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Artificial Intelligence: The Golden Era or the End of Humanity?

"Verily, I say unto you, the days spoken of in the Apocalypse is nigh!" (Metropolis, 1927)

Over half a century ago Alan Turing predicted that by the millennium "one will...speak of machines thinking without expecting to be contradicted". Fast-forward six decades and inventions including Google's search engine, Siri and Tesla's self-driving cars seem to have proved him correct. However, the unchartered realms of Artificial Intelligence have reignited deep-set societal fears of a world dominated by uncontrollable technology. Although these storylines have long been a part of popular culture, more recently concerns of machines superseding humans have been advocated in real life by well-respected public figures, adding weight to thoughts previously relegated to movie-night discussions. Aside from blockbuster visions of a complete apocalypse, what will an Artificial-Intelligence-led future look like for non-techno-mortals?

The economist John Maynard Keynes predicted widespread unemployment "due to our discovery of means of economising the use of labour outrunning the pace at which we can find new uses for labour." However, until now, the mechanisation of work has generally been limited to physical, repetitive labour like factory assembly lines replacing the cottage industry and heavy machinery replacing manual agricultural labour. Artificial Intelligence will extend the reach of machines. A paper by Carl Benedikt Frey and Michael Osborne uses innovative mathematical and statistical techniques to rank how susceptible 702 jobs are to computerisation. It concludes, unsurprisingly, that jobs including high-skill, human-to-human interaction and judgment are most protected, and routine, low-skill, low-wage tasks are most susceptible, but it also demonstrates the wider impact on the working world. In reality, computerisation is occurring even in statistically safe jobs, including traditionally "techno-haven" professions that prided themselves on their irreplaceable creativity, intellect and flair, such as theatre musicians and song composers. Whilst technology cannot currently make these and other professions redundant, the reduction in work and subsequent increased competition could mean that the volume of jobs is at risk in the future.

Potential uses of AI in the education sector

It does not have to be all doom and gloom however, as technology could assist rather than replace humans. Although current developments in the education sector pale in comparison to those in the non-education space, the potential for changing the way we learn is colossal. With technology assisting in the provision of unique learning pathways, tailoring content to individual student needs and learning levels, and assessing understanding and thought processes to provide feedback to students, educators could have more time to engage with specific issues and with individuals who struggle to succeed through conventional learning. In higher education, with its particular emphasis on self-led study and development, online shopping techniques could provide reading lists based on articles or books viewed by the student, but could also be used to tailor the topics covered and teaching methods to student preferences, providing the opportunity to offer a wider scope of subject content.

Inevitably, the growth of Artificial Intelligence will impact on the work available, putting more pressure on those entering the workplace as well as altering what is required from those already in it. However, when machines take jobs or tasks from humans, new ones tend to be created in their wake. While technology will never completely replace educators, Artificial Intelligence will change their role. Lectures will

combine faculty staff with technology to provide competency-based teaching, which may allow faculty staff to spend more time on research in their field, but which will also require universities to consider new revenue streams to replace previous reliance on teaching to underwrite non-funded research. Providing that Artificial Intelligence owners put appropriate programming safeguards in place and our desire for humans to work continues, there should be enough work, both through job creation and redefinition of pre-existing roles, to prevent Keynes' prediction. Whether Artificial Intelligence could eventually override restrictions put in place is a question for another day.

Legal developments

There are still significant hurdles for Artificial Intelligence. Most computer "thinking" uses clever algorithms that calculate the likelihood of events, but technology still struggles to identify nuances, imprecision and Simultaneous Localisation and Mapping (the art of perceiving physical space and understanding how to move through it). However, if the rapid development of technology so far is anything to go by, this will not take too long to address, which in itself will present challenges to our society. In law, for example, we will need new definitions and to reconsider issues including liability and compensation, the balance between use and security, and limits on development. Some legislation will already apply to new technology, in a similar vein to the way it has with the development of Uber and AirBnB, but there will be circumstances where this is not possible or desirable, as highlighted by the RoboLaw Consortium, a group of experts advising European legislators on manging the introduction of new robotic and human enhancements technologies into society. It recommended (inter alia) the reform of liability rules to separate safety and compensation, allowing for no-fault compensation and standardised safety requirements, to encourage development in the area, but in any case emphasised that solutions should be technology-specific. Whatever the ultimate outcome, we still have a long way to go to reach it.

