

Priyanka Roy Chowdhury & Nishaan Sengupta

BA LLB

KIIT School of Law

**AN INSIGHT ON ARTIFICIAL INTELLIGENCE AND
INTELLECTUAL PROPERTY RIGHTS: A CRITICAL
ANALYSIS**

Regular tasks in the field of Intellectual Property Rights (IPR) are laborious, howsoever Artificial Intelligence (AI) technology, since its invention has been enabling professionals to strategically divide their time and focus more on the deliberate aspect of decisions in their portfolio. AI and Copyright have brought the issue of ownership of Copyright at loggerheads in connection to Who shall the true owner of Copyright be: Humans or AI?. By virtue of the above-stated proposition, a situation may be envisioned whereby granting of Copyright Ownership to AI causes it to secure a position that is placed higher than the creators which is Humans. Having mentioned the ambiguous situation, the advocates of AI shall promote the ideology of ownership of copyright by AI, as, in many a circumstances the AI is the creator and not a mere tool acting as a helping hand for humans. Such dynamics were never anticipated by the Legislature and hence, IPR Laws do not cater to a remedy in such situations. Not even the Judiciary has encountered such conundrum. Anticipating the occurrence of a high probability of such a situation in the future it is imperative to fill the vacuum space. The author shall endeavour to whether such situation may be governed by The Copyright Act.

Keywords: AI, Copyright, owner, creation, tool

UNDERSTANDING THE PERPLEXITIES OF AI AND COPYRIGHT

The advent of copyright had been observed in the printing era also known as the Gutenberg's invention time. Recently after the invention, a massive number of nations had enacted the Law, however failed to envision a situation where ownership of copyright would be debated. Neither the Legislature nor the IPR Law could anticipate such a situation, hence, the Legal provision (IPR) do not cater a remedy to such ambiguous legal issue. Furthermore, there may be situations where the AI is not merely a helping hand to '*Homo Sapiens*' but contributes in the creative process as the in-charge and hence operates from a higher position in comparison to its fellow human creators. Can such AI be given recognition? This query has to be inquired in this ever evolving society, especially when technology is an omnipotent phenomenon. The term 'author' has been defined as "author" means, - in relation to a cinematograph film or sound/recording, the producer; and in relation to a cinematographic film to mean owner of the film at the time of its completion".¹ Therefore, the rights of producer or owner of the cinematographic film are protected. As observation has already been made, there is no explicit mention of the conundrum involving the AI and Copyright in The Copyright Act, hence the author shall endeavour to provide a remedy to such a situation.

AI not acting inferior to its fellow human creators: Watson (cognitive solutions platform: broad number of offerings spanning cognitive computing, machine learning, deep learning, predictive AIs, and natural language processing) in IBM; DeepMind (machine learning tool), Cloud Machine Learning (cloud machine learning services in Google).²

The above stated instances are an indication that AI is no longer a mere tool in the formulation of a new ideas but an important decision maker of the creative interest.

DOES AI SHOW THE PROPENSITY TO LITIGATE ?

¹ The Copyright Act, 1957

² "AI and the Law- Legal and Tax issues", The Future is here: Artificial Intelligence and Robotics", 21, (July 3, 2018, 5:10p.m.)
<http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Artificial_Intelligence_and_Robotics.pdf>

Can ownership of Copyright be conferred to AI? In accordance with the Jurisprudence of most of the countries, one of the basic requirements of originality is a human author. However in the entire saga of AI, the perplexities of the debate are subject to serious troubles, however, several precedents have been laid down with regard to the conferring of copyright when the owner is a non-human entity or an AI. The author while dealing with such conundrum has observed few cases as relevant :

However, to the contrary to the popular belief, that ownership shall be granted to Humans, in the English case of *Nova Productions v Mazooma Games*³ the Court of Appeal had to decide on the authorship of a computer game, and declared that a player's input "is not artistic in nature and he has contributed no skill or labour of an artistic kind". Hence , copyright under the given circumstances was not provided to the human who created the algorithm of the machine. To the contrary, provision of authorship to the programmer, is evident in a few countries such as the Hong Kong, Ireland and New Zealand. This approach is best encapsulated in UK copyright law, section 9(3) of the Copyright, Designs and Patents Act (CDPA), which states:

