

THE RIGHT FOCUS

SEPTEMBER 2023 // TECH EDITION



TABLE OF CONTENTS

3 EXAMPLES OF THE USE OF ARTIFICIAL INTELLIGENCE
IN THE DIGITALISATION OF THE ECONOMY
Jan Ziomek

5 A ROBOT INSTEAD OF AN HR DEPARTMENT, OR
AI IN EMPLOYMENT LAW
Magdalena Nurzyńska-Sawicka

7 OPENAI WANTS TO PROTECT KEY TRADEMARKS
OF ITS BRAND – BUT IS IT TOO LATE
Tomasz Szambelan

9 ACTION AGAINST CHATGPT – FIRST LAWSUITS
INVOLVING THE FAMOUS CHATBOT
Mateusz Koc / Bartłomiej Galos

12 INVESTMENT AGREEMENTS IN IT JOINT VENTURE
PROJECTS: WHAT TO LOOK FOR
Rafał Rapala / Patrycja Wakulak

14 TAX RELIEF FOR NEW TECHNOLOGY AND
INNOVATION
Jakub Dittmer / Jan Janukowicz

EXAMPLES OF THE USE OF ARTIFICIAL INTELLIGENCE IN THE DIGITALISATION OF THE ECONOMY



 JAN
ZIOMEK

From at least the 1950s, when Alan Turing published his paper 'Computing Machinery and Intelligence', the concept of artificial intelligence has captivated people's imagination with the promise of a breakthrough in the way the world and the economy can function.

Today, AI solutions are increasingly facilitating our activities in many diverse areas, including:

Data analysis and pattern recognition

With the availability of huge collections of structured data, artificial intelligence can effectively assist in their analysis and pattern search, making it possible, for example, to build advanced risk assessment models, thereby increasing the scope for secure financing. Such tools can also be successfully used to optimise processes and supply chains, and are being used to combat various types of criminal activity.

Service personalisation

Requires changing established standards every time. Until now, any deviation has been costly and could be unprofitable on a case-by-case basis. With artificial intelligence, which is efficient, for example, we can get more tailored digital content, including websites, e-learning or music.

Business process automation

Personnel costs can often be a significant burden, especially in the case of labour-intensive and repetitive activities. This is why business process automation is undergoing dynamic development, allowing the reduction of human activities in favour of their automation (e.g. generating repetitive reports, ordering data and electronic documents, checking for changes in regulations).

Advice

With the right database, AI can be successfully used to support decision-making processes, for example in capital market advice, where the tool can use historical data, current data and the company's investment policy to recommend specific financial instruments to the client, thus optimising profit. Another example is assisting medical staff in classifying a patient conditions.

Customer service

There is a growing market for chatbots/customer assistants. A well-designed tool with a large database can effectively speed up customer service, especially for routine issues.

The process of digitalisation and automation through the implementation of artificial intelligence in various areas of life seems inevitable. However, we need to be aware that this brings with it a number of challenges, including the potential for restricting access to information (information bubble) or a discriminatory approach due to the training of models based on poorly chosen information.

EU regulation on artificial intelligence

The proposed EU Regulation laying down harmonised rules on artificial intelligence (the AI Act) addresses these challenges. It will regulate the different uses of AI, including the obligations of providers and users of artificial intelligence systems.

As the draft Regulation is a comprehensive piece of legislation, preparing for its application will require an analysis of the information processed and the identification of necessary changes to IT infrastructure or policies and internal instructions.

Due to the specificity of this area, the success of the process of adapting to the Regulation will depend on the support of experienced AI consultants and lawyers who can help identify potential gaps and risks, and highlight the opportunities and possibilities that such solutions offer.





A ROBOT INSTEAD OF AN HR DEPARTMENT, OR AI IN EMPLOYMENT LAW



MAGDALENA
NURZYŃSKA-
SAWICKA

The development of new technologies and artificial intelligence is certainly streamlining or even automating an increasing number of processes. Indeed, many solutions are being widely used, including in HR departments.

Unfortunately, some of them raise significant legal concerns, and regulations are still being drafted. What changes should employers be preparing for and what should they be addressing right now?

The world needs rules for artificial intelligence

The US and China are already working on AI laws, but it is the European Union that is closest to passing a relevant piece of legislation.