Despite the uncertainty of an Artificial Intelligence future, history teaches us that change is normal - we survived the first industrial revolution and life will continue after the next. By restricting use of Artificial Intelligence to where it is necessary, the future world will require people to work in newly created jobs, as well as in redefined roles. That's not to say that it will be a straightforward and comfortable transition. We will need to be flexible: applying skills previously gained to re-defined (or created) roles, and willing to embrace change and to continue to learn. It will not, however, be a complete overhaul of our current world. Some legal drafting is broad enough to cover issues arising from new technology, including defective products and liability, but where this is not the case, flexibility will be required in further drafting and application. In the same way, the world will still need thought-leaders and professions that rely on intellect, creativity and flair, but they may be used for different or completely new purposes. Luckily, we still have a few years to acclimatise ourselves to these inevitable changes, while Artificial Intelligence learns what our ancestors have been working on for the last few million years.

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Thinking service levels

Any opportunity to streamline the procurement process by making a market of service providers available instantly to purchase must be good news. This is the idea behind the government's G-Cloud platform for procuring IT services. The G-Cloud marketplace allows contracting authorities to choose "cloud-based" service providers from a pre-approved list. There are, of course, puzzles. This week's puzzle is how to ensure a fair competition for service providers who provide for completely different service levels. This is particularly acute where the rules of the competition prevent negotiating with the G-Cloud service providers.

The real problem is based around the proposed service levels. This is a topic that procurement professionals and their internal teams often consider too late in the process, following selection of the best technical solution at the best price. I can illustrate this using a simple scenario for the non-mathematically inclined.

A university is looking to procure a service provider to provide a "cloud-based" IT system, which could be anything from a student records management system to back-office HR and payroll system and anything in between. It has gone out to market and down-selected three potential service providers:

Service Provider 1 promises a service which is provided 24 hours a day, 7 days a week (for 365 days); with a service level of 99.99% availability over a 12 month period. This provides for around an hour of unscheduled downtime over the year.

Service Provider 2 promises a service which provides a service level of 99.99% availability, but over the core business hours, which might be over a 5 day week, for 36 weeks and excluding bank holidays and public holidays. This provides for around eight minutes of unscheduled downtime over the same period during those core hours. By simply reducing the measure from total hours to "core" hours – the hours which actually matter to the client – this has the effect of massively prioritising the university's service needs and, therefore, remedies for breach. While Service Provider 1 could drop one hour during term time with no remedy, Service Provider 2 can only drop eight and a half minutes.

Service Provider 3 promises a service which is provided 24 hours a day, 7 days a week with a service level of 99.5% availability over a 12 month period. This deceptively small reduction in the service level – half a percentage point - provides for almost 44 hours of unscheduled downtime over the year. That is the equivalent of almost two entire days! Because the measure of availability is by reference to a 24 hour service, this measure does not take account of the business risk where the downtime occurs during term-time or during a critical point in the academic calendar.

Table: Service Level Examples

Hours/ Day	Days/ Week	No. of weeks	Total Days	Total Hours	Service Level	Downtime (Hours)	Downtime (Minutes)
24	7	52	365	8760	99.99%	0.86	52.6
8	5	36	174	1392	99.99%	0.14	8.4
24	7	52	365	8760	99.50%	43.80	2628.0

You can find out more about G-Cloud at the following website:

https://www.digitalmarketplace.service.gov.uk/

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Battle of the internet search engine

In the recent case of *Victoria Plum Ltd (t/a Victoria Plumb) v Victorian Plumbing Ltd & Ors ([2016] EWHC 2911 (Ch)),* online retailer Victoria Plum has won a trademark case against leading online bathroom supplier Victorian Plumbing over an infringement relating to search engine advertising. Victorian Plumbing was spending 'hundreds of thousands of pounds per annum' on the adverts that have been found liable for trademark infringement.

Facts

The claimant and defendant, both bathroom retailers operating primarily online, have co-existed under their similar names for over 15 years. The claimant traded under the name Victoria Plumb until July 2015 when it changed to Victoria Plum. (It was accepted by both parties that nothing turned on the omission of the 'b'.) Their otherwise relatively agreeable co-existence became discordant when the defendant, Victoria Plumbing, began bidding on the claimant's Victoria Plumb trade mark for key word advertising online.

