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Copyright

Malaysia: Trends & Developments
Shearn Delamore & Co

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Trends and Developments

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The Rise of the Machines: Artificial Intelligence & Copyright Law – the Malaysian Landscape

Artificial intelligence, better known as AI, is an area of computer science that deals with the creation of intelligent machines that work and react like humans. AI has already gained widespread momentum, as is best evidenced by the millions and billions of dollars that are being channelled into the research and development of AI systems worldwide. One may ask what the return on investment in AI systems will be, and most importantly, whether investors will be entitled to exclusive rights to exploit works created by AI.

Innovation in this field moves on apace. In just five months in 2018, we have seen the introduction of Stethee (an AI-enabled stethoscope system designed to work as easily as a traditional stethoscope, allowing users to listen to heart and lung sounds with sophisticated amplification and filtering technology), and the AI Holographic Concierge. Both have been developed in Malaysia and are world firsts.

More significant in the context of copyright law has been the long-running legal battle in the US over the ownership and

extent of copyright over the famous monkey selfie taken by Naruto, the Indonesian crested macaque, in which it was ruled by the courts that Naruto has no rights to the selfie he took as he is not human. With the recent boom of artificial intelligence, more and more creative works have been the result of non-human authors. In view of the increasing prevalence and development of AI technology in Malaysia, this article seeks to analyse the existing legal copyright framework in Malaysia and to discuss whether AI-created works are copyrightable in Malaysia under the existing legislation.

AI as a Tool of the Human Author

The first category is represented by works generated by AI programmes with the direct guidance, assistance or input of human beings. In this category, AI is used as a tool to achieve a determined or predicted goal or outcome. A work created using a computer programme is deemed to be a computer-aided work, as human intervention is required. An example may be the creation of a painting by an artist who has selected a brush, the blending mode, shape of the paint stroke and the area for the paint to be applied. He or she has therefore, to some extent, input his or her requirements

into the AI algorithm used to create the work. Although the artist cannot exactly predict the final version of the generated painting, he or she has directly contributed to its creation and has some expectations as to what it may look like. Under Malaysian copyright law, an author of such a work may be the writer or the maker of the said programme. Such an author will have legal claims over the resulting creation if he or she cites the AI programme as a tool or medium used in the creative process.

In *Wedding Galore Sdn Bhd v Rasidah Ahmad* (2016) 6 CLJ 621, the Malaysian High Court held that the respondent was entitled to the copyright of two edited photographs. The respondent was the photographer who had taken the original photographs. That by itself would entail a degree of skill and creativity to produce the original photograph. Thereafter, the respondent had, as per her evidence, used various computer programmes and techniques in order to improve on the photographs that she had taken. She had used Adobe Photoshop to bring out and improve the colour, and used various tools to enhance the background, remove imperfections and generally improve the photographs. By analogy, it could be argued that an AI machine, just like a camera, is simply a tool employed by an author to express his or her idea in a material form.

AI as an Independent Actor in the Creative Process

The second category of works deals with autonomously generated AI creations. The computer programmes responsible for autonomously generating works are the result of human ingenuity, and their source code may be copyrighted as a literary work under the Malaysian Copyright Act. AI-created works are very different from those created using conventional computer programmes: AI-created works are, as the name suggests, created by AI. An important feature of AI-created works is that while programmers can set parameters, the works are actually generated by the computer programme itself.

Malaysian copyright law provides that copyright shall vest initially in the 'author'. The definition of an 'author' under the existing legislation does not seem to extend to non-humans or non-legal entities. Section 3 of the Copyright Act defines an 'author' as follows:

- in relation to literary works, the writer or the maker of the works;
- in relation to musical works, the composer;
- in relation to artistic works other than photographs, the artist; and
- in relation to photographs, the person by whom the arrangements for the taking of the photographs were undertaken.