This is because in Europe, in addition to heated discussions, concrete work is being done on an EU regulation on artificial intelligence.

It is important to note that this will be a regulation, which means that once it comes into force, it will be directly applicable in all Member States, without the need for national legislation.

And, by the way, the General Data Protection Regulation (GDPR), which did not require implementation in the form of national laws, works on a similar basis.

Human Resources: a high-risk area

The regulation defines conditions for the use of AI systems in the field of employment in the broad sense (situations such as recruitment, promotion, dismissal decisions, etc.), which has been classified as a high-risk area.

This classification is based on the fact that the use of these systems has a direct impact on the lives and finances of most people.

The European Commission also notes that such systems may perpetuate historical patterns of discrimination based on gender, age, origin, etc., which is another reason for considering them as high-risk systems. Potential violations of data protection and privacy rights are also a significant risk.

Classifying employment as a high-risk area will entail additional obligations for those using AI systems.



EU regulation on AI in HR

The draft regulation requires that in high-risk areas, an appropriate system for managing these risks must be put in place and be regularly updated.

Employers will be required to take appropriate measures to manage these risks in accordance with the numerous requirements under the regulation.

In addition, systems in place should be tested in order to implement the most appropriate risk management measures. Such testing should be carried out before the system is placed on the market, and also 'as appropriate'. The regulation also requires that systems are transparent and enable users to interpret the output, and that they are subject to effective human oversight.

Most of the provisions of the proposed regulation only set out the objective to be achieved, leaving the appropriate measures to define the assumptions arising from the law up to the providers and users of the artificial intelligence.

The draft regulation itself suggests that employers wishing to support their processes with AI will need to prepare for a number of organisational steps, if only because the regulation provides for penalties of up to EUR 30,000,000 or, if the infringement is committed by a company, up to 6 % of its total worldwide annual turnover for the preceding financial year - whichever is higher.

Amendment to the Trade Union Act

Polish lawmakers are currently working on an amendment to the Trade Union Act of 23 May 1991 with plans to extend the list of information that employers must provide at the request of trade unions. As of September 2022, the draft is at the stage of first reading in committees.

The proposed amendments would require employers to provide information on the parameters, rules and instructions on which

algorithms or artificial intelligence systems relevant to decision-making are based and which may affect conditions of work and pay, access to and retention in employment, including profiling.

With regard to this additional right of trade unions, there have been concerns that the extent of the information to which trade unions would have access could breach business confidentiality.

This is a significant risk due to the potential for disclosure of company know-how. Therefore, in order to balance the interests of both employers and trade unions, a non-disclosure obligation should be introduced together with extended access to information.

Artificial intelligence in the field of HR: current status

Does the fact that legislation directly addressing AI has yet to take effect mean that currently employers have complete discretion in this area?

Absolutely not!

After all, it is important to remember that any action taken by an employer, and therefore any use of tools, including those based on artificial intelligence, must not lead to unequal treatment or be based on discriminatory criteria.

It is therefore worth reviewing them, especially from this point of view.



OPENAI WANTS TO PROTECT KEY TRADEMARKS OF ITS BRAND BUT IS IT TOO LATE?



TOMASZ
SZAMBELAN

On the surface, it would appear that the market success enjoyed by OpenAI OpCo, LLC, the makers of ChatGPT, depends at least partly on the rights to the crucial word marks ChatGPT and GPT-4. Nothing could be further from the truth. It turns out that the AI solutions giant has still not obtained protection for these trademarks in its home market.

Late registration of the ChatGPT trademark

Despite the fact that ChatGPT 4.0 has been a well-known AI tool for almost a year now, OpenAI OpCo, LLC still has no word mark protection in the US for its flagship product.

The first application for the ChatGPT trademark was filed with the US Patent and Trademark Office (USPTO) in December 2022. This is surprising as the first version of ChatGPT made available to users of GPT-3.5 was released several weeks earlier, in November 2022.

The next application was filed only a few days before the official release of GPT-4, a new version of ChatGPT (March 2023). However, this action was also long overdue, as the name and functionality of the new product had been widely known for several months.

