

## Covington, Microsoft Attys Say AI Trust Key To Use In Law

By **Bonnie Eslinger**

*Law360 (July 2, 2018, 5:23 PM EDT)* -- A Covington & Burling LLP partner and a Microsoft in-house attorney speaking at a conference about artificial intelligence warned Friday that as the technology is applied to legal problems, AI systems have faced questions about baked-in biases and a lack of transparency as to how they reach decisions.

The dialogue was part of the day-long US-China AI Tech Summit, co-hosted by The AI Alliance of Silicon Valley, China's AI Industry Alliance, and The Future Society, a think tank incubated at the Harvard Kennedy School of Government.

The panel on "AI in the Law" included U.S. attorneys from Microsoft, Paul Hastings and Covington & Burling LLP; an executive from Silicon Valley tech company ClearAccess IP; a legal researcher at Beijing-based HuaYuYuanDian Law Research Institute; and an intellectual property associate law professor at Renmin University in Beijing. Future Society director Nicolas Economou moderated the discussion. Economou is also the CEO of H5, an information retrieval and electronic discovery company.

Asked by Economou about the "attendant risks" of AI, Covington AI Initiative Co-Chair Lee Tiedrich said there's a recognition that the new technology brings new legal challenges.

"One issue that's been getting a lot of attention in the United States is whether and to what extent AI applications need to provide transparency and undertake efforts to reduce bias in the outcomes they produce," Tiedrich said.

To illustrate this, the Covington attorney noted a recent case in which an AI application was used in connection with the sentencing of a criminal defendant. The man challenged the sentence, alleging that the AI algorithm violated his due process because he didn't have any transparency or insight into how the sentencing decision was reached, Tiedrich said.

"The court ultimately upheld the sentence because it determined the judge considered other factors too," Tiedrich said. "But the case really highlights the tension that the AI community is going to face and the need to provide information and also to accommodate and provide some transparency on what they're doing."

Michael Philips, an assistant general counsel for Microsoft Corp. working with the company's artificial intelligence and research group, said the case against Eric L. Loomis — who after being found driving a car that had been used in a shooting was sentenced to six years imprisonment partly based on software used to assess a person's risk to the community — highlights the promise and the possible perils of artificial intelligence.

"We think a lot about the fundamental impact of AI systems, automated decision-making," Philips said. "We're certainly thinking about what the impact of these systems might be on concepts like due process and equality under the law."

Microsoft's research organization is looking at the components of artificial intelligence, including the "architectural choices," the algorithms, and the data that's used to train such systems, to determine how and to what extent bias could be introduced that would affect the outcomes," Philips said.

"You see this in situations like facial recognition systems that recognize light-skinned males better than dark skinned females, what are the implications of that? Philips said. "With the criminal conviction system, is the data that's being fed into the system inherently biased because it results from over-policing into certain communities? How do those things factor in as we go about looking into these systems?"

Jiyu Zhang, an intellectual property associate professor at the Renmin University in Beijing, said China is also starting to use artificial intelligence programs within its court system, in part to reduce case backlog.

"We always say that justice delayed is justice denied. People hope that using AI technology in courts will help to promote efficiency as well as help to allocate resources better, just like the AI technologies do in other areas," Zhang said.

Using a computer may also make China's legal system more fair, its proponents hope.

"China is a very large country and some studies have shown that different judges in different areas may give different judgments for similar cases," Zhang said. "They hope that the technologies help to get similar decisions for similar cases."

Among other uses, artificial intelligence is being used to check documents, provide sentencing guidelines, and also to allocate court resources by analyzing the types of cases that can be expected in a coming year, Zhang said.

Jia Gu, a legal researcher and former Jiangsu Province judge, also called for study on the case outcomes produced when artificial intelligence systems are used.

"You don't know how it's built or what process is going on underneath," she said.

Deepa Krishna, director of business development for ClearAccessIP, a Silicon Valley tech company touting an artificial intelligence analytics tool for managing patent assets, said in some situations, the benefits outweigh the risks.

“AI, I believe, will be fundamentally transformative for innovation and the IP profession,” Krishna said.

ClearAccessIP recently worked with a university system that had about 15,000 patent assets globally that wanted to understand which patents might pertain to self-driving cars.

“We were able to mine 15,000 assets and come up with about 250 that pertained to the sensors and the integration software that is at the core of self-driving cars technology,” Krishna said.

Paul Hastings partner Rob Silvers, a former U.S. Department of Homeland Security assistant secretary of cybersecurity, focused his comments on the liability and regulatory exposure that companies and other entities will face when using AI.

Products that are driven by AI will inevitably hurt something, or people are going to come forward and claim they were hurt or disadvantaged in some way by AI,” Silvers said. “What companies want to do is build an architecture of protection and containment for the company around its use of AI so you can enjoy all the benefits and monetization, but also protect the company.”

The Paul Hastings attorney pointed to self-driving cars as an example.

“Currently, 90-plus percent of car accidents are caused by human error. Traditionally the liability in those kinds of scenarios goes on to a person,” Silvers said. “What is going to happen as technology literally takes the wheel out of the hands of the driver and into the hands of the technology is you’re going to see liability begin to shift to companies.”

But it won’t be that simple, because many companies can be involved in an AI product. In the case of the self-driving cars that includes the makers of the sensor, the operating systems, etc., he said.

Silvers added that concerns about AI and discrimination are not limited to court justice.

“In addition to bias being morally reprehensible in many contexts, it’s illegal under fair employment laws, under fair housing laws, under fair lending laws,” the Paul Hastings attorney said. “And so when you have AIs driving outcomes in those kinds of highly regulated areas where anti-discrimination laws are in play, you need to have robust protections to ensure that bias is not being replicated from the bias that exists in the real world, and certainly, is not being exacerbated.”

That said, Silvers put out a quandary to be tackled: what if it’s shown that an AI system is less biased than the real world?

“Is that a violation of employment discrimination or a lending discrimination statute? I don’t know, it seems like an improvement.” he said. “So, there’s a lot of gray area here.”

Concerns about AI and its black-box decision-making will also create intellectual property issues for the companies creating proprietary technologies, Tiedrich said.

In the case of the criminal defendant, if the court had compelled the AI company to produce its algorithm, it would have comprised trade secret protections, the Covington partner said.

“The key takeaway here from the U.S. perspective is as the technology continues to advance and move forward, it’s going to be really important for the communities involved to step back and look at the

various legal issues affected by AI, such as transparency, bias, privacy, data security and liability,” Tiedrich said. “And come up with some sensible rules and guidelines that balances all of them.”

Friday’s AI gathering also looked at the building momentum behind artificial intelligence technologies in other industries, including transportation, health care and fintech.

--Editing by Pamela Wilkinson.

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