Lawyer Insights

Five Reasons Why You Should be Monitoring These Four Artificial Intelligence Cases

By John Gary Maynard, III
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The first wave of litigation involving generative AI and/or machine learning is well under way. There are (at least) five reasons why you should be monitoring four significant ongoing cases that involve artificial intelligence-related platforms and issues.

The cases are:

- *Doe 1 v. GitHub, Inc.*, et al, 4:22-cv-06823-JST (N.D. Cal.)
- *Andersen, et al. v. Stability AI, et al*, 3:23-cv-00201 (N.D. Cal.)
- *Getty Images (US), Inc. v. Stability AI, Inc.*, 1:23-cv-00135-UNA (D. Del.)
- *Thomson Reuters Enterprise Centre GmbH, et al v. ROSS Intelligence Inc.*, 1:20-cv-00613-LPS (D. Del.)

1. Three cases are against AI creators, while the fourth addresses the legality of machine learning in general.

Why is this important? Because the cases have potential to attack the very essence of generative AI and machine learning.

Think of AI and machine learning as a massive "land grab" or, perhaps more accurately, a "content grab." At the heart of this content grab is the question of whether content creators should be compensated when their content is used to train AI or machine learning products. Additionally, AI platforms might, in turn, create "new" content that competes against the original content. At least some of the claims in these cases are focused on answering this question.

2. Each of the four cases involves a different AI or machine learning platform.

There are different types of generative AI products: some generate code, some text, and some images. One of the four cases concerns code generation (*Doe*), two concern image generation (*Andersen* and *Getty)*, and one concerns machine learning in general *(Thomson Reuters*).

3. These cases are here to stay.

At least two of the cases are expected to move forward, having already survived motions to dismiss.

Thomson Reuters centers on the creation of a legal research platform that competes against Thomson's Westlaw platform. The complaint alleges that ROSS Intelligence violated Thomson's copyright rights by inducing third-party LegalEase to breach its license terms with Westlaw. Specifically, Thomson asserts that ROSS paid LegalEase to download copyrighted materials and provide that material to ROSS, then

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ROSS used machine learning to build a competing platform with the material, although the details about how ROSS used machine learning to do so were thin.

The court denied a motion to dismiss by ROSS, stating "the complaint plausibly alleges acts of infringement—namely that Defendants have engaged in mass, illicit downloading of copyrighted Westlaw material through LegalEase, which material was then used to develop the ROSS platform." This is noteworthy because it means, at least for purposes of surviving a motion to dismiss, that a complaint alleging specific copyrighted material was used to train a platform demonstrates a violation of copyright law even if (i) the output (which the complaint alleges is a derivative work) does not actually display the copyrighted content and (ii) the complaint does not detail how the machine learning occurred.

In *Doe*, the complaint alleges that GitHub (a repository of copyrighted, open-sourced software) used software in its repository to train its AI platform, Copilot, and the platform generated code from artificial intelligence. Although the code in GitHub is open-sourced, its use is still subject to license terms, one of which is that any use of the code must provide attribution.

Here the court denied in part a motion to dismiss by GitHub. Although two counts were dismissed without leave to amend and eight counts were dismissed with leave to amend, two crucial claims remain as alleged: (i) copyright violation under the DMCA and (ii) breach of contract. These claims focus on the failure of Copilot to provide code attribution.

Motions to dismiss are pending in *Andersen* and *Getty*.

4. The theories and claims at issue in the four cases are plentiful and may multiply in the future.

As is common when technology outpaces the law, thoughtful, conscientious lawyers identify a wide variety of theories under existing law in attempts to address complex new issues. That has definitely occurred here.

The legal teams in these four cases assert theories ranging from copyright to contract to publicity to equity. For example, in *Andersen*, the plaintiffs, who are all illustrators, allege a violation of the right of publicity based on the use of their names without consent; specifically, that the AI product at issue allows searching for a particular artistic style based on an artist's name. In *Getty*, the plaintiff asserts claims under trademark law, focusing on the blurring or altering of the GETTY trademark or watermark that accompanies its images.

It will be interesting to see whether any or all of the asserted theories in these cases are successful.

5. *Thomson Reuters* could provide the first substantive opinion on whether machine learning platforms are fair use under US copyright law.

As the oldest of the four cases, *Thomson Reuters* is farthest along. Motions for summary judgment, including a motion regarding copyright infringement and the affirmative defense of fair use, were filed on December 22, 2022. Decisions on these motions may well set precedent and provide a road map for use in the other three cases, as well as new matters that arise in the future.

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