



Innovation and Legalities: Generative AI and Intellectual Property in Nigeria

INTRODUCTION

In the face of concerns over the ethical usage of generative artificial intelligence (AI), what is clear is that generative AI has come to stay, and its cross-sectoral impact cannot be denied. Notably, generative AI throws up several legal concerns across diverse fields of law inclusive of intellectual property (IP). In this article, we will tease out the niceties of the fine interactions between generative AI and IP law in Nigeria, the intrinsic challenges, and opportunities as well as our predictions for the future of generative AI in Nigeria.

THE NEXUS OF GENERATIVE AI AND IP

In September 2023, the *Author's Guild* in the US initiated a class-action suit against OpenAI in the federal court in Manhattan, New York, over claims that copyright of leading writers like George RR Martin and John Grisham are being infringed to train the generative AI system.¹ Later in December, the plaintiffs filed an amended complaint naming *Microsoft* as a defendant on the basis that it "works in close partnership" with OpenAI on the large language models built using unauthorized book databases. Depending on the outcome, this case could set legal precedents for future lawsuits involving AI, copyright, and partnerships between tech companies. The court's decision may equally provide guidance on the legal responsibilities of entities collaborating on AI projects.

The most notable of these IP issues implicated by generative AI feature in the realm of copyright and beg questions revolving round authorship and unauthorized usage of copyrighted material. Questions such as: **who authors copyright in AI-generated material? Is it exploitative or otherwise infringing, for an AI developer to use copyrighted material without consent? To what extent does fair use avail in these circumstances?**

Under the Nigerian Copyright Act 2022 (**CA 2022** or **the Act**), it is arguable that AI is not in contemplation of being conferred authorship status for copyright, as the law delimits the scope of persons eligible for authorship status for copyright to an individual or a body corporate.² Since AI does not fall under either category, there is little room to argue that AI is eligible for authorship under Nigerian copyright law. On the flip side, there may be room to argue that just as the law evolved to confer artificial legal personality on corporate entities, the law may equally evolve to confer limited authorship status to AI in the realm of IP where such work is mainly generated by AI's originality with minimal human input. Jurisdictions like South Africa are forward-looking in this regard in conferring patent to an AI, as referenced subsequently in this article.

Further bone of contention that arises is in relation to the fact that AI systems are trained³ with existing copyrighted material. The question of whether usage of these materials requires consent of the human copyright owners is unresolved or, that the defence of fair use in the public interest avails. As alluded to earlier, suits have been commenced in other climes, alleging copyright infringement against generative AI companies.

1. *The Authors Guild, John Grisham, Jodi Picoult, David Baldacci, George R.R. Martin, and 13 Other Authors File Class-Action Suit Against OpenAI - The Authors Guild*
2. *Section 5, Copyright Act 2022. From our engagement with the Nigerian Copyright Commission (NCC) on this point, we are aware that the NCC even opines that only individuals can be conferred authorship status with respect to copyright, and body corporates are excluded.*
3. *In other words, fed with data.*

Were such suits hypothetically before the Nigerian courts, a consideration of the factors provided by the CA 2022 for denoting 'fair use' becomes apt⁴ notably: (x) the purpose and character of usage of the material; (y) nature of the work; (z) amount and substantiality of the portion used in relation to the work as a whole, and (xx) effect of the use upon the potential market value of the work. Since fair use is a defence that is applied on a case-by-case basis, the decision of a Nigerian court would turn on an analysis of the applicability of the disjunctive factors in the Act, to the case at hand.⁵ It is our considered view that in Nigeria, fair use will only be available for generative AI where, for instance, usage of copyrighted material to train AI is for a worthy societal cause that does not substantially impact on the market value of the copyrighted work.



Generative AI and other forms of IP

Beyond the interaction between generative AI and copyright there is still room for conversation around the interaction between generative AI and other forms of IP such as trademarks and patents.

Trademark law essentially protects distinctive marks, such as words, logos, symbols, or sounds, that identify and distinguish the source of goods or services. In the context of generative AI, a fundamental question arises as to whether the output of generative AI algorithms can be used as trademarks. Regarding the poser on whether the output of generative AI may be deemed trademarks, the analysis turns on the proprietorship status of AI as our trademark law defines trademarks by reference to the persons having the right to use the trademark.⁶ So on whether generative AI can create trademarks, our Trademarks Act, unlike the Copyright Act, does not specify who can be deemed the proprietor of a trademark. A cue may however be taken from the Interpretation Act⁷ to arrive at the conclusion that generative AI is not capable of being a proprietor of trademark under the current tenor of Nigerian trademark law .

In the realm of patent law, that basically protects inventions which change the state of the art, the question arises as to whether generative AI itself or the products generated by generative AI can be protected as patents . As we see it, it is plausible to canvass for the registrability of generative AI as a patentable invention in itself where the newness metric under the Patents and Designs Act (PDA)⁸ is passed. What will be cumbersome to argue under the present state of Nigerian patent law is for generative AI to be recognized as an inventor or a patentee, as was done in a jurisdiction like South Africa, examined in a subsequent portion of this article. The position under the PDA is analogous to the regime under the Trademarks Act discussed above, as such there is little room to argue under Nigerian statute, that generative AI can be deemed a patentee.

