INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

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www.ijlra.com
Volume 2 Issue 7 | Aug 2023
ISSN: 2582-6433

GENERATIVE ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY RIGHTS: NAVIGATING THE NEW LANDSCAPE

AUTHORED BY - POOJA KATEEL

In this age of rapid technological advancement, the advent of generative Artificial Intelligence (AI)[1] has transformed several industries, most notably the creative sector. AI has advanced significantly, particularly in the domain of generative AI. Generative AI models, like StyleGAN and GPT-3, have proven to be remarkably adept at producing unique and lifelike material in a variety of media, including text, photos, music, and more. These models have the power to dramatically change a number of industries, including marketing, the creative arts, and entertainment. They do this by automating content creation processes and opening up new forms of expression. AI is expected to become a seamless part of daily life in the near future.

New technologies and Intellectual Property have always coexisted peacefully, and as a result, policies pertaining to Intellectual Property have had to evolve to keep up with both. AI technology has the ability to tip up the Intellectual Property system by posing fundamental queries about authorship, ownership, and infringement, amonga lot of other things.

Determining copyright ownership, for example, becomes difficult when an algorithm produces a work that mimics an already-existing piece. In these situations, is the AI system or the human creator the primary author? Other problems about whether generative AI works should be examined to the same criteria of originality as human-generated works, arise when defining the originality and novelty of AI-generated works and how this can affect the requirements for patentability and copyright protection.

When AI models produce content that bears a strong resemblance to human creations, concerns about ownership, protection, and use of the generated works surface. Concerns over the limits of fair use and the application of conventional intellectual property rules in the context of AI are also raised by the use of currently copyrighted works in training data and the possibility of its

[1] Hereinafter referred to as AI

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infringement[2].

Investigating intellectual property rights in generative AI is important because it is an important aspect increating a transparent legal and moral framework that encourages creativity while upholding the rights of artists. Stakeholders must work toward creating strong legal frameworks, moral standards, and industry standards that strike a balance between promoting AI advancements and protecting the rights of content creators and Intellectual Property holders by being aware of the issues and concerns surrounding Intellectual Property in generative AI.

This research intends to contribute to the creation of a thorough and fair framework that, in the context of generative AI, promotes responsible innovation, encourages creativity, and protects intellectual property rights by bringing these issues to light.

THE INTERPLAY BETWEEN THE CONCEPTS OF GNERATIVE AI AND INTELLECTUAL PROPERTY RIGHTS

What is Generative AI?

Generative AI is a subset of AI and machine learning that involves teaching a computer programme complex techniques to create original works of art, music, and literature. Generative AI is the output of deep learning methods that enable it to recognise increasingly difficult patterns, make decisions, and accomplish more sophisticated or infinite jobs without human intervention or direct involvement[3]. These models have got a lot of attention because of their ability to generate human-like content and have applications in a variety of fields, including creative industries, content generation, and research[4].

Within the context of generative AI, various forms of intellectual property rights become relevant. Some of them are listed below:

i. **Copyright**: Original creative works, such as literary, artistic, musical, and theatrical pieces, are protected by copyright laws. It protects the content generated by the author

[2] Archer, P. (2021). AI inventors: can AI own intellectual property rights? [online] Raconteur. Available at: https://www.raconteur.net/technology/ai-intellectual-property-rights/. (last visited Dec. 6, 2023).
[3] Research Handbook on the Law of Artificial Intelligence (Edward Elgar, 2018) 496.
[4] Appel, G., Neelbauer, J. and Schweidel, D.A. (2023). Generative AI Has an Intellectual Property Problem. [online] Harvard Business Review. Available at: https://hbr.org/2023/04/generative-ai-has-an-intellectual-propertyproble (Last visited Dec. 4, 2023)

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or creator, by giving the creator exclusive rights for a set amount of time, such as stories, poetry, artwork, or music.

ii. **Patents**: New techniques, methods, or processes employed in generative AI models are all protected by patents. Patents give the owner of the invention exclusive rights, prohibiting others from making, selling, or distributing the innovation without the owner's consent, for a set amount of time.

iii. **Trademarks**: Trademarks protect distinguishing marks—like logos, brand names, or symbols—that are connected to particular goods or services. Trademarks may be relevant in generative AI when the models produce content that features or mimics registered brands without permission.

iv. **Trade Secrets**: Trade secrets are important and proprietary business knowledge that gives an edge over competitors. Trade secrets in the context of generative AI can be exclusive model architectures, exclusive algorithms, or private training data.

