



**The Journal of Robotics,
Artificial Intelligence & Law**

Editor's Note: Autonomous Vehicles, and Other AI Developments

Victoria Prussen Spears

Autonomous Vehicles: Now and In the Future, and Where Is the Legal Landscape Headed?

Elaine D. Solomon

The Blueprint for an "AI Bill of Rights"

Peter J. Schildkraut, James W. Kim, Marne Marotta, James V. Courtney Jr., and Paul J. Waters

Federal Circuit Decision Casts Doubt on Availability of Patent Protection for AI-Generated Inventions

Robert A. McFarlane and Rosanna W. Gan

Recent Enforcement Proceedings Against Decentralized Autonomous Organizations and Liability Risk

Ali Dhanani and Brian J. Hausman

How Will Companies Assure the Conformity of Artificial Intelligence of Things Devices with Their Sales Contract and Consumers' Reasonable Expectations Under the New EU Sales of Goods Directive?

Anna Sophia Oberschelp de Meneses and Kristof Van Quathem

Does the European Union Commission's Proposal on AI Liability Act as a Game Changer for Fault-Based Liability Regimes in the EU?

Nils Löfing

Latest on Software and AI Devices from the United Kingdom's MHRA

Jackie Mulryne and Eleri Williams

- 77 Editor’s Note: Autonomous Vehicles, and Other AI Developments**
Victoria Prussen Spears
- 81 Autonomous Vehicles: Now and In the Future, and Where Is the Legal Landscape Headed?**
Elaine D. Solomon
- 93 The Blueprint for an “AI Bill of Rights”**
Peter J. Schildkraut, James W. Kim, Marne Marotta,
James V. Courtney, Jr., and Paul J. Waters
- 103 Federal Circuit Decision Casts Doubt on Availability of Patent Protection for AI-Generated Inventions**
Robert A. McFarlane and Rosanna W. Gan
- 111 Recent Enforcement Proceedings Against Decentralized Autonomous Organizations and Liability Risk**
Ali Dhanani and Brian J. Hausman
- 121 How Will Companies Assure the Conformity of Artificial Intelligence of Things Devices with Their Sales Contract and Consumers’ Reasonable Expectations Under the New EU Sales of Goods Directive?**
Anna Sophia Oberschelp de Meneses and Kristof Van Quathem
- 129 Does the European Union Commission’s Proposal on AI Liability Act as a Game Changer for Fault-Based Liability Regimes in the EU?**
Nils Löfing
- 135 Latest on Software and AI Devices from the United Kingdom’s MHRA**
Jackie Mulryne and Eleri Williams

EDITOR-IN-CHIEF

Steven A. Meyerowitz

President, Meyerowitz Communications Inc.

EDITOR

Victoria Prussen Spears

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

Melody Drummond Hansen

Partner, Baker & Hostetler LLP

Jennifer A. Johnson

Partner, Covington & Burling LLP

Paul B. Keller

Partner, Allen & Overy LLP

Garry G. Mathiason

Shareholder, Littler Mendelson P.C.

Elaine D. Solomon

Partner, Blank Rome LLP

Linda J. Thayer

Partner, Finnegan, Henderson, Farabow, Garrett & Dunner LLP

Edward J. Walters

Chief Executive Officer, Fastcase Inc.

John Frank Weaver

Director, McLane Middleton, Professional Association

THE JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE & LAW (ISSN 2575-5633 (print) /ISSN 2575-5617 (online) at \$495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. Copyright 2023 Fastcase, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact Fastcase, Inc., 711 D St. NW, Suite 200, Washington, D.C. 20004, 202.999.4777 (phone), 202.521.3462 (fax), or email customer service at support@fastcase.com.

Publishing Staff

Publisher: Morgan Morrissette Wright

Production Editor: Sharon D. Ray

Cover Art Design: Juan Bustamante

Cite this publication as:

The Journal of Robotics, Artificial Intelligence & Law (Fastcase)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2023 Full Court Press, an imprint of Fastcase, Inc.

All Rights Reserved.

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

711 D St. NW, Suite 200, Washington, D.C. 20004

<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE & LAW, 711 D St. NW, Suite 200, Washington, D.C. 20004.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@
meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, scientists, engineers, and anyone interested in the law governing artificial intelligence and robotics. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrisette Wright, Publisher, Full Court Press at mwright@fastcase.com
or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service

Available 8 a.m.–8 p.m. Eastern Time

866.773.2782 (phone)

support@fastcase.com (email)

Sales

202.999.4777 (phone)

sales@fastcase.com (email)

ISSN 2575-5633 (print)

ISSN 2575-5617 (online)

How Will Companies Assure the Conformity of Artificial Intelligence of Things Devices with Their Sales Contract and Consumers' Reasonable Expectations Under the New EU Sales of Goods Directive?

