

HOW EXISTING AND DEVELOPING LAWS APPLY TO ARTIFICIAL INTELLIGENCE

Part I

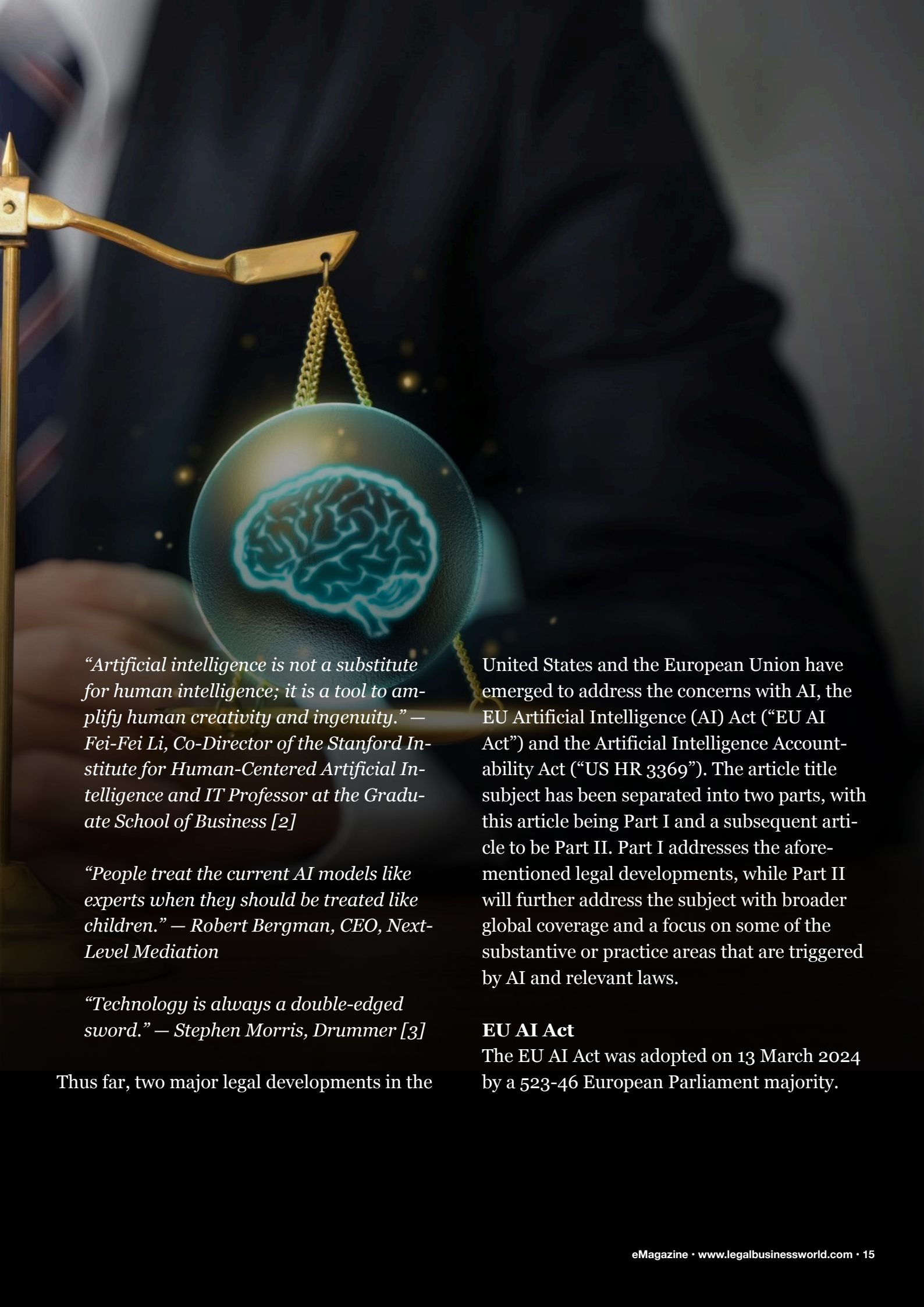
Susan Andrews, Founder and Principal of Andrews Dispute Resolution



The use of Artificial Intelligence (AI) by businesses is becoming increasingly prevalent due to its evolving and improving advantages. Most global businesses reported an increase in performance or profitability from digital transformation including AI over 24 months based on KPMG's Global Tech Report 2023. [1]

This expansion of AI activity increasingly highlights the need for legal oversight of the appropriate and ethical development and use of AI. Such activity also draws attention to the nature of AI. Obviously, most things have both negatives and positives, and AI is no exception.

