN-DEPTH

Artificial Intelligence Law

JAPAN

LEXOLOGY

Artificial Intelligence Law

EDITION 2

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In Depth: Artificial Intelligence Law is a perceptive global overview of the fast-evolving state of law and practice surrounding artificial intelligence (AI) systems and applications. Focusing on recent developments and their practical implications, it examines key issues including legislative initiatives, government policy, AI risk management principles and standards, enforcement actions and much more.

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Japan

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Summary

Introduction

The artificial intelligence (AI) industry in Japan is experiencing robust growth. In 2023, the market size for AI systems in Japan reached 685.87 billion yen, marking a 34.5 per cent increase from the previous year. This growth is expected to continue, with projections estimating that the market will expand to more than 2.5 trillion yen by 2028.[1]

Driving this expansion is the proactive involvement of the Japanese government, which is committed to advancing AI development and utilisation. Members of Japan's ruling Liberal Democratic Party have published the AI White Paper 2024, aiming to make Japan 'the world's most AI-friendly country'.[2] Newly appointed Prime Minister Ishiba, who took office in October 2024, has also affirmed his commitment to maintaining this policy direction. As part of its national strategy, Japan is actively investing funds to strengthen AI development capabilities and has been implementing policies to promote the use of AI in a flexible and swift manner.

Japan is increasingly recognised as an important player in the global AI landscape. Major international AI companies have been advancing their AI development efforts in Japan. For instance, OpenAI opened its first office in Asia in Tokyo in April 2024. CEOs of major foreign tech companies, including Meta and OpenAI, visited Japan and held meetings with then-Prime Minister Kishida. A prominent researcher formerly with Google is also making moves to establish a start-up called Sakana AI in Japan. This trend is driven by several factors: the country's proactive approach to AI utilisation, a generally positive public response to AI, relatively lower labour costs compared to other G7 countries and the high potential for AI adoption in Japan's major businesses.[3]

Japan has historically taken a rather lenient stance on AI regulation, aiming to harness the technology's positive impact on society without stifling innovation with excessive rules. Currently, there is no comprehensive AI-specific regulation. Japan relies on existing laws to regulate AI technologies. Japan's government has adopted an 'agile governance' approach, providing non-binding guidance and deferring to the private sector's voluntary efforts to self-regulate in response to the rapid advancements in AI technologies.[4] Under this policy, several guidelines have been published by relevant ministries and agencies to address legal issues. The most important of these, published in 2024, are the AI Guidelines for Business Ver1.0,[5] and the General Understanding on AI and Copyright in Japan,[6] which will be discussed in detail below.

There are recent signs of a shift in the Japanese government's approach to AI regulation. The AI Strategy Council determines AI policies for various Japanese government ministries. In August 2024, the AI Strategy Council established the AI Legal Framework Study Group to begin discussions on the necessity of comprehensive AI-specific legislation, raising the possibility of a new law specifically regulating AI. It will be important to closely monitor anticipated changes in the AI regulatory framework in Japan.

Year in review

Technology

The emergence of Japanese large language models (LLMs) is a noteworthy technological development in Japan in 2024. The Japanese government has been actively contemplating support measures for the development of Japanese LLMs. For instance, the National Institute of Information and Communications Technology (NICT) announced the creation of a large-scale generative language model with 40 billion parameters, using a high-quality, proprietary Japanese web text dataset of 350 GB with minimal noise.[7] According to the announcement, the NICT's LLM has not yet undergone fine-tuning or reinforcement learning, and while its performance is not on par with models like ChatGPT, it has reached a level capable of handling interactions in Japanese. Moving forwards, the NICT plans to further expand the scale of its training texts, focusing primarily on Japanese. As of May 2024, the NICT is continuing its development efforts, working on multiple types of LLMs, including one with up to 311 billion parameters, to study the impact of different parameters and training data on performance. Additionally, other developments are underway, such as CyberAgent's Japanese LLM 'CyberAgent LLM' and NTT's Japanese LLM 'tsuzumi'.

Developments in policy and legislation

There is currently no comprehensive Japanese legislation governing AI. In 2024, the government released several key guidelines related to AI. Among the most significant are the AI Guidelines for Business Ver1.0 and the General Understanding on AI and Copyright in Japan.

AI Business Guidelines

In April 2024, the Ministry of Economy, Trade and Industry (METI) and the Ministry of Internal Affairs and Communications (MIC) released the AI Guidelines for Business Ver1.0 (AI Business Guidelines). Up to this point, each ministry and agency had issued its own guidelines on AI governance.[8] The AI Business Guidelines were published in an effort to integrate and update the existing guidelines, and to present them as comprehensive guidelines for a wide range of AI businesses.

The AI Business Guidelines are primarily designed to help businesses using AI in their operations to correctly understand the associated risks and to support their voluntary efforts; however, these AI Business Guidelines do not have any legal enforcement power.

