Artificial Intelligence, Entertainment, and Intellectual Property: Navigating the New Frontiers

By: Michelle DSouza

Date: 2/13/23

Artificial Intelligence (AI) has catalyzed change in the ways we create, consume, and distribute the arts. As AI-generated work gains prominence in the entertainment industry, it raises significant challenges related to the scope of intellectual property laws. As they stand, intellectual property laws were created to safeguard the rights of 'human' creators. Nevertheless, they have failed to account for the unique legal challenges posed by AI-generated works. With burgeoning technological advancements rendering the intersection of intellectual property and AI increasingly complex, this article will examine the legal challenges and discrepancies surrounding the application of intellectual property laws posed by AI-generated works in the entertainment industry.

I. AI in the entertainment industry

The proliferation of AI has resulted in new forms of artistic expression, with media creation increasingly intertwined with AI-powered technologies. AI automates the creative process, helping media companies meet higher demand volumes at lower costs.[1] For instance, AI applications like Flow Machines operate in the music industry, assisting songwriters in music composition and melody creation. The final work products created by applications like Flow Machines have found recognition on music charts and Spotify playlists.[2] Alternatively, in the film industry, AI is actively being used to supplement computer-generated imagery (CGI) by refining facial expressions and movements and superimposing them on different characters or even using deceased actors' past facial performances to complete movies.[3]

These developments, though still fairly new, have been in the making. In 2016, Twentieth Century Fox teamed up with IBM Watson to create the trailer for its film *Morgan*; such applications of AI to assist in the filmmaking and promotion process are likely to gain popularity among film

[1]Siddhika Prajapati, "6 Applications of AI in Entertainment Industry," *Analytic Steps*, January 22, 2023, https://www.analyticssteps.com/blogs/6-applications-ai-entertainment-industry.

[2]Peter H. Diamandis, "AI is about to Completely Change the Face of Entertainment," *Singularity Hub*, January 24, 2023; Siddhika Prajapati, "6 Applications of AI in Entertainment Industry," *Analytic Steps*, January 25, 2023, https://www.analyticssteps.com/blogs/6-applications-ai-entertainment-industry.

[3]Preeti Singh, "The future of Entertainment with Artificial Intelligence," *Medium*, January 22, 2023, https://medium.com/technology-hits/the-future-of-entertainment-with-artificial-intelligence-75483644e189; Siddhika Prajapati, "6 Applications of AI in Entertainment Industry," *Analytic Steps*, January 25, 2023, https://www.analyticssteps.com/blogs/6-applications-ai-entertainment-industry.

studios in the coming years.[4] Today, deep learning models like DALL-E have been used to create pictures and cartoon characters based on text prompts, while models like GPT-3 are predicted to play instrumental roles in the development of storylines and dialogs.[5] Ultimately, AI has proven to be a valuable addition to the video game industry.

II.   AI-generated works and Intellectual Property Laws: Scope of Protection

Notwithstanding the increasing role of AI in the entertainment industry, intellectual property laws have failed to keep pace with the rapid surge of AI-generated works in the entertainment industry, and this could negatively impact the free flow of creativity and innovation in the digital arts landscape.[6] AI-generated works raise important questions concerning copyright authorship and ownership. The Copyright Law of the United States protects original works of authorship.[7] However, Section 306 of the US Copyright Office's Compendium qualifies such protection to works 'created by a human being' by limiting protection to 'fruits of intellectual labor founded in the creative powers of the mind.'[8] Due to these limitations, the Copyright Office is unlikely to register a claim where AI is listed as an author or co-author, as a human being was not the direct creator.[9] In 2022, artist Kris Kashtanova received a registered copyright on her graphic novel *Zarya of the Dawn*.[10] To create the artwork, Kashtanova used Midjourney, an AI program that creates images using textual descriptions, and listed it on the cover page of the work.[11] However, the copyright registration for the graphic novel does not list Midjourney as an author.[12] The U.S. Copyright Office responded to this by stating that the office would not knowingly grant copyright registration to a work that claims

to be solely created by an AI machine.[13] Similarly, in *Thaler v. Vidal*, the court refused to list AI software as an inventor on a patent application.[14] Scholars have criticized such an anthropocentric approach to IP protection, citing concerns that if AI programmers cannot recuperate their labor through the financial incentives provided by IP protection, they may be discouraged from utilizing their knowledge to develop AI programs, thereby stifling innovation.[15] In fact, some scholars claim that the process of feeding data into AI systems would qualify as creative input by a human author.[16] However, in the absence of any concrete directions from Congress regarding legal standards surrounding AI-generated work products, media companies planning to use AI to assist in their creative process could render themselves vulnerable to mass litigation.[17]

In addition, AI systems are trained using large volumes of information available on the internet, which consists of both copyrighted and non-copyrighted material.[18] The law is silent as to whether copyrighted material fed into an AI's algorithm to produce art would constitute copyright infringement or whether this would be considered protected within the ambit of fair use.[19] In *Feist Publications, Inc. v. Rural Telephone Service Co.,* the court held that in order to warrant copyright protection, a work must possess some minimal degree of creativity.[20] Some might argue that AI's use of copyrighted material results in the use of a certain amount of creativity, thereby satisfying the minimum modicum of creativity requirement laid down by the court in *Feist*.[21] Another problem that could potentially arise with the use of copyrighted material for creating AI-generated works relates to derivative works. Section 101 of The Copyright Act provides that a derivative work is a work that borrows from the original copyrighted material of another to create a new work.[22] Under Section 106(2) of The Copyright Act, the copyright owner has the exclusive authority to prepare or authorize others to prepare derivative works based on the original art.[23] Scholars are divided on if the

---

[13]Ibid.