The following quotes address aspects of the nature of AI:



“Artificial intelligence is not a substitute for human intelligence; it is a tool to amplify human creativity and ingenuity.” — Fei-Fei Li, Co-Director of the Stanford Institute for Human-Centered Artificial Intelligence and IT Professor at the Graduate School of Business [2]

“People treat the current AI models like experts when they should be treated like children.” — Robert Bergman, CEO, Next-Level Mediation

“Technology is always a double-edged sword.” — Stephen Morris, Drummer [3]

Thus far, two major legal developments in the

United States and the European Union have emerged to address the concerns with AI, the EU Artificial Intelligence (AI) Act (“EU AI Act”) and the Artificial Intelligence Accountability Act (“US HR 3369”). The article title subject has been separated into two parts, with this article being Part I and a subsequent article to be Part II. Part I addresses the aforementioned legal developments, while Part II will further address the subject with broader global coverage and a focus on some of the substantive or practice areas that are triggered by AI and relevant laws.

EU AI Act

The EU AI Act was adopted on 13 March 2024 by a 523-46 European Parliament majority.

The EU AI Act aims to both regulate the ethical use of AI [4] and to extend to AI legislation the Brussels effect that occurred with the General Data Protection Regulation (GDPR) [5]. In other words, the European Union, through its legal institutions and standards, exercises a global power to “Europeanize” important aspects of global commerce. [6]

Because the EU AI Act is expected to be broad, it is likely to have a significant impact on businesses, and this application of the law will start between early 2025 and early 2026, depending upon the type of technology and system. Also, it divides AI systems into various risk levels and can impact both users and providers. Therefore, businesses should be aware that they might be regulated as both users and providers of AI technology and systems, depending upon their activities.

Further, the EU is intending to develop additional legislation targeting specific areas, such as products liability, employment, and copyright. The products liability legislation is already being developed, while the employment and copyright laws are expected to emerge following the June 2024 EU elections. [7]

Finally, as it relates to this article, compliance with the EU AI Act does not relieve businesses from their obligations with existing EU laws, including certain sectoral legislative acts. Examples of such laws include personal data, consumer protection, social policy, national labor law and practice, and product safety (to which existing sectoral legislative acts also apply). [8]

US HR 3369

US HR 3369 was introduced to the United States House of Representatives on 16 May 2023. US HR 3369 instructs the Assistant Secretary of Commerce for Communications and Information to conduct a study on accountability measures for AI systems, to hold meetings with relevant stakeholders for the purpose of soliciting feedback, and for other purposes, including submitting a report.

The study is to include an analysis of how accountability measures: are being incorporated into AI systems used by communications networks and electromagnetic spectrum sharing applications; can facilitate the closing of the digital divide and assist the promotion of digital inclusion in the United States; and may reduce risks related to artificial intelligence systems, including cybersecurity risks. The study is to also analyze how the term “trustworthy” is used, defined and applied, as well as the relationship between the terms “trustworthy,” “responsible” and “human-centric” with respect to AI. [9]

Comparison Points of EU AI Act and US HR 3369 [10]

The EU AI Act defines AI as software developed with machine learning, logic- and knowledge-based approaches, and statistical approaches, including deep learning, while US HR 3369’s definition focuses on systems using machine learning.