The AI Business Guidelines categorise AI businesses into three groups: AI developers, AI providers and AI users. These three outline approaches that each type of AI business should adopt. However, some of the points that AI businesses need to address are somewhat abstract. For example, AI developers are advised to handle personal information and intellectual property included in training data in accordance with legal requirements, and to be mindful of potential biases in the training data and model training process.

Even though the AI Business Guidelines are not legally binding and no sanctions or penalties can be imposed based on them, they serve as a valuable reference for businesses when considering the risks associated with developing AI models and providing and using AI systems, as well as the potential measures to address those risks.

New AI regulation initiatives

There are recent signs of a shift in the Japanese government's approach to AI regulation. The AI Legal Framework Study Group has begun discussions regarding the necessity of comprehensive AI-specific legislation. It will be important to closely monitor the development of the AI regulatory framework in Japan.

Other AI initiatives

In February 2024, the Japanese government established the AI Safety Institute, an organisation dedicated to investigating, setting standards and developing implementation methods for AI safety standards. As of now, the AI Safety Institute has not issued any specific guidance.

In October 2024, the Japan Fair Trade Commission (JFTC) announced the launch of a domestic market survey on generative AI. The JFTC released a discussion paper, Generative AI and Competition, as part of this survey and called for feedback from a wide range of stakeholders, including IT businesses and AI users. The JFTC will analyse the survey results and, if necessary, provide guidance on antitrust laws and competition policy.

As discussed above, 2024 saw significant developments in AI-related policy and legislation. In 2025, it will be particularly important to monitor the progress of comprehensive AI regulations, as well as policy developments in areas such as intellectual property, cybersecurity and competition law.

Cases

DABUS patent application case

One of the notable cases related to AI that garnered attention in 2024 is the DABUS patent application case. On 16 May 2024, the Tokyo District Court ruled that the term 'inventor' as defined by the Patent Act is limited to natural persons and does not include AI. In this case, the plaintiff had filed an international patent application under the Patent Cooperation Treaty for an invention related to a 'food container and a device and method for alerting and attracting attention'. The application listed 'DABUS, an artificial intelligence that autonomously invented this invention' as the inventor in the domestic application documents. The Japan Patent Office rejected this application, prompting the plaintiff to file a lawsuit seeking to overturn the Japan Patent Office's decision. The Tokyo District Court held that intellectual property law defines an invention as something created through human creative activity, indicating that AI inventions were not anticipated. Additionally, the wording of the Patent Act presupposes that an inventor is a natural person. Therefore, the court concluded that AI itself cannot be considered an inventor.

Legislative and regulatory framework

Overview

Although the adoption of a new law is under consideration, Japan does not currently have any law that specifically and comprehensively regulates AI. The development and use of AI in Japan are now governed by a variety of existing laws. As part of the soft-law approach to AI that it has taken to date, the Japanese government has issued a number of non-binding documents to guide AI development and use.

There are two key principles and strategies that guide the government's approach to AI policy, AI Strategy 2022[9] and Social Principles of Human-Centric AI,[10] both of which outline the government's fundamental strategy and principles concerning AI. To guide companies' efforts to address the risks associated with AI, various ministries within the Japanese government have also published non-binding guidelines. As mentioned above, in April 2024, METI and MIC released the AI Business Guidelines (see section 'AI Business Guidelines', above).

In the context of sector-specific laws in Japan, there is no direct prohibition on the use of AI. However, certain existing laws require businesses to adopt measures for transparency and fairness, which can relate to the use of AI. For example, the Act on Improving Transparency and Fairness of Digital Platforms mandates that large online marketplaces, app stores and digital advertising companies designated by METI implement transparency measures, such as disclosing key factors that determine search rankings.[11]

Although they do not directly target AI systems, certain existing laws are relevant to the development and use of AI models and systems. For example, the development and implementation of AI models and systems may raise concern under Japan's intellectual property laws and the Act on the Protection of Personal Information (APPI).

Possible enactment of new AI regulations

As mentioned, the AI Legal Framework Study Group began discussions in 2024 regarding the necessity of comprehensive AI-specific legislation, raising the possibility of the enactment of a new law specifically regulating AI.

Managing AI risks and impacts

Intellectual property

Overview

Japan has been actively promoting the development and utilisation of new technology, such as AI, as part of its national strategy. Consequently, intellectual property-related policies have been revised to accommodate the flexible use of these emerging technologies. Although Japan does not recognise a concept of 'fair use,' the Copyright Act provides exceptions that permit specific type use of copyrighted works.