4. Section 20, Copyright Act 2022.

5. There is a dearth of Nigerian case law on the subject of fair use but in *Hyde Park Residence v. Yelland* [2001] Ch 143, the English Supreme Court held that 'the Court must judge the fairness [of usage of a copyrighted material] by the objective standard of whether a fair-minded and honest person would have dealt with the copyright work' in the manner alleged.

6. Cap T13 LFN 2004, section 67 as amended by the Business Facilitation Act 2022 where a trademark is defined as 'a mark used or proposed to be used in relation to goods or services for the purposes of indicating a connection between the goods or services and a person having the right, either as a proprietor or as a registered user, to use the mark, whether with or without any indication of the identity of that person, and may include shape of goods, their packaging and combination of colours...' [Emphasis supplied]

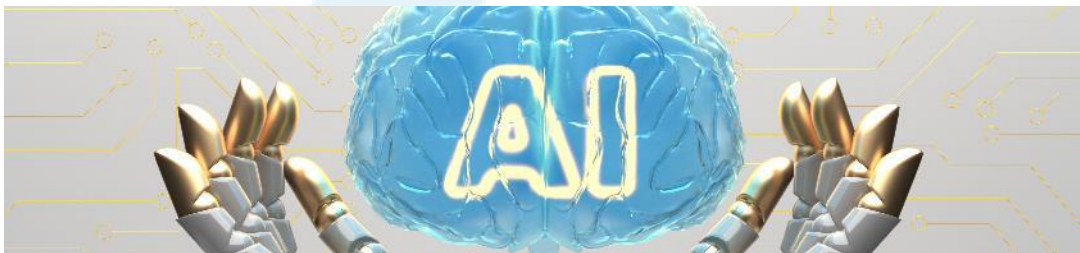
7. Cap I17 LFN 2004, section 18 which provides that 'a person includes any body of persons corporate or unincorporate.'

8. Cap P2 LFN 2004, section 1 of the PDA.

CHALLENGES

As generative AI progresses, the risk of widespread IP infringement remains rife as autonomous generative AI often relies on the input of third-party information and data (including protected IP) to reproduce human-like generated works, as well other AI systems, without any human involvement. Another challenge with generative AI & IP, is the conundrum in determining the allocation of liability (infringement) derived from works of autonomous AI.

The courts were confronted with this in several cases where Stability AI's image-generating AI software, Stable Diffusion⁹ was under scrutiny. Stable Diffusion is one of the world's fastest-growing open-source AI platforms promising advanced autonomous creation of descriptive and realistic images with enhanced image composition and face generation. In the US, IP owners (Anderson¹⁰ and Getty Images¹¹) alleged that Stability AI, appropriated images and data from online sources including the claimant's website for training Stable Diffusion for commercial purposes. Very recently, on the 1st of December 2023, the Business and Property Courts of England and Wales under the High Court of Justice in the UK found merit to Getty's claims of copyright infringement and ruled that the matter can proceed to trial.¹²



A Global Outlook on AI-Authorship/Inventorship

In several jurisdictions across the globe, regulators, legislators, and the judiciary have attempted to regulate/legislate and establish legal precedence in addressing some of the IP-related issues arising from generative AI. As seen in the case of the scientist, Dr. Stephen Thaler who sought patent recognition in several jurisdictions¹³ for an invention created by an autonomous Generative AI system named DABUS- Device for Autonomous Bootstrapping of Unified Sentience, Dr. Thaler claimed that DABUS incorporates artificial neural networks capable of envisioning inventions that he himself would never have conceived. However, the DABUS patent application was refused on grounds that an AI could not be granted inventorship according to letters of the legislation.¹⁴ Three weeks ago, the UK Supreme Court treaded the same path when it unanimously upheld the decision of the Comptroller-General of Patents, Designs and Trademarks that AI could not be considered an inventor under the Patents Act of 1997.¹⁵ This decision was echoed in all jurisdictions save for South Africa.

The South African DABUS application has been earmarked in history as the first patent to be granted AI inventorship.¹⁶ Notably, Saudi Arabia has accepted filing formalities for ownership of the DABUS patent application listed as the inventor but is yet to finalize the substantive application of the patent application.¹⁷ If successful, Saudi Arabia will become the second jurisdiction to recognize AI-inventorship.

9. <https://stability.ai/stable-diffusion> (accessed 07.12.2023).

10. Case No. 3:23-cv-00201 (N.D. Cal. 2023).

11. Getty Images (US), Inc. v. Stability AI, Inc. Case No. 1:23-cv-00135 (D. Del. 2023).

12. Getty Images v Stability AI [2023] EWHC 3090 (Ch).

13. Australia, Brazil, Canada, China, European Union, India, Israel, Japan, Korea, New Zealand, Saudi Arabia, Singapore, South Africa, Switzerland, Taiwan, United Kingdom and United States.

