

Assaying the Copyright Law Jurisprudence in the Age of Artificial Intelligence: A Comparative Study

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Abstract: The emergence of Artificial Intelligence (AI) as a potent creative force has thrown copyright regime into a whirlwind of challenges. At the heart of this inferno lies the perplexing question of authorship: can machines wield the pen and lay claim to intellectual property rights protection over their creations and whether AI, devoid of intention or consciousness, truly be considered an author or is it merely a sophisticated tool in the hands of human creators, nullifying its claim to authorship. The research paper divulges in to complex issue of copyright protection to AI-generated works and further examine how the various recent judicial pronouncements have impacted the copyright regime with special reference to 'authorship' and 'ownership' to the AI-generated works. The author aims to dissect the intricate knot of authorship and ownership in the context of AI, untangling the challenges they pose to existing legal frameworks.

Keywords: Artificial Intelligence, Copyright law, Authorship, Ownership, Intellectual Property

1. Introduction

The swift development and rise of Artificial Intelligence (herein referred as AI) has not only proven to be a boon for stakeholders¹). But it has also posed various challenges to the existing legal frameworks and Intellectual Property Rights regime is one of the many domains in the legal field which is marked by a paradigm shift²). The anthropocentric-based Intellectual Property laws are struggling to adapt and incorporate the complex AI-generated works under its regime, as the 'work' of creativity and innovations has always been subjected to human efforts³). However, the incubation of artificial intelligence has diverted the attention of stakeholders, legislators, and policymakers across various jurisdictions to delve into the dilemma whether the 'works' generated by AI or non-human creators with minimal or without human intervention falls within the ambit of current intellectual property regime⁴).

Over the past decade, the machines, computers, or devices empowered by artificial intelligence have been subject to producing magnificent literature, artistic and musical works which were traditionally attested only to humans⁵). 'Flow-Machines' is an AI model that creates or composes the music independently without human intervention or in collaboration with other human authors by "combining music rules generated by analysing a variety of music with advanced software technology to help creators to freely create various styles of melodies based on their own concepts⁶)." 'Amper' is the first AI of its kind to compose and produce an entire music album which was developed by a software company comprising of technical experts and professional musicians⁷). The researchers of Future University Hakodate developed and trained an AI programme which wrote a novel entitled, 'The Day A Computer Writes A Novel' and was nominated for Hoshi Shinichi Award⁸). Though the novel written by AI was not purely independent and free from human intervention as the parameters were set by the developers but ultimately AI did create a copyrighted work which was nominated for an award⁹).

Similarly, a 3D painting entitled 'The Next Rembrandt' was generated by an AI after analysing more than thousands of works of the renowned Dutch artist Rembrandt Harmenszoon Van Rijn¹⁰). The goal of Next Rembrandt project was to produce a new Rembrandt painting bearing similar properties of the original Rembrandt painting¹¹). Such growing trends in the field of technology indicates the intrusion of Artificial Intelligence in the domain of Intellectual Property Rights¹²). The traditional anthropocentric approach implying that only a human author can be accredited with the copyright protection for original and creative works has been posed with several complex legal

issues due to the unprecedented progress in the field of Artificial Intelligence¹³).

2. Challenges to Jurisprudential Foundation of Intellectual Property Rights by AI

The genesis of the Intellectual Property regime has its roots derived from the John Locke's Natural Right Based Theory, Jeremy Bentham's Theory of Utilitarian, Kant and Hegel's Personhood Theory and Reward Theory¹⁴). According to Locke's Natural right theory, an author has a natural right over his intellectual endeavour because of the labour and creativity put into by the author¹⁵). Imbibing the principle of Locke's theory, the AI should be considered an author or owner of its generated work, since the end-product or the outcome is result of AI's own computation (labour) without any interference of human¹⁶).

