

# Al Art and Entertainment: Are we ready?

**Nick Kraegen,** Senior Associate, and **Kelly Choo,** Associate (Baker McKenzie), delve into the copyright concerns and complexities of Al-generated art and entertainment.

While lawyers and lawmakers soberly consider the myriad questions artificial intelligence (AI) poses, creators have taken to the streets.

In its latest strike, the Writers Guild of America West (**WGA**), among other things, seeks to keep AI from writing or rewriting literary material (that is, what a "writer" produces, including stories, treatments, screenplays, dialogue, sketches, and so forth), creating source material, and preventing certain material from being used to train AI.

There may be a similar stoush brewing in Australia: The Media Entertainment and Arts Alliance's (**MEAA**) submission in response to the Australian Government's discussion paper on 'Safe & Responsible Artificial Intelligence in Australia' urged regulation of the sector "be developed as a matter of urgency", and said it had:

...particular concern for our members working in journalism, content creation, design, screen performance, as voice-over artists and as musicians. These industries are all highly vulnerable to AI risks. It is conceivable that many of our members could be replaced by various versions of generative AI – and thus it is important that consent, copyright and the creativity of the individual are protected, and placed at the heart of any regulation.<sup>1</sup>

That is an understandable concern in light of generative AI's capabilities. If, however, the commercial art and entertainment industries move as quickly to the heavy use of AI in creating their products as these concerns imply, they are likely to find significant challenges in navigating the current copyright landscape.

This article explains the principal areas of complication and uncertainty for AI-generated art and entertainment, being generative AI's controversial origins, significant incongruities with existing copyright law, and variable reception in the global copyright landscape. It then proposes some legal and commercial implications of a sudden shift to widespread use of AI-generated art and entertainment content.

# AI vs the humans

The controversy of AI-generated creative material is as much about where it came from as where it is used. Even casual observers will know there are a number of fights brewing and ongoing around the data (which, in this case, includes copyright works) used to 'train' AI.<sup>2</sup>

A number of individuals and businesses around the world have already brought proceedings against the creators of generative AI, alleging their content has been used in the course of training, and that the creation and ongoing use of the technology infringes their copyright. The various proceedings concern a range of different material, including photographs,<sup>3</sup> art,<sup>4</sup> computer code,<sup>5</sup> and literary material.<sup>6</sup>

One class action against OpenAI, in which comedian and author Sarah Silverman is a lead plaintiff,<sup>7</sup> alleges that in the course of creating ChatGPT, OpenAI infringed the rights of authors by training the large language model on texts of their books.

The claim is framed in a number of ways, including unjust enrichment, negligence and unfair competition. But as to copyright infringement, it alleges OpenAI has, without authority, made copies of the books, made derivative works, publicly displayed copies (or derivative works), and/or distributed copies (or derivative works). Interestingly, the plaintiffs contend that the AI engine itself infringes the rights of authors because it constitutes a derivative work of the plaintiffs' work. It also alleges *every* output of the engine constitutes an infringing derivative work of the plaintiffs' work.

# Al-generated creations: novel, not original – copyrightable?

Existing copyright law in Australia is incongruous with AIgenerated works and other subject matter in significant and fundamental ways.

There is a growing consensus, at least in Australian commentary, that even though generative AI produces material similar to human-made literary, dramatic, musical

