



ARE Copyright Alert: Artificial Intelligence Recognized as a Reliable Method in Expert Evaluation of Similarity of Works

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Introduction

Many thought leaders have hypothesized that it will not be long before artificial intelligence (“AI”) and/or machine learning (“ML”) systems will be used as part of legal analysis process. We have seen AI/ML systems be used to help law firms in a wide variety of ways to prepare their legal services.

Now, in the context of a Daubert motion, one district court potentially opened the flood gates for using AI/ML systems at trial.

In an order dated October 21, 2020, Judge Guidry from the Eastern District of Louisiana, recognized the reliability of an expert’s methodology “given that he conducted artificial intelligence assisted facial recognition analysis of [the masks at issue] to determine whether the use of mathematics and target facial recognition algorithms comparing the two works would find that human perception would works to be substantially similar.” *Bertuccelli v. Universal City Studios LLC*, No. 19-1304, Order (E.D. La. Oct. 21, 2020).

The Case

In *Bertuccelli*, plaintiffs, Jonathan Bertuccelli and Studio 3, Inc., brought a claim for copyright infringement against defendants, including Universal City Studios LLC and Universal City Studios Productions LLLP, alleging defendants’ use of a mask of a baby face in the Happy Death Day feature films infringes plaintiffs’ “King City Baby” copyright.

Defendants moved to exclude opinion testimony by plaintiffs’ proposed experts as inadmissible under the Federal Rules of Evidence and the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Under *Daubert*, the court must determine (1) whether the expert’s testimony reflects scientific knowledge, is derived by the scientific method, and is supported by appropriated validation; and (2) whether the testimony will assist the trier of fact to understand the evidence.



Specifically, defendants argued that the “proposed testimony is unreliable and that neither witness is qualified to opine on issues related to copyright infringement.” Slip op. at 2. However, plaintiff asserted that the expert “reliably applied mathematical analysis using artificial intelligence facial and target algorithms to predict human response to similarity between [‘King City Baby’] and the Happy Death Day mask.” Id.

The court remarked on the expert’s experience with “algorithmic reasoning for artificial intelligence-enabled driving systems, including facial recognition technology” and reasoned that the expert’s “methodology [is] reliable given that he conducted an artificial intelligence facial recognition analysis of the King Cake Baby and Happy Death Day mask to determine whether the use of mathematics and target facial recognition algorithms comparing the two works would find the human perception would view the works as substantially similar.” Slip op. at 4. Accordingly, the court denied defendants’ motion to exclude the opinion testimony. In denying the motion to exclude, the court noted that defendant’s concerns with the proposed testimony “can be explored on cross-examination and do not necessitate completely excluding their opinions and testimony.”

Conclusion

Bertuccelli is no doubt just one of many decisions yet to come that will address the boundaries of when AI/ML systems may be used to assist the fact finder in legal disputes. It is a brave new world in which we live.

For more information on how artificial intelligence and machine learning are being used and/or protected by intellectual property, please contact the authors.

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