REVISTA IBÉRICA DO DIREITO

Recebido: 17.06.2020
Aprovado: 28.08.2020

Andrzej Frycz Modrzewski
Krakow University
Polónia

Volume 1, Número 2,
Ano 1
2020

ISSN 2184-7487
Registado na Biblioteca
Nacional de
Portugal

www.revistaibericadodireito.pt

Responsible AI licenses- a real alternative to generally applicable laws?[1]

Kamil Szpyt[2]

Abstract: The aim of the conducted research is to present general characteristics of Responsible AI Licences, analyze their advantages and disadvantages as well as assess whether they can find wider application in practice and, above all else, to find the answer to the question posed in the title, that is if Responsible AI Licences can truly be considered a genuine alternative to generally applicable laws as a means of regulating the legal status of Artificial Intelligence. In the article the scientific content of studies on artificial intelligence and licensing of artificial intelligence has been analysed with a special emphasis on a legal point of view. Responsible AI Licences templates present on the Internet were also analysed and discussed. In view of the reflections made in the article, we must embrace the view that allows for a broader application of Responsible AI Licences in practice. Suitably drafted templates and clauses may very well be able to supplement generally applicable laws, as well as serve as a kind of "prosthesis" until relevant provisions are enacted. At the same time, however, Responsible AI Licences cannot be regarded as a real alternative to generally applicable laws and provide a comprehensive regulatory framework for the creation and use of AI.

Key words: Responsible AI License; artificial intelligence;

1 The research was financed from the funds earmarked for the statutory activities of the Faculty No. WPAiSM/DS/17/2019.

2 PhD, Assistant Professor, Private Law Institute, Faculty of Law, Administration and International Relations, Andrzej Frycz Modrzewski Krakow University, kszpyt@afm.edu.pl.

Introduction

"Responsible Artificial Intelligence," "Trustworthy Artificial Intelligence" and "Human-Centric Artificial Intelligence" - these concepts have become commonplace in public space for a close to a year now[3]. The reasons for this state of affairs can be sought both in the ongoing development of artificial intelligence (AI)[4], and in increasing public awareness of the use of such solutions in everyday devices (e.g. in mobile phones). However, what terrifies the average user much more than a robot rebellion organised by Skynet[5] is the prospect of a teenage neighbour from his local estate utilising widely available deep fake technology and a set of photos of the user to create entirely convincing fake porn featuring the said user, which is then uploaded onto the Internet or sent to friends and acquaintances[6].

This potential danger has attracted the attention of both EU lawmakers and several national legislatures. For almost three years now an increasing number of reports and statements have appeared addressing this issue[7]. However, what is needed in such an important area as AI are carefully drafted legislative measures preceded by an extensive and exhaustive debate on the problem. However, this in turn may give rise to fears that, as a consequence, the introduction of real, all-embracing "hard" regulations (EU regulations, directives) will be a long time coming.

The above situation has borne fruit in the search for alternative solutions designed to provide a platform for regulating (at least to some extent) the legal status of artificial intelligence (temporarily or permanently). The first such approach is based on the notion of "codes of ethics"/"good practices," an increasing number of which are being developed by various institutions (entrepreneurs, associations, etc.)[8]. The second solution, on the other hand, boils down to the practice of regulating the rules of

3 The use of these terms by the EU legislator and expert groups acting on its behalf has contributed significantly to this (see: the report of 8 April 2019 of High-Level Expert Group on Artificial Intelligence entitled "Ethics Guidelines for Trustworthy AI"; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Building Trust in Human Centric Artificial Intelligence (COM(2019)168)).

4 There are numerous proposals in legal doctrine to define the term "artificial intelligence". The EU legislator has also dealt with this issue. Unfortunately, a more detailed analysis of this issue would go far beyond the scope of the subject. However, it is worth noting a relatively new and at the same time comprehensive definition proposed by T. Zalewski, which will be considered valid on the grounds of this article: "artificial intelligence is a system that allows for tasks that require a learning process and new circumstances to be taken into account when solving a problem, and that can act autonomously and interact with its environment to varying degrees depending on the configuration" (T. Zalewski, Definicja sztucznej inteligencji, in: M. Świerczyński, L. Lai (eds.), Prawo sztucznej inteligencji, Warsaw: C. H. Beck, 2020, p. 13).