In 2018, the Copyright Act was amended to foster innovation using such emerging technologies. These amendments include the introduction of flexible exceptions, notably Article 30-4, which grants broad rights to use copyrighted materials for information

analysis, including the training of AI models. Professor Tatsuhiro Ueno, a prominent professor in copyright law, has analysed this provision and stated that it makes Japan a 'paradise for machine learning'.[12]

The rise of generative AI, however, has brought new challenges to the forefront, especially concerning the intersection of AI and intellectual property rights. The ability of AI to produce works nearly indistinguishable from those created by humans has raised concerns, particularly among creators, about potential copyright infringements during the AI learning and creation processes.

In response to this, the Cultural Council, established within the Agency for Cultural Affairs in 2024, has released the document General Understanding on AI and Copyright (the General Understanding).[13] While this document is not legally biding, it consolidates the discussions held within the Agency regarding key issues related to AI and copyright, such as copyright infringement during AI development and the use of AI-generated content. In the following sections, we will outline the key issues discussed in the document.

Copyrightability of AI-generated material

According to the Copyright Act, a (copyrighted) 'work' is defined as a 'creatively produced expression of thoughts or sentiments that falls within the literary, academic, artistic, or musical domain'. Materials autonomously generated by AI are not creatively produced expressions of thoughts or sentiments and therefore are not protected as copyrighted works. However, if a natural person utilises AI as a 'tool' with the intention of expressing thoughts and emotions in a work and makes a creative contribution, the resulting work can be deemed a copyrightable work created by the person who utilised AI. In cases of this kind, the individual with 'creative intention' and 'creative contribution' is considered the author.

For example, merely prompting AI typically does not result in copyrightable work. The General Understanding provides a few examples of factors in determining the copyrightability of AI-generated material:

1. amount of instructions and input;
2. number of generation attempts; and
3. selection from multiple output materials.

In addition, the General Understanding states that any additions or modifications made by humans to AI-generated materials that can be considered creative expression are generally considered to be copyrighted works.

AI training and copyright infringement – non-enjoyment exception

In Japan, there is no general exception permitting use of copyrighted works in the manner of the fair use doctrine in the United States. Instead, the Copyright Act contains specific exceptions that permit certain types of uses, such as the 'non-enjoyment use' exception and the 'minor use' exception discussed below. The non-enjoyment use exception was introduced in a recent amendment of the Copyright Act in 2018. This exception, stipulated

in Article 30-4, is broad and typically applicable to AI model training, making the Copyright Act of Japan one of the more flexible copyright laws in the world.

Article 30-4 permits the use of a copyrighted work without the copyright holder's consent when:

1. the purpose of use is not to enjoy the thoughts or emotions expressed in the work, such as in the case of information analysis;
2. the use does not unjustly harm the interests of the copyright holder; and
3. the use is within the limits deemed necessary.

Using copyrighted material for training AI models usually falls within the information analysis element of the non-enjoyment exception, as it does not aim to involve enjoyment of the thoughts or emotions expressed in the work, which means that the work may be used without the permission of the copyright holder to the extent considered necessary.

The General Understanding states that whether an act falls under the act of 'enjoying' the 'thoughts or emotions' expressed in a work as stipulated in Article 30-4 is determined from the perspective of whether it is an act aimed at satisfying the intellectual or spiritual desires of viewers through viewing the work, based on the legislative purpose of the article and the general meaning of 'enjoyment'. In making such determination, not only the claims about the actor's subjectivity but also the manner of use, the circumstances leading to the use, and other objective and external circumstances are comprehensively considered. For example, AI learning with the specific intent of producing outputs that directly reflect the creative expressions of certain copyrighted works contained in the AI training data, known as 'over-fitting', is considered to have an enjoyment purpose, and therefore Article 30-4 does not apply.

The General Understanding also clearly provides that if the use of a work has multiple purposes, and if the purpose of 'enjoyment' is included alongside the non-enjoyment purpose, then the Article 30-4 exception does not apply.

As noted, another element of the Article 30-4 exception is that the use does not 'unjustly harm' the interests of the copyright holder. The General Understanding suggests that when considering whether this element applies, the court needs to assess whether the use will 'compete in the market with the copyrighted work' and 'impede the potential sales channels of the copyrighted work in the future'. This assessment should take various factors into account, such as 'technological advancements' and 'changes in the way the copyrighted work is used'.

The General Understanding clearly states that the mere fact that a copyright holder has expressed opposition to a certain use of its work does not mean that the use unjustly harms the copyright holder's interests. However, there will be unjust harm where there is uncompensated reproduction of a database of copyrighted works that contains data in a format that can be used for information analysis and is available on the internet for a fee. The General Understanding mentions the situation where technical measures have been taken to prevent the reproduction of copyrighted works used for AI training, and it can be inferred from such measures and past records that a database of copyrighted works, including data within a website, organised for use in information analysis, is intended to be offered for compensation. In that situation, the act of bypassing protective measures

and collecting a large amount of data posted on the website by a crawler for the purpose of AI training can be considered to be an act that inhibits potential sales channels for the copyrighted works in the database. Thus, the copyright holder's interests would be unjustly harmed and the Article 30-4 exception would not apply.

