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Editorial Note

Exploring the Questions and Challenges of Artificial Intelligence Generative Models in Europe

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ABSTRACT

The development and use of artificial intelligence (AI) systems are raising concerns among experts and intellectuals, including Elon Musk, Steve Wozniak, and Yuval Noah Harari. In a letter signed by multiple individuals from various fields, they call for a halt to the development of advanced AI systems, citing the risks of propaganda and untruths flooding information channels, the automation of jobs, the development of non-human minds that could replace humans, and the danger of losing control of civilization. These concerns have resulted in calls for regulatory measures and investigations into companies like OpenAI. However, addressing the challenges posed by AI requires not just legal and regulatory instruments but also stronger cultural and critical education.

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1. Introduction

In 1992, Black Sabbath released "Dehumanizer," their sixteenth studio album, featuring the track "Computer God" as the opening song. The lyrics of the song discuss the social consequences of the overwhelming power of computers and AI, with lines such as "Computerize God, it's the new religion."

Thirty years afterwards, on March 22, 2023, an open letter[1] has been subscribed by Elon Musk, Steve Wozniak, Yuval Noah Harari, and other intellectuals, entrepreneurs and experts, calling for a halt to the development of Artificial Intelligence (AI) systems. The letter expresses concern about the dangers of machines flooding information channels with propaganda and untruths, automating away jobs, developing non-human minds that could eventually replace humans and risking the loss of control of civilization.

The letter specifically appeals to all laboratories training AI systems to suspend the implementation of more powerful systems like GPT-4 for at least six months. During this pause, efforts should be focused on defining advanced security protocols in cooperation with institutions to ensure these systems are entirely safe. The letter also calls for the establishment of new regulatory authorities to oversee the development of AI.

The clarity of the positions expressed in the letter, as well as the diversity of its signatories, cannot be ignored. Similarly, it is worth noting that the aforementioned positions are not isolated, as criticism against LLMs-based products (*i.e.* Large Language Models) and the way they are developed and released is flourishing. By way of example, on March 30, 2023 a complaint[2] has been filed with the American Federal Trade Commission by the Center for Artificial Intelligence and Digital Policy against OpenAI, Inc. and its recently released product GPT-4. The complaint focuses on the product's release having occurred in the lack of a previous independent assessment and on the company's conduct allegedly putting in practice unfair or "*deceptive acts or practices in or affecting commerce highlights*". The document lists eight main areas of concern, namely: bias in the training model, children's safety, consumer protection, cybersecurity, deception, privacy, transparency, public safety.

Even more dramatically, a further call[3] has been launched on the newspaper Time on March 29, 2023 by U.S. decision theorist Eliezer Yudkowsky, stating that pausing LLMs' trainings is not enough and "*If we go ahead on this everyone will die, including children who did not choose this and did not do anything wrong*".

Even considering some excesses, the above criticisms raise multiple questions, including whether public authorities can govern such a phenomenon, what tools should be used, and how compliance with any measures or laws that may be passed can be ensured. The latter point is becoming a central theme in the relationship between technology and law.

1. ChatGPT and the Italian Data Protection Authority: a case for rethinking the European regulatory framework?

On March 30, 2023, the Italian Data Protection Authority has issued an urgent measure against OpenAI, limiting the temporary processing of personal data for Italian users regarding ChatGPT, its most well-known relational AI software[4]. The Authority's main arguments basically boiled down to an alleged lack of user information, the absence of legal basis for the massive collection and storage of personal data, the inaccuracy of personal data included in the system's outputs and the lack of any filter to verify the age of users under 14 years old. Almost simultaneously, the Canadian

[1] Full text of the letter can be downloaded here https://futureoflife.org/open-letter/pause-giant-ai-experiments/.
[2] Full text of the compliant is publicly available here https://cdn.arstechnica.net/wp-content/uploads/2023/03/CAIDP-FTC-Complaint-OpenAI-GPT-033023.pdf.
[3] Full text of the letter can be downloaded here https://time.com/6266923/ai-eliezer-yudkowsky-open-letter-not-enough/.
[4] Press release available here (ITA/ENG version) https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870847#english. The Garante's decision is dated March 30, 2023.

Commissariat à la protection de la vie privée has launched an investigation into the same company: the proceedings were started, reportedly, "*in response to a complaint alleging the collection, use and disclosure of personal information without consent*"[5].

As to the Italian case, OpenAI's response was to make the service no longer accessible from Italy and to consequently announce a refund of the subscription paid by "pro" users.

It is not the place to discuss the possible defects of the measure adopted by the Italian Authority, although it is somewhat perplexing that the urgency behind its adoption was not motivated in any way, and the "phone verification" system that OpenAI implements for ChatGPT registration wasn't fully scrutinized (in Italy, to own a SIM card, one must be 15 years old).