Further, Section 10 of the Copyright Act provides that copyright shall subsist in every work eligible for copyright of

which the author (or in the case of a work of joint authorship, any of the authors) is, at the time when the work is made, a qualified person. A 'qualified person' is defined under the Copyright Act as

- in relation to an individual, a person who is a citizen of, or a permanent resident in, Malaysia; and
- in relation to a body corporate, a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia.

While it remains to be tested in the Malaysian courts, there are indications that AI-created works may not be entitled to copyright protection in Malaysia. This is because AI-created works are arguably computer-generated works where the creator, AI, is neither a natural person nor a body corporate, and hence does not fall within the definition of a 'qualified person' under the law.

Going forward, the question is whether copyright law should recognise and give protection to AI-generated works to encourage growth, development and innovation of AI in Malaysia. In *Creative Purpose Sdn Bhd & Anor v Integrated Trans Corporation Sdn Bhd & Ors* (1997) 2 CLJ Supp 107, the High Court held that if an 'author' could also mean a 'qualified person' and 'qualified person' was defined by the Act as including a body corporate, it would not be right to read the word 'author' in Section 26(4) as referring only to natural persons. There are concerns that denying copyright from being issued to developers and owners of AI machines reduces their incentives to create new AI programmes, and may ultimately lead to a lower number of AI-generated copyrightable works and (after expiry of their copyrights) a considerable decrease in works entering the public domain.

Perhaps, as technology progresses, the definition of authorship will eventually be redefined or extended to include non-humans or non-legal entities. Alternatively, perhaps a reinterpretation of the terms 'employee' and 'employer' is an alternative solution to the issue of AI-generated works falling into the public domain.

AI and Duration of Copyright

Assuming that a non-human or non-legal entity is qualified as an 'author', one of the complications that remains is the terms of the duration of copyright that should be granted to AI-created works. This is because the existing legislation generally grants copyright protection to works for the duration of the author's life and a further 50 years after their death. If a computer/machine is deemed to be a qualified author of the AI-created works, it appears that the legislation could potentially allow for an indefinite period of copyright protection for such works.

AI and Originality

Further, Section 7(3) (a) of the Copyright Act requires sufficient effort to have been expended to make the work original in character. Reproduction that might be impossible for a human to carry out might well be possible for sophisticated human intelligence.

AI and the Right to Sue

The other issue that needs to be addressed is the right to sue and be sued for AI-created works, assuming the copyright-owner of such works is a non-human and non-legal entity. A non-human or non-legal entity has no legal capacity to sue or to be sued in Malaysia. If the copyright-owner of the AI-created works has no capacity to sue for copyright infringement or vice versa, it appears to be insignificant if such AI-created works are entitled to copyright protection, as the copyright-owner will not be able to commence an action against the infringer in a possible infringement case.

Having considered the above, it appears that the practical approach is to identify a human or a legal entity as the author of the AI-created works. While countries such as the United States, Australia, Europe and Singapore have taken the position that AI-created works are not copyrightable, the

relevant copyright legislations in the United Kingdom and New Zealand seem to offer a different view. The copyright legislations in the UK and New Zealand have defined the 'author' of a computer-generated work to be the person by whom the arrangements necessary for the creation of the work are undertaken. The existing copyright law in Malaysia needs to be reformed or amended firstly to recognise and cover computer-generated works or AI-created works. The same reform is also necessary to recognise the person/s involved in the creation of the coding or algorithm of the AI as the 'authors' or 'joint authors'.

AI is the current trend and technological frontier over which companies and countries are competing to control. It is no secret that AI is expected to replace the majority of jobs that currently exist, professions included. This is a phenomenon and trend that is happening not just in Malaysia but worldwide. In order to strike a balance between reaping the benefit of technological advancement and social benefit, laws have to keep pace to ensure not only conventional types of works are copyrightable but also works created by non-humans such as AI. The existing legislation in Malaysia will require major reformation and it remains to be seen if these issues will be addressed by the legislative authority.

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