10 Legal Subject Matters Popping Up In AI Litigation

By **Mark Davies** (August 24, 2023)

Mark Davies

As artificial intelligence continues its dramatic rise in influence, do you know which legal subject matters will take on increasing importance?

Are you ready for the influx of AI litigation — litigation that has doubled annually since 2019? Are you able to advise on the uncertainty driving many of the legal disputes that follow fundamental technological change?

Fortunately for lawyers, there is a straightforward source of answers to these questions: judicial opinions in AI litigation matters. Over the past five years, judicial opinions have addressed AI in many different legal areas.

About one-third of the litigation has involved patents and copyrights. Roughly another third has involved related areas, such as privacy, trade secrets and trademarks. And the remaining third has involved more traditional areas of law, such as contracts, employment, securities and products liability. The common law of AI is here already.

For today's in-house counsel, the fundamental problem is that the common law takes time. But a study of existing case law is an important first step.

Although each dispute is resolved on its own facts, some lessons are already emerging. The following discusses illustrative judicial opinions in 10 legal subject matters.

In contracts, securities and trademarks, the AI cases show little if any complexity in applying basic legal rules to disputes involving AI.

Contracts

Consider the prominent AI contracts case, Nuance Communications Inc. v. IBM Corp. Nuance paid IBM $25 million for a license that entitled Nuance to one copy of IBM's software system, which embedded DeepQA — IBM technology that uses AI to search for answers to natural language questions. Nuance claimed that it was entitled to all updates that IBM made to DeepQA, and IBM argued that it only had to share updates developed by a specific IBM group.

In 2021, the U.S. District Court for the Southern District of New York held that the parties' primary purpose was to give Nuance access to any updates to DeepQA that would facilitate its ability to create commercially applicable products directly from the DeepQA code. Because Nuance's license entitled it to updates made anywhere in IBM, the court held that IBM had breached its agreement by withholding some updates to DeepQA.

This case illustrates how basic contract law principles can resolve AI litigation of the highest stakes.

Securities

So too, district courts have dismissed securities litigation involving AI without resort to any

special legal considerations.

In the 2020 case of Jiajia Luo v. Sogou Inc., a Beijing-based internet company with a search engine "powered by artificial intelligence" filed an earnings press release with the U.S. Securities and Exchange Commission stating it would "phase out hardware products that [were] not AI-enabled." After Sogou's share price fell by 19%, the shareholders filed a securities fraud action.

In granting the defendant's motion to dismiss, the Southern District of New York court emphasized that "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Dismissing the case, the court observed that the company disclosed that it "intend[ed] to grow [its] business and improve [the] results of operations by ... continu[ing] to pursue innovations in AI technologies."

Trademarks

Similarly, trademark cases are not suggesting the need for legal adjustments.

In Zaletel v. Prisma Labs Inc., plaintiff Zaletel had a "Prizmia" photo editing app that he launched to modify and apply filters to photos and videos created with a GoPro camera. Zaletel alleged trademark infringement based on the defendant's "Prisma" photo transformation app, which uses artificial intelligence technology to transform photos and videos into works of art using the styles of famous artists.

In reviewing the familiar likelihood of confusion factors, the U.S. District Court for the District of Delaware concluded in 2017 that "while plaintiff broadly describes both apps as distributing photo filtering apps, the record demonstrates that defendant's app analyzes photos using artificial intelligence technology and then redraws the photos in a chosen artistic style, resulting in machine generated art." Based on these "very real differences in functionality," the court found that the two products were "directed to different consumers."

Copyrights

How do we advise on the copyright legal questions presented by AI applications?

Abbasi v. Bhalodwala is a case that was decided in 2015 by the U.S. District Court for the Middle District of Georgia. There, plaintiff Abbasi created software that tracked lottery tickets and licensed it to convenience stores, gas stations and other places where tickets were sold. The licensees agreed not to "reverse engineer, decompile, or disassemble the software product."

The defendant, owner of a Stop N Save convenience store and a licensee of the tracking software, began marketing his own Lottery Artificial Intelligence App with images copied directly from the copyrighted software. Abbasi sued the defendant for copyright infringement.

The district court found substantial similarity between the copyrighted software and the allegedly infringing product. Notably, AI copyright cases very often cite the U.S. Supreme Court decision in Feist Publications Inc. v. Rural Telephone Services Company, a 1991 case about telephone directories.

Although AI is machine-driven, the legal disputes are between real people. And, appropriately, AI disputes are arising in two legal regimes that often involve emotional tension.

Employment

For employment law and AI, consider LBI Inc. v. Charles River Analytics Inc. This case, decided in 2020 by the Superior Court of Connecticut, turns on the scope of a noncompete agreement. LBI, a small research and design development company, was hired to design, build and test the U.S. Navy's unmanned underwater vehicles. LBI partnered with defendant Charles River Analytics to do the computer analytics.

During the project, Charles River hired two of LBI's employees who were subject to noncompete agreements. One of those employees uploaded thousands of LBI's files to his personal Dropbox account while he worked for LBI, including accounting and engineering files, photographs, and related designs and renderings used to fabricate and manufacture the unmanned vehicle buoys for the Navy underwater drone project.

