NAVIGATING COPYRIGHT in the AGE of GENERATIVE AI

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Today, we see the rapid development of generative artificial intelligence ("AI") technologies and their adoption by users across the world to assist them in all kinds of daily tasks. As AI pushes beyond the creative boundaries from performing simple tasks to autonomously creating works ranging from text, images, music and even software codes, the line between human and machine is getting faint. The increasing use of generative AI challenges the core principle of traditional copyright framework where legal protection is premised on original works produced by human authors. Thus, AI-driven creativity forces a thorough reassessment of authorship, ownership, liability and regulatory frameworks in copyright law.

To better understand the crux of the matter, it is important to first learn how generative AI works. Generative AI uses machine-learning models to learn the patterns from extensive data created by humans. It then uses the learned patterns to generate new content from simple language prompts. Notable examples include large language models ("LLMs") such as OpenAI's GPT series and Google's Gemini for writing and chatbots, DALL·E and Stable Diffusion for image creation, GitHub Copilot for coding, and Udio for music creation.

A striking example of how generative AI presents critical legal challenges concerning copyright laws: on 25 March 2025, a tool was released by OpenAI on ChatGPT allowing users to upload an image and recreate it in the style of the user's option, and one of the most popular style was that of Studio Ghibli, the Japanese animation studio behind many successful films such as *Spirited Away, My Neighbor Totoro* and *Howl's Moving Castle*. Almost immediately, the Ghibli AI phenomenon began to flood the internet. The images generated clearly resembles the distinctive visual characteristics associated with Studio Ghibli. While OpenAI CEO Sam Altman called this new feature as *"a new high-water mark for us in allowing creative freedom"* and also changed his profile photo on X to a "Ghiblified" image, the Japanese trade organisation representing publishers like Studio Ghibli asked OpenAI to stop training its AI models on their copyrighted content without permission, and Japan's Content Overseas Distribution Association also claims that there might be copyright violation in Japan.

There are two main legal challenges posed in the age of generative AI that essentially tie to the two fundamental cores of copyright law: human authorship and originality.

In Malaysia, s. 10(1) of the Copyright Act 1987 ("CA 1987") provides that copyright shall subsist in every work where the author is a "qualified person" under s. 3 of CA 1987, when the work is made, ie a person who is a citizen or permanent resident in Malaysia, or a body corporate established in Malaysia or vested with legal personality under the laws of Malaysia. The Copyright (Application to Other Countries) Regulations 1990 further grants works originating from specific countries, particularly those in the Berne Convention, the same protection in Malaysia as if they were Malaysian works. Same protection is also extended to foreign authors under the principle of "national treatment", provided they are citizens or permanent residents of a Berne Convention member country at the time the work was made, and that the work was published in Malaysia within the time frame stipulated by s. 10(1)(b) alongside s. 4(3) of CA 1987. All in all, the law does not recognise AI as the author of an AI-generated work.

Similarly, many other jurisdictions also require human authorship for copyright protection. While the Court in the United States ("US") case of *Thaler v. Perlmutter* (2023) denied copyright for art created entirely by AI with no human input, there is an ongoing discussion in the European Union to consider sui generis right for AI-generated works and to extend limited rights to such works. Besides, the United Kingdom ("UK")'s Copyright, Designs and Patents Act 1988 has a specific provision for "computer-generated works" assigning authorship to the person who made the necessary arrangements for the creation of work, for a shorter protection period.

As such, it appears that sufficient human intervention in the creation of work will justify copyright protection when AI is merely being an assisting instrument, rather than a creator. However, in cases where there is human input in an AI-generated content, who owns this copyright? Is it the developer of the AI model who arguably creates the data learning process? Is it the user who inputs the prompts that allows the AI to generate the content? Or the owner of the data used by the AI? More so, how much human intervention is necessary to qualify as an author? Despite most generative AI tools providing terms of service or terms of use that grant users rights to outputs, unfortunately, to date, there is no clear guideline from legislators to resolve these issues, thus creating ambiguity in the regulatory landscape.