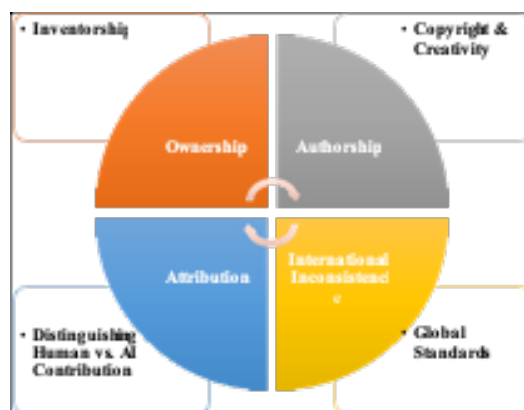


Fig1 Challenges to Jurisprudential Foundation of Intellectual Property Rights by AI

Therefore, giving copyright ownership to a programmer or end user for AI-generated work would be against the principle of Natural Right Theory¹⁷). Under the International Intellectual Property regime, Copyright is usually granted to original artistic, literary, musical, and

dramatic works¹⁸). Copyright is a statutory right which aims to grant protection to the original and creative works of human intellect¹⁹). Copyright law does not extend its protection to the mere ideas, but provides protection to ideas into the form of expression, i.e. in tangible form²⁰). The term 'Original' denotes creativity and does not amount to novelty²¹). Hence, 'Originality' is the quintessential requirement to be eligible for Copyright protection. For 'Originality of Work', the copyright law derives its jurisprudence from the following two doctrines²²).

'The Sweat of the Brow': According to this doctrine 'originality' or 'substantial creativity' is not the foremost requirement of copyright²³). This doctrine states that a copyright protection is granted to an author based on his significant labor, skill and hard work which is put into creation of his/her work, even if it lacks significant creativity and originality²⁴). The sweat of the brow doctrine was further elucidated in the landmark ruling of *University of London Press v. University Tutorial Press* where the court held that "an author's expression need not be an original form rather the pre-requisite requirement is that the work must not be copied and it must originate from the author²⁵)." Further, in India this doctrine was recognized and followed in *Burlington Home Shopping v. Rajnish Chibber* where the court held that 'compilation of work' by the author would be granted with copyright protection²⁶).

'Modicum of Creativity': The test of 'originality' saw a paradigm shift from 'Sweat of the Brow' doctrine to doctrine of 'Modicum of Creativity' by US Supreme court in *Fiest Publications v. Rural Telephone Service Company Inc.* where the court negated the 'Sweat of the Brow' doctrine and emphasized that for a 'work' to be 'original' it must not only be the product of independent creation²⁷). but there must be a display of 'modicum of creativity' by the author, i.e. there must be a minimum level of creativity applied by the author in its work²⁸). Similarly, in India the Supreme Court while negating the 'Sweat of the Brow' doctrine in *Eastern Book Company v. D.B. Modakii* followed the doctrine of 'Modicum of Creativity' doctrine and held that "to establish copyright the creativity standard applied is not that something must be novel but some amount of creativity is required in the work to claim protection under copyright" and further the court introduced the notion of "flavour of minimum requirement of creativity²⁹)".

Initially, the machines or computer were introduced to assist the programmers in the outcome of a desired result, where the programmers were the real originators of the final output. Such works were referred as Computer Assisted Works (CAW)³⁰). However, the rapid change and advancement in technology has seen Artificial Intelligence come to the fore, which eventually

has side-lined the Computer Assisted Works to Computer Generated Works (CGW)³¹). Though CAWs do not carry any issue with respect to copyright protection since it merely acts to get the desired result³²). Whereas CGW has posed a challenge to Copyright protection where the AI-enabled software/programme is the actual originator of the final output³³). Hence the question of whether AI-generated 'works' fulfils the criteria of 'originality' or 'creativity' is very much debatable as artificial intelligence rely on the existing data and programmes by human³⁴).

