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Client Alert

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Indonesia: AI and IP laws – uncharted territory?

Overview

AI is redefining what is possible across industries today. In Indonesia, businesses are increasingly adopting AI, both as developers creating novel AI tools and as users leveraging AI to generate text, images, audio and other forms of creative output. However, Indonesia's current Intellectual property (IP) framework, which was designed before the prevalence of AI, reveals notable gaps when applied to AI and leaves important questions around protection, ownership and infringement.

It is essential to understand these legal gaps to operate confidently in this 'uncharted territory'. By proactively addressing key IP considerations within the current IP legal framework, businesses in Indonesia can take steps to protect their innovations, manage risks, and leverage AI's potential, even amidst regulatory uncertainty.

In this issue

Recognizing gaps in Indonesia's IP legal framework for AI

Protectability

Copyright

Under Law No. 28 of 2024 on Copyright ("**Copyright Law**"), works that are eligible for copyright protection must reflect originality and must be the result of human intellectual effort. Under this framework, the question of copyright for AI-generated content creates challenges, particularly regarding the level of human input required and the definition of authorship.

a. Originality

To qualify for copyright protection, a work should be recognized as a product of human originality. In the case of Generative AI, the role of human creator is often limited to entering prompts or setting parameters, while the output or generated content is produced by AI algorithms. This minimal human involvement challenges whether AI-generated works can meet the originality requirement and qualify for copyright.

b. Authorship

Authorship, as defined by the Copyright Law, is limited to human individuals or legal entities. Further, it also adopts an anthropocentric approach, as exemplified by the term of copyright protection: '*70 years after the calendar year in which the author of the work **dies***'. This term assumes that the author is a human being, subject to mortality, and Generative AI systems, no matter how sophisticated or how independent the systems may appear, do not fit into any definition of authorship.

In a recent statement, the Director General of Intellectual Property Rights ("**DGIP"**) stated that copyright protection remains grounded in originality and human creativity. The DGIP further clarified that copyrightable works require a 'human touch', which is a standard that purely AI-generated works cannot meet. Although in practice Generative AI tools can assist creators, works produced entirely by AI may lack the personal and creative quality that is essential for copyright protection.

Patent

In the Indonesian patent legal framework, protectability depends on two elements, namely patentability and inventorship:

a. Patentability

According to the recently enacted Law No. 65 of 2024 on the Third Amendment of Law No. 13 of 2016 on Patent ("**New Patent Law**"), an invention is defined as an inventor's idea that materialized in a specific technological problem-solving activity. This comprises products, processes, improvements and developments of products and processes. It also includes new types of inventions, namely systems, methods and uses. Despite this broad scope, the New Patent Law does not yet address the new complexities that AI introduces into inventiveness and patentability. Instead, the New Patent Law continues to uphold the core requirements for patentability, namely novelty, inventive step and industrial applicability.

b. Inventorship

Like in many other countries, in Indonesia, inventorship is a core requirement for a patent to be granted because it determines who is legally attributed as the creator of the invention and who holds the patent rights. The New Patent Law requires human inventorship, be it a natural person or a legal entity, and requires that they have made a genuine contribution to the invention. If no human can legitimately claim to have contributed to the invention, as may happen in a scenario where the invention is AI-generated, the DGIP may refuse to grant a patent, as there would be no recognized inventor.

Trademark

Trademarks differ from copyright and patents because it primarily serve to identify the source of goods and services. Under Law No. 20 of 2016 on Trademarks and Geographical Indications ("**Trademark Law**"), for a trademark to be registrable in Indonesia, it must be distinctive and not confusingly similar to existing trademarks. When a business uses AI to create a trademark, the AI tool can assist in generating a unique and potentially distinctive trademark. In theory, AI-generated outputs that meet these criteria can qualify as a trademark. However, the challenge in using AI to create a trademark lies in ensuring that the output is genuinely unique and does not unintentionally infringe upon existing trademarks. AI, in particular Generative AI systems, are trained on vast datasets that can include existing images, words, designs, or patterns that the AI may reference or adapt in the creation process. As such, although AI-generated trademarks can appear original, there is a risk that the AI's reliance on the training data may lead it to produce a trademark that resembles a third party's trademark. This would pose a potential risk of rejection due to similarity, as well as possible infringement claims.

Ownership

The prevailing IP legal framework creates unique challenges in defining ownership for AI-generated works, because in traditional settings, ownership follows naturally from the involvement of a human author in creating the work. However, with AI-generated content, determining ownership can be quite challenging, since, theoretically, multiple stakeholders involved in the generation of the content may claim ownership over the AI-generated content:

A. Developers of AI Systems

Developers of AI systems are those who invest in designing and training the AI. They may argue for ownership based on their role in creating the underlying technology. However, since they often lack direct involvement in each specific output, their connection to the creative result can be indirect, which limits their ability to claim ownership.

B. The Users or Prompters

As the ones who direct the AI system to generate outputs, users or prompters may see themselves as authors, particularly when they guide the AI's output through specific prompts. In Indonesia, where human creativity is crucial for ownership, the role of the user or prompter must involve meaningful, original input to establish a strong ownership claim. If the user's involvement is limited to basic prompts without further shaping the output, their claim to ownership could be challenged.

