

Skilled in the Art With Scott Graham: Orrick's Mark Davies on the Emerging AI Wars

By Scott Graham

Orrick's Mark Davies on the Emerging AI Wars

There's a simple reason **Orrick, Herrington & Sutcliffe partner Mark Davies** undertook a legal treatise addressing the litigation risks around artificial intelligence.

"To misquote the bank robber Will Sutton, because that's where the litigation will be," says Davies, whose *Artificial Intelligence: Law & Litigation* was issued earlier this month.

The number of cases involving AI is doubling every year, and touching everything from intellectual property to securities to employment, Davies says. The pace of technological change is so fast that there's only so much statutes and regulations will be able to do—the rest will have to be filled in by case-specific litigation, just as it's been with the internet and with smartphones.

Skilled in the Art caught up with Davies earlier this week for some thoughts about the new frontier.

What are some of the issues you've been seeing with AI and intellectual property? A big thing in

the copyright context is fair use. At the heart of AI is data. If there's no data, there's no AI. What machine learning is doing is understanding the data. So with data comes the question of whose data is it? That comes up in a lot of different contexts, including copyright, and the answer is often "What's fair to use?"

Right now the [precedent] is the *Google v. Oracle* Supreme Court case, which is not about AI, but it's about advanced technology and it lays out some principles that may well come into play in this context.

You've said that lawyers need to understand how to have a conversation about AI. What are some of the key terms lawyers need to know? In the book I look at some judicial opinions that have defined AI. One question that has changed over time a little bit is, "Is there a difference between artificial intelligence and machine learning?" It used to be that artificial intelligence meant a computer doing something that a human would have to think about to do. So like tic-tac-toe.



Mark Davies, partner with Orrick, Herrington & Sutcliffe.

Courtesy Photo

But today what people usually mean is machine learning. That's what's brought AI into the mainstream, the exploding use of machine learning, and that's why it's all over the cases.

The other term that lawyers should know is artificial general intelligence. That is the type of intelligence that gets past what humans can do. This isn't in any of these cases, but I think it's in the background. A lot of people, including lawyers, judges and jurors, when they hear artificial intelligence, they get that worry of

“Where is this going? Is it really true that artificial intelligence is always going to be under human control?” The fear of that can lead to who wins and who loses cases.

Is our litigation system built to resolve issues over AI? At a really high level, and there are exceptions, one of the things I learned from the book is that the litigation is working just fine. It’s not like you look at the litigation involving artificial intelligence and go, “Oh wow, there’s a broken system here.” Litigation is working.

An example you and I know really well is the smartphone wars. They were intense, but they’re done. It’s certainly possible that the same thing will happen with AI. It’s a dramatic change technologically, and then the legal system is going to sort it out.

There are areas of law that I had not expected to see—securities cases, employment cases, contract cases involving AI. But it’s all working fine. You want to win, you don’t

want to lose. But you don’t read those cases and think litigation is failing.

What are some issues that have come up or that you anticipate coming up in a few categories? Let’s start with antitrust. In antitrust, what’s interesting there is really one key case [U.S. v. Saber] and it was written by Judge Stark, whose views on AI are obviously very important.

Because of his now being on the Federal Circuit. Exactly. It’s a case involving travel agencies and I don’t want to over-read it, but I at least got the sense that he is optimistic about technology in that case. And you can find other judges who might be more skeptical of technology. And navigating that as a litigator is really important.

Let’s move onto copyright. In the copyright cases what really struck me is the influence of the Feist decision. It takes effort out of the [copyrightability] equation and says you have to have originality.

And I’m wondering how this decision plays out in the context where acquiring the data, reading the data is so important to the product. There are some cases that would have come out a different way had Feist not been in place. And so instead all that pressure is going to the fair use inquiry that we talked about.

How about patents? The chapter on patents and AI has three basic buckets. One is, is this AI something that’s patentable? You also have the claim construction question: Does the patent claim the technology? And then you have questions about description and enablement of the AI invention.

I think a lot of people in law may feel intimidated by AI, by the coders and by the technology. One thing I’m really hoping the book does is help people get past that. Coders are human. The people writing the code are real people like you and me. It’s important in the legal context to keep that in mind.