3.1 Complexities arising out of AI-generated works under Copyright Laws

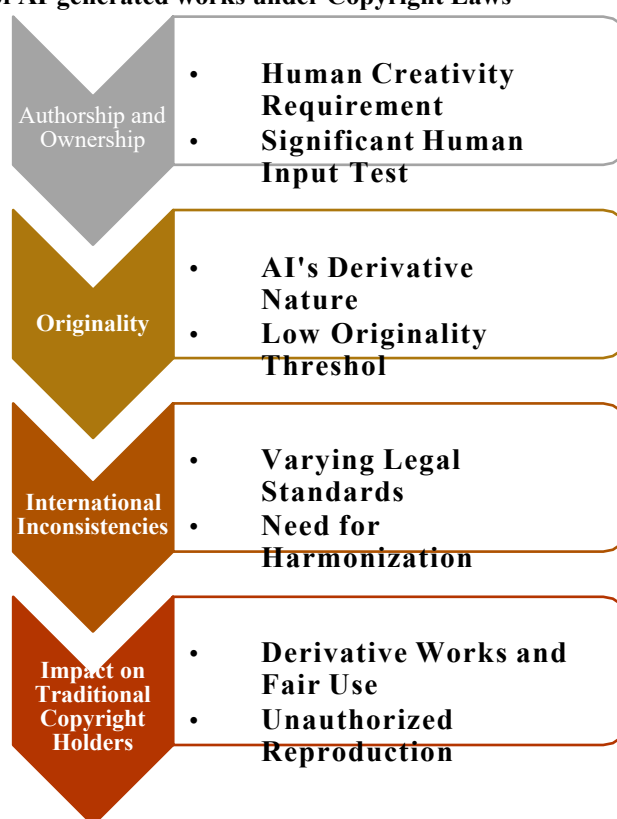


Fig. 2: Challenges of AI-generated works under Copyright Laws

At the heart of the copyright conundrum lies the perplexing question of authorship³⁵). Can AI, devoid of intention and consciousness, truly be considered an author³⁶). Traditional copyright law hinges on the idea of a "fixed, tangible medium of expression," authored by a human whose

creativity and ingenuity manifest in the work³⁷). Whereas, the works generated by artificial intelligence is largely based upon the data and algorithms which eventually poses a query that whether the Artificial Intelligence trained on the complex algorithms and data which has been programmed by the humans falls within the ambit of copyright law and does it exhibit the 'originality' which is the foremost requirement for copyright protection³⁸). Once the issue of authorship is addressed, the conundrum of ownership comes to the fore³⁹). The question as to who owns the copyright of the works generated by artificial intelligence, whether it is the programmer who designed and programmed the AI, or is it the user of such work who used it as a creative tool or is it the AI itself⁴⁰). The current existing copyright regime further complicates the issue of ownership of AI being an owner of copyrighted work⁴¹). If the AI generated work exhibits originality and autonomy and fulfils all the requirement of copyright protection, can it be provided with the copyright protection which is held in reserve for the human authors⁴²). Hence, the current copyright framework which is largely based on anthropocentric approach i.e. only humans can be an author or owner of a copyrighted work, struggles to incorporate the creative and

original work under its ambit which is generated by AI⁴³).

Recently, the United States Copyright Office on March 16, 2023 while delving into the issue of ‘authorship’ & ‘ownership’ to AI-generated works, published the “Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence”⁴⁴). The guidance specifically states that “US Copyright Office will not register works produced by a machine or mere a mechanical process that operates randomly or automatically without any creative input or intervention from a human author⁴⁵.” Hence this implies that US copyright emphasizes and requires ‘human authorship’ for the purpose of registering copyrighted works as the expression ‘author’ in the US Copyright act excludes non-humans⁴⁶). Further in assessing the AI-generated work, the US Copyright Office further clarified in its submission that it would make an analysis case by case and would see that “whether the ‘work’ is basically one of human authorship, with a computer or other device merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were conceived and executed not by [a human] but by a machine⁴⁷.”

Various jurisdictions across the globe are dealing with immense challenge by bringing their laws and legal structure in consonance with the rapid growing of advanced technologies⁴⁸).

Though legal systems require ample time to evolve in contrast to the ever-changing nature of technological developments, a reasonable and extensive discussion with the respective stakeholders is required to bring any kind of major changes in the legal structure with regards ‘ownership’ and ‘authorship’ to AI-generated autonomous works⁴⁹).

3. Analysis of Copyright Protection to AI-generated works under various International Jurisdictions

As of now, there is no comprehensive legal framework with respect to Artificial Intelligence generated works to be regulated under Intellectual Property regime⁵⁰). The current Intellectual Property regime across the world stems from the perception that original and creative work can be produced by the human intellect only⁵¹). Article 3 of Berne Convention lays down the criteria for eligibility of ‘works and states that the ‘author’ of the ‘works’ seeking copyright protection should be a national of one of the signatory countries or he/she should be the first to publish the work⁵²). Further, from the definition of ‘published works provided in article 3 it is inferred that the ‘author’ can only be humans and not machines⁵³).