ChatGPT - why applications are so important

Trademark protection is obtained upon registration and is effective from the date the application is filed. Thus, if a trademark owner who uses a mark to designate goods and/or services unnecessarily delays filing an application, or does so after the product has been launched, they may be acting to their own detriment.

Indeed, it is not difficult to imagine that their competitors will be the ones to file product marks based on or referring to the names used by the owner.

This seems to be happening in the AI industry. Recently, Elon Musk announced that he is working on an alternative to ChatGPT called TruthGPT. There are also solutions on the market such as MedicalGPT and DirtyGPT.

OpenAI's situation is complicated by the fact that others may hypothetically block registrations containing the word element 'GPT' by claiming that it is commonly used to mark artificial intelligence goods and services.

OpenAI has not obtained protection at the USPTO for the ChatGPT, GPT or GPT-4 marks, and all applications are pending at the Office. A prolonged period of non-protection for word marks may therefore have further negative consequences. Both in the short and long term.

Has OpenAI learned its lesson

When analysing the OpenAI case and looking for the causes of errors in building and managing the trademark portfolio, it can be concluded that the developers of the application may simply have been surprised by the scale of their success.

However, it appears that lessons have been learned in this area. At the end of July, with the announcement of the release of the latest version of ChatGPT, i.e. GPT-5, in the autumn of 2023, an application was filed to obtain protection rights for such a word mark.

Best to learn from others' mistakes

Can companies with much smaller operations learn from OpenAI's mistakes as they build their own brands?

Of course they can!

They should remember to apply as early as possible for trademark protection for the marks they intend to use to identify their goods or services.

It is also important to check whether a mark can indeed be protected or whether it infringes the rights of others before registering it.

This last point is particularly important, as authorities analyse whether the mark applied for infringes the rights of those previously registered.



 **BARTŁOMIEJ
GALOS**



 **MATEUSZ
KOC**

ACTION AGAINST CHATGPT FIRST LAWSUITS INVOLVING THE FAMOUS CHATBOT

When a prototype of a chatbot created by OpenAI was first launched in late 2022, it sparked a great deal of controversy worldwide. It very quickly gained supporters, although alongside its obvious benefits, a number of risks were perceived - including those related to data processing and the copyright of creators of works used by OpenAI's algorithms.

Although seen as a useful tool to help with work or study, in many cases it began to stir up controversy, and the first copyright infringement cases hit the media, involving creators who realised that the chatbot may have used their works without permission.

Authors sue OpenAI

According to media reports^[1], novelists Mona Awad (Canada) and Paul Tremblay (US) have filed a lawsuit with the San Francisco federal court against OpenAI for copyright infringement.

They claim that OpenAI is illegally using their property to "train" its tool, arguing that ChatGPT generates highly accurate summaries of their books. The lawsuit points out that OpenAI's training data includes more than 300,000 books, including those from illegal shadow libraries that offer copyrighted books without permission^[2].

This is not the only case of its kind. US artist Sarah Silverman has joined the group of those who have filed class action lawsuits against OpenAI and Meta^[3]. The lawsuits claim that both ChatGPT and LLaMA (i.e. a chatbot developed by Meta) are trained on copyrighted material.

The artists unanimously argue that the use of their works to train artificial intelligence infringes their copyright. But these are not the only allegations. They also claim other infringements, such as the unauthorised creation of advanced text algorithms based on their works and infringement of the right to dispose of their creations.

Others are also considering legal action against OpenAI

The New York Times and OpenAI have been negotiating a potential licensing agreement under which OpenAI would have the right to use NYT articles in its tools for a fee. Unfortunately, these talks have become so contentious that The New York Times is also considering legal action.

The main concern for The New York Times is that artificial intelligence technology companies are becoming direct competitors to traditional publishers. This is because they create content that answers users' questions based on original reports and articles written by journalists. As a result, there is concern that this practice could negatively impact the value and uniqueness of the newspaper's content and revenue[4].

Machine learning vs. third-party rights

The above cases highlight the growing copyright challenges at a time when algorithms are learning from huge data sets, often protected by copyright.

The Polish Copyright and Related Rights Act[5] currently appears to be insufficiently adapted to provide adequate protection for creators whose works are used to train artificial intelligence, and is limited to considering a work solely as a manifestation of human activity.