Minor use exception

Article 47-5 of the Copyright Act provides another exception that may apply to certain types of AI use of copyrighted works. This Article permits minor uses of copyrighted works that are incidental to the provision of results from computerised analysis of information. For example, this includes the identification or location of specific information through searches and the provision of those search results, as well as the analysis of information and the provision of those analysis results. However, the scope of the exception is limited to 'minor uses' that are determined in light of 'the proportion of the part of the work that is used, the amount of the part that is used, the accuracy of the display when it is used, and other factors'. Additionally, this exception does not apply if the use unjustly harms the interests of the copyright holder.

Copyright infringement by AI-generated works

The Copyright Act establishes legal protection for creative works. In the field of AI, questions often arise concerning uses of AI-generated content that could potentially amount to copyright infringement.

Under Japanese law, a new work will infringe the copyright of an existing work if there are no applicable exceptions under the Copyright Act, and the existing work and the new work share both:

1. similarity – creative expressions are identical or similar; and
2. dependence – the new work was created based on the existing work.

For this purpose, the 'similarity' between AI-generated works and works created by humans without using AI are determined in the same manner. Therefore, there must be a determination of whether the essential expressive features of the existing copyrighted work can be perceived in the new work.

There are ongoing discussions about 'dependence' in connection with AI-generated material, and there is no established view yet. However, the General Understanding provides opinions when:

1. it is unknown whether the existing copyrighted work is used for AI training: if it is uncertain whether a particular copyrighted work is used in the AI training data, dependency will be presumed if the copyright holder can prove that 'the AI user had access to the existing copyrighted work' or 'the AI-generated material has a high degree of similarity with the copyrighted work.' This means that it is possible for the copyright holder to establish dependency even though it is unknown whether the AI has used the copyrighted work during AI training; and
2.

> the copyright holder can prove that the existing copyrighted work is used for AI training: it is generally assumed that there was dependency on a preexisting copyrighted work if the work was used for AI training during the development stage of that AI, even if the user of the AI was not aware of such use.

If AI-generated content meets the criteria for similarity with and dependence on existing copyrighted works, then such content could be deemed to infringe copyrights. This may lead to claims for damages, injunctions and, in exceptional cases, even the possibility of criminal liability.

Risk mitigation

It is often the case that copyright infringement is not recognised when copyrighted material is used for training AI models due to the non-enjoyment exception or minor use exception. However, the non-enjoyment exception under Article 30-4 does not always apply to all types of machine learning. It is essential to thoroughly examine whether the use:

1. is not deemed to have an enjoyment purpose;
2. does not unjustly harm the interests of the copyright holder; and
3. is within the necessary limits.

When using works created by AI, it is important to be aware of the risks of copyright infringement. Among the requirements for copyright infringement, similarity is judged in the same manner as for works not using AI. Although the interpretation of dependence with regard to AI is not yet firmly established by judicial precedents, if the existing work was used for training the applicable AI, there is a possibility that dependence may be presumed regardless of the AI user's awareness.

According to the General Understanding, in principle, AI users are liable for copyright infringement related to AI-generated materials. However, the General Understanding also states that developers of generative AI and businesses providing services using generative AI could be liable in certain cases. For example, if an AI service provider is aware of a high probability that the generative AI will produce infringing works, failing to take steps to prevent such infringement could increase the likelihood of liability for the service provider. To mitigate the risk of being accused of copyright infringement of another's work, it is necessary to avoid using content that clearly resembles existing works and to maintain records of the production process to demonstrate independence from others' copyrighted materials. Businesses should consider implementing measures to prevent generative AI from producing copyright-infringing materials. For example, if a business becomes aware that the AI it develops or uses tends to frequently produce materials that infringe on copyright laws, it should take steps to avoid such infringements.

Additionally, when using AI to create content, the criteria for protecting AI-generated content as copyrighted works are not yet well defined. To ensure protection as copyrighted works, it is advisable to maintain records of the production process.

Data protection

One of the critical legal concerns surrounding AI pertains to data protection. In the development and use of AI models and systems, if any data collected and used by a business comprises personal information, the business is required to handle that information in accordance with the APPI.[14] The primary areas of concern related to AI and data protection can be summarised as follows.

Purpose of use regulation

Under the APPI, the following purpose of use regulations apply when using personal information:

1. specification of the purpose of use: this must be stated as accurately and precisely as possible;
2. notification or public disclosure of the purpose of use: when collecting personal information, the purpose of use must be notified to the individual or disclosed to the public; and
3. restriction based on the purpose of use: personal information cannot be processed beyond the scope required to achieve the specified purpose of use without obtaining the individual's consent.