He then shared those files with Charles River when he was hired. LBI sued Charles River for tortious interference with business relations and alleged violations of a noncompete agreement. A jury awarded LBI $839,423 in damages.

Trade Secrets

Given the ever-advancing technology in highly competitive settings, trade secrets is another common AI litigation subject matter that often evokes strong emotions.

For example, in the 2016 case of Loop AI Labs Inc. v. Gatti, a Silicon Valley startup that develops AI technology to provide customer data to companies accused its former CEO of taking a job at a competitor months before leaving her job at Loop. The complaint alleged that the CEO used secret information to try to orchestrate a deal while actively destroying relationships with other potential investors.

The CEO argued that Loop failed to provide adequate trade secret disclosures as required to pursue a claim under California's Uniform Trade Secrets Act. The U.S. District Court for the Northern District of California agreed. Neither LBI nor Loop involve legal complexities due to AI technology. Rather, they turn on traditional human complexities.

The Communications Decency Act of 1996

In other legal areas, AI disputes simply reveal the legal uncertainty that already exists in those areas. For example, several cases have held that the AI algorithms used by internet providers are protected by the Communications Decency Act of 1996, codified at Title 47 of the U.S. Code, Section 230.

In Dyroff v. Ultimate Software Group, a fatal dose of heroin was purchased via an online service provider. The decedent's mother filed a complaint in the U.S. District Court for the Northern District of California against the website operator. The district court dismissed the case, citing Section 230. The U.S. Court of Appeals for the Ninth Circuit affirmed in 2019.

In 2019, a similar result was reached in Force v. Facebook by the U.S. Court of Appeals for the Second Circuit. The case was originally held in the U.S. District Court for the Eastern

District of New York. But note that two dissenting judges from these appellate cases would have held the providers liable for their roles in facilitating the harmful activities, even if only through their algorithms. Just as the Supreme Court has not yet resolved questions about the CDA, those questions arise in the AI context as well.[1]

Patents

Similarly, AI litigation has often involved patents.

In Singular Computing LLC v. Google LLC, for example, the plaintiff accused Google of infringing three patents that cover computer architectures aimed at increasing the efficiency of programs that use artificial intelligence. In 2020, the U.S. District Court for the District of Massachusetts denied Google's motion to dismiss because "the claims recite the features that supposedly make them inventive."

Other cases have found AI patents to teach ineligible subject matter. In Kaavo Inc. v. Amazon.com Inc., for example, the U.S. District Court for the District of Delaware held in 2018 that the claims were "directed to the abstract idea of setting up and managing a cloud computing environment." There is a widely acknowledged legal tension about the scope of patent law's obviousness doctrine, and such tension can arise in the AI setting.

Products Liability

Importantly, one area where judicial disagreement may take on special characteristics is products liability.

In Loomis v. Amazon.com LLC, Loomis ordered a hoverboard from Amazon that was sold and shipped directly from a third party. Communications about shipping came through Amazon. Loomis gave the hoverboard to her son. When he later charged the hoverboard in her bedroom, it caught fire, and Loomis suffered burns to her hand and foot.

In 2021, the Court of Appeal of the State of California held that Amazon could be held strictly liable for the damage caused by the hoverboard because it was in the vertical chain of distribution of the hoverboard. The court noted that Amazon placed itself directly between the third-party vendor and the buyer and so should bear the consequences of that business model.

The majority opinion does not mention AI, but the concurrence explains how AI entered this dispute. The centrality of machine learning to Amazon's safety practices was set out in an online press release "written by Amazon" posted in "response to a Wall Street Journal story about the safety of products offered in [the Amazon.com] store."

Other courts have reached different results, e.g., the 2019 opinion by the U.S. Court of Appeals for the Third Circuit in Oberdorf v. Amazon.com Inc. Oberdorf originally filed a complaint in the U.S. District Court for the Middle District of Pennsylvania.

Privacy

Another high-profile subject matter of particular importance to AI litigators is privacy.

Despite loud calls for new AI federal legislation, it is far from clear that any legislation will be passed. But some state laws governing AI and privacy have been enacted.

In 2021, the U.S. Court of Appeals for the Seventh Circuit considered privacy and AI in Thornley v. Clearview AI Inc. In 2008, Illinois enacted the Biometric Information Privacy Act, the first law governing the collection and storing of biometric information:

> A plaintiff might assert, for example, that by selling her data, the collector has deprived her of the opportunity to profit from her biometric information. Or a plaintiff could assert that the act of selling her data amplified the invasion of her privacy that occurred when the data was first collected, by disseminating it to some unspecified number of other people.

But the Thornley complaint alleged no such thing, and it was dismissed because the plaintiffs "described only a general, regulatory violation." In the absence of federal privacy legislation governing AI, state privacy laws — and the inevitable differences among them — will be a likely source of legal uncertainty for AI.

Antitrust, Immigration and Section 1983

There are also important AI opinions in other subject matters, such as antitrust, immigration, and Title 42 of the U.S. Code, Section 1983. American law schools often teach the Justice Oliver Wendell Holmes Jr. line that the "life of the law has not been logic; it has been experience."

AI also is not about logic; it is about experience. The two are already working together.

Mark S. Davies is a partner at Orrick Herrington & Sutcliffe LLP.

[1] See Gonzalez v. Google and Twitter v. Taamneh.