[14]*Thaler v. Vidal*, Appeal No. 2021-2347 (Fed. Cir. Aug. 5, 2022); Tanner Co, "The Intellectual Property Implications of AI-Generated Images," *NYU Journal of Intellectual Property & Entertainment Law* (blog), January 22, 2023, https://jipel.law.nyu.edu/the-intellectual-property-implications-of-ai-generated-images/.

[15]Kalin Hristov, "Artificial Intelligence and the Copyright Survey," *Journal of Science Policy & Governance*16, no. 1 (2020): 2.

[16]Lights, Camera, AI: Artificial Intelligence Authorship and Copyright Ownership in the Entertainment Industry of Tomorrow (April 2018)
https://legaltechcenter.net/files/sites/159/2018/04/1.-Lights-Camera-AI-Artificial-Intelligence-and-Copyright-Ownership-in-the-Entertainment-Industry-of-Tomorrow.pdf.

[17]Ibid.

[18]Supra *n*. 6.

[19] Ibid.

[20] *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

[21] *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); 17 U.S.C. §103.

[22] 17 U.S.C. §101.

[23] 17 U.S.C. §106(2); Jay T. Westermeier, "Understanding the Importance of Derivative Works," *Finnegan*, February 8, 2023, https://www.finnegan.com/en/insights/articles/understanding-the-importance-of-derivative-works.html.

use of copyrighted material by AI generators could pose derivative work problems. Some believe that AI generators use data extracted from the original work to create new art instead of incorporating elements of the original work, resulting in substantial similarity between the two. In contrast, some believe that AI generators could emulate sufficient material from the original work, further complicating the question of who owns the copyright in AI-generated work.[24] The statute under Section 103 explicitly provides that while the original author retains copyright of the elements of the original work used in the derivative work, the author of the derivative work owns the copyright to the material contributed in the creation of the derivative work.[25] With the non-recognition of AI as an author, the question of copyright ownership in derivative works remains for the legislature to decide.

In order to promote creativity and free expression, the fair use doctrine allows copyrighted works to be used under certain conditions without prior permission from the original author. Whether or not the use of such copyrighted materials would fall under the fair use doctrine has received ambivalent responses, seeing as the copyrighted work is not being used for its expressive content but for its data.[26] Authors of copyrighted work argue that their moral rights—such as the right of attribution— are infringed upon by AI-generated works. These authors are increasingly prohibiting the use of their names as input prompts, given growing fears that AI-generated artwork may usurp human-created works' position in the industry.[27] The rapid growth of AI in the entertainment industry has revealed that the current gap in intellectual property laws poses a threat to the very bedrock of its original purpose of promoting creativity and fostering innovation.

III.   Call for action

As AI continues to proliferate in entertainment, countries like New Zealand have responded to the call for clarity by recognizing AI as authors in creative works. Following suit, Japan and the European Union have invested significant resources in determining the best course of action with respect to intellectual property laws and AI-generated works.[28] In the United States, Congress has

---

[24] Hannibal Travis, "Intelligent Entertainment: Shaping Policies on Algorithmic Generation and Regulation of Creative Works," *Florida International University Law Review* 14, 179 (2020): 187.

[25] Jay T. Westermeier, "Understanding the Importance of Derivative Works," *Finnegan*, February 8, 2023, https://www.finnegan.com/en/insights/articles/understanding-the-importance-of-derivative-works.html.

[26] Isiah Poritz, "Generative AI, Andy Warhol 'Fair Use' Lead 2023 Copyright Issues," *Bloomberg Law*, January 22, 2023, https://news.bloomberglaw.com/ip-law/generative-ai-andy-warhol-fair-use-lead-2023-copyright-issues.

[27] Kevin Kelley, "Picture Limitless Creativity at Your Fingertips," *Wired*, January 22, 2023, https://www.wired.com/story/picture-limitless-creativity-ai-image-generators/.

[28] Supra *n*. 15.

been entrusted under Article 1 §8, cl.1 of the Constitution to promote the progress of science and valuable arts. As AI and its prevalence in the entertainment industry continue to grow, Congress must respond to the need for statutory guidance and provide a revised framework of intellectual property laws that adequately address the loopholes in the law and balance the rights and interests of all parties involved. Critics have raised concerns about the efficacy of intellectual property laws and whether or not said laws will be rendered obsolete in this rapidly evolving technological era. In the past, intellectual property laws have been revised to accommodate technological advancements. Presently, the limitless scope of AI-powered technology requires lawmakers to respond effectively to and alleviate the deficiencies in intellectual property laws. The laws and policies developed by Congress in the next few years will play a determinative role in establishing the utility of intellectual property laws to regulate the industry while simultaneously promoting innovation.