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INTELLECTUAL PROPERTY AND AI AT CROSSROADS

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ABSTRACT

The unwavering upheaval caused because of the traditional laws pertaining to intellectual property rights being unable to accommodate emerging trends in artificial intelligence is a cause of concern. This paper exhibits an exhaustive study of the lacunas that lie in the legal system or to be more precise in the intellectual property laws, which opens the potholes of mismanagement. It discusses at length the inconsistencies in copyrights laws as well as in patent laws, thereby urges lawmakers to hear the alarming bells and make necessary amendments in the parent acts. It is the time that Indian jurisprudence acknowledges the rampantly growing AI technologies and get away with ownerships issues and the like.

By, discussing various case laws, the paper highlights the stand of not just the Indian Courts but examines the amalgamated approach that is adopted by other courts in deciding upon the copyright or patent rights of work/inventions generated by AI machines. Lastly, it talks about the growing nature of artificial intelligence. Therefore, an attempt needs to be made to revamp the existing laws.

KEYWORDS: Artificial Intelligence, Intellectual Property rights, The Copyright Act, The Indian Patent Act, Modicum of Creativity.

INTRODUCTION

Artificial intelligence (AI) is a combination of science as well as engineering which works in making computers, think and process like human brains. AI has taken a firm hold in all spheres of life, ranging from simple google search to highly mechanized auto-pilot cars. The AI boom has dramatically revolutionalised the steadfast quest for technological progress. Back in 1982, when blockbuster Blade Runner came into the limelight, one could have barely imagined that

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machines can function like humans and supposedly surpass it. But now, what was a bleak imagination then, has become part and partial of our lives.

Artificial intelligence has become a new buzzword today as it is discussed almost in all domains. Machine learning and deep learning have heavily contributed to the development in the fields of AI. These machines can learn from experiences and reproduce the desired set of results on a specific search. Multiple branches of disciplines like, Philosophy, Mathematics, Sociology, Physics, Neuro-Science, Psychology, etc have contributed to shaping AI to better suit the needs of present times.

The AI advancements are instrumental in bringing about a paradigm shift, but surely not everyone buys it and so the opinions are grossly divided. A bunch of people are of the mindset that these machines are lowering the burden of humans, and thereby making the work less prone to anomalies. But on the other side of the coin, some fear exhibiting the image of how the world would look if someday machines take over humans. In this techno-savvy world, people are highly sceptical about how amicably AI and IPR (Intellectual Property Rights) work together. In the effort of sprucing up machines, it becomes all the more important that the legal implications of the same are not left behind. Clearing the patches so as to eradicate the challenges posed by AI to the IPR regime is not only tricky but a challenging process. In the same vein, let's dive into the nuances of this so-called rollercoaster association that AI and IPR share.

HOW COPYRIGHT ACT IS CATCHING UP WITH A.I.?

Today, we live in an age where machines are able to develop programs, create content, and produce artworks. And it is quite foreseeable that in coming times, AI machines will be able to develop new technologies, potentially new varieties of drugs that will need patent protection. This opens up a Pandora box of complicated questions constantly oozing out. One of the painstaking tasks is to decide the rightful owner of the work generated by machines without human involvement. And if the software developer would be able to pull an arrow in his quadrant when it comes to claims of ownership of work created by AI software?

The Copyright Act 1957 categorically states that this act covers the works in relation to "original literary, dramatic, musical and artistic works, cinematograph films and sound recordings."[1] It is imperative to note that this act explicitly covers the work that is done by the author's skills, judgement and labour. It doesn't give due regard to work that is generated by machines.

[1] Section 13 of the Copyright Act 1957.

Likewise, when a design is launched, the designer is the rightful owner but when the same task is performed by a machine then it is devoid of this title of ownership. It is interesting to note that in 2017, SOPHIA (a social robot) was granted citizenship in Saudi Arabia. It is interesting to note that if robots can acquire citizenship then maybe as per their legal status they might get their work protected here and elsewhere.

Seemingly, if copyright law acknowledges the work generated from machines then this law will be deemed to encourage creativity exhibited not only by humans but machines as well. Before the 1970s, it was out of the picture to think that machines can possess skills to produce creative work. Due to technological advancements, today machines are not just automated platforms that can assist, but, they can make calculative decisions and respond accordingly.