The claimant alleged that the defendant had infringed its registered trade mark by bidding on the claimant's name as search advertising key words. This meant that when consumers searched for Victoria Plumb, Victorian Plumbing's website was presented.

The defendant sought to rely on the defence of concurrent use. They also alleged that the claimant had bid on the defendant's name as a keyword and as a result was estopped from pursuing its trade mark infringement claim. They also put in a counterclaim for passing off.

Issue

The court had to decide whether the adverts would make it difficult for informed internet users to determine whether the goods or services referred to in the adverts belonged to Victoria Plum or to a third party.

The judge explained that the likelihood of confusion amongst average consumers as a result of the practice of bidding on the trade marks of competitor companies had been considered previously in *Google France Sarl v Louis Vuitton Malletier SA* (Case C-236/08; [2010] RPC 19) and by the Court of Appeal in *Interflora Inc v Marks and Spencer Plc* ([2014] EWCA Civ 1403; [2015] FSR 10). In his view the previous cases established that a user who searched by reference to a brand name was likely to be looking specifically for that brand. In this case there was particular propensity for confusion if the resultant advertising was vague as to origin.

The judge said that the defendant was using the sign Victoria Plumb and variations which were considered to be identical or confusingly similar to the claimant's registered trade marks. He was therefore held that this amounted to infringement.

Honest concurrent use

The defendant's attempt to rely on the defence of honest concurrent use was rejected. The judge was willing to consider the defence but concluded that it did not apply in this case. The main reason for this was that, although the defence could entitle a defendant to continue to use its own name or mark where the marks used by the claimant and defendant were different, it could not entitle the defendant to use the claimant's mark.

Estoppel

The judge rejected the defendant's submission in relation to estoppel under section 48 of the Trade Marks Act 1994. He said that the defendant would have needed to show that the claimant had made a representation to the defendant that it was entitled to bid on the claimant's trade marks in order for this to be accepted.

Passing off

The court accepted the defendant's counterclaim for passing off. The defendant complained that the claimant bidding on the name Victorian Plumbing as a key word so as to cause the return of links containing the text

Victoria Plumb should amount to a trade mark infringement in the same way. In accepting this, the court applied similar reasoning to the initial claim brought by Victoria Plum.

Conclusion

In this decision both the claimant and defendant succeeded in stopping the other from using their trade marks in the context of keyword advertising. It is important for all universities to be aware of the implications of this increasingly popular way of advertising, especially where their trade mark name(s) are similar to that of other institutions. Where two separate entities have co-existed under similar names for a long period, honest use of the names would not give rise to a claim. Liability will only arise where one party exacerbates the level of confusion beyond that which is inevitable, resulting in what could be considered encroachment on the similar entity's goodwill.

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It's all about telecoms

The new Electronic Communications Code (the New Code), part of the Digital Economy Bill, is to be enacted early next year and is being introduced with the purpose of assisting the government's aim for 95% of the UK public to have access to superfast broadband by December 2017. The New Code is set to introduce many changes that will have a profound effect on the dynamic of the working relationship between landowners and telecoms operators.

The New Code appears to make it easier and more cost-effective for operators to build and construct masts on privately-owned land. It does this by giving operators automatic rights to upgrade equipment, share apparatus and assign the benefit of agreements to another operator, all without the landowner's consent. This creates an obvious risk for universities, as an unknown third party could be occupying their land without their knowledge. As such, university estates teams will need to consider inserting notice provisions in any new telecoms agreements in order that they are notified of any changes in the identity of occupiers on their land.

A further change in the New Code is the notice period to be given to operators upon the expiry or termination of a telecoms agreement. The current Code provides that 28 days are to be given, but the New Code provides that 18 months' notice is required. Following the expiration of that notice, an application to the court must (still) be made for an order to require the operator to vacate the site. As such, universities will need to engage with operators from a much earlier date in order to obtain vacant possession in a timely manner.