According to legal scholars and commentators, "creations generated by computer applications that imitate the human creative process do not constitute a work"[6], with ChatGPT being such an application in the present case.

This approach leads to the recognition of the absence of copyright protection, which at this stage may open the way to the free exploitation of the content produced by ChatGPT, including activities such as modifying or sharing the results.

The ChatGPT Terms of Use transfer the rights to the creations produced by this tool to the users, but at the same time place full responsibility on them, including the consequences resulting from the publication of such content[7].

According to dissenting views, AI-generated creations could be considered works[8], e.g. "derivative works of the works on which the system has learned.

Such an assumption could have serious consequences for ChatGPT's end users, as their use of AI-generated creations in their own activities could lead to infringement of the rights of creators of original works and, consequently, to direct liability"[9].

Therefore, the stage at which AI can be perceived as infringing intellectual property rights is the moment of "training" AI, or TDM (text and data mining) for short. According to Article 23 of the Act on Copyright and Related Rights in Poland, it is possible to use other people's works on the basis of authorised use or on the basis of a licence agreement. However, the issue remains unclear.

A more concrete legal basis for the use of works by companies such as OpenAI will be provided by Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, which is yet to be transposed into Polish law.

An analysis of the draft provisions and recitals of the above-mentioned Directive shows that AI tools will be able to analyse copyrighted works in the learning process without the consent of authors and other rights holders for commercial purposes by private parties under the following conditions:

- The works that AI tools will analyse will be lawfully accessible (lawful access should include access to content that is freely available on the Internet)[10]
- Reproduction and downloading will take no longer than necessary for text and data mining purposes
- Holders of rights to works to be analysed by AI do not explicitly state that they refuse access to the works for the purposes of mining, e.g. in metadata or terms of website or service use[11]

The steps taken by the European Commission should be seen as a sign of awareness of the nature of copyright in the European Union.

[The cases described provide a reasonable basis for concluding that the works of Polish artists may also be exploited by ChatGPT-type programmes.](#)

The lack of case law and the ambiguity of the Copyright and Related Rights Act create uncertainty for creators and end users with regard to ChatGPT-generated creations.

However, it appears that the forthcoming Directive will remove the existing uncertainty and provide a precise basis for the lawful use of new technology products and, in the event of non-compliance, a basis for legal redress.

[1] Kamil Nowak, Authors have filed a lawsuit against OpenAI. It is about the illegal use of their books by ChatGPT / acces date: 31.08.2023

[2] The Feed, The Economic Times, OpenAI faces Lawsuit filed by US-based authors Mona Awad, Paul Tremblay / data dos / access date: 31.08.2023

[3] Jack Queen, Sarah Silverman sues Meta, OpenAI for copyright infringement / access date: 31.08.2023

[4] Bobby Allyn, 'New York Times' considers legal action Against OpenAI as copyright tensions swirl / access date: 31.08.2023

[5] Act of 4 February 1994 on copyright and related rights (uniform text: Journal of Laws of 2022, item 2509, hereinafter: the "Copyright and Related Rights Act").

[6] A. Niewęglowski [in:] Copyright. Commentary [Prawo autorskie. Komentarz], Warsaw 2021, Article 1.

[7] Terms of Use / access date: 06.09.2023

[8] Cf. P. Książak, S. Wojtczak, Copyright in the face of artificial intelligence (an attempt at an alternative view), PiP 2021, No. 2, pp. 18-33

[9] Agnieszka Wachowska, Marcin Ręgorowicz, ChatGPT in practice – key legal issues / access date: 06.09.2023

[10] Recital 14 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L 2019 No. 130, p. 92).

[11] R. Markiewicz, 2.2.4. Commercial use of TDM. Copyright in the Digital Single Market. Directive (EU) 2019/790 of the European Parliament and of the Council, Warsaw 2021



INVESTMENT AGREEMENTS IN IT JOINT VENTURE PROJECTS WHAT TO LOOK FOR



 **PATRYCJA
WAKULUK**



 **RAFAL
RAPALA**

The signing of an investment agreement is a significant stage in investing in new technologies, and takes place immediately after the negotiating and signing of a term sheet and the conducting of a due diligence by an investor.

