

LEGAL FRAMEWORK OF THE CURRENT COPYRIGHT PROTECTION SYSTEM AND THE LEGAL ANALYSIS OF AI-GENERATED WORKS

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Abstract: *Copyright protection provides certain exclusive rights to the creator (author) for his creative work. Any form of expression is sufficient to be eligible for copyright protection provided it is original. Originality expresses the interrelationship between the author and the work. Creativity is the main point within the concept of originality which refers to author's intellectual production.*

In the discussion over copyrightability of AI-generated work, the concepts of author, work and fixation need to be clarified in the light of technology development. Under the current legal Intellectual Property protection instruments, AI is not directly entitled to be considered as an author (as it is not human), but the work created by AI may be discussed as copyrightable subject matter which makes challenge for existing copyright system. In this context, the terms 'work' and 'output' needs to be differentiated in respect to AI-generated works.

AI generated work is the result of mechanical work of AI system. However, it can be original, new that has not existed before. Although it can be original, creativity in that work is questionable. Because creativity is the conscious and moral point in the originality concept which attributes the human (the author) and the human labor.

Keywords: *copyright protection, originality, Artificial Intelligence, AI-generated creativity, difference between 'work' and 'output'*

Intellectual Property is the “creations of the mind” [16]. As one of the categories of IP, copyright protection provides certain exclusive rights to the creator (author) for his creative work. Protection provided for the creators is aimed to incentivize creativity through economic rewards and recognition of the creators. [17] Criteria for eligibility of copyright protection has been prescribed under the Berne Convention for the Protection of Literary and Artistic Works 1886 [3]. According to Article 2 of the Berne Convention, protected works include, but are not limited to literary and artistic works, derivative works, and collections.

The subject matter of copyright protection includes every production in the literary, scientific, and artistic domain; in any mode or form of expression provided, they are original creations. It means that there is not any interdependence between eligibility of copyright protection and the content of the work. Any form of expression is sufficient to be eligible for copyright protection provided it is original. Two necessary conditions for copyright protection for 'human-generated work' have been recognized: 1) the subject matter; and 2) the author.

Based on the above-mentioned criteria for subject matter of copyright protection, the main conditions of the work to be eligible for copyright protection are 1) fixation in any form, and 2) originality. Fixation refers to any form of embodiment on any tangible medium. Mostly national legislation establishes fixation as a requirement for copyright protection. Originality refers to the creative work of the author. For being entitled to copyright protection,

“An author's works must originate from him; they must have their origin in the labor of the author” [15, p.42].

It means that, the 'work' defined under the frame of copyright protection requires to have an author. Originality is attributed to the interrelationship between the author and the work (which reflects the labor of the author). The concept of “original” in copyright protection means that the work is created independently by the author and the work attains minimal degree of creativity. [7] Creativity refers to the expression of

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oneself in any form. Creativity is the main point within the concept of originality which refers to author's intellectual production. An original work attributed to the author is a work that is protected by copyright. Copyright protection does not cover facts or ideas as such. But original arrangement, creative choice by the author or original selection entitles the compilation or collection to copyright protection.

In the Berne Convention, the concept of author is not clarified, however it seems from the text that "authors who are nationals" of one of the countries of the Union are provided with protection. Thus, the author is the human, and that person (human) is deemed to be the creator of the work. Further, in the Berne Convention it is also mentioned that "authors enjoy the rights in respect of works for which they are protected" (Art. 5). Article 2.6 of the Berne Convention says that "This protection shall operate for the benefit of the author and his successors in title". It means that authors enjoy the rights for the work that they have created. In the Berne Convention, "rights of the authors in their works" have been stressed, but the term 'author' has been left open. However, case law clarified this concept in various legal systems. The term "author" has been accepted as "he to whom anything owes its origin; originator; maker" [5], and thus the copyright protection implies to human creations reflecting author's personality and expression of his free and creative choices [6]. "Consciousness" is one of the most disputed elements attributed to the human in respect to copyrightability of the work. But this is important to note that "consciousness" implies "neuralness" as well. It means that creativity process is somehow perceived by the person through senses. As it is accepted by case law purely mechanical labor which is creative and mechanical as such are not considered as creative. [5]