*"In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."*⁴

The debate between whether Copyright shall be conferred to AI or humans still persists as the Jurisdictions of some countries permit the same whereas the other countries deny it⁵. Seeking assistance from The Constitution of India, however, it does not provide any rights and duties for the AI, nor have the Courts adjudicated the legal status of AI machines.⁶

³ *Nova Productions v Mazooma Games*[2007] EWCA Civ 219

⁴ "Artificial Intelligence and Intellectual Property", 10, (July 2, 2018, 2:20 p.m), <http://www.wipo.int/about-ip/en/artificial_intelligence>

⁵ *Id*

⁶Can an AI algorithm copyright what it creates?, 2, (July 2, 2018, 2:15p.m.) <<https://www.forbes.com/sites/kalevleetarv/2017/08/02/can-an-ai-algorithm-copyright-what-it-creates>>

While there has been opinions put forth in the past that copyright is to be conferred where the work of creative interest bears the fruit of intellectual labour⁷, which is possible only in case of '*homo sapiens*', while some other are of the opinion that copyright may be conferred to AI since AI functions as higher intelligence mechanism owing to advanced technology and is under myriad circumstances the master controller.⁸ The author would be elated to bring to notice that appointment of AI is observed as one of the Directors in the Board of Directors in Hong Kong.⁹ Also, India has witnessed the emergence of AI as an integral part of an Indian Company, Spot Draft.

Having dealt with some of the imperative case laws in this regard, the assistance of some of the basic doctrines of Copyright Law is sought. In the light of an imperative doctrine of Copyright Law, it has been contended by various legal professionals that the concept of "originality" has undergone a paradigm shift from the 'sweat of the brow' to the 'modicum of creativity'.

In the light of the case *Feist Publication Inc. v. Rural Telephone Service*¹⁰ the United States Supreme Court totally negating the doctrine held that for the purpose of a creation to be original, a work need not only be the product of independent creation, but it must also exhibit a "modicum of creativity".¹¹ This doctrine explicitly stipulates that originality subsists in a work where there is the presence of sufficient amount of intellectual creativity and judgment. The standard of creativity must constitute a minimum level of creativity for the purpose of availing copyright protection.¹²

⁷*Feist Publications v Rural Telephone Service Company*, 499 U.S. 340 (1991)

⁸ *Id*

⁹Artificial Intelligence would discriminate and Companies would get away with it - Experts explain why Hong Kong Law needs to catch, 2, (July 2, 2:05p.m)
up<<https://www.scmp.com/news/hong-kong/economy/article/2112786/updated-laws-needed-hong-kong-can-embrace-artificial>>

¹⁰ *Feist Publications v Rural Telephone Service Company*, 499 U.S. 340 (1991)

¹¹ *Id*

¹² *Id*

Seeking assistance from this particular doctrine, ‘Modicum of creativity’¹³ and the also taking into consideration an imperative aspect, that AI is conferred Legal Status and being aware of the basic principle of, ‘where there is a right there is a remedy’, AI shall be conferred ownership of Copyright since its recognition as a Legal personality hence, having certain rights and remedies further enables AI to be in possession of ownership of Copyright in circumstances where it is at a higher position in comparison to its human creators.

THE ROAD TOWARDS SYNERGY

It must be a deliberate effort from the side of the existing Copyright Laws to provide for provisions which shall explicitly state for a definite remedy in such ambiguous situations. After analyzing myriad precedents, existing legal regimes and lacunas, the author has come to a juncture where ownership of Copyright shall be conferred to AI. Such a conclusion has been arrived at by seeking assistance from the doctrine, ‘Modicum of creativity’ and the also taking into consideration an imperative aspect, that AI is conferred Legal Status and being aware of the basic principle of, ‘where there is a right there is a remedy’, AI shall be conferred ownership of Copyright since its recognition as a Legal personality, hence, having certain rights and remedies further enables AI to be in possession of ownership of Copyright in circumstances where it is placed at a higher position in comparison to its human creators. And, if this situation takes the shape of reality, it is not very hard to envision a situation whereby AI shall be working at par with the Human race, hence promoting a highly advanced country in terms of technology and commerce. Also the author has observed that though India has not encountered the dilemma between conferring of ownership of copyright but the world scenario directs India to envision a situation as this in the future and allow India to lead by example.