This is because the aim of the founders and creators of start-ups is to obtain a source of funding for the development and implementation of their project, whilst investors are seeking to make a profit on their new investment.

Investment agreement: binding nature

Investment agreements are a formal reflection of existing discussions between the parties planning to set up a joint venture.

In practice, such discussions are usually held between the founders of a project (startup) and investors. Private or professional investors or funds, including venture capital funds.

Such agreements, unlike term sheets, are binding in nature and represent a formal commitment to a specific action or inaction by the parties, e.g. for start-up founders not to engage in activities that compete with the activities of a company in which a capital investment is made. The documentation may also include exemptions from such a prohibition.

Joint venture or change in existing shareholding structure

Investment in a start-up can be made via:

- A joint venture involving the creation of a new entity. This is an initial stage where the founders' only asset in attracting investment partners may be an idea, a specific business plan and an experienced team who will remain involved in the project even after the company has been registered and the investment made.
- An investor joining an entity existing in the market as part of an increase in the company's share capital and taking up newly issued shares offered to the investor. The implementation of such a scenario will usually result in the dilution of the founders' existing ownership package, unless they also decide to participate in such an increase by making a cash (or in-kind) contribution in exchange for additional shares issued.

Start-ups and investors – investment agreement provisions

Virtually every investment agreement contains standard contractual clauses, i.e.:

- Drag along (the right to force the remaining minority shareholders to sell their shares) – usually granted in favour of either an investor or a majority shareholder.
- Tag along (the right to join in the sale of shares) – usually granted to minority shareholders or start-up founders.
- Lock-up – a prohibition on the sale of company shares within a certain period (usually during a cooperation period) or without an investor's consent.

Key Performance Indicators (KPIs)

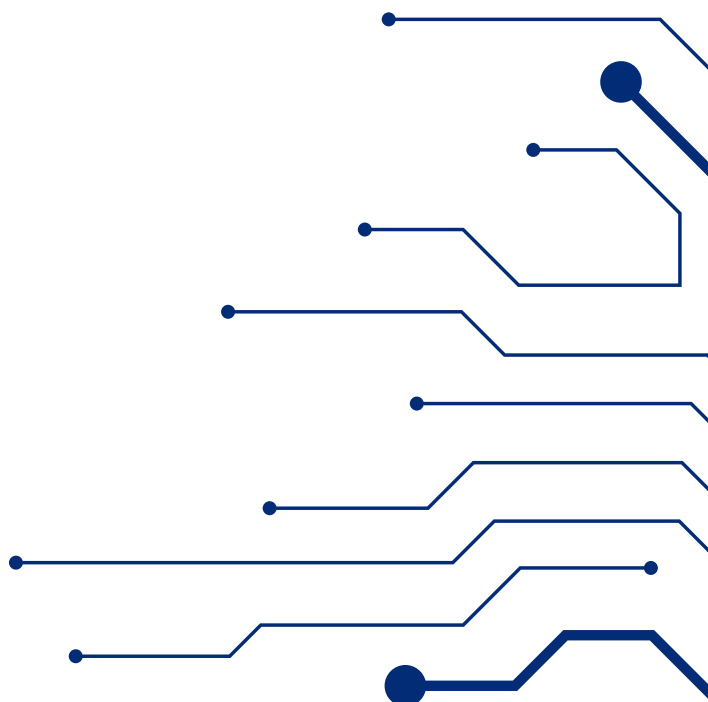
Investment agreements also include provisions that take into account the specificities of a particular industry and of the company itself, both formal and business-related.

A good example may be Key Performance Indicators (KPIs), which set out the conditions that must be met before the next investment tranche is released or the founders exercise the option to buy back an investor's shares ([read here >>](#)).

In the IT industry, such key conditions may include, but are not limited to, the completion of the design and prototyping phase, the construction and delivery of a platform or application for testing, the creation of a product within a certain timeframe or its sale at a specific level.

It is important to bear in mind that jointly negotiated contractual provisions, including a prepared business plan and developed KPIs, can ensure a successful cooperation for the parties for several years.

Therefore, it is worth paying a little more attention to their content and preparing such provisions that will be satisfactory to both parties in a joint venture transaction.