The purpose of use that should be specified is the ultimate goal to be achieved through the use of personal information, and there is no need to specify even the processing method as a means of achieving this goal. However, according to the Q&As issued by the Personal Information Protection Commission (PPC),[15] if a business handles personal information in a way that the individual cannot reasonably foresee, particularly when profiling to analyse an individual's behavior or interests, the purpose of use must include such handling.

Consequently, businesses processing personal information using AI must ensure that the use falls withing the specified and notified or publicly disclosed purpose of use. Any processing of personal information that goes beyond the scope of the stated purpose is strictly prohibited and requires consent from the individual.

Acquisition regulation

When acquiring personal information, the following regulations apply:

1. appropriate acquisition: false or other fraudulent means are prohibited; and
2. regulation of acquiring sensitive personal information: the individual's consent must be obtained in most cases.

Sensitive personal information (Special Care-Required Personal Information under the APPI) is information that requires additional considerations to prevent unfair discrimination or prejudice against the individual. The scope of sensitive personal information is listed in the APPI and includes information related to race, creed, social

status, medical history, criminal history, facts of having been a victim of a crime and disabilities (subject to certain exceptions).[16]

In the context of AI, special attention is needed in relation to the regulation of acquiring sensitive personal information. For example, when AI businesses collect publicly available information from the web as training data for AI development, they must ensure that they are not collecting sensitive data without consent (see the subsection 'Open AI Alert' below for more information on sensitive personal data and considerations for AI businesses).

Third-party provision and cross-border transfer

The provision of personal data to third parties generally requires the individual's consent. However, there are exceptions; for example, when providing personal data in connection with entrusting processing functions (e.g., outsourcing), the data recipient is not considered a third party, and thus the third-party provision regulation does not apply.

When the recipient is a third party located in a foreign country, additional obligations apply (cross-border transfer regulations). It is necessary to obtain consent from the individual after providing the necessary information about the recipient's country and its legal systems for protecting personal information unless an exception applies.[17]

In the context of AI, the question arises whether the 'input' of personal data into an AI system (for use as learning data or in the form of prompts) constitutes 'provision' to the third party providing the AI service. This point has not yet been officially clarified. However, if the data input by users will not be used for the third-party AI provider's own purposes, such as for machine learning, the input could be interpreted as not constituting 'provision' and thus not being subject to third-party provision regulations.

When inputting personal information into AI, businesses must assess if said act constitutes third-party provision and ensure compliance with third-party provision requirements and cross-border transfer requirements.

APPI compliance

As outlined above, when using AI and processing personal information, it is essential for businesses to review their compliance frameworks for adherence to the APPI. In particular, when dealing with the acquisition of sensitive personal information, obtaining consent from the individual is generally required, and there may be practical challenges. In this regard, regulatory guidance issued to OpenAI is currently a valuable reference tool.

OpenAI Alert

In June 2023, the PPC issued a statement primarily concerning the use of generative AI.[18]

Interestingly, the statement includes an attachment, Summary of Alert to OpenAI, which outlines the guidance issued by the PPC to OpenAI, LLC and OpenAI OpCo, LLC – the developers and providers of ChatGPT. This guidance focuses on two critical points.

First, OpenAI is instructed not to obtain sensitive personal information without obtaining the prior consent of the individual and, second, it is required to notify the individual or

publicly disclose the purpose of use of the information in Japanese. In particular, when dealing with sensitive personal information, the company must perform the following:

1. ensure that sensitive personal information is not included in the collected information;
2. immediately after collecting the information, reduce the amount of sensitive personal information that may be included in the collected information to the extent possible;
3. if, even after implementing the measures under items (a) and (b), sensitive personal information is discovered in the collected information, delete the collected information or make it impossible to identify specific individuals before processing the collected information into a learning dataset, immediately and to the extent possible; and
4. in cases where the data subject or the PPC requests or instructs not to collect sensitive personal information from a specific site or third party, comply with such requests or instructions unless there are legitimate reasons to refuse to do so.

Fairness, bias and discrimination

Currently, Japan does not have a specific law that directly mandates the assurance of fairness in, and the elimination of bias and discrimination from, AI models and systems. Although there is no binding legal obligation, the guidelines published by the government address these issues. For example, the Social Principles of Human-centric AI include the principle of fairness, accountability and transparency, and state that 'Under AI's design philosophy, all people shall be treated fairly, without undue discrimination on the basis of their race, gender, nationality, age, political beliefs, religion or other diverse backgrounds'.