- 1 Media Entertainment and Arts Alliance, 'Safe and Responsible AI: Submission of the Media Entertainment and Arts Alliance (MEAA)' (PDF, 1 August 2023) <a href="https://www.meaa.org/download/meaa-submission-on-safe-and-responsive-ai-in-australia/?wpdmdl=49210&refresh=64f6c1b">https://www.meaa.org/download/meaa-submission-on-safe-and-responsive-ai-in-australia/?wpdmdl=49210&refresh=64f6c1b</a> 0cd17e1693893040>.
- 2 For a helpful explanation of what this process entails, see e.g., Christoph Schuhmann et al, 'LAION-5B: An open large-scale dataset for training next generation image-text models' (2022) 36<sup>th</sup> Conference on Neural Information Processing Systems Track on Datasets and Benchmarks <a href="https://arxiv.org/abs/2210.08402">https://arxiv.org/abs/2210.08402</a>; Tinting Qiao et al, 'Learn, Imagine and Create: Text-to-image generation from prior knowledge' (2019) 33<sup>rd</sup> Conference on Neural Information Processing Systems <a href="https://dl.acm.org/doi/10.5555/3454287.3454367">https://dl.acm.org/doi/10.5555/3454287.3454367</a>; Alana Kushnir and Mia Schaumann, 'Friend or foe? How artificial intelligence is challenging the law's approach to art' (2022) 35(8) Intellectual Property Law Bulletin 141.
- 3 Getty Images (US) Inc v. Stability AI Inc, U.S. District Court for the District of Delaware, No. 1:23-cv-00135 ('Getty Images').
- 4 Andersen v. Stability Al Ltd, U.S. District Court for the Northern District of California, No. 3:23-cv-00201.
- 5 DOE 1 et al v. GitHub, Inc. et al. U.S. District Court for the Northern District of California, No. 3:22-cv-06823.
- 6 Tremblay et al v. OpenAl, Inc. et al, No. 4:23 Civ. 3223 (N.D. Cal Jun. 28, 2023); Silverman et al v. OpenAl, Inc. et al, No. 3:23 Civ. 3416 (N.D. Cal Jul. 7, 2023); Kadrey et al v. Meta Platforms, Inc., No. 3:23 Civ. 3417 (N.D. Cal Jul. 7, 2023).
- 7 Silverman et al v. OpenAI, Inc. et al, No. 3:23 Civ. 3416 (N.D. Cal Jul. 7, 2023).

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or artistic work, copyright is unlikely to subsist in material merely 'generated' without substantially more human involvement. $^{8}$ 

The key reason for that is section 32 of the *Copyright Act* 1968 (Cth) (**Act**), which provides that copyright only subsists in "original" works. 'Originality' does not require that an idea itself be novel, but rather that it is not copied from another work, originating instead from its author exercising intellectual effort in reducing the work to material form.<sup>9</sup> Put another way, originality and authorship are "correlatives" in copyright, because authors bring into existence works the Act protects, and so "originality means that the creation (that is the production of the work) required some independent intellectual effort".<sup>10</sup>

Those principles have emerged in a line of case law that moved away from subsistence of copyright in matter developed through substantial effort, though without an identifiable author, to prioritising the existence of an author and his or her intellectual effort.<sup>11</sup> Relevantly, they therefore developed as part of a trend toward human contribution as key element of subsistence. Notably, at a user level, generative AIs are capable of producing substantial outputs with almost no human labour *or* intellectual effort.

In *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 (*Phone Directories*), Perram J gave a detailed explanation of what an author doing something original means in the context of computer-assisted creation:

...care must be taken to ensure that the efforts of that person can be seen as being directed to the reduction of a work into a material form. Software comes in a variety of forms and the tasks performed by it range from the trivial to the substantial. So long as the person controlling the program can be seen as directing or fashioning the material form of the work there is no particular danger in viewing that person as the work's author. But there will be cases where the person operating a program is not controlling the nature of the material form produced by it and in those cases that person will not contribute sufficient independent intellectual effort or sufficient effort of a literary nature to the creation of that form to constitute that person as its author: a plane with its autopilot engaged is flying itself. In such cases, the performance by a computer of functions ordinarily performed by human authors will mean that copyright does not subsist in the work thus created.<sup>12</sup>

It is not hard to imagine a situation in which an artist or writer – or perhaps even a film executive – utilises an AI engine in a much more nuanced and detailed way than simply requesting an articulation of a very high level idea, such that they may be "seen as directing or fashioning the material form of the work".<sup>13</sup> An artist named Jason Allen, for instance, controversially placed first in last year's Colorado State Fair art competition with an artwork he created over the course of 80 hours' effort using Midjourney and Photoshop.<sup>14</sup>

Diving deeper into the mechanics of the Act reveals more incongruity and thorny questions. For example, while copyright subsistence in 'subject matter other than works' (sound recordings, cinematograph films, broadcasts and published editions of works) is not subject to an express originality requirement, the application of the Act's subsistence provisions to AI-generated matter of this kind is still not straightforward and merits closer examination.