The former applies to AI systems placed on the market, put into service, or used in the EU, regardless of development origin, while the latter’s scope of application is on companies

providing AI systems in the healthcare, transportation, and criminal justice sectors which pose significant risks to privacy, security, or other public interests. [10]

The EU AI Act defines AI as high risk if intended for use as safety components of products or in critical applications such as employment and essential public services where significant risks can arise. US HR 3369's definition of high risk focuses on whether AI's use involves significant impacts on individual rights, safety, or critical services access, or poses systemic risks to such sectors as financial stability or public safety. [10]

The EU AI Act imposes compliance obligations of risk assessment, high quality datasets, transparency and user information provision, robustness, accuracy, and security measures, while US HR 3369 requires impact assessment, bias and discrimination testing, transparency reports, and privacy safeguards for high-risk AI systems. Enforcement mechanisms under the EU AI Act involve significant fines of up to 6% of annual global turnover or €30 million, whichever is higher, plus other corrective measures. Under US HR 3369, relevant federal agencies could impose unspecified penalties that might include fines, injunctions, and other corrective actions. [10]

Transparency requirements of the EU AI Act include mandatory information sharing regarding AI systems' capabilities and limitations. US HR 3369 requires mandatory disclosure to regulators, and in some cases to the public, of the logic, data, and design processes of high-risk AI systems. [10]

Data governance under the EU AI Act requires data quality and management without bias and with privacy, especially for high-risk AI systems, while US HR 3369 focuses on preventing discrimination and ensuring data privacy and security by AI systems. While the EU AI Act has mandatory human oversight of high-risk AI systems to ensure they can be overridden or disabled and to reduce risks, US HR 3369 stresses the importance of human review and decision making authority, particularly in critical decisions affecting individual rights and safety. The technical documentation and record keeping requirements of the EU AI Act are technical documentation and logs for high-risk AI, while US HR 3369 mandates detailed documentation of the design, development process, and training data for high-risk AI systems to facilitate oversight. [10]

Finally, under the EU AI Act, market surveillance and monitoring involves marketing authorities monitoring the market to ensure compliance, including the ability to carry out inspections and impose remedies. In contrast, US HR 3369 requires federal agencies to monitor compliance and conduct evaluations of AI systems' impacts in critical sectors. [10]

Conclusion

In the context of the adoption of AI for the legal industry generally and as it pertains to business more specifically, the somewhat fragmented and inconsistent nature of the ensuing standards inherent in the existing and emerging laws is bound to create ambiguity. Such ambiguity is likely to be both an advantage and disadvantage in the legal context, as

the potential inconsistent and incompatible legal standards lead to challenges. The reality is that this situation will create more disputes for resolution through the plethora of dispute resolution processes ranging from negotiation and mediation to arbitration and litigation.

This concludes Part I on the subject of how existing and developing laws apply to AI, with its focus on the two major legal developments in the US and EU, the EU AI Act and US HR 3369. Part II will further address the subject of AI law enforcement with broader global coverage and a focus on some of the substantive or practice areas that are triggered by AI and relevant laws.

Notes

- [1] Decoding the EU AI Act, KPMG, 2024, Introduction, page 4, <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2024/02/decoding-the-eu-artificial-intelligence-act.pdf>
- [2] Top 10 Expert Quotes That Redefine the Future of AI Technology <https://www.nisum.com/nisum-knows/top-10-thought-provoking-quotes-from-experts-that-redefine-the-future-of-ai-technology>
- [3] It All Comes Back Around for Stephen Morris, Tempe Nakiska, Interview Magazine, 18 October 2012 <https://www.interview-magazine.com/music/stephen-morris-new-order>
- [4] Infra. 1., Executive Summary, page 6.
- [5] EU Formally Adopts World's First AI Law, Data Matters Privacy Blog, Sidley Austin, LLP, <https://datamatters.sidley.com/2024/03/21/eu-formally-adopts-worlds-first-ai-law/#:~:text=On%20March%2013%2C%202024%2C%20the,in%20favor%20of%20the%20legislation.>

- [6] Bradford, Anu, The Brussels Effect (2012). Northwestern University Law Review, Vol. 107, No. 1, 2012, Columbia Law and Economics Working Paper No. 533, SSRN:

<https://ssrn.com/abstract=2770634>

- [7] Infra. 5.