In addition to the above guidelines, several organisations from the industry and academia have released guidelines for developers and others involved in developing AI, with the goal of providing common guidelines for quality assurance. Two noteworthy sets of guidelines are the Guidelines for Quality Assurance of AI-Based Products and Services published in April 2024 by the QA4AI Consortium (which consists of major Japanese IT companies and academics), and the Machine Learning Quality Management Guideline (Revision 4.2.0) published in April 2024 by the National Institute of Advanced Industrial Science and Technology. These guidelines provide practical approaches to implementing fairness measures when developing AI systems and services, which are invaluable for organisations engaged in AI system development.

Quality and performance

There are no laws or regulations explicitly governing the quality and performance of AI models and systems. However, as mentioned above, there are several guidelines issued by organisations in the private sector.

For example, the QA4AI Consortium Guidelines encompass five essential dimensions for constructing and evaluating quality assurance in AI products: data integrity, model robustness, system quality, process agility and customer expectation. Additionally, they

introduce a catalogue of technologies designed to enhance quality assurance for AI products and provide specific guidance in four domains: content generation systems, smart speakers, industrial processes and autonomous driving. These guidelines align with recent technological trends concerning explainability and interpretability in machine learning, making them particularly valuable.

Transparency and accountability

While there are currently no laws or regulations that explicitly address transparency and responsibility in the field of AI in Japan, certain guidelines have been established to encourage adherence to these principles. For instance, the Social Principles of Human-centric AI incorporate the principles of fairness, accountability and transparency as part of their framework. These principles emphasise the need for 'appropriate explanations based on the purpose and context, such as the fact of using AI, methods of acquiring and utilising data used by AI, and the adequacy of AI's operational results'. Moreover, they stress the importance of establishing AI mechanisms to build trust in AI systems and the data and algorithms that underpin them.

Liability

Currently in Japan, there is no specific legislation or regulation pertaining to AI itself. Liability related to AI usage is governed by existing laws, such as the Civil Code and the Product Liability Act.

Civil Code

Under the Civil Code, individuals have the right to claim damages in cases of contract breaches or tortious actions. In cases where a contractual relationship exists and a breach of contract is established by a party, a claim for damages based on breach of contract is recognised. Even in cases where there is no contractual relationship, if there is an intentional or negligent tort, a claim for damages based on tort is recognised. However, in both contract breach cases and tort cases, the scope of damages is limited to damage causally related to the breach of contract or tort, which means:

1. damage that typically arose from breach of contract or tort; or
2. damage sustained under special circumstances that the breaching person expected or should have expected.

It is important to note that the Civil Code does not provide for punitive damages.

In Japan, clear standards for attributing liability in AI-related scenarios have not been established by the courts. As a result, businesses using AI should consider implementing measures to mitigate potential legal exposure, including limiting their liability to some extent in their contracts and terms of service. However, the Consumer Contract Act renders clauses that unilaterally harm consumers' interests as void, such as exempting businesses from liability for damages in certain circumstances, waiving the consumer's right to rescind or specifying the amount of damages that consumers must pay.

Product Liability Act

Under the Product Liability Act, if losses or damage such as death or bodily injury or infringement of property rights are caused by a 'defect' in the delivered 'product', the manufacturer is liable for compensating those losses or damage even without any proof of negligence.

The term 'product' means movables that are manufactured or processed. Thus, AI software itself is not a product. However, if the AI software is incorporated into and integrated with a tangible object, that tangible object constitutes a product. The Product Liability Act of Japan contains no presumption of causation or defect.

The term 'defect' refers to a lack of safety that the product normally provides. Determining the presence of a defect involves a comprehensive assessment of various factors, such as the product's characteristics and its expected use.

Affected parties are required to allege and prove the existence of a defect in the product. This could be challenging given the complexity of AI decision-making processes. Nevertheless, given that some Japanese court judgments have eased the burden of proof in specific cases, particularly when those affected face difficulties in obtaining adequate knowledge and information about the product, the courts may apply similar rules in the context of AI product liability. However, there have been no specific court rulings that have explicitly addressed this issue.

Consumer protection

In Japan, while there is no unified consumer protection law, there are various related laws in place. Key legislation in this context includes the Consumer Contract Act. When using AI to provide services to consumers or offering AI services directly to them, such consumer protection legislation may apply. The following typical consumer protection laws may present issues for businesses using AI to provide services to consumers.

The Consumer Contract Act regulates unfair solicitation practices by businesses that induce consumers to enter into contracts through methods that may cause confusion or misrepresentation. Consumers have the right to revoke their contract applications or individual consent if they have been affected by such unfair solicitation practices. For example, if an AI system misrepresents important facts, leading consumers to enter a contract based on false information, the contract may be subject to cancellation.

Furthermore, the Consumer Contract Act renders clauses that unilaterally harm consumers' interests as void, such as exempting businesses from liability for damages in certain circumstances, waiving the consumer's right to rescind or specifying the amount of damages that consumers must pay. Hence, it is crucial for businesses, especially those in business-to-consumer operations using AI, to ensure their compliance with consumer protection laws, and to align their contracts and terms of use with these legal provisions.