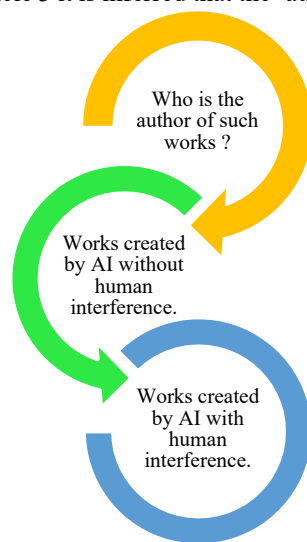


Fig. 3 Diagrammatic representation of copyright protection to 'works' generated by AI with and without human interference

United States of America

Section 17 of the Copyright Law of the United States, provides that the copyright protection would be garnered to the ‘author’ of the works⁵⁴). Though the term ‘author’ has not been defined explicitly in the said statute but the issue of human authorship and non-human authorship has been delved by the US courts in various judgements⁵⁵). In the landmark case of *Naruto v Slater* (also known as ‘Monkey Selfie’ case) the US District Court of Northern District of California dealt with the question of animal ownership in photographic work and held that copyright does not authorize animals to file copyright

infringement suits⁵⁶). The court elaborated that the court observed that copyright law while providing protection to ‘works created by the ‘author’ largely identifies author as a person and therefore for a ‘work’ to be qualified for the copyright protection must be created by a human entity⁵⁷).

European Union

Under the current European Union laws, there is still a debate going on that whether the AI- generated works should be provided with the copyright protection⁵⁸). There are no specific provisions in European Union legislation which suggests that the ‘author’ of the original creation of works should be human only but various copyright directive does require an ‘own intellectual creation’ by the ‘author’⁵⁹). The CJEU’s interpretation of the term ‘originality’ in the leading case of *Infopaq International A/S v Danske Dagbaldes Forening* (2009), where CJEU held that the copyright protection would apply to only those ‘works’ which would “reflect the author’s own intellectual creation” and therefore keeping AI-generated works out of the ambit of copyright protection⁶⁰).

However, EU Parliament’s Legal Affairs Committee’s study on European Civil law rules in robotics has observed that there is a very sluggish progress in the copyright regime with respect to AI-generated works⁶¹). Therefore in its draft report it demanded criteria for ‘own intellectual creation’ for protectable works which are created by the robots and computers⁶²). Similarly, following *Infopaq*, the European Union courts have emphasised the concept of ‘the author’s own intellectual creation’ to mean works where its author expresses his creative ability in an original manner by making free and creative choices and thus stamps his “personal touch” on the works ⁶³). Hence from the above judicial pronouncements it is construed that the court requires some kind of human input if it states that creation must reflect author’s personality⁶⁴).

Germany

Under German copyright law, section 2(2) of German Copyright Act provides protection for “personal intellectual creations” whereas section 7 of German Copyright Act defines ‘author’ as the ‘creator of the work’⁶⁵). Thereby, it can be inferred that the author of personal intellectual creations can only be humans and the machine generated works are kept out of the ambit of the copyright protection law in Germany⁶⁶). Further, in German copyright regime, to qualify the criteria of ‘originality’ there must be some personal touch of the author’s personality in the work created⁶⁷).

United Kingdom

The UK Copyright, Designs and Patents Act, 1988 (CDPA) by adding a new provision (Section 178) provides an authorship of computer-generated work (without any human intervention) to any person by whom ‘the arrangements necessary’ for the creation of work has been undertaken⁶⁸). However, as per section 9(3) of CDPA it is unclear as to which ‘person’ should undertake the ‘the arrangements necessary’ for the creation of work? Further, the determination of ‘originality’ by the AI-generated works is unclear as well⁶⁹).

China

The Shenzhen Nanshan District People’s Court in 2019 held that an article produced/generated by an AI system ‘Dreamwriter’ is liable for protection under copyright⁷⁰). Dreamwriter is an intelligent data-based writing assistance system which was developed by Tencent Technology Co⁷¹). Ltd. In 2018, an article written by ‘Dreamwriter’ was published Tencent on its website with a note at the end stating that “This article was automatically written by Tencent’s robot Dreamwriter”⁷²). The defendant without the plaintiff’s prior authorization published the same article and consequently a suit was filed by Tencent for copyright infringement⁷³). The court held the defendant liable for infringement and stated that the article generated by the AI system ‘Dreamwriter’ is liable for copyright protection under the Chinese Copyright law⁷⁴).