Taking aside the above remarks, however, what is of greater interest from a general perspective was the alleged lack of a legal basis justifying the collection of personal data to "train" the algorithms underlying the platform's functions. This issue, indeed, raises significant questions about the legal framework for the development and use of AI and the potential risks to privacy and personal data protection.

it is undeniable that the rigidity of the GDPR[6] approach (amplified by often restrictive interpretations by the EDPB[7] and the EU Court of Justice) represents a problem for which two solutions can be envisaged:

1. The Artificial Intelligence Act, currently under discussion at EU level, could have been the ideal legislative instrument to insert ad hoc legal bases for the processing of data in the context of artificial intelligence systems. Unfortunately, this has not been done: it is a serious gap that could still be filled, thus making that legislation truly "future-proof";
2. If ad hoc legal bases are not to be provided, then it is necessary to broaden – even interpretively – the scope of application of the "legitimate interest" referred to in Article 6, letter f of the GDPR. This would also allow for the safeguarding of other types of data processing (such as targeted advertising), where consent is incorrectly deemed to be the "golden rule" and other legal bases could equally apply given the protections required under the GDPR.

Regarding point 2, it is noteworthy to mention that in the provision of April 11th, 2023[8], the Italian Data Protection Authority, in relation to the ChatGPT case, indicated to OpenAI, among the conditions in order to revoke[9] the limitation imposed by the provision of March 30th, to change *"the legal basis of the processing of users' personal data for the purpose of algorithmic training, by removing any reference to contract and relying on consent or legitimate interest as legal bases by having regard to the assessment the Company is required to make from an accountability perspective"*.

This constitutes the first significant recognition by a European data protection authority that legitimate interest can potentially serve as a suitable legal basis for the development of artificial intelligence systems.

Moreover, this has already occurred in 2014 on the occasion of the judgment of the Court of Justice of the European Union in the Google Spain case[10]. Although it made headlines for recognizing the right of each individual to be delisted from a search engine for results obtained from their personal data, few remember the wisdom

[5] Press release – dated April 4, 2023 – available in English here https://www.priv.gc.ca/en/opc-news/news-and-announcements/2023/an_230404/.

[6] GDPR is the acronym for "General Data Protection Regulation", Regulation (EU) 2016/679.

[7] The European Data Protection Board (EDPB) is an independent European body, which contributes to the consistent application of data protection rules throughout the European Union, and promotes cooperation between the EU's data protection authorities. The EDPB is established by the General Data Protection Regulation (GDPR) and is based in Brussels.

[8] See https://garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9874702#english.

[9] OpenAI reinstated service in Italy on April 28th, see https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9881490#english .

[10] See https://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62012CJ0131.

and balance with which the Court then addressed the underlying issue.

If search engines were autonomous data controllers, on what legal basis could they scrape the information (including personal data) entered on the web to organize and offer it as a service? On that occasion, the Court had no doubts in affirming that processing such as that carried out by a search engine operator could fall under the ground then contemplated in Article 7, letter f) of Directive 95/46/EC (now Article 6, letter f of the GDPR), namely the pursuit of the legitimate interests of the controller.

How can one fail to see the parallelism with the current issue relating to ChatGPT and, more generally, the training of artificial intelligence systems using freely accessible resources on the internet?"

However, before proceeding with any hasty enthusiasm and considering the issue as easily solvable, it must be considered that, as clarified by the Court of Justice of the European Union in the Fashion ID judgment,[1] for a processing to be based on legitimate interest, three cumulative conditions must be met (purpose, necessity and balance):

1. the pursuit of the legitimate interest of the data controller or of the third party or parties to whom the data are communicated;
2. the need for the processing of personal data for the pursuit of legitimate interest; and
3. the condition that the fundamental rights and freedoms of the data subject do not prevail.

Regarding "necessity" under the second condition, the EDPB guidelines have clearly highlighted how the assessment must be particularly careful *"to ensure that the processing of data based on legitimate interests does not involve an unduly broad interpretation of the need to process data... this means that it is necessary to assess whether there are other, less invasive means of achieving the same objective"*.

The reference to the legitimate interest of the data controller is also not sufficient in the absence of a comparative test aimed at determining whether it prevails over the interests or fundamental rights and freedoms of the data subject.

Therefore, as previously mentioned, the particularly strict approach of the Court of Justice of the European Union and the EDPB could put at risk, or at the very least could make it difficult to implement, the legitimate interest as a legal basis for the processing of personal data for the purpose of training Artificial Intelligence systems.

3. Conclusion: the need for a new cultural approach

That being said, any normative or regulatory instrument that is developed to govern artificial intelligence systems cannot ignore the responsibility (including cultural responsibility) of the individual.

Perhaps the question that should be asked is: are we certain that the security of these systems can be guaranteed only through the production of laws, regulations, and guidelines, whose correct application would in any case be slow and certainly difficult to ensure? Is the legal instrument still the most powerful tool by which we can imagine mastering the change? Should we only focus our attention on laws, regulations, and guidelines, or should we rather put all our best efforts in strengthening the education of human beings – as well as machines – to ensure that they are provided with the cultural and critical tools to be conscious users of new means, rather than being victims of them?

Returning to the initial musical reference (1992's "Computer God"), many years later, in 2013, "God is dead?" followed: given that legal professionals have traditionally viewed the law in a manner akin to a person of faith contemplating a deity, it can be posited, as a metaphorical construct, it can be argued, as a metaphorical construct, whether this is still the assumption we should move from.

[1] See https://curia.europa.eu/juris/document/document.jsf?text=&docid=216555&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1617054.