Enforcement

There is no comprehensive law specifically applicable to AI, and therefore there is no central regulatory authority overseeing its use. Instead, existing individual laws govern AI and the relevant regulatory authorities enforce those laws based on their jurisdiction. Consequently, with regard to the APPI, the PPC is responsible for conducting administrative enforcement against companies that violate the law. As mentioned above, the PPC has provided a statement to OpenAI with regard to the company's services.

Legal practice implications

AI is making its way into the area of legal practice, including the field of knowledge management. For instance, Legalscape, a legal technology company, has introduced an AI research system that combines natural language processing technology with law-optimised generative AI. Additionally, there is a growing array of AI tools designed to assist legal professionals, such as BoostDraft, an AI assistant for legal document drafting and proofreading for lawyers. These AI-powered tools have been adopted by major law firms and corporations.

The widespread implementation of AI into legal practice faces some limitations because of various laws and guidelines, including those specified in the Attorneys Act. Article 72 of the Attorneys Act strictly prohibits non-lawyers from engaging in the business of providing legal services, including the fee-based provision of expert opinions related to litigation cases and general legal matters. This may include activities such as providing legal advice through interactive AI chatbots and conducting contract reviews in cases involving legal rights and obligations. In essence, if a service involves interpreting the legal aspects of a situation, assessing legal risks or suggesting modifications to contracts from a legal perspective, it may fall under the umbrella of 'legal services' and may be considered the provision of 'expert opinions' related to 'legal matters'.

As regards AI-driven contract review services in particular, in August 2023, the Ministry of Justice issued the guidelines 'Provision of Contract-Related Business Support Services Using AI and the Relationship with Article 72 of the Attorneys Act' to clarify the requirement for services not to violate Article 72. For instance, these guidelines state that if an AI-driven service reveals the existence and degree of legal risks tailored to a specific case or provides concrete amendments on the basis of the background, circumstances and content of the contract for that particular case, it may fall under the category of providing expert opinions and other legal services. However, if the service merely displays discrepancies between the contract under review and the template of a contract registered by the service provider or user, it would not fall within the scope of activities regulated in this way.

Outlook and conclusions

Of particular note is the possibility that Japan may introduce legislation specifically regulating AI. This could mark a shift from the current soft-law approach. The Japanese government is expected to outline the direction of new regulations by the end of 2024. It

will be important to closely follow the discussions of the AI Systems Study Group under the AI Strategy Council.

Moreover, the Japanese government is actively pursuing leadership in the Hiroshima AI Process, an international framework for AI. On 30 October 2023, the G7 issued the International Guiding Principles for Organizations Developing Advanced AI Systems and the International Code of Conduct for Organizations Developing Advanced AI Systems. In May 2024, during the Organization for Economic Co-operation and Development's Ministerial Council Meeting, the Hiroshima AI Process Friends Group was established with the participation of 49 countries and regions. The Friends Group is a voluntary framework of countries that supports the spirit of the Hiroshima AI Process and, as of 2 August 2024, it includes 53 countries and regions.

Given the rapidly evolving nature of AI regulation, it is of the utmost importance for companies to implement risk mitigation measures. The AI Business Guidelines are a good reference to identify-associated risks and consider mitigation measures. These strategies encompass revising or creating user contracts and terms of use to reduce liability and prevent the infringement of third-party rights, including intellectual property. Conducting internal compliance reviews is paramount, especially in areas related to data protection. This includes the implementation of internal AI usage guidelines, providing training and conducting risk assessments.

Companies involved in AI-related businesses in Japan should keep abreast of these guidelines and maintain a vigilant watch over ongoing developments.

Endnotes

1 International Data Corporation. 2023. 'Announcing Domestic AI System Market Forecast in 2024'. Accessed 3 October 2024. Available at: https://www.idc.com/getdoc.jsp?containerId=prJPJ52070224 (in Japanese). ^ Back to section

2 Liberal Democratic Party Digital Society Promotion Headquarters AI Evolution and Implementation Project Team, 11 April, 2024, 'AI White Paper 2024: New Strategies for Stage II — Toward the World's Most AI-Friendly Country'. Available at https://www.soumu.go.jp/main_content/000944148.pdf. ^ Back to section

3 Yutaka Matsuo, 'The Potential of Generative AI in Industry' presented at the 9th meeting of AI Strategy Council highlights several reasons why Japan is drawing the attention of global AI companies, such as positive reactions to AI, lower labour costs, and significant opportunities for digital transformation in large corporations. Available at https://www8.cao.go.jp/cstp/ai/ai_senryaku/9kai/shiryo1-4.pdf (in Japanese). ^ Back to section