5 Skynet - a fictitious, self-aware military defense system, appearing in a series of films about the Terminator. Aiming at the complete annihilation of mankind, it has provoked a war between humans and machines (see, inter alia: Terminator (1984), directed by J. Cameron).

6 More about deep fake technology see: K. Szpyt; Sztuczna inteligencja i nowe technologie (nie zawsze) w służbie ludzkości, czyli cywilnoprawna problematyka rozwoju i popularyzacji technologii deepfake, in: K. Flaga-Gieruszyńska, J. Gołaczyński, D. Szostek (eds.), Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe. Zagadnienia wybrane, Warsaw: C. H. Beck, 2019, pp. 75-94; D. Harris, Deepfakes: False pornography is here and the law cannot protect you, in: Duke Law & Technology Review, vol. 17, 2019.

7 See, inter alia: White Paper of 19 February 2020 on Artificial Intelligence – A European approach to excellence and trust; the Commission report of 19 February 2020 on safety and liability implications of Artificial Intelligence, the Internet of Things and robotics; the Commission communication of 25 April 2018 on Artificial Intelligence for Europe (COM(2018)0237).

8 See, inter alia: the code of good practice proposed by Bosh (Bosch code of ethics for AI, available at: https://assets.bosch.com/media/en/global/stories/ai_codex/bosch-code-of-ethics-for-ai.pdf [Access: 25th May 2020]).

AI usage by means of special license agreements, i.e. so-called Responsible Artificial Intelligence Licenses (RAIL or Responsible AI Licenses).

It is precisely the latter agreements that will be the focus of the present article, in which I will outline their general characteristics, analyse their advantages and disadvantages and assess whether they can find wider application in practice. Above all else, I will endeavour to answer the question posed in the title, namely can RAIL truly be considered a genuine alternative to generally applicable laws as a means of regulating the legal status of AI?

1. Responsible AI Licenses – characteristics

Responsible AI Licenses are agreements between, on the one hand, entities possessing rights to AI and, on the other, persons wishing to use it[9]. Within this group, two distinct types of agreement can be distinguished:

a) a Responsible AI End-User License - this regulates the way in which ready-to-function AI is used as a whole, without the possibility of its being modified in any;

b) a Responsible AI Source Code License – this instrument regulates the way in which an AI source code is used, including any possible scope for its modification.

Licenses of this type are usually limited, personal (non-exclusive), revocable and non-transferrable. Only a very small number of examples of such agreements can be found on the Internet. The most famous of such licenses, and at the same time their precursors, were those created by a group of researchers[10] and made available at www.licenses.ai[11].

As can be easily guessed, the Responsible AI End-User License is an agreement inspired by the classic End-User License Agreements widely applied in the video game and software industries. In turn, the Responsible AI Source Code License is modelled on open source software licenses[12]. At the same time, in addition to fairly standard restrictions and obligations owed to the licensor (such as prohibiting any infringement of third-party intellectual property rights), both these agreements also contain clauses of a more general, "ethical" nature. The assumption is that they are not

9 Due to the limited framework of the article, I will not elaborate on the question of what kind of rights they might be. It can be also mentioned that most often licensors will have artificial intelligence copyrights. However, that doesn't have to be the rule. For example, the licensed AI may be a product of another AI's activity, which in practice in most European jurisdictions would raise the suspicion (warrant a position) that it could not be considered a legally protected work.

10 D. Contractor, D. McDuff, J. Haines, B. Hecht and C. Hines were mentioned as the authors of the draft contracts (RAIL) on the website; see the origin of these licences: K. Johnson, RAIL debuts license agreements for the responsible use of AI, available at: https://venturebeat.com/2019/02/11/rail-debuts-license-agreements-for-the-responsible-use-of-ai/ [Access: 25th May 2020].