While copyright subsists in, for example, cinematograph films made by a 'qualified person', films made in Australia, or films first published in Australia,<sup>15</sup> the 'maker' of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken,<sup>16</sup> and, subject to contract, the maker of the film is the first owner of the film.<sup>17</sup> Sound recordings are subject to similar provisions, though with the added complication that:<sup>18</sup>

- a) a sound recording, other than a sound recording of a live performance, shall be deemed to have been made at the time when the first record embodying the recording was produced; and
- b) the maker of the sound recording is the person who owned that record at that time,

where "record" "includes a disc, tape, paper, electronic file or other device in which sounds are embodied."  $^{19}$ 

- 8 See e.g., Andrew Wiseman and Bryanna Workman, 'Copyright in the age of artificial intelligence and authorless works' (2019) 32(3) Intellectual Property Law Bulletin 34; Sharon Givoni and Fiona Ng, 'A world of pure imagination? Originality in the digital age' (2022) 24(1) Internet Law Bulletin 183.
- 9 Apple Computer Inc v Computer Edge Pty Ltd (1986) 161 CLR 171, 182-3.
- 10 IceTV Pty Ltd & Anor v Nine Network Australia Pty Ltd (2009) 254 ALR 386 at 395.
- Cf Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd (2002) 192 ALR 433, IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 254 ALR 386, Phone Directories, Primary Health Care Ltd v Commissioner of Taxation (2010) 267 ALR 648.
- 12 Phone Directories [118].

13 Ibid.

- 14 Kevin Roose, 'An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy', *The New York Times* (online, 2 September 2022) <a href="https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html">https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html</a>.
- 15 Act s 90.
- 16 Act s 22(4).
- 17 Act s 98.
- 18 Act s 22(3).
- 19 Act s 10.



These frameworks are simply not equipped to engage with AI-generated content. Who has 'made the arrangements' necessary for the making of a generated film, and even who 'owns' the medium in which a generated sound recording is first embodied are potentially complex factual and legal matters. As in the case of works, they leave the question of copyright subsistence and ownership in AI-generated instances of these materials open to interpretation and debate.

# A global question

Turning to the international copyright position for generative AI, there are at least two important factors at play.

First, a key principle in most international treaties is the 'national treatment' of copyright rights.<sup>20</sup> In other words, rights of foreign nationals in copyright works and materials created in those countries are afforded the same recognition and protections of works created within party jurisdictions. As part of that recognition, the same rules governing subsistence, ownership and infringement of copyright generally apply for the purposes of resolving whether and how that material will be protectable, or indeed whether its creation or use infringes copyright.

That being the case, and with no international treaty governing AI training or the copyright status of AIgenerated works, the copyright status of AI and its output is as varied globally as the individual quirks and features of the copyright laws of countries around the world.

Secondly, the status of copyright protection in AI-generated material in the rest of the world is somewhat varied. In the UK, section 9(3) of the Copyright, Designs and Patents Act 1988 specifically allows computer generated works to benefit from copyright protection, and provides "the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken", though there are doubts as to whether this confers full protection on AI-generated works.<sup>21</sup> Similar provisions exist in Ireland and New Zealand.<sup>22</sup> In the US, a sufficient degree of human authorship is still required for works to obtain copyright protection. So much was apparent in the US Copyright Office's decision in February 2023, where an application to register a comic book was revoked, to the extent that the images contained in the comic book were AI-generated by Midjourney.<sup>23</sup> Although the EU approach is similar to that of the US, with no express protection being

granted for computer-generated works, the EU's proposed 'AI Act' would force companies deploying generative AI to disclose copyright material used to develop systems.<sup>24</sup>

From this, it is clear that generative AI and its works are going to get a slightly different reception wherever they go in the world today. These variations may become more or less significant as jurisdictions proceed to introduce piecemeal legislative responses to AI.