Anna Sophia Oberschelp de Meneses and Kristof Van Quathem*

This article discusses the challenges that companies may face under the new EU Sales of Goods Directive (Directive 2019/771) when selling connected devices with an artificial intelligence component—also called “Artificial Intelligence of Things” (AIoT)—to consumers. For example, they will have to demonstrate the devices’ conformity with their sales contract and consumers’ reasonable expectations. It also discusses how companies can address these challenges by appropriately informing consumers about the AIoT device’s functionalities and dynamic nature.

On May 20, 2019, the European Union adopted a new Sales of Goods Directive (Directive), which requires entities selling goods to EU consumers to ensure that these goods conform with subjective and objective requirements set out in the Directive. Because this legislation was adopted in the form of a directive, it did not apply directly in all EU Member States. Instead, Member States were given until July 1, 2021 to implement it into their national legal frameworks. The national (implementing) laws started applying on January 1, 2022.

The Directive applies to “goods,” which are broadly defined as “any tangible movable items.” In addition, it also applies to digital content or digital services incorporated or interconnected with these goods that are necessary for the goods to perform their functions.¹ As such, the directive will also apply to connected devices with an artificial intelligence component—also called “Artificial Intelligence of Things” (AIoT) devices.

What Is Artificial Intelligence of Things?

The concept of “Artificial Intelligence of Things” has emerged in the past three years. It combines the concepts of “artificial intelligence”—systems that display intelligent behavior by analyzing their environment and taking actions with some degree of autonomy to achieve specific goals—and “Internet of Things”—distributed network-connected physical objects that are capable of sensing or acting on their environment and able to communicate with each other, with other machines, or with computers.² Forbes magazine defines AIoT as “devices that can analyze data and make decisions and act on that data without involvement by humans.”³

Examples of AIoT include self-driving cars, wearable devices, and home appliances that are connected to the Internet and include artificial intelligence systems. The home appliance producer Bosch, for example, offers a range of home appliances that it openly categorizes as being AIoT.⁴

How Do the Sales of Goods Directives’ Subjective and Objective Requirements Apply to AIoT?

Subjective Requirements

The Sales of Goods Directive requires that goods (in this case, AIoT devices) conform with the sales contract entered into between the seller and the consumer in relation to those goods. The Directive specifies that the goods must be:

1. Of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, required by the sales contract;
2. Fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the sales contract, and in respect of which the seller has given acceptance;
3. Delivered with all accessories and instructions, including on installation, as stipulated by the sales contract; and
4. Be supplied with updates as stipulated by the sales contract.

Regarding point 1, the artificial intelligence component of a good may make it more difficult to specify with a high degree of

precision its functionality. It is important that the way in which the sales contract describes the main characteristics of the AIoT, including its functionalities, compatibility and interoperability,⁵ reflects the dynamic nature of the AIoT.

Specifically, it would need to describe the different possible outputs based on how the artificial intelligence system is configured and the input it receives so as to mitigate the risk that a consumer alleges that the AIoT device does not function as promised in the contract.

Regarding point 2, if the AIoT device is sold to a consumer under the condition that it can perform a certain function, then this should be true. With AIoT products, it is important that the consumer is clearly informed about the possible functionalities of the AIoT device prior to purchasing it and that he or she understands its dynamic nature and the purposes for which the AIoT can be used.

Points 3 and 4 are self-explanatory and likely do not create any particular concerns from an AIoT standpoint as compared to other connected devices.

Objective Requirements

The goods must also comply with the following objective requirements:

1. Be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing EU and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;
2. Where applicable, be of the quality and correspond to the description of a sample or model that the seller made available to the consumer before the conclusion of the contract;
3. Where applicable, be delivered along with such accessories, including packaging, installation instructions, or other instructions, as the consumer may reasonably expect to receive; and
4. Be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility, and security normal for goods of the same

type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling.

Regarding point 1, sellers of AIoT devices will need to take into account the consumer's reasonable expectation of how the AIoT device functions in light of similar AIoT devices in the market. However, this may not be an easy task since AIoT devices promise a level of customization that is not entirely predictable and the consumer's expectations of how the AIoT will work may be subjective. For this reason, it may be useful for sellers to clearly specify what functionalities the AIoT device does not have (in addition to those that it has) compared to other similar AIoT devices on the market.

Regarding point 2, if the seller makes an AIoT device available as a sample prior to the consumer purchasing it, then the way it functions may be different from how the AIoT device that the consumer buys functions. The inputs the sample AIoT device received (e.g., in a store) will not be the same as the inputs the consumer's AIoT device receives. The way AIoT devices function may depend on that input. For that reason, it may be useful to provide appropriate disclaimers to consumers at the time they are trying a sample.

Regarding point 3 this likely does not create any specific concerns for AIoT devices.

Regarding point 4 and similar to point 1, sellers will need to think about the quality and features of similar AIoT devices that are in the market in order to determine what a consumer would consider "normal" for AIoT devices of the same type. The directive requires sellers to take into account the consumer's reasonable expectations based on the "nature" of the AIoT device and also any public statements relating to the AIoT device.