11 See: Responsible AI End-User License (available at: https://www.licenses.ai/enduser-license [Access: 25th May 2020]) and Responsible AI Source Code License (available at: https://www.licenses.ai/open-source-license [Access: 25th May 2020])

12 See more about open source software: G. Bassett, B. Fitzgerald (eds.), Legal Issues Relating to Free and Open Source Software, pp. 1-126, available at: http://eprints.qut.edu.au/13673/1/open_source_book.pdf [Access: 25th May 2020].

only supposed to protect the interests of the licensor[13], but also the general public. They prohibit the use of AI for activities deemed morally questionable (at least in the opinion of the creator of the license/licensor). In practice, it is precisely these clauses that would allow these licenses to be treated as an instrument providing (more or less) comprehensive regulation of the legal status of AI. The catalogue of such clauses is not yet exhausted. For example, the above-mentioned templates, available for downloading on the website www.licenses.ai, prohibit the following:

a) the gathering and analysis of specific information on individuals (intended to protect the right to privacy and personal data)[14];

b) the falsification or the creation of false audio or audio-visual recordings (primarily deep fakes), unless they have been tagged (with a watermark, signature, etc.) as being false[15];

c) any diagnosis of a patient's health that has not been overseen by a human being as well as the use of AI in certain areas of insurance activity (e.g. to determine the amount of a premium and consider the claims of victims)[16];

d) the use of AI in certain areas of the judicial system and penal policy (including for the purpose of predicting the likelihood of any individual committing an offence or reoffending)[17].

It is up to the authors of the standard form agreement alone to decide on how broad the catalogue of these clauses[18] will be and whether they will allow users to add their own contractual stipulations. Another issue is what, if any, legal consequences would result from a possible failure to abide by the aforementioned restriction prohibiting any modification of the agreement. However, this problem goes beyond the scope of the present article.

2. Responsible AI Licenses - pros and cons

To determine the suitability of Responsible AI Licenses as a potential legal regulator of the creation and use of AI, we should first look at their most important advantages and disadvantages. Only following an analysis of these, will it be possible to draw any more general conclusions.

The benefits include the following:

13 "The licensor's interests" should be broadly understood here. The idea is not only to secure potential material benefits, but also to prevent a third party from using the AI in a way that would be contrary to the licensor's world/moral viewpoint and thus create emotional discomfort for the licensor.

14 See: Article 4 (A) Responsible AI End-User License; Article 3 paragraph 2 point 1 Responsible AI Source Code License.

15 See: Article 4 (B) Responsible AI End-User License; Article 3 paragraph 2 point 2 Responsible AI Source Code License.

16 See: Article 4 (C) Responsible AI End-User License; Article 3 paragraph 2 point 3 Responsible AI Source Code License.

17 See: Article 4 (D) Responsible AI End-User License; Article 3 paragraph 2 point 4 Responsible AI Source Code License.

18 For example, in the Responsible AI End-User License belonging to EDGEIMPULSE, INC. there is only one clause that can be considered an "ethical" clause: the prohibition of the use of AI for military purposes. The second prohibition - to use the AI to commit criminal acts - is closer to a classic contractual clause than an ethical clause (see: Article 1 (A) point 1 Responsible AI License, available at: https://docs.edgeimpulse.com/page/responsible-ai-license [Access: 25th May 2020]).

a) the possibility to create and modify licenses quickly – unlike generally applicable laws, standard form agreements are not subject to the dictates of often painstaking legislative procedure. As a result, they can be created and modified much more effectively, and adapted to changes in the surrounding environment, including those effected by technological advances. Moreover, the creation of such licenses is not the sole reserve of clearly defined legislative bodies, which as a consequence means that a much larger number of people may be involved in the process or several independent groups can create an unlimited number of templates;

b) flexibility - relatively general contractual clauses can be inserted in a license without causing major problems, thereby making them better suited to the goal of ensuring more ethical artificial intelligence. However, this will not always be possible in the case of "hard" law (regulations, directives). At the same time, since such licenses can be modified these clauses can also be made more specific and more in line with the needs of the license creator (including by providing greater clarity in general clauses taken from generally applicable law). In practice, in many cases this would make it possible to avoid diverging perspectives arising, for example, from the parties to the agreement having a different understanding of certain concepts, due in turn to their different cultural, social and legal backgrounds;

c) extraterritoriality - at the present time, there are growing discrepancies in the direction and pace of regulation in the field of artificial intelligence as reflected in the legislative solutions being adopted in the EU, the United States and certain Asian countries. Promoting certain generally recognised contractual standards would (at least to some extent) harmonise the rights and obligations of the contracting parties, thereby guaranteeing certainty in business relations;

d) accessibility of content - the contract templates discussed above will usually have a relatively short form of up to several pages in length. As a result, it would be much easier to familiarise oneself with the content of such licenses (especially for non-lawyers) than analyse several voluminous EU legislative instruments. As a result, such an approach may increase awareness of their content, and, later, also of their application in practice.