The concept of "authorship" in classic copyright protection system is generally attributed to the human person. In most cases, aim of copyright protection policy is to incentivize the human authors to create new works for the benefits of society. [14, p.4] From different approaches to Intellectual Property, such as labor [10, Ch.V] (According to John Locke's "Labor theory of property" the fruits of one's labor's is his own, because that person worked for it) or personality [8] (Origin of personality approach is associated with G.Hegel's philosophical theory about human will and reason which refers to subjective and objective mind reflected in the property) approach, copyright protection is directly linked to human. So that, the work reflects the personality of the author (human person), or labor of the author. From utilitarianism point of view, the human audience in common get benefits from copyrighted works and ownership exceptions. [11, p.599] A utilitarian approach implies the concept of social welfare and, according to that, the authorship for a work brings social benefits to society.

In the discussion over copyrightability of AI-generated work, the concepts of author, work and fixation need to be clarified in the light of technology development. Those questions have been issued in relation to the emergence of computer-generated works or AI-generated works in line with advancement of technology. On this occasion redefinition of the term 'authorship' to include both human and non-human authors are being discussed. [12]; [13, p.659]; [2]

When arguing the question of copyrightability of AI generated works, it is important to clarify several questions such as whether AI can be regarded as an author under the existing copyright protection system; whether that is possible to regard AI as a person or as a right-owner; whether they should be considered as author; etc.?

Based on the established requirements for authorship and the work which have been recognized in the relevant IP legal instruments, AI is not directly entitled to be considered as an author (as it is not human), but the work created by AI may be evaluated as copyrightable subject matter and this makes challenge for existing copyright system. The reason is that, the terms 'work' and 'output' needs to be differentiated in respect to AI-generated works.

Crucial interrelationship between the author and the work leads to copyright protection. This interrelationship in human-generated work implies to minimum level of creativity which leads to originality and attribution of it to the author which means to be intellectual labor of the author. Criteria for minimum level of creativity is not definite by now. But the degree of originality has been argued in case-law, and resulted in the point that there is not requirement for high level of originality or creativity in copyright protection. The uniqueness of the personality of human has been taken as a main line and evaluated as a prerequisite for copyright protection. [4] The originality standard in copyright protection has been accepted in such a way, because of considering the work to be original needs not to be copied from any other work. [1]

Similar interrelationship prescribed in the legal instruments does not appear clearly in respect to AI-generated work. However, in line with development, AI can produce complex creative works based upon various multiple neural networks. Those works may be even non-distinguishable from the work created by human.

Time-by-time authorship held by computer programs or algorithms is called as algorithmic as it is based on neural work of the brain. [9] The source of AI-generated creativity is algorithm which takes its origin from human labor or mind. Any production which is AI-generated work is the result of mechanical work of AI that is structured by humans. From this perspective, even the output generated by AI cannot be considered "work" in the sense of copyright protection. That is to say, the end result of AI processing is the output which is mechanical fruit of processing. It is not the work which reflects the labor, personality, and creative choice of the creator as a copyrightable subject matter.

The other point in this case is about the labor put in the AI processing. Before AI to generate a creative work, there must be various inputs to be included to AI structure. These inputs cover data which should comprise comprehensive information to be sure in the result whether it is right and logical. And this demands labor of not one person or system, but several. Next Rembrandt Case [18]; [19]; [20] may be example of it. This AI system is based on data, data analysis and use of data in a well-organized multi-layered and qualified way to generate new work which in the end is a labor of lots of people in combination with technology.

Thus, originality of AI is mechanical based on data analysis and data processing. It is not an intuitive or conscious job. There is some definite logic behind the work of AI in data processing and data analysis. The result (work) may or may not be known to the programmer or may be unpredictable and this does not imply any significance.

In respect to human labor in AI, human person also takes origins of creativity from various sources including previous knowledge and experiences, environment etc. It means that human input structured on AI systems does not make absolute block for providing copyright protection to AI generated works.

AI generated work is the result of mechanical work of AI system. Although it is mechanical, it can be original, i.e., new that has not existed before. Even if the AI-gene-

rated work can be original, but concern about creativity in the work is questionable. Because creativity is the conscious or moral point in the originality concept which attributes the human (the author) and the human labor. The conscious interrelationship between the author and the work does not clearly appear in the case of AI-generated work.

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