CLIENT ALERTS & INSIGHTS

Exploring First Amendment and Editorial Judgment Protections for Large Language Models

JULY 15, 2024

Authors: Ziyong “Sean” Li

I. Introduction

Large language model (LLM) companies are at the forefront of artificial intelligence technology. They create tools that generate and provide information through sophisticated algorithms. These companies have transformed how we interact with information but they also face complex legal challenges. One significant issue they encounter is First Amendment rights, which protect freedom of speech.

First Amendment rights play a critical role for LLM companies because they help safeguard the ability to generate and share information without undue third-party interference. These rights can arise in various circumstances, such as when LLMs produce content that some may view as controversial, biased or inappropriate. For instance, if a company decides to fine-tune its model to avoid generating harmful or offensive content, it might face accusations of censorship or bias. Furthermore, in cases where LLMs inadvertently produce false or defamatory information, especially related to public figures, First Amendment protections could be invoked to defend the company against liability claims. These issues highlight the importance of ensuring that LLM companies can operate freely while balancing the need for responsible content generation.

To better understand how First Amendment protections might apply to LLM companies, we can look into historical precedents in the tech industry. One case that sheds light on this issue is *e-ventures Worldwide, LLC v. Google, Inc.*, Case No. 2:14-cv-646, 2017 WL 2210029 (M.D. Fla., Feb. 8, 2017). It shows how courts have interpreted the application of First Amendment rights to tech companies and their content generation practices.

II. *e-ventures Worldwide, LLC v. Google, Inc.*

e-ventures Worldwide LLC specialized in search engine optimization (SEO) for its clients to improve their rankings on search engines like Google. Meanwhile, Google has guidelines to prevent manipulation of search results, including rules against link schemes, doorway pages and scraped content. In 2014, a Google analyst found one of e-ventures’ websites directing users to a malicious spam network. As a result, Google removed all e-ventures’ websites from its search results and informed e-ventures of the violations.

e-ventures claimed that Google’s actions were not genuinely about web spam but motivated by anti-competitive concerns. It argued that Google’s removal of its sites was intended to protect its revenue. In response to Google’s actions, e-ventures filed claims for unfair competition under the

Lanham Act, violating Florida's Deceptive and Unfair Trade Practices Act and tortious interference with contractual relationships.

The Court granted Google's motion for summary judgment, primarily based on First Amendment protections. The Court ruled that the First Amendment protects the results produced by an Internet search engine as a form of speech. Google's decision to remove e-ventures' websites was likened to a newspaper editor's decision on what content to publish:

> [T]he First Amendment protects as speech the results produced by an Internet search engine. [] A search engine is akin to a publisher, whose judgments about what to publish and what not to publish are absolutely protected by the First Amendment. [] The presumption that editorial judgments, no matter the motive, are protected expression is too high a bar for e-ventures to overcome.

e-ventures Worldwide, LLC v. Google, Inc., 2017 WL 2210029 at *4 (internal citations and quotations omitted). In other words, the Court emphasized that Google's actions in ranking and determining website compliance with its guidelines involve editorial judgment. These decisions, whether perceived as fair or unfair, are protected under the First Amendment. In conclusion, the Court determined that Google's rights under the First Amendment precluded all of e-ventures' claims.

III. First Amendment Rights Implications for LLM Companies

LLM companies generate content through advanced algorithms, just as search engines generate search results after applying specific filters. These models provide information and answers based on vast datasets. However, they do not operate entirely unsupervised. To offer safe and accurate information that meets particular user needs, LLM companies often need to fine-tune the models, a process that involves human interference. This fine-tuning process is similar to editorial decision-making because it involves selecting which information the model should prioritize or suppress. When an LLM provides an answer to a query, it reflects the editorial decisions made during its fine-tuning process. This process involves human judgment about what is appropriate or relevant. Much like how Google decides which search results to display, LLM outputs are shaped by these fine-tuning decisions.

However, this fine-tuning process, while necessary, opens up potential litigation risks. Users or content creators might allege that the LLMs are biased or censoring certain viewpoints. For instance, if an LLM is programmed to avoid generating harmful content, it might inadvertently suppress certain opinions, arguably resulting in censorship allegations.

The First Amendment could provide a robust defense for LLM companies in such scenarios. Just as Google's search results are considered a form of editorial judgment, LLM fine-tuned outputs could be argued to be protected speech. This defense hinges on the idea that LLMs, like search engines, exercise editorial judgment in generating content. Additionally, there is a significant public interest in the free flow of information that LLMs provide, further supporting their protection under the First Amendment.

While the First Amendment provides broad protections for freedom of speech, it is not absolute and includes several notable exceptions such as defamation, incitement of violence and commercial speech. These exceptions can complicate the legal issues for LLM companies. For example, if

plaintiffs consistently observe a trend in LLM responses that contain false information about specific individuals or incite violence, they might allege that these responses fall outside First Amendment protections. However, such claims would require plaintiffs to substantiate their allegations with concrete evidence.

The issue then becomes: when a plaintiff identifies a troubling trend or potential harm in the LLM's outputs, what must they present to overcome the Rule 11 threshold? This is a critical juncture in the litigation process, as not all problematic content generated by LLMs results from intentional human fine-tuning. Often, the issues can stem from the training data itself or the inherent randomness of the algorithms. Overcoming Rule 11 at the pleading stage is pivotal because it unlocks the door to discovery. Once in discovery, plaintiffs could request detailed information about the fine-tuning process, including internal communications, datasets and algorithmic adjustments. This phase can be incredibly costly and burdensome for defendants, often creating a strategic advantage for plaintiffs' settlement negotiations.

This dynamic underscores the importance for potential defendants-the LLM companies-to proactively consider their litigation strategies. They must anticipate the types of claims that might arise and prepare to rigorously defend the fine-tuning process and training data. On the other hand, plaintiffs who believe their rights have been harmed by intentional fine-tuning face significant challenges in collecting evidence, as much of the fine-tuning process is not publicly accessible. This creates a situation where both sides must be well-prepared to balance protecting free expression with addressing legitimate harms.

IV. Conclusion

The legal landscape for First Amendment protections in the AI industry is complex and evolving. The case of *e-ventures Worldwide, LLC v. Google, Inc*. highlights how courts may view the editorial judgments of tech companies as protected speech. For LLM companies, this precedent suggests that their fine-tuning processes, similar to editorial decisions, could be similarly protected. However, these protections are not absolute and the potential for litigation remains, especially concerning defamation, incitement and other exceptions to free speech. As such, interested parties must be proactive in their legal strategies, considering safeguarding editorial freedom and evidentiary issues and preparing for litigation milestones.

Sean Li is a Partner in Benesch's Intellectual Property Practice Group. He can be reached at 628.600.2239 or sli@beneschlaw.com.