- [8] Infra. 4.

- [9] H.R.3369 - Artificial Intelligence Accountability Act, 118th Congress (2023-2024), Congress.gov, <https://www.congress.gov/bills/118/congressional-legislation/3369/artificial-intelligence-accountability-act>

- [10] AI Regulations, Mediators and Arbitrators, Robert Bergman, 21 March 2024, mediate.com, <https://mediate.com/ai-regulations-mediators-and-arbitrators/>

About the Author

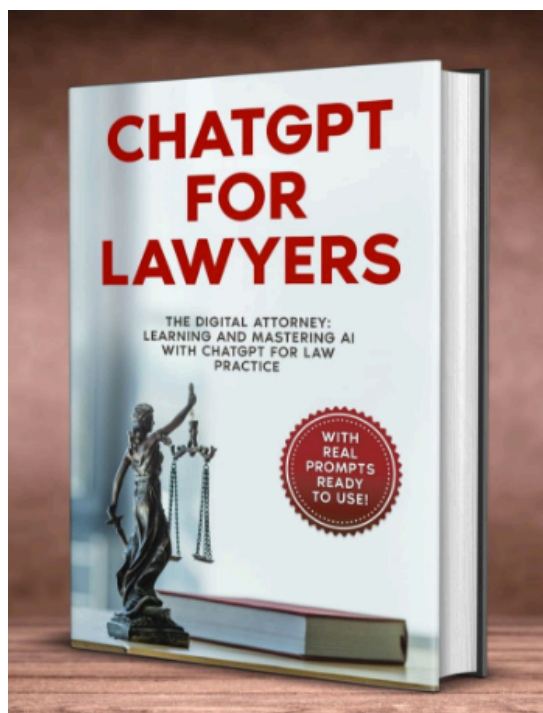
Susan Andrews is Founder and Principal of Andrews Dispute Resolution, focusing on Online Dispute Resolution, Dispute Resolution Analysis, Negotiation, and Mediation services for dispute resolution, decision making, and dealmaking in General Civil and Commercial contexts domestically and internationally. She is an Active Member of the Kentucky Bar Association, Chair Elect of its Alternative Dispute Resolution Section, a Life Fellow of the Kentucky Bar Foundation, the nonprofit, charitable arm of Kentucky's legal community, an International Mediation Institute (IMI) Qualified Mediator, Co-Chair of its Online Dispute Resolution Task Force, an Advisory Board member of InnovADR, a Member of the

American Bar Association (ABA) Online Dispute Resolution Task Force Working Group III, Guidance with Respect to Special Issues Relating to Private ODR, that published the American Bar Association Section of Dispute Resolution Guidance for Online Dispute Resolution (ODR), and a Life Fellow of the World Mediation Organization (WMO). As a certified NextLevel™ Mediation Dispute Resolution Analyst and Online Dispute Resolution specialist, Susan has a keen interest in technology in general and as it pertains to dispute resolution in particular.

She is a co-author of "Mediation Beyond Covid: Hacks, Craics and Crocodile Tears," an Amazon #1 Best Seller in multiple categories internationally, bringing readers behind the front lines of pandemic conflict resolution with reflection, wisdom, and humour, and with proceeds supporting Mediators Beyond Borders International (Oceania) (MBBO) in

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Susan holds a Juris Doctor (JD) degree from Southwestern Law School (formerly Southwestern University School of Law) and a Bachelor of Arts (BA) in Liberal Arts from Mount Saint Mary's University (formerly Mount Saint Mary's College) in Los Angeles. She studied International Law both domestically and internationally, including Private and Public International Law, Comparative Law, European Union Law and International Trade Law, at Southwestern Law School, Tulane University Law School's Tulane Institute of European Legal Studies at Paris-Dauphine University, and University of Georgia / Institut d'Etudes Européennes, Université Libre de Bruxelles's Dean Rusk International Law Center Annual Brussels Seminar on the European Union.



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