In terms of application of the New Code, it appears that some provisions will have retrospective effect on agreements that were entered into prior to the New Code. However, it appears that the provisions relating to assignment and sharing of apparatus will not apply retrospectively, so it may be prudent for universities to conclude current negotiations prior to the enactment of the New Code to avoid these onerous powers.

In light of the above, it is important for university landowners to consider their current arrangements now and if necessary to seek advice in order to understand how their responsibilities and rights may be affected once the New Code comes into force.

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Manifestly inappropriate final written warning could not be relied on

In the recent case of *Bandara v British Broadcasting Corporation ([2016] UKEAT 0335_15_0906)* the EAT has upheld the decision of an employment tribunal that an employer was not entitled to rely upon a final written warning which had been given to an employee, when considering whether to dismiss that employee for further misconduct, if the decision to issue the warning was 'manifestly inappropriate'. However, the EAT went on to hold that the tribunal erred in finding that the dismissal was nonetheless fair. The tribunal had wrongly posed the hypothetical question of what would have happened had the existing warning been an ordinary, as opposed to a final, written warning. Instead, the tribunal ought to have considered the extent to which the employer relied on the final written warning and, given the employer's reasoning, whether the dismissal fell within the range of reasonable responses under the Employment Rights Act 1996.

Mr Bandara worked as a senior producer in the BBC's Sinhalese service. Until 2013, he had an unblemished disciplinary record going back almost 18 years. In August 2013, he was subject to disciplinary proceedings in respect of two incidents which had taken place earlier that year. The first was in connection with abusive behaviour and refusing to follow a reasonable management request. He apologised to the senior manager concerned the following day and no further action was taken at the time. The second was a breach of editorial guidelines, which related to his decision to prioritise coverage of the 30th anniversary of Black July – a sombre date in Sri Lankan history – over that of the birth of Prince George. The disciplinary decision-maker considered that both incidents potentially constituted gross misconduct, and decided to impose a final written warning.

Shortly thereafter, Mr Bandara was subject to further disciplinary proceedings, concerning various allegations of bullying and intimidation; being abusive towards colleagues; and refusing to obey management instructions. The disciplinary decision-maker in these proceedings found most of the allegations proved or partially proved, and concluded that Mr Bandara should be summarily dismissed.

Mr Bandara's claims of race discrimination and unfair dismissal were dismissed at tribunal, notwithstanding the tribunal's finding that the earlier final written warning was manifestly inappropriate. Mr Bandara appealed against the decision, and the BBC cross-appealed against the tribunal's finding on appropriateness of the earlier warning.

EAT decision

The EAT noted that, generally, earlier decisions by an employer should be regarded by the tribunal as established background and should not be re-opened. However, an earlier disciplinary sanction can be re-opened if it is 'manifestly inappropriate'. In the present case, the EAT considered that the tribunal had been entitled to conclude that the earlier final written warning should not have been imposed as the misconduct in question plainly did not amount to gross misconduct, either by reference to the BBC's disciplinary policy or by generally accepted standards.

However, the EAT held that the tribunal had erred in concluding that Mr Bandara's dismissal was nonetheless fair. Where an employee is dismissed for misconduct following a final written warning that the tribunal considers manifestly inappropriate, the tribunal should not put forward a hypothesis of its own, but should examine the employer's reasoning and see whether or not the decision to dismiss was reasonable. If the employer treated the warning as no more than background or as indicative of the standard to be expected of an employee,

and in fact dismissed for the misconduct alleged in the new proceedings, then it may be that the dismissal was fair. If, however, the employer attached significant weight to the warning, for example starting from the position that because the employee was already subject to a final written warning, he or she should be dismissed for any significant further misconduct, it is difficult to see how the employer's decision could be reasonable.

Comment

When considering the sanction of dismissal where a prior warning remains active, an employer may wish to satisfy itself that there is nothing inappropriate about the earlier warning before relying upon it.

If a tribunal finds that a warning is manifestly inappropriate, the employer may not rely on that warning and it is likely to be harder for the employer to satisfy the reasonableness test in the ERA 1996.

Where there is an active warning on file but a dismissal is on account of standalone gross misconduct, employers should make clear in the dismissal letter that the gross misconduct alone was the reason for dismissal. This may avoid the appropriateness (or otherwise) of the earlier warning being brought into question.

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