

Focus | Entertainment, Art & Sports Law

Defamation by AI: An Old Tort Meets A New Technology

BY MARC FULLER

Defamation is a centuries-old tort. From time to time, as technological innovations increase the speed and scope of communications, courts must apply longstanding defamation doctrines to new media. With the advent of generative artificial intelligence, we are at such a moment. Large language models (LLMs) and similar AI programs generate content at an astonishing pace, and the technology is rapidly being woven into the fabric of speech, commerce, and our daily lives.

With defamation, the AI concern is that LLMs frequently generate fictional outputs. A Stanford University study found that even bespoke legal AI tools that draw from a database of documents generate false outputs almost 20 percent of the time. What's more, these fabrications often have a veneer of plausibility. It can be difficult at first glance to distinguish fact from hallucination. Hence, the almost daily news reports of hallucinated case cites and holdings—and even “factual” recitations—that make their way into filed legal briefs.

But what happens when hallucinated AI output is both false and reputationally damaging to an individual or business? Professor Eugene Volokh coined the term “Large Libel Models” in recognition of the potential for LLMs to generate defamation claims. So far, only a handful of such cases have been filed, but they raise important questions about levels of culpability when hallucinated AI content defames others.

The First AI Defamation Case

In 2023, a Georgia radio talk show host, Mark Walters, learned from a jour-

nalist friend that he had been the subject of an AI hallucination. After several prompts from the journalist, ChatGPT falsely stated that Walters stood accused of fraud and embezzlement. The journalist did not actually believe the report, and his skepticism was confirmed when he contacted Walters directly. But Walters still sued, alleging a claim for defamation against Open AI, the maker of ChatGPT. Two years later, Walters lost on summary judgment, for reasons that illustrate some of the challenges of applying traditional defamation law to claims against AI companies.

As background, the threshold requirement of a defamation claim is the defendant's publication of a false and defamatory statement of fact to a third party. State of mind also plays an essential role. A public-official or public-figure plaintiff must prove actual malice, *i.e.*, that the defendant knew the statement was false or entertained serious doubts about its veracity. A private figure usually only needs to show negligence.

The actual malice standard, which governed Walters's claim, presents a conceptual challenge in cases involving AI companies. How can a doctrine focused on a human's subjective state of mind apply to an LLM? Regardless of whether such a showing is even possible, Walters failed to make it. He could not prove that Open AI knew that its output about him was false, and the company's general awareness that hallucinations sometimes occur was insufficient. In addition to no actual malice, the Georgia court also held that Walters had failed to prove defamatory meaning or to identify any

damages based on an output that the journalist never actually believed.

Republication Claims

The Walters case is just the first court to answer these questions. In future cases, courts may consider whether an LLM qualifies as a “publisher” under defamation law. Some scholars, including Professor Lyrisa Lidsky, argue LLMs may resemble distributors—like bookstores and libraries—more than traditional publishers.

The “publisher vs. distributor” dichotomy also highlights an important, if slightly more mundane, point: even if the LLM is a “publisher,” it might not be the only one. While the few cases filed so far have targeted AI companies—Open AI, Meta, and Google—future plaintiffs might choose to sue the person responsible for the prompts that led to the LLM's output or for any republication of that output.

Republication cases fit more naturally into traditional defamation doctrines. Courts have long considered claims based

on the republication of factually dubious information. Defendants who republish hallucinated LLM outputs may have defenses, including privilege and state of mind, but questions of what constitutes actual malice and negligence in this precise context remain unanswered. And because issues of actual malice and negligence often require expensive discovery, even a successful defense can become a financial burden.

This is where Professor Volokh's coined term, Large Libel Models, resonates. Even if Walters turns out to be the first in a drumbeat of cases definitively rejecting defamation claims against AI companies, the potential remains for an explosion of claims against re-publishers of hallucinated content. To avoid becoming the next cautionary tale, AI users would do well to understand their technology and its potential for hallucination, and to exercise care in the use and repetition of its output. **HN**

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