#### Is clarity coming?

In the past year, the Australian Government has announced reviews into the copyright enforcement regime and the regulation of AI in Australia.<sup>25</sup> These reviews garnered submissions from industry groups, with wide-ranging views put forward on the role of AI in the art and entertainment sectors, in particular, and the ways in which it could (or arguably should) be regulated in Australia. It is likely that a range of general and sector-specific regulations will be impacted, with possible reform in Australia that follows the progression of other nations around the globe, but there is no clear timeline on that reform as at today.

### The technology and the controversies are here, but the reforms and international consensus are not. What does that mean?

So as AI art and entertainment continue to outpace the very area of law designed to protect those industries' interests, how do content creators and users operate in this new world?

First, where achieving copyright ownership in content is a priority, it may be necessary to take components of AI-generated art and then have them assembled or further 'worked on' by human authors to result in the creation of copyright subject matter. AI-generated works might also achieve some protection where adapted or embodied in other subject matter - as David Brennan puts it, "[1] oosely and metaphorically, Part III works are the wines of copyright created by vignerons (authors) and Part IV subject matters are the wine bottle of copyright put out by wineries (producers)."26 An example of that might be if WGA lose their fight, and movies (cinematograph films, protected subject matter under Part IV of the Act) are made in the traditional fashion, but using AI-generated scripts, so that the resulting content is at least protectable as a cinematograph film. Another example might be a performer's rights in a performance and recording of an AI-composed musical work.

20 See, for example, Berne Convention for the Protection of Literary and Artistic Works, Article 5(1).

- 21 Sharon Givoni and Fiona Ng, 'A world of pure imagination? Originality in the digital age' (2022) 24(1) Internet Law Bulletin 180, 183.
- 22 For the position in Ireland, see section 21(f) of the Copyright and Related Rights Act, 2000. For New Zealand, see Copyright Act 1994 section 5(2)(a).
- 23 United States Copyright Office, 'Zarya of the Dawn (Registration # VAu001480196)' (PDF, 21 February 2023) <a href="https://www.copyright.gov/docs/zarya-of-the-dawn.pdf">https://www.copyright.gov/docs/zarya-of-the-dawn.pdf</a>>.
- 24 European Parliament, EU AI Act: first regulation on artificial intelligence (Web Page, 14 June 2023) <a href="https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence">https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence</a>.
- 25 Australian Government Attorney-General's Department, Copyright enforcement review 2022-23 (Web Page) <a href="https://www.ag.gov.au/rights-and-protections/copyright/copyright-enforcement-review-2022-23">https://www.ag.gov.au/rights-and-protections/copyright/copyright-enforcement-review-2022-23</a>; Australian Government Department of Industry, Science and Resources, Supporting responsible AI: discussion paper (Web Page) <a href="https://consult.industry.gov.au/supporting-responsible-ai-">https://consult.industry.gov.au/supporting-responsible-ai-</a>.
- 26 David Brennan, Copyright Law (Federation Press, 2021) 78.



Such protection, however, is not necessarily complete. Where, for example, a person wishes to allege that a film has 'copied' from their film in terms of replicating its base plot, characters, dramatic situations and so forth, they would likely need to rely on the underlying literary material from which their film was created, unless there has been an actual copying of the audiovisual material from their film.<sup>27</sup> Similarly, the musician described above may wish to restrain unauthorised performances or re-recordings of 'their' musical work. If the underlying literary or musical material were AI-generated, however, copyright subsistence issues may arise and prevent the filmmaker or musician from restraining the unauthorised 'replications'.

Secondly, difficulty in asserting exclusive rights in artistic or entertainment material created using generative AI may dictate the way it is commercialised.

It is useful for copyright owners or licensees to assert copyright rights where exclusivity of access to content (as in the case of SVOD services) or the scarcity or uniqueness of material in the hands of the user or owner (as in the case of visual art) is key to its value. If a party's ownership rights in AI-generated or assisted content are uncertain, these distribution models may be less attractive because the ability to enforce against unauthorised use is more limited. This issue and others might also incentivise those who commercialise art and entertainment to resist the temptations of incorporating AI-generated content (much in the same way that software developers with the ambition of commercialising their works have resisted incorporating open source software) lest it undermine their ability to license the work commercially.

