

Automated Vehicles In 2019: Predictions And Suggestions

By **Melody Drummond Hansen, Heather Meeker and Jason Orr**

(January 18, 2019, 3:04 PM EST)

“The only thing that is constant is change.”

—Attributed to Heraclitus

“Life moves pretty fast. If you don’t stop and look around once in a while, you could miss it.”

—Ferris Bueller



Melody
Drummond
Hansen

With decades of advancements in enabling technologies (such as location services, LiDAR, cameras and artificial intelligence), millions of self-driven miles and billions of dollars invested, companies are testing and deploying automated vehicles in greater numbers across the country. The AV industry has come a long way since the first DARPA Grand Challenge in 2004, when an AV could be foiled by a large rock, and none of the vehicles finished the route.

As the AV industry continues to grow and expand in 2019, innovators will continue to face novel business, regulatory and legal questions. Here are some of our predictions and recommendations for the AV space in 2019.

Data Privacy and Security Will Be Central to AV Success

AV technologies are data intensive — generating and processing terabytes of data per day of driving — and high-speed data connectivity will be an essential feature in vehicles in the next few years. With an increased global focus on data privacy and security concerns across many industries, AV companies will find themselves under even greater scrutiny from regulators, consumer watchdogs, attorneys general and civil plaintiffs regarding their privacy and data security policies.



Heather Meeker

Previously proposed amendments to the AV START Act, for example, called for studies of how to protect consumer privacy and information security, including ways to remove personal information where appropriate — echoing concerns raised in the long-pending Security and Privacy in Your Car Act. The Federal Trade Commission has been holding hearings on consumer privacy and data security, and the U.S. Department of Transportation has committed to work closely with the FTC on data privacy issues for AVs.



Jason Orr

In 2018, voters in San Francisco passed a consumer privacy ballot initiative, affirming the public's right to know how data is being collected and used, and requiring the city to enact policies addressing data privacy and protection. At the same time, local, federal and international bodies are increasingly making seemingly conflicting demands regarding the types of data that companies should collect, retain, share and report — sometimes suggesting that certain data should not be collected without permission, while at other times seemingly encouraging that such data be collected, reported or even potentially shared with competitors.

Companies can expect to see increased emphasis on how accurately they communicate to regulators and users regarding their data collection and use practices.

Recommendations for AV companies:

- Develop plans for collecting, transmitting, retaining and using data from AVs;
- Vet those plans, including policies regarding segregation and anonymization of personal data, against current regulations;
- Communicate accurately and effectively regarding data privacy and cybersecurity;
- Learn from missteps in other industries; and
- Create agile technology environments and privacy policies that can respond to a changing legal landscape.

Open Source Licensing Diligence and Disputes Will Be on the Rise

Many AV companies are electing to offer their AV platforms as open source, or are choosing to rely on others' open source software to build their AV platforms. Many more companies may be building their technology around open source components without realizing that such components are subject to open source terms, or without fully understanding those terms. Also, AV companies are heavy users of data sets to train and refine aspects of AV technologies such as machine learning.

Many publicly available data sets are offered as "open source" or "open data" — but there currently are no agreed standards for open data licensing, and the terms applied to data sets are often unclear, undisclosed or potentially inaccurate. Open source law, moreover, generally is nascent, with few published decisions regarding the interpretation of open source licenses. In addition, there is no one "open source" regime; instead, there are many competing and evolving license terms, which can include conditions requiring sharing the corresponding source code used to build binaries, or that may limit remedies available for patent infringement.

Unfortunately, the open source landscape also includes some aggressive copyright asserters who focus on consumer products, including vehicles, often bringing unsupported claims. Automotive companies often have detailed compliance requirements for their supply chain. In 2019, we expect more attention to open source compliance, as investors seek to manage risk of compliance claims, but also more initiatives favoring release of open source code by AV companies.

Recommendations for AV companies:

- Build a coherent policy for ingesting open source software and/or datasets, and clearly communicate this policy to engineering teams and partners;
- Be prepared for supply chain audits, and consider a self-audit of open source software and/or datasets;
- Consider supply chain standards like Open Chain and SPDX, adherence to which your customers may demand; and
- Monitor competitors for use of your open source contributions, including identifying any violation of licensing terms.

Safety: Continued Deference to Industry, But Also Increased Scrutiny, Particularly on Advertising

While AV technologies have great promise to drastically reduce road deaths and injuries in the near future, safety remains a perennial topic of concern for companies, regulators and the public. The AV START Act, for instance, contemplated that the DOT and the National Highway Transportation and Safety Administration would create rules specific to AV safety, privacy and data security, among other subjects. Future legislation on AVs is expected to take a similar approach.

New federal guidelines could help harmonize the existing patchwork of state and local approaches to AVs, and create more certainty in the space. Such adoption and implementation will take years, however, and in the short term, federal and state regulators are expected to continue to look to industry to develop relevant safety practices and standards, as well as to educate regulators regarding the safety of existing technologies and to propose sensible rules appropriate to AVs.

As the industry matures and there is increasing deployment and commercialization, regulators, attorneys general and the plaintiffs bar are expected to scrutinize both the safety of AV technologies and how AV developers communicate with consumers about their technology. For example, both existing policies and proposed regulations target how AVs are advertised to consumers, with a goal of limiting unreasonable consumer expectations for the technology, and thereby improving operation safety.

Recommendations for AV companies:

- Demonstrate and contextualize the safety of AVs compared to the well-known risks of road deaths and injuries due to human error;
- Help develop sensible safety regulations and standards that take into account the realities of AV technologies;
- Monitor and comply with federal, state and local testing and safety reporting requirements; and
- Craft consumer messages to accurately reflect the capabilities and limitations of AV technologies, and to offer guidance on how users can contribute to safety.

Continued Synergies With Other Market and Technological Disruptors

AVs will continue to develop alongside other technological and market innovations, such as ride-sharing,

mobility-as-a-service, and electric and hydrogen power for vehicles. In 2019, we expect continued synergies across AV technologies and these other areas of disruption, as well as continued expansion of AVs into more traditional markets such as commercial delivery and trucking. AV companies should be prepared to address the types of business and legal concerns faced by such evolving industries.

Recommendations for AV companies:

- Assess regulatory and other legal trends in relevant markets, while identifying AV-specific concerns; and
- Build alliances across emerging markets and educate users and regulators to increase trust and confidence.

Increasing International Considerations

2019 will see increased international deployment, especially in China and Europe, taking advantage of political will and more unified regulatory environments. Already substantial cross-border investment will accelerate in this new year, as investors scour the globe for the most favorable locations for a return on investment.

Recommendations for AV companies:

- Look outside the United States for market developments;
- Where cross-border deployments are involved, be mindful that different laws and regulatory regimes may apply for safety, advertising, privacy and security; and
- Monitor developing international policies that may impact the ability to engage in cross-border transactions or to involve foreign investors in the United States.

We Can Meet the Challenges of AVs

In July we will celebrate the 50th anniversary of the moon landing. It is an apt time to remember that the computers in our pockets have many times the processing power of the computers that put humans on the moon. As we begin 2019, we are poised to take a giant leap into the AV future.

Melody Drummond Hansen and Heather J. Meeker are partners and Jason A. Orr is an associate at O'Melveny & Myers LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.