Importance of Intellectual Property Protection in Generative AI

In the field of generative AI, Intellectual property protection is essential for a number of reasons, which provide insight that should be taken into account while putting any framework in place to govern AI and IP-related issues. Some of the reasons for Intellectual property protection are:

i. Encouraging Innovation: AI developers and organisations are encouraged to devote resources and effort to developing and refining generative AI models by use of intellectual property rights. Ensuring that authors can profit from their works fosters creativity and leads to the development of cutting-edge AI technologies. This is made possible by robust Intellectual Property protection.

ii. Rights and Rewards for Creators: Exclusive rights over their produced content are granted under Intellectual Property protection, giving creators the ability to manage and profit from their creations. It guarantees that content creators get credit and financial compensation for their work and permits them to licence, sell, or distribute their work.[5]

iii. Preventing Unauthorized Use: Intellectual Property Protection makes AI-generated content less likely to be used, copied, or distributed without authorization. It

[5] AI throws the patent system into turmoil. [online] Available at: https://www.downtoearth.org.in/blog/science-technology/ai-throws-the-patent-system-into-turmoil-90230 (Last visited Nov. 28 2023)

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safeguards the financial interests and rights of creators by enabling them to sue for infringement and enforce their rights.

iv. Balancing Interests: The public, content creators, and AI developers can all have their interests fairly balanced with the aid of intellectual property laws. Intellectual Property protection promotes innovation and creativity, as well as the availability of public domain works and fair use of already-existing content, by granting exclusive rights for a set amount of time.

v. Economic Value and Market Development: Strong intellectual property protection in generative AI promotes the expansion of businesses and sectors centred on AI-generated content. It promotes the establishment of new business prospects and income streams by fostering the development of licencing and commercialization models.

Overall, Intellectual Property protection is essential for encouraging market growth, safeguarding creators' rights, encouraging innovation, and maintaining a just and balanced ecosystem for generative AI.

AUTHENTICITY CHALLENGE TO INTELLECTUAL PROPERTY GENERATED BY AI:

❖ Copyright Act, 1957- India

Section 2 (d) (vi)[6] of the statute defines author as, "*in relation to any literary, dramatic, musical or artistic work that is computer-generated, the person who causes the work to be created".*

❖ Patents Act, 1970- India

The Act's exclusion of Al systems from its scope of application has limited the rights of "persons" under this statute. As is evident from Sections 2 (1) (p), 2 (1) (t)[7], where the term patentee refers to a person, and Section 6 (1) (a), which specifies that "any person" may file a patent application, as well as from Section 2 (1) (ja)[8], which defines "inventive step,"

[6] Copyright Act, 1957.
[7] Patent Act, 1970.
[8] *Ibid*.

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which is a necessary condition for an invention to be patentable, meaning that it cannot be "obvious to a person skilled in the art."

- The United Kingdom's Copyright, Designs and Patents Act[9], 1988 (CDPA)

  Under this legislation, Section 9 (3)[10], 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."*

  Section 178 of the CDPA, has defined computer-generated work, as *"generated by computer in circumstances such that there is no human author of the work"*.

- Irish Copyright and Related Rights Act, 2000

  Section 21[11] defines 'author' as, the person who creates a work and includes: (f) in the case of a work that is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken;".

  'computer-generated' is defined under Section 2 (1)[12] as, "in relation to a work, means that the work is generated by a computer in circumstances where the author of the work is not an individual".

Intellectual property laws in different jurisdictions only grant rights to an individual. Nonetheless, granting rights to a work that the AI system independently generated with little or no human involvement remains difficult in the absence of legislative or court support.