4 The Ministry of Economy, Trade and Industry (METI) published the 'AI Governance in Japan' report on 9 July 2021, which provides a comprehensive overview of Japan's AI regulatory policy. The report states that 'legally-binding horizontal requirements for AI systems are deemed unnecessary at the moment'. Available at https://www.meti.go.jp/shingikai/mono_info_service/ai_shakai_jisso/pdf/20210709_8.pdf. ^ Back to section

5 METI and Ministry of Internal Affairs and Communications (MIC), 19 April 2024, 'AI Guidelines for Business Ver1.0' available at https://www.meti.go.jp/shingikai/mono_info_service/ai_shakai_jisso/pdf/20240419_9.pdf. ^ Back to section

6 The Legal Subcommittee under the Copyright Subdivision of the Cultural Council, 15 March 2024, 'General Understanding on AI and Copyright in Japan' available at https://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/pdf/94037901_01.pdf (in Japanese). An overview of the document in English is available at https://www.bunka.go.jp/english/policy/copyright/pdf/94055801_01.pdf. Additionally, the Cabinet Office Intellectual Property Strategy Promotion Office published the 'Interim Report of the Study Group on Intellectual Property Rights in the AI Era', in May 2024. This report summarises the government's discussions on concerns and risks related to generative AI and intellectual property. Available at https://www.kantei.go.jp/jp/singi/titeki2/chitekizaisan2024/0528_ai.pdf (in Japanese). ^ Back to section

7 The National Institute of Information and Communications Technology 'Prototype of a Large-Scale Language Model Specialized in Japanese (Generative AI) – Development of a Generative Large-Scale Language Model Trained Exclusively on Japanese Web Data with 40 Billion Parameters', 4 July 2023. https://www.nict.go.jp/press/2023/07/04-1.html. ^ Back to section

8 For example, METI published the 'Contractual Guidelines for the Use of AI and Data' in June 2018 (version 1.1 published in December 2019) and the 'Governance Guidelines for Implementation of AI Principles Ver. 1.1' in January 2022. In addition, the AI Network Society Promotion Council, established under MIC, published the 'Draft AI R&D Guidelines for International Discussions' in July 2017, the 'AI Utilization Guidelines' in August 2019, and the 'Review of AI Development Guidelines and AI Utilization Guidelines' in February 2022. ^ Back to section

9 Secretariat of Science, Technology and Innovation Policy Cabinet Office, Government of Japan. 'AI Strategy 2022'. 22 April 2022. Available at: https://www8.cao.go.jp/cstp/ai/aistratagy2022en.pdf. ^ Back to section

10 Secretariat of Science, Technology and Innovation Policy Cabinet Office, Government of Japan. 'Social Principles of Human-Centric AI'. 29 March 2019. Available at: https://www8.cao.go.jp/cstp/ai/humancentricai.pdf. ^ Back to section

11 Currently, only the few companies designated by METI are subject to the law: Amazon Japan GK; Rakuten Group, Inc; LY Corporation; Apple Inc and iTunes KK; Google LLC; and Meta Platforms, Inc. ^ Back to section

12 Tatsuhiro Ueno, 'Data Mining and Copyright: Japan as Paradise for Machine Learning', *Artificial Intelligence*, Volume 36, Issue 6 (November 2021). ^ Back to section

13 Please see *supra* n. 6. ^ Back to section

14 The APPI is Japan's principal data protection legislation. It applies to all business operators handling personal information, which are entities that use personal information databases for business purposes. In simpler terms, the APPI applies to all business operators that manage personal information of individuals in Japan in the context of their businesses. This includes companies that are located within Japan, as well as those that operate offices from abroad and handle personal information by which persons in Japan are identifiable in relation to offering goods and services to them in this country. ^ Back to section

15 PPC. Q&As on the Guidelines for the Act on the Protection of Personal Information. Q2-1. Available at: https://www.ppc.go.jp/personalinfo/faq/APPI_QA/. ^ Back to section

16 However, information that only suggests these characteristics is not considered sensitive personal information. ^ Back to section

17 The exceptions are as follows: (1) the foreign country is one designated by the PPC as a country having a data protection regime with a level of protection equivalent to that of Japan. Currently, the European Economic Area countries and the United Kingdom have been designated as such foreign countries; (2) the recipient has a framework of data protection that meets either of the standards prescribed by the Enforcement Rules of the APPI. The standards include: (1) the existence of appropriate and reasonable methodologies (such as contracts) through which the recipient will treat the personal information in accordance with the principles of the requirements under the APPI (the equivalent measures exemption); or (2) obtention of certification under an international arrangement, recognised by the PPC, regarding its framework (e.g., APEC CBPR System). ^ Back to section

18 PPC. Press release dated 2 June 2023. Available at: https://www.ppc.go.jp/news/careful_information/230602_AI_utilize_alert/ (in Japanese). ^ Back to section

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