The lacuna lies in the fact that the countries give copyright only to the work that is created by the expertise of a human being and not machines. The Supreme Court of United States of America (USA) in the case of *Feist v. Rural Telephone Service Co*[2] pointed out that for protecting any work under copyright law it is imperative that the work should be done or originated by the human intellect and labour. In another interesting case from the USA named, *Naruto v. slater*[3] the circuit court validated the decision of the District Court. The Court upheld that the claim of copyright infringement invoked by a monkey over its selfies, taken by him from an unattended wildlife photographer's camera is not tenable. In this famous case a monkey, a crested macaque, took photos of himself from a camera and in response to it; the Photographer and Wildlife Personalities published those photos in the book. Later, People for the Ethical Treatment of Animals (PETA) on behalf of the monkey, filed a suit so as to copyright infringement. The plaintiff asserted that Naruto (the monkey) was the owner and author of those photographs but the Court was of the opinion that in order to bring a suit of copyright infringement it is so important that the author should have statutory standing, but Naruto is an animal and so the Copyright Act doesn't expressly give animals the right to file such sits. Finally, the suit was dismissed.

Like the US there are many other jurisdictions that do not protect the work generated by AI. In Australia, *Acohs Pty Ltd v Ucorp Pty Ltd*[4] the court held that the work which is generated by machines couldn't be protected because it is devoid of human skills and expertise. Talking in the

[2] 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358,1991 U.S.
[3] No. 16-15469 (9th Cir. 2018)
[4] [2012] FCAFC 16; 201 FCR 173; 287 ALR 403; 95 IPR 117

Indian context, the Supreme Court in the case of *Eastern Book Company v D.B. Mohak*[5] has emphasized the "modicum of creativity"[6] and held that it is possible for machines to pass the test of originality. The court was of the opinion that derivative work should contain skills, intellect, and labour. And emphatically stated the work should put up colours of creativity rather than being out and out a copy of the already existing work.[7] However, the Copyright Act, 1957 raises a cause for concern when the definition of "author" is looked at, because it is explicitly clear that the standard set to qualify as an author is hard to be achieved by machines. The AI machines lack the status of a legal person.

PATENT & A.I. RELATED ISSUES

Patents are the rights that are granted for an invention that holds novelty and are unique in character. Now AI and patents are linked to each other in a way that today, inventions are even generated by machines. But, it is largely seen that a patent is only granted for an invention originating from human intellect. When AI machines are also capable of inventing valuable services, etc, the question that looms is what/who should be given a right of getting it patented? Machines or Humans who make machines! If, at all, there is a need to aligning patent rights with ever-growing AI-based inventions?

In *Diamond v. Diehr,*[8] The US Court held that mere abstract ideas like mathematical algorithms are not eligible to be patented because "they are the basic tools of scientific and technological work", and granting them patents can impede the growing innovation process.[9] Recently, in *Stephen L Thaler v. Comptroller General of Patents, Design and Trade Mark*[10] the High Court of England and Wales upheld the decision of the United Kingdom Intellectual Property Office (IPO) by rejecting the application of grant of patent to an AI machine named, DABUS (Autonomous Bootstrapping of Unified Sentience). Thaler was of the opinion that as he is the owner of DABUS, and any invention done by its machine, automatically grants him the right to get the invention patented. In simple words, according to Thaler he has ownership of DABUS and

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[5] (2008) 1 SCC 1

[6] Shuchi Mehta, "Analysis Of Doctrines: 'Sweat Of the Brow' & 'Modicum Of Creativity' Vis-à-vis Originality In Copyright Law" (*India Law, 9 January 2015)*< https://www.indialaw.in/blog/blog/law/analysis-of-doctrines-sweat-of-brow-modicum-of-creativity-originality-in-copyright/> accessed 15 July 2021

[7] AB and others, "Eastern Book Company and Ors. Vs D. B. Modak and Ors." (*Law Times Journal, 7 October 2020)* https://lawtimesjournal.in/eastern-book-company-and-ors-vs-d-b-modak-and-ors/ accessed 17 July 2021

[8] 450 U.S. 175, 101 S. Ct. 1048 (1981)

[9] Adv. Ramit Rana, "Artificial Intelligence: Policy, IPR and law in India and other countries worldwide" (*The Daily Guardian, 9 July 2020)*< https://thedailyguardian.com/artifical-intelligence-policy-ipr-and-law-in-india-and-other-countries-worldwide/ > accessed 14 July 2021

[10] [2020] EWHC 2412 (Pat)

DABUS has transferred the right to grant patents to him.[11] But IPO and Special Patents Court clearly stated that DABUS is a machine and not a legal person, thereby it can't have the right to hold patents.