PATENTABILITY OF INVENTIONS BY AI:

To receive a patent, a number of requirements have been outlined under the TRIPS agreement and other national legislation. These requirements[13] include the following:

a) The Subject Matter of the invention must be patentable.
b) The invention must be new/novel.
c) The invention should have a certain application in the industry.
d) Innovative or Inventive Steps must be taken in order to make the invention.

[9] Hereinafter referred to as CDPA.
[10] The United Kingdom's Copyright, Designs and Patents Act, 1988.
[11] Irish Copyright and Related Rights Act, 2000
[12] *Ibid.*
[13] Lisa Vertisky, 'Thinking Machines and Patent Law' in Barfield et al (eds.), Research Handbook on the Law of Artificial Intelligence (Edward Elgar, 2018) 496.

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The idea that only one individual may have any kind of patent in the nation is widely acknowledged and is supported by a number of laws, reports, rulings from the Hon'ble Supreme Court of India, and rulings from other authorities.

As a result, AI and related tools cannot be granted the status of a juristic or artificial person. This opinion was supported by the historic ruling of the Hon'ble Supreme Court in *Som Prakash Lekhi V. Union of India*[14], which held that AI cannot be regarded as a juristic person and that the law cannot ascribe duties to it because it does not meet a number of necessary requirements, including the ability to sue or be sued. As a result, no AI-generated content is eligible for patent protection.

A human being must play a vital role in the patent application process. Consequently, if AI-generated content or invention is to be granted a patent, a human being must be involved in the process and be eligible to receive the patent.

COPYRIGHT PROTECTION OF INVENTIONS BY ARTIFICIAL INTELLIGENCE

Since the emergence of AI platforms that create content in the technology sector, one of the main challenges in providing protection for AI-generated material is navigating the boundaries of Copyright laws.

Regarding the legal standing and protection afforded to content created by AI, Indian courts have snot said much. Since the artificially generated content could be created by infringing upon an already copyrighted work, there are a number of challenges to overcome before granting any ownership or authorship rights to it[15]. In particular, granting protection to artificially generated content would violate the copyrights of the parties who already hold authorship rights over the content.

Second, AI lacks the locus standi to sue anyone and cannot be sued in its own name because it is a non-juristic person. Therefore, the legislature would need to make a decision regarding artificial intelligence's legal position before it could decide whether to grant copyright to content created

[14] **1981 SCR (2) 111.**
[15] Toby Bond and Sarah Blair, Artificial Intelligence & Copyright: Section 9(3) (2019) JIPLP 14(6), 423.

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by AI[16].

Finally, because AI exists forever, the 60-year rule that governs the copyrights of artistic or literary works and grants protection only for 60 years after the death of the author will not apply to it, negating the whole point of extending copyright protections.

PREVENTING UNLAWFUL USE: INTELLECTUAL PROPERTY IN THE AI REGIME

With the development of generative AI , it is more crucial than ever to stop unauthorised use of intellectual property. The following actions and approaches could deal with this issue under the AI regime:

1. Copyright Protection: The fundamental Intellectual Property protection tool known as copyright gives authors of original works the exclusive right to their creations. In order to respect and abide by copyright laws, AI developers and users must secure the necessary licences and permits for any copyrighted content utilised in training data or created outputs. This aids in preventing the unlawful use and infringement of works protected by copyright.
2. Licensing and Permissions: The licencing restrictions should be taken into consideration by AI developers when employing copyrighted items as training data. In order to ensure compliance with Intellectual Property laws, prevent unauthorised use, and enable the lawful use of copyrighted content, permissions and licences must be obtained from the relevant rights holders.
3. Watermarking and Attribution: AI generated content can have its source and creator identified by adding measures like digital watermarks or metadata. This prevents unapproved usage and offers a way to provide credit correctly, safeguarding the rights of the authors and facilitating traceability.
4. Monitoring and Detection: Finding instances of infringement can be aided by the development of technology and methods for monitoring and detecting unapproved usage of AI-generated content. These monitoring systems have the ability to search social

[16] *Ibid.*

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media, online platforms, and other sources for unauthorised uses. Based on the information found, appropriate legal action can be taken.