14. Commissioner of Patents v Thaler [2022] FCAFC 62.

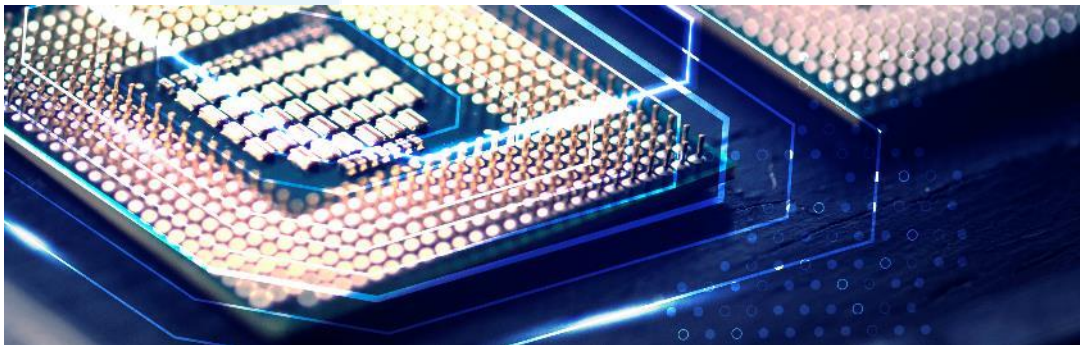
15. Thaler v Comptroller-General of Patents, Designs and Trademarks [2023] UKSC 49 delivered on 20 December 2023

16. Patent No. ZA2021/03242.

17. Application No. 521422019.

From the above highlighted decisions, it appears the courts are keen on a more conservative approach in granting AI ownership of works curated by AI. Till date, the global consensus remains that AI being non-human inventors, are excluded from acquiring inventorship rights, however, the proprietor of the AI involved in an inventive activity may be designated as the inventor.¹⁸ Although no similar application was filed at the Nigerian Patent Registry, it will be interesting to know what approach our Registry will favour in determining AI inventorship, perhaps the Registry will observe a more nuanced approach. Under our PDA, there is no explicit definition of what or who an inventor is but the provisions of the Act remain unambiguous in its reference to human-inventorship. Specifically, provisions of the Act expressly refers to “inventor” as a “person”, “he” or “him”.²⁰

In a more recent turn of events in the copyright realm, the Internet Court of Beijing delivered a landmark ruling on Monday, November 27, 2023, when it acceded to copyright ownership in an AI-generated picture.²¹ A stark contrast is the earlier US Copyright Office ruling on the registration of an AI-generated²⁰ comic book entitled Zarya of the Dawn. The US Copyright Office failed to acknowledge copyright in AI-generated images—copyright in the body of work was only limited to the original human authorship and excluded aspects of the work generated by the AI tool.²² Relatedly, the Nigerian Copyright Commission is likely to tail the US Copyright Office decision in Zarya of the Dawn as Nigeria’s new copyright regime²³ does not acknowledge authorship of AI-generated works.



CONCLUSION

The intersection of AI and IP in Nigeria poses complex challenges and promising opportunities. The ongoing class-action suit in the United States against OpenAI underscores the intricate IP issues arising from the use of generative AI, particularly in the realm of copyright. Questions around authorship, ownership, and fair use become pivotal as AI systems like ChatGPT and Google's Bard continue to evolve.

The Nigerian legal landscape, as outlined in the CA 2022, currently does not explicitly recognize AI as an eligible entity for copyright authorship. However, the dynamic nature of technology suggests a potential evolution in legal frameworks to accommodate the unique contributions of AI to creative outputs. Trademark and patent laws also present challenges, with current statutes leaning towards human proprietorship.

¹⁸ EPO, case number: J 0008/20 (Designation of inventor/DABUS) 21-12-2021.

¹⁹ Section 2 (1) and (2), PDA.

²⁰ <https://www.natlawreview.com/article/beijing-internet-court-recognizes-copyright-ai-generated-images>. (accessed 07.12.2023)

²¹ Midjourney AI Art Generator.

²² Registration #VAu001480196 (February 21, 2023).

²³ Copyright Act, 2022.

Balancing innovation with IP protection is a significant challenge, as AI's capacity for autonomous creation raises concerns about widespread infringement and liability allocation. The recent litigation involving Stability AI's image-generating software highlights the real-world impact of unauthorized use of copyrighted material in training AI models.

Looking ahead, Nigeria must grapple with establishing clear regulations and legal precedents for generative AI. The role of regulatory bodies, the judiciary, and the development of best practices will be crucial in navigating the intricate issues surrounding IP protection in the age of AI. As AI continues to advance, policymakers are likely to introduce new laws to ensure transparency, address liability concerns, and adapt IP laws to the evolving technological landscape. Generative AI is undeniably here to stay, and Nigeria's IP protection mechanisms must evolve in tandem with this transformative force.

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