It is heavily argued that the lopsided approach of courts is creating a legal conundrum as far as the future of bridging the gaps between IPR and AI is concerned. It is seen that even today, it is a set norm that software-generated inventions or processes though novel and conspicuous in nature, stand out in the race of protecting its work. The way AI influences the choices of customers, therefore, manoeuvring the decision-making ability shows how the number of such cases will arise in the coming days unless relevant policies are made and implemented.[12]

AI AND IPR IN THE INDIAN CONTEXT

In the age of smartphones and computers, unknowingly yet knowingly, artificial intelligence has enhanced our quality of life. This disruptive technology is having a transformative impact on various fronts like socio-economic development, better health facilities, financial growth and many more. It provides tailor-made solutions to giant problems to effectively escalate the advantages of technology transfer.

In 2018, the Indian Government came out with a Discussion Paper on "National Strategy for Artificial Intelligence #AIFORALL", where it highlighted how AI is exponentially increasing globalization rate. This paper focused on sectors like Healthcare, Agriculture, Education, Smart Cities and Infrastructure for highlighting the role AI tools are playing in boosting the Indian economy.[13]

Considering the involvement AI has on us, it is imperative to make or amend Indian legislations to get rid of the loopholes that exist. The Copyright Law in India, like in other jurisdictions does not give equal protection to the work generated by machines. For anyone to claim copyright over any piece of work, it should qualify the "test of originality". But, it is highly debatable to decide if the machines can also pass this test. Another issue looming over AI is the battle for ownership rights. Since, machines are not accepted as the owner of any work or invention, the fight related

[11] Saransh Chaturvedi, "The Curious Case of Dabus: Who should own the AI-Related inventions?" *(The SCC Online Blog, 26 December 2020)*< https://www.scconline.com/blog/post/2020/12/26/the-curious-case-of-dabus-who-should-own-the-ai-related-inventions/#_ftn1 > accessed 16 July 2021

[12] Gunjan Paharia, "Intersection of Artificial Intelligence and IPR- Gunjan Paharia" *(Forbes India)* <https://www.forbesindia.com/article/legalpowerlist2020/intersection-of-artificial-intelligence-and-ipr-gunjan-paharia/65843/1> accessed 17 July 2021

[13] "National Strategy for Artificial Intelligence #AIFORALL" *(NITI Aayog, June 2018)* <https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf> accessed 17 July 2021

to infringements is inevitable. It is important to cater for the elephant in the room by enacting proper acts of AI establishment.

CONCLUSION

The exhaustive discussion can be encapsulated by saying that it is of utmost need to recognize as well as overhaul AI rights so that the prospective technological growth is not sabotaged. This is the age of advancement and innovations, so laws must not rebuke newer approaches but assimilate them for the greater good.

Now, it is an established fact that artificial intelligence and intellectual property rights do not work in silos, so this unique metamorphosis needs acceptance at warp speed. This concoction of AI and IPR envisages an approach where laws should be made to lessen legal battles and uplift inventions where machines are given the rights and legal standing. The traditional laws are not sufficient to cover emerging new trends in AI. There are severe glitches when it comes to granting ownership rights, and the work generated by machines is not considered authentic or original work. Whether it is copyright laws or patent laws, it is required to either chalk out a way to recognize and give credits to the work of AI machines or maybe new laws should be pitched to better absorb the probable inconsistencies to blur the distinction that is made between AI-generated work and work done by humans.

It is high time for lawmakers to work in parallel with the ever-growing AI technology. The various jurisdictions around the globe need to work in unison to implement laws that can bring uniformity in how AI impacts us all.