5. Education and Awareness: Unintentional infringements can be avoided by raising understanding of intellectual property rights, copyright laws, and the value of respecting Intellectual Property among AI developers, users, and the general public. This involves sharing knowledge regarding fair use, licencing, and the optimal ways to use copyrighted material in the AI system.
6. Ethical Guidelines and Policies: A framework for responsible AI development and application can be established by implementing and upholding ethical standards and policies that place a high priority on respect for intellectual property rights. These rules may cover matters like intellectual property protection, giving due credit, and adhering to copyright regulations[17].
7. Collaboration with Rights Holders: Developing cooperative connections with content producers, rights holders, and groups that advocate for their interests can promote understanding among parties and make collaborations or licencing arrangements easier. Open communication and negotiation can guarantee that copyrighted material is used fairly and with authorization in AI applications.
8. Legal Enforcement: It is crucial to use legal action to enforce intellectual property rights when there has been obvious infringement or unauthorised use. Owners of intellectual property have the right to file a lawsuit to defend their rights and get compensation for harm caused by unlawful usage. Working together with Intellectual Property and AI-focused legal professionals can assist in navigating the legal intricacies and guaranteeing proper enforcement.

In the AI regime, preventing unauthorised use of intellectual property necessitates a multifaceted strategy that includes ethical considerations, legal measures, public awareness efforts, and stakeholder participation. The AI community can support an innovative atmosphere while preserving the rights of artists and rights holders by observing intellectual property rights, securing the necessary authorizations, and encouraging ethical behaviour.

[17] Wang, A. (2023). 'Nine stitches instead of eight': Unmasking fashion's 'superfakes'. [online] The Sydney Morning Herald. Available at: https://www.smh.com.au/lifestyle/fashion/nine-stitches-instead-of-eight-unmaskingfashion-s-superfakes-20230505-p5d63o.html?utm_source=pocket-newtab-intl-en (Last visited Nov. 23 2023).

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CURRENT LEGAL STRUCTURE AND LACUNA IN THE INDIAN LEGAL FRAMEWORK

The legal environment in India pertaining to Intellectual Property and generative AI is still developing, and there are still some issues that need to be resolved. While intellectual property rights are fairly protected by the current legal system, which includes the Copyright Act of 1957, Trademark Act, 1999 and the Patent Act, 1970, there are currently no laws that specifically cover generative AI. This makes it difficu lt to determine the legal standing of works produced by AI as well as the obligations of AI users and developers.

CHALLENGES IN THE CURRENT LEGAL FRAMEWORK OF INDIA:

1. **Authorship and Ownership**: The question of authorship and ownership of works generated by AI is not specifically addressed by the Copyright Act 1957. This begs the question of who should be regarded as the content's author and owner—the AI system or the human developer. To ascertain each party's obligations and rights, clarity is required.
2. **Fair Use and Transformative Works**: Under Indian law, the terms "fair use" and "transformative works" are not clearly defined in the context of generative AI. Determining the limits of acceptable usage for AI-generated content is difficult due to the absence of defined criteria, especially when it comes to using previously published copyrighted works as training data.
3. **Data Protection and Privacy**: Comprehensive law addressing data protection and privacy concerns directly related to AI is still needed, even if the Digital Personal Data Protection Act, 2023 has received a nod from the Parliament. To guarantee that the gathering, storing, and use of data in generative AI models abide with privacy laws, specific standards must be followed.
4. India may need to explore specific adjustments to current laws or adopt new legislation that clarifies and protects intellectual property rights in the context of generative AI in order to close these gaps.