In the alternative, however, content is also commonly distributed today on an advertising-supported basis, or as part of a broader commercial strategy to build an audience which can be leveraged for other commercial opportunities (social media content creators and influencers, for instance). The cost of enforcing rights in content commercialised on that basis may well outweigh any benefit of doing so given that in most cases its original source is the most convenient and cost-effective form of access to it anyway, or the fact that the majority of its value is realised within a short period after its release. So, the value in 'rights-light' AI content may be most efficiently realised through these models, rather than the ones that rely on controlling access to works (and enforcing against unauthorised use). However, whether this is the preferred use and distribution of content by today's content businesses is a different question.

Thirdly, it is hard to understate the potential impact of an inconsistent international approach giving rise to patchy recognition of rights in AI-generated content, or safe-harbours for platforms themselves.

To start with, it may impede the deployment of generative AI systems in some jurisdictions where liabilities potentially arise as a result of the use of training data to build the system. Indeed, if Sarah Silverman's 'derivative works' argument discussed above gains traction, it might make it difficult to distribute AI-generated content at all in some jurisdictions.

Most obviously, however, an inconsistent international approach also exposes content created by or with the assistance of generative AI systems to unauthorised use in jurisdictions offering lesser protections for that material. This is particularly challenging considering the global nature of content businesses today, that roll out their services and business models accordingly. Inconsistent treatment of AI around the world is likely to force those businesses to either offer bespoke jurisdiction-specific services or adopt a minimum standard for their service (that is, adopting the position required in the most conservative jurisdiction). Both options are inefficient.

Fourthly, and as a consequence of the way generative AI tools are built, there is some indication that they appear to be capable of 'content replication' (producing content substantially identical to pieces of content appearing in their training datasets). A 2022 study of diffusion models for text to image generation identified a risk that these models "might, without notice, reproduce data from the training set directly, or present a collage of multiple training images."<sup>28</sup> A less extreme but notable example of replication is in Getty Images' case, where images Stable Diffusion generated are alleged to have contained modified versions of Getty Images' watermark and credit information.<sup>29</sup>

Obviously, reproducing or recommunicating substantial parts of content would run the risk of an infringement claim from a copyright owner, with the potential value of such a claim increasing with the scale of the use.

Finally, while those challenges are contended with in the short to medium term, AI-generated art and entertainment may ultimately take a very different form. Some have suggested the 'end game' of AI-generated art and entertainment is content entirely bespoke to the user, provided on a one to one basis between the user and the engine. While generative AI capable of doing that would obviously be invaluable (and potentially terrifying), there may be a much more limited value in asserting exclusive rights in the content it creates, because its value is to a specific individual and not of broad commercial appeal. Given the likely high commercial value of such technology, the rights of owners of any data or content used to train it become an even more important and challenging question.

## Conclusion

While the concerns of artists, writers and other creators about the rise of generative AI are entirely understandable, it must also be acknowledged that AI art and entertainment today finds itself adrift in a rocky copyright landscape, both in Australia and globally. Those turning to generative AI to supply their creative needs may well find it a more complicated source of creative content than hoped – even compared with humans!

27 As was the case in Zeccola v Universal City Studios Inc (1982) 46 ALR 189.

28 Gowthami Somepalli et al, 'Diffusion Art or Digital Forgery? Investigating Data Replication in Diffusion Models' (PDF, 12 December 2022) <a href="https://openaccess.thecvf.com/content/CVPR2023/papers/Somepalli\_Diffusion\_Art\_or\_Digital\_Forgery\_Investigating\_Data\_Replication\_in\_Diffusion\_CVPR\_2023\_paper.pdf">https://openaccess.thecvf.com/content/CVPR2023/papers/Somepalli\_Diffusion\_Art\_or\_Digital\_Forgery\_Investigating\_Data\_Replication\_in\_Diffusion\_CVPR\_2023\_paper.pdf</a>>.

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29 Getty Images (n 3).
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