In turn, the disadvantages of RAIL include:

a) excessive inclusiveness – despite ensuring the advantages of speed the fact that all entities are entitled, with no restrictions whatsoever, to create RAIL licenses carries the risk of a large number of poorly constructed and ambiguously phrased patents appearing on the market;

b) there is no obligation to use them - contrary to generally applicable laws, in the case of license agreements, no one is required to use them in real life. As a consequence, in practice they may be excluded from circulation due to the reluctance of potential licensors to rely on them;

c) difficulties with enforcing contractual compliance - this should be understood as a two-fold problem: firstly, complications may arise from licensors asserting their rights before common courts, which are often unfamiliar with AI; secondly, licensors may be reluctant to act against licensees, especially those who - despite breaking "ethical" clauses - pay the license fee on time;

d) the fragmentary character of the regulations and their limited scope - agreements are a typical feature of private law. They cannot, however, provide a comprehensive regulatory framework for issues related to public law, including criminal law (e.g. criminal liability for offences committed when using or creating AI). The second point to keep in mind is the fact that agreements only regulate relations between the parties to the agreement, without creating effective erga omnes rights. This fact will prevent many issues from being regulated, e.g. the possible establishment of intellectual property rights in the case of AI creative works, an issue that is currently giving rise to many complications.

3. Conclusions and proposals for further legal action

An analysis of the reflections made in the previous section suggests that RAIL, although not without its flaws, is a potentially effective solution, albeit one that requires further steering and development. Undoubtedly, there should be calls for "responsible" templates for both types of license. Moreover, the insertion of "ethical" clauses is not a novelty in open source licenses - similar experiments have already taken place in the past[19]. However, a more innovative approach would involve "grafting" them onto an End-User License. Such an approach is justified by the specific functioning of AI. This is because the final outcome of the work of AI is not always predictable. After all, the algorithm may evolve. Furthermore, the data that will be used to train it is also not without significance. Changing the database can result in a situation where an algorithm originally designed to detect intruders in schools ends up being used in practice to track political opponents.

At the same time, in view of the above, it is also worth considering the use of "ethical" clauses in commercial licenses, and not simply those accessible under open source licenses[20]. Bearing in mind the underlying purpose of "responsible licenses," I believe that it can also be successfully implemented in such cases. The more so as, in addition to the contractual stipulations outlined above, RAIL licenses do not for the most part feature any specific solutions that would allow them to qualify fully as separate type of contract. As a result, all licenses that incorporate certain generally accepted "ethical" clauses in their content could ultimately be widely considered "responsible." Furthermore, this would also allow their inclusion in other agreements used in the creation and development of AI, for example agreements concerning the transfer of rights to databases.

Bearing in mind the above-mentioned danger of excessive inclusiveness associated with RAIL, it should be pointed out that, unfortunately, this risk cannot be completely eliminated. Allowing a particular group of entities a specific kind of monopoly in the creation of standard form contracts, even if only in the name of the principle of freedom of contract, should be deemed unacceptable. One possible alternative worth

19 See, inter alia: C. A. Ehmke, An Ethical License for Open Source Projects, available at: https://firstdonoharm.dev/ [Access: 25th May 2020].

20 However, in the case of open source licenses, RAIL will probably be the most important. This is due to the fact that the AI will then be made available to an unidentified group of people, essentially outside the licensor's control.

considering here is the creation of a group of widely recognised experts (e.g. acting within EU bodies), both practitioners and theoreticians, who would draft optimal standard form agreements and/or standard clauses.

Another issue that needs addressing, and which has already been referred to above, is the absence of any obligation to use standard form agreements and clauses in practice. In this case, unfortunately, it is difficult to propose any fully effective solution. Besides any possible promotional campaigns for standard form agreements/clauses mentioned in the previous paragraph, we could also consider reserving the designation "responsible contract" exclusively for those entities which actually use the clauses drafted by the above-mentioned group of experts. This would constitute a mark of high quality that could have a positive impact on the image of licensors and their reception in public space, which in turn could motivate others to use this solution (although in such cases licensors would no longer be permissible to modify the templates/clauses).

With regard to the difficulties with enforcing contractual compliance, it should be pointed out that - unfortunately - problems of this type are characteristic of all kinds of cases involving highly specialised issues. One possible solution might be to establish and maintain a specialised arbitration court (in particular one that could operate online).