GLOBAL METHODS AND OPTIMAL STRATEGIES

Legal frameworks and best practises for addressing intellectual property challenges in generative AI have been investigated by international jusrisdictions. Some of the noteworthy methods are:

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1. Updating copyright laws: Many nations have updated their copyright legislation in response to the difficulties presented by artificial intelligence. For instance, the Copyright Directive of the European Union covers topics like ownership and liability and has rules for content created by AI.
2. Fair Use Guidelines: States such as the United States have created fair use regulations that can be modified to accommodate new technologies, such as AI. These standards offer flexibility in terms of figuring out what uses of copyrighted material in AI-generated content are acceptable.
3. Industry Standards and Best Practices: AI best practises and ethical guidelines are being developed by industry associations and international organisations. Initiatives like the Partnership on AI and the Montreal Declaration for Responsible AI highlight how crucial it is for AI development and application to be transparent, accountable, and to protect intellectual property rights.

India could use these global approaches and best practises as a guide to develop its own laws and moral standards for generative AI.

ETHICAL FACTORS FOR GENERATIVE AI DEVELOPERS AND USERS

Ethical considerations are crucial in the development and use of generative AI. Some key ethical considerations include:

i. Transparency and Disclosure: When using AI, developers should be open about it and make it obvious when material is produced by these systems. It is important for users to understand that the material they are dealing with is generated by AI, not by humans.

ii. Accountability and Liability: To establish who is responsible for information created by AI, certain criteria are required. Developers should be held accountable for any ethical or legal transgressions as well as the results of their AI systems.

iii. Responsible Data Usage: Developers need to make sure privacy laws are followed and acquire the right consent before collecting data. User data must be handled carefully, secured, and without bias to prevent discriminatory results.

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iv. Respect for Intellectual Property: By securing the appropriate licences for copyrighted works used as training data and preventing trademark or patent infringement, developers and users may respect intellectual property rights.

v. Ethical Review and Oversight: In order to guarantee adherence to ethical principles and encourage responsible practises, systems for ethical assessment and oversight of generative AI development and deployment should be established. Stakeholders may encourage ethical AI innovation while defending intellectual property rights and addressing societal issues by incorporating these ethical considerations into the creation and application of generative AI.

KEY TAKEAWAYS FROM REAL-WORLD SITUATIONS

Intellectual property rights and generative AI in real-world contexts offer important insights into the issues and concerns at hand. Among the lessons discovered are:

1. Authorship and Ownership: It is difficult to identify the creator and owner of works produced by AI. To address the rights and duties of AI creators, users, and the AI systems themselves, explicit regulations or legal restrictions are required.
2. Licensing and Collaboration: Establishing licencing frameworks and guaranteeing equitable recompense for AI-generated content require cooperation between AI developers, content creators, and rights holders. Standardised licencing models can assist expedite the procedure and enable the morally and legally acceptable use of works created by AI.
3. Ethical Boundaries and Responsible AI Usage: To ensure that no damaging or deceptive information is created and shared, ethical boundaries must be established before generative AI may be used responsibly. The moral implications of AI-generated outputs ought to be given top priority by developers and users alike.

RECOMMENDATIONS AND CONCLUSION

Looking ahead, several recommendations can be considered to resolve the challenges in relation to intellectual property rights in generative AI:

- Using Regulation and Policy to Address the Issues: Proactively addressing the legal ambiguities and gaps around generative AI is a responsibility of governments and regulatory agencies. It will be essential to create certain rules or regulations that recognise

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the distinctive qualities of AI-generated work and offer clarification on authorship, ownership, and culpability.

- Striking the righ balance between Innovation and Intellectual Property Rights: Finding a balance between fostering innovation and protecting intellectual property rights is essential. Fair and equitable frameworks for the use and protection of AI-generated material can be established with the assistance of collaboration and communication amongst AI developers, content creators, and rights holders.
- Encouraging Conscientious AI Development and Application: Developing moral standards and generative AI tenets is necessary to further responsible AI development. To ensure responsible and ethical AI usage, it will be essential to educate AI developers, users, and the general public on the ethical implications and potential risks involved with AI-generated content.

Complex issues and considerations surround Intellectual Property rights in the field of generative AI. Concerns like authorship, ownership, licencing, and responsible AI use require the development of clear legal frameworks, moral standards, and cooperative efforts between parties. It is possible for society to fully utilise the promise of generative AI while upholding an ecosystem that is just and balanced for producers, consumers, and the general public by encouraging innovation and safeguarding Intellectual property rights.