TAX RELIEF FOR NEW TECHNOLOGY AND INNOVATION



 JAKUB
DITTMER



 JAN
JANUKOWICZ

The modern world is evolving dynamically and continuously under the onslaught of ever-evolving technologies. Digital revolutions, artificial intelligence, blockchain and the internet are just a few examples of innovations that have changed people's lives and environments in ways that were unimaginable just a few decades ago.

However, in the context of law in particular, new challenges are emerging alongside new opportunities. That is why we are looking at the relationship between tax law and new technologies, with a particular focus on tax relief in this area. Fortunately, there is a lot to choose from.

R&D Tax Relief

R&D Tax Relief is available to taxpayers who carry out research and development activities. Such activities should consist of the use of existing knowledge to create or improve products, processes or development services. It is also important that these activities are carried out on a regular basis and not on an occasional basis.

This relief allows companies to deduct eligible costs incurred for ongoing research and development activities. These include expenditure on the purchase of materials and raw materials, expert opinions, consultancy services, the use of scientific and research equipment and personnel costs.

PIT and CIT taxpayers may deduct the amount of costs allocated to research and development activities, which may not exceed the amount of income generated in a given tax year. In general, the R&D Tax Relief allows taxpayers to deduct 100 % of the costs incurred for research and development activities and, in the case of employee remuneration, the deduction can reach up to 200 % of the costs incurred.

IP Box

Another notable relief is the Innovation Box or IP Box. It allows companies to apply a preferential tax rate of 5 % to income earned from eligible intellectual property rights.

In order to benefit from the IP Box, an intellectual property right should fulfil three conditions:

- It must be created, developed or perfected by the taxpayer in the course of its R&D activities

- It must be eligible, i.e. qualify as:
 - A patent
 - A utility model protection right
 - A registration right to an industrial design
 - A supplementary protection certificate to a patent for a medicinal product or a plant protection product
 - A registration right for an authorised medicinal product or a veterinary medicinal product
 - A copyright to a computer programme
- It must be legally protected in accordance with individual provisions contained in separate acts or international agreements approved by the Republic of Poland, as well as other international agreements to which the European Union is a party.

The IP Box applies primarily to income derived from:

- Sales of eligible IP
- Fees or royalties received under licence agreements relating to eligible IP
- Profits from eligible IP included in the sale price of a product or service

It is worth noting that from 2022, the R&D and IP Box reliefs can be applied simultaneously.

Robotisation Relief

A relatively new facility for businesses is the Robotisation Relief, which was introduced in January 2022 as part of the so-called 'Polish Deal' and allows investment in new industrial equipment.

The Robotisation Relief allows companies to make an additional deduction of 50 % of the deductible costs incurred for the purchase and implementation of industrial robots. Companies can benefit from this relief if they decide to use industrial robots to streamline their production processes.

Examples of costs that may be deducted as part of the robotisation expenditure include expenditure on the purchase of new production assets, such as industrial robots or machinery and peripheral equipment that are functionally related to industrial robots. Expenditure on the acquisition of intangible assets necessary for the proper commissioning and use of industrial robots and the above-mentioned fixed assets may also be deducted.

Prototype Relief

Prototype Relief is also worth mentioning. In a nutshell, this relief facilitates the implementing of an entrepreneur's idea into a real product. It can be used by entrepreneurs who pay income tax, whether PIT or CIT.

Currently, prototype relief allows a company to deduct an additional 30 % of its expenses from its tax base, provided that the relief does not exceed 10% of the company's income.

A company that decides to develop a prototype will be able to treat the costs associated with its production as deductible costs. Examples of the costs of prototyping include the purchase price or manufacturing cost of the fixed assets necessary to start production or the costs of purchasing the materials and raw materials necessary to make a prototype.

Summary

Regulations are changing at a rapid pace, making it difficult to take advantage of all the technology reliefs available. This is further complicated by the inconsistent approach of the tax authorities. Therefore, if you are considering using a particular relief, it is worth doing a thorough analysis of the tax legislation and checking whether you are actually entitled to it.

FOLLOW US



kochanski.pl

The Right Focus newsletter does not contain legal opinions and may not be taken as legal advice or as the basis for making business decisions. Each case is unique and requires individual analysis. Kochanski & Partners does not assume any liability for the use of the information contained herein without prior consultation.