Also, when the regulatory framework is fragmentary, this cannot be completely avoided. Of course, some of these gaps can be filled with numerous and extensive ethical clauses, but they will never be a substitute for generally applicable laws.

In light of the above considerations, we must embrace the view that attempts to apply the concept of RAIL more broadly in practice appear justified. Suitably drafted templates and clauses may very well be able to supplement generally applicable laws, as well as serve as a kind of "prosthesis" until relevant provisions are enacted. At the same time, however, to answer the question posed in the title, RAIL cannot be regarded as a real alternative to generally applicable laws and provide a comprehensive regulatory framework for the creation and use of AI.

Summary

At the present time, RAIL appears to offer promising material for further research. As a potential regulator of AI, these licenses have many advantages: they can be created and modified quickly, and they offer flexibility, extraterritoriality and accessible content. However, this does not change the fact that in the current situation, further work is undoubtedly required to ensure the optimal standard form agreements and clauses. Even then, however, it will still not be possible to eliminate all the weaknesses of this solution, the most important being the fragmentary form of such regulations and their limited scope. As a result, RAIL can never be treated as a genuine and exhaustive alternative to generally applicable laws. At most it can complement them can serve as a kind of "prosthesis" until the appropriate regulations are introduced.

However, it is difficult to predict the future fate and "career" of these templates/clauses. If EU lawmakers or national legislatures introduce highly detailed regulations

in the future, they may lose their raison d'etre entirely and become no more than a curiosity. On the other hand, with the proper engagement, it is not out of the question that they will continue to evolve and become a significant source of private law, as occurred, among other things, in the case of FIDIC[21].

Bibliography:

BASSETT G., FITZGERALD B. (eds.). Legal Issues Relating to Free and Open Source Software, pp. 1-126. Available at: http://eprints.qut.edu.au/13673/1/open_source_book.pdf. Access: 25th May 2020.

Bosch code of ethics for AI. Available at: https://assets.bosch.com/media/en/global/stories/ai_codex/bosch-code-of-ethics-for-ai.pdf. Access: 25th May 2020.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Building Trust in Human Centric Artificial Intelligence (COM(2019)168).

EHMKE, C. A. An Ethical License for Open Source Projects, Available at: https://first-donoharm.dev/. Access: 25th May 2020.

HARRIS D. Deepfakes: False pornography is here and the law cannot protect you, in Duke Law & Technology Review, vol. 17, 2019, pp. 99-127.

JOHNSON K. RAIL debuts license agreements for the responsible use of AI. Available at: https://venturebeat.com/2019/02/11/rail-debuts-license-agreements-for-the-responsible-use-of-ai/. Access: 25th May 2020.

Responsible AI End-User License. Available at: https://www.licenses.ai/enduser-license. Access: 25th May 2020.

Responsible AI License. Available at: https://docs.edgeimpulse.com/page/responsible-ai-license. Access: 25th May 2020.

Responsible AI Source Code License. Available at: https://www.licenses.ai/open-source-license. Access: 25th May 2020.

SZPYT K. Sztuczna inteligencja i nowe technologie (nie zawsze) w służbie ludzkości, czyli cywilnoprawna problematyka rozwoju i popularyzacji technologii deepfake. In: FLAGA-GIERUSZYŃSKA K.; GOŁACZYŃSKI J.; SZOSTEK D. (eds.). Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe. Zagadnienia wybrane. Warsaw: C. H. Beck, 2019, pp. 75-94.

The Commission communication of 25 April 2018 on Artificial Intelligence for Europe (COM(2018)0237).

The Commission report of 19 February 2020 on safety and liability implications of Artificial Intelligence, the Internet of Things and robotics.

The report of 8 April 2019 of High-Level Expert Group on Artificial Intelligence entitled "Ethics Guidelines for Trustworthy AI".

21 FIDIC (acronym for Fédération Internationale Des Ingénieurs-Conseils) - a set of widely recognised international standards which serve as models for design or construction contracts developed by the editorial committee of the International Federation of Consulting Engineers

White Paper of 19 February 2020 on Artificial Intelligence – A European approch to excelence and trust.

ZALEWSKI T. Definicja sztucznej inteligencji, in: ŚWIERCZYŃSKI M.; LAI L. Prawo sztucznej inteligencji, Warsaw: C. H. Beck, 2020, pp. 1-14.