Further, we also understand that the training process of generative AI often involves using a significant amount of copyrighted works, thereby raising another important question: does training generative AI models constitute copyright infringement? In fact, OpenAI has publicly admitted that it would be impossible to train its AI chatbot, ChatGPT, without access to copyrighted works. Nonetheless, authors and copyright owners believe that AI-generated content is a nuanced reproduction of the collective copyrighted works without their authorisation and hence, it amounts to copyright infringement.

Conversely, AI companies argue that generative AI tools make fair use of copyrighted works by studying them to learn to create new content. Fair use is the term used under the US copyright law, akin to fair dealing under the English and Malaysian copyright law. By virtue of s. 13 of CA 1987, the defence of fair dealing allows for copyrighted works to be used without authorisation for non-commercial purpose and specific purposes, including for research, private study, criticism, review or the reporting of news or current events, provided that it is accompanied by an acknowledgement of the title of the work and its authorship (for certain works).

Fair use is the key defence for AI companies, including OpenAI and Microsoft, in the ongoing copyright lawsuit brought by *The New York Times* ("Times") over the unauthorised use of their news articles to train generative AI tools, namely ChatGPT and Copilot. Currently, this case is in the discovery stage, where a court order was obtained for OpenAI to preserve users' chat logs for the Times to review as potential evidence of infringement. All eyes are on this lawsuit as its outcome will set a significant legal benchmark, particularly on the defence of fair use and fundamentally redefining copyright law in the age of generative AI.

In the meantime, Getty Images, which owns one of the largest photo libraries in the world, filed a lawsuit against the developer of Stable Diffusion, Stability AI, in the US and UK for copyright infringement. However, Getty Images withdrew its primary copyright infringement claim in the UK due to jurisdictional hurdle where the training of Getty's photos largely occurred on servers in the US. In November 2025, the UK Court ruled that the AI model did not constitute an "infringing copy" as it does not store or reproduce any copyrighted works. This decision was seen as a major win for the AI companies, establishing that training AI models on copyrighted works in the UK does not automatically constitute infringement, but the crucial question of whether training an AI model on

copyrighted material without a licence is lawful if the training occurs within the UK's jurisdiction, remains a live issue. In any event, Getty Images shifted its legal battleground for a fresh start on the same copyright infringement issue in the US where the training data centres are located.

One possible way to put the controversy to rest is to mandate that AI companies can only train their AI models on copyright protected works if they are licensed or authorised by the copyright owners. A licensing framework can help to regulate the use of copyrighted training data and may prove to be mutually beneficial for both copyright owners and AI companies. In fact, major music labels like Universal Music Group had resolved their copyright infringement case through licensing deals with Udio (a generative AI music creation platform). The deal involves Udio creating a new platform where users can legally generate music using licensed songs, while artists and songwriters are fairly compensated for their works. However, this may be tricky as ownership of copyright works can come with many layers with different owners. It will be difficult to determine whether the AI companies have obtained all the necessary licences and authorisations from all relevant parties.

In addition, AI companies are also encouraged to be more transparent about their training data and have more ethical AI models. For example, Neutune, a South Korean AI research lab, is developing an attribution system to track and credit the creators whose work plays a part in AI-generated music. Besides, possible reforms such as introducing new AI-generated work statutory rights, as well as fair dealing exceptions tailored to the use of AI, should also be considered.

It is only a matter of time before these legal issues are being tested under the Malaysian law. In view of the highly technical nature of generative AI, it will be very challenging to prove all the elements of copyright infringement, especially the subsistence of copyright over AI-generated work, or proof of use of copyrighted work.

Given the inherently human-centric nature of copyright law, the existing traditional framework is likely to continue prioritising the protection of human creators. However, the advent of generative AI and increasingly unethical use of copyrighted works suggest that the law cannot remain static. Accordingly, the Malaysian legal framework may need to adapt by introducing necessary amendments to address emerging issues in a manner that strikes a careful balance — one that does not unreasonably impede technological innovation, yet continues to respect and safeguard the intellectual property rights of creators. Ultimately, while generative AI may serve as a powerful tool to enhance efficiency and expand creative possibilities, one cannot deny that human input and personal expression remain the most valuable and irreplaceable elements in the creative industries. As the saying, often attributed to filmmaker Martin Scorsese, goes, *"the most personal is the most creative"*.