Public statements can be included in advertising of any sort distributed by the seller or someone acting on the seller's behalf, including the manufacturer of the AIoT device. Since it is the seller that is responsible for ensuring the AIoT device's conformity with these statements, it will be in its interest to conduct a due diligence of all statements made about the AIoT device and give precise instructions about what information others acting on its behalf can disclose about the AIoT device.

Finally, the Directive provides that there shall be no lack of conformity with the objective requirements if, at the time of the conclusion of the sales contract, the seller specifically informed the consumer that a particular characteristic of the goods deviated from the objective requirements for conformity and the consumer expressly and separately accepted that deviation when concluding the sales contract.

What Is the Potential Liability of the Seller of AIoT Devices Under the Sales of Goods Directive?

Under the Sales of Goods Directive, consumers are entitled to remedies for any lack of conformity with the above-mentioned subjective and objective requirements of the AIoT devices that occurs or becomes apparent within the period during which they are to be supplied under the contract or, if no such period is defined, for two years after the purchase of the AIoT device.

These remedies include the right to have the AIoT device brought into conformity, to receive a proportionate reduction in its price, or to terminate the contract. Member States may also allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days.

In addition, consumers may claim remedies for damages they suffered as a result of the lack of conformity. Contractual clauses limiting the seller's liability for non-performance may not be valid in accordance with the EU Unfair Contract Terms Directive (Directive 93/13/EEC, as amended).

The enforcement venues of the Sales of Goods Directive vary depending on how Member States implemented the Directive and, more generally, on how consumer law is historically enforced in each Member State. The three typical venues are (1) courts, (2) alternative dispute resolution, and (3) public authorities (e.g., administrative authority or ombudsman). In the European Union, consumers (or nonprofit organizations on their behalf) generally enforce their rights under consumer law before civil courts.

EU regulators will need to assess the AIoT device's conformity with the contract and measure the reasonable expectations of consumers in relation to the relevant AIoT device which, as indicated above, may not be straightforward.

Conclusions and Practical Tips on How to Limit the Risk of Liability

The Sales of Goods Directive requires that entities selling AIoT devices to consumers ensure that these products function as described in the sales contract—the subjective requirements—and as reasonably expected by consumers based on any information disclosed about the AIoT device prior to purchase and how similar AIoT devices on the market function—the objective requirements.

Thus, the Directive places emphasis on the information that consumers receive about the AIoT devices prior to purchasing them and how this information forms their expectations as to how the AIoT device will function.

The list below aims to provide some practical tips on how to mitigate the risk of consumers alleging that AIoT devices do not conform with the subjective and objective requirements.

Practical Tips

- Clearly describe the possible functionalities of the AIoT device in the sales contract and packaging and avoid making assurances about the specific output of the AIoT device.
- Consider specifying what functionalities the AIoT device does not have (in addition to those that it has) compared to other similar AIoT devices on the market.
- Provide appropriate disclaimers to consumers at the time they are trying a sample (e.g., in a store) warning them that the performance of the AIoT device they purchase may vary in certain aspects because it receives different inputs.
- Carefully assess what information other entities in the supply chain disclose about the AIoT device's functions and, whenever possible, provide clear instructions to these other entities on what information they can (and cannot) disclose.

Notes

* Anna Sophia Oberschelp de Meneses, an associate in the Data Privacy and Cybersecurity Practice Group of Covington & Burling LLP, advises companies on European data protection, cybersecurity, and other data-related

laws, as well as consumer law and helps clients coordinate international projects in these areas. Kristof Van Quathem, of counsel to the firm, advises clients on data protection, data security, and cybercrime matters in various sectors, and in particular in the pharmaceutical and information technology sector. Based in the firm's office in Brussels, the authors may be contacted at aoberschelpdemeneses@cov.com and kvanquathem@cov.com, respectively.

1. Article 2(5)(b) refers to these digital content and digital services as follows: “any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions.” Separately, the European Union also adopted a directive concerning contracts for the supply of digital content and digital services (Directive 2019/770). This article does not discuss how this other directive could apply to AIoT.

2. There are several definitions for “artificial intelligence” and “Internet of Things.” We have used the definition of “artificial intelligence” that was put forward by the European Commission's High-Level Expert Group on Artificial Intelligence, accessible at https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf, and the definition of “Internet of Things” that the European Parliament used in its 2015 report, accessible at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/557012/EPRS_BRI\(2015\)557012_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/557012/EPRS_BRI(2015)557012_EN.pdf).

3. Forbes, “What Is the Artificial Intelligence of Things? When AI Meets IoT” (December 20, 2019), accessible at <https://www.forbes.com/sites/bernardmarr/2019/12/20/what-is-the-artificial-intelligence-of-things-when-ai-meets-iot/?sh=2080aec7b1fd>.

4. See Bosch's website at <https://www.bosch.com/stories/topics/aiot/>.

5. This requirement stems from Articles 5(1)(a)(g) or 6(a)(r) of the EU Consumer Rights Directive (Directive 2011/83/EU), as amended.