C. Joint Ownership between Developer and User

It is possible to consider joint ownership in a collaborative setting where both the developer and the user contribute to the AI's function and purpose. While the prevailing Indonesian IP laws do not currently provide a clear pathway for joint ownership in the context of AI, in practice, this is a potential solution in some contractual frameworks, e.g., Terms of Use of the AI platform.

As for the AI itself, it cannot claim ownership of the AI-generated content. AI, as a non-human entity and a tool created by humans, does not meet the legal criteria to be an author or inventor, and therefore cannot hold ownership rights.

Infringement risks

The infringement risks can emerge at both the input (training phase) and output (content generation phase). Consequently, developers working with AI in Indonesia must carefully consider all aspects involved in these phases to avoid risks of infringement.

Input

The input stage involves the data that AI systems are trained on. For AI, especially Generative AI, producing relevant and accurate outputs typically requires large datasets. This may include copyrighted material, such as images, text or music, which may be pulled from public sources, repositories or databases, sometimes by way of scraping or crawling, to be able to capture the volume of data needed for effective training.

Under the Copyright Law, using copyrighted materials without permission generally can be considered as copyright infringement, especially if used for commercial purposes. The Copyright Law allows use for limited, non-commercial uses such as education, research, criticism, government purposes and performance free of charge, so long as they do not harm the copyright holder's fair interests. However, these exceptions do not extend to commercial data usage for AI training or large-scale data mining.

This restrictive framework means that under the Copyright Law, companies training AI, especially Generative AI models, would generally need to obtain permission or licensing from copyright holders to use copyrighted materials. Alternatively, they would need to rely on public domain, synthetic data (artificially generated information created by algorithms to simulate real-world data without directly using copyrighted materials), or properly licensed data. Without such permission, any unauthorized use of copyrighted material in AI training could be deemed as copyright infringement. Copyright owners whose contents or works are being copied would have a basis to challenge the developer on the grounds of unauthorized reproduction, publication or communication to the public of their copyright works.

Moreover, training AI with copyrighted materials, especially text, books or articles, may also lead to another issue from the publisher's rights perspectives. Under Presidential Regulation No. 32 of 2024 on the Responsibilities of Digital Platforms to Support Quality Journalism ("**PR 32/2024**"), digital platforms, which has a broad definition and may include developers, need to compensate Indonesian press companies for the use of their news contents. Digital platforms need to negotiate the form of cooperation with the Indonesian press companies, which could take the form of paid licensing, revenue sharing or aggregate news users data sharing.

Output

Once an AI model has been trained, it generates content based on the patterns it has learned from the input data. For AI, especially Generative AI, these inputs might include text, images, music or even trademarks. While AI-generated content often appears novel, there is a risk that it may inadvertently resemble existing copyrighted works or trademarks due to similarities in stylization, structure or composition derived from the training data. In this case, the copyright holder or trademark owner may argue that the output unlawfully reproduces or adapts their content.

Do note that in terms of copyright infringement, the Copyright Law uses a qualitative measure and an author or copyright holder's economic rights as a standard. The qualitative measure standard does not specify any definite percentage, but allows a person to use a part of the copyright work, as long as they do not use any elements of that work that symbolize the originality of that work, and do not violate an author or copyright holder's reasonable interest and economic rights. In practice, a confirmatory expert opinion from the Copyright Office is required to determine the existence of an act of infringement. Even so, the unauthorized reproduction of third party copyrighted material would increase the exposure of developers to legal liability and the risk of challenges from the rights' owners.

Actions to consider

Although AI is still a grey area within the framework of Indonesian IP laws, we set out below a to-do list that might be useful for both developers and users to implement responsible and IP compliant AI practices.

Developers

- The best practice to address ownership issues is addressing it in contractual agreements, e.g., Terms of Use. The agreement can specify whether the developer, user, or both, have ownership rights over the AI-generated content. Further, it can also set out usage rights over AI-generated content, which allows the developer to retain ownership while licensing specific usage rights.

- To mitigate risk of infringement, developers should ensure that they use either licensed, public domain, or original data to train AI models. As an alternative, developers can also consider using synthetic data. Establishing clear licenses for any copyrighted material included in training datasets can help reduce infringement risks.
- Documenting how the AI were trained would be a prudent approach. The documentation can cover all phases of AI model training, from the initial pre-training stage to the fine-tuning stage. This comprehensive coverage is important for developers to fully understand and verify the data's use throughout the AI models' training and development processes.

Users

- Users who use AI-generated outputs, especially for commercial use, such as for trademarks, branding and corporate operational matters, should carefully review AI-generated branding elements to confirm that they do not infringe on existing trademarks. This can involve trademark searches and risk assessments to ensure that the generated content is not similar to existing registered trademarks within the jurisdiction where registration is sought for the proposed trademark.
- It is crucial to avoid using third-party IP in prompts to minimize the risk of AI-generated outputs infringing on IP.
- Organizations or businesses that use AI may need to ask their employees to refrain from prompting an AI system with IP protected materials or confidential information. This is crucial to minimize the risk of that data being transmitted to third parties as it is being used to train the AI.