Australia

The current Australian Copyright regime does not provide copyright protection to AI-generated autonomous works⁷⁵). Though, the definition of ‘literary work’ under the Australian Copyright Act, 1968 expressly provides protection to the computer programs⁷⁶). The Australian Copyright act provides that the ‘author’ of a work in which copyright subsists, the person must be a ‘qualified person’⁷⁷). Section 32 of the act defines ‘qualified person’ which states that ‘qualified person’ is an Australian citizen or a person resident in Australia⁷⁸). Hence, AI is neither a citizen nor a legal person. In the landmark judgment of *Achos Pty Ltd v Ucorp Pty Ltd* the court held that any inventions made by a computer cannot be shielded with

protection under copyright law as such invention is not produced by a human⁷⁹).

India

Similar to the UK Copyright, Designs and Patents Act, 1988 (CDPA), section 2(d)(vi) of the Indian Copyright Act, 1957 provides that, “author” means in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created” ⁸⁰). It can be seen through expression from the above-mentioned section that it clearly mentions that for the purpose of computer-generated works, the person causing the work to happen will be considered as an author⁸¹). Here, the interpretation of section 2(d)(vi) patently implies that it does not exclusively recognise computers to be intelligent as humans as it only recognises those computers which are controlled or operated by the humans⁸²).

Further, after 2012 Copyright Amendment, Section 57 was incorporated in Copyright Act, 1957 which talks about the ‘Moral Rights’ of the author which includes Right of Paternity and Right of Integrity⁸³). However, these provisions merely suggests that Artificial Intelligence does not find copyright protection under the current regime⁸⁴). Further, in *Eastern Book Co. v D. B. Modak*, the Supreme Court ruled that for a ‘work’ to qualify copyright protection must meet the standards of ‘modicum of creativity⁸⁵.’ In this case the court held that for a ‘work’ to qualify copyright protection there must be ‘minimal degree of creativity’ and ‘there must be some substantive variation and not merely a trivial variation⁸⁶).

1. A Sui-Generis system to protect Artificial Intelligence creations

After analysing the legal structure of various international jurisdiction, it is very pertinent to note that all the national laws governing ⁸⁷). IPR has adopted a traditional anthropocentric approach where an AI devoid of legal personality would not suffice in protecting its autonomous generative work under the aegis of copyright laws. Unlike humans, AI would not be liable for copyright infringement⁸⁸). It would be the person behind the AI whether, legal person or natural person, who will be held liable for the infringement caused by the AI designer⁸⁹). But also, if the AI designer copy another AI design and produce a work, then the issue of copyright infringement would not at all arise, because the AI lacks human authorship and originality⁹⁰). Since, AI works lacks human authorship, it generally ends up in a public domain, which is another cause of concern because there is very little incentive offered to fashion companies to invest in AI-generated designs⁹¹). AI-generated designs falling in public domain would give free access to others and copy it⁹²).

Hence it is suggested to the legislators and policy makers to withdraw their attention from the conventional anthropocentric approach and create a new Sui-Generis system to accommodate and re-evaluate the AI-generated works which does not fit in the conventional Intellectual Property rights regime⁹³).

4. Conclusions & Suggestions

The interplay between AI and IP law presents a complex and dynamic landscape. Navigating these challenges will require thoughtful collaboration between legal scholars, policymakers, technologists, and ethicists⁹⁴). Embracing innovation while prioritizing fairness, transparency, and ethical considerations is crucial for shaping an IP framework that fosters responsible and beneficial AI development⁹⁵). This addressing these challenges collaboratively, it can ensure that the ever-evolving world of AI flourishes within a robust and adaptable legal framework⁹⁶). It fosters creativity, protects genuine originality, and ultimately serves the broader good of society⁹⁷). With the advent of Artificial Technology, we are currently entering into the stage where most of the creative works and information will be produced by the intelligent machines without any kind of human intervention⁹⁸).

Therefore, while considering as to how to provide copyright protection and authorship to the AI-generated works, we should also seek to preserve the bond between intelligent machines and their works⁹⁹). Further, the current moral rights regime which is granted to human authors for their creative work could well become a useful source of information in near future to vest such rights in AI systems as well¹⁰⁰). Further, in the absence of a comprehensive legislation to protect the AI-generated works, what are the options and challenges to current IP regime is a topic to be delved into¹⁰¹). In pursuit of providing IP protection to the AI-generated works, the international institutions and the national laws should be reformed to acknowledge the rising phenomena of Artificial Intelligence technology and provide the AI-generated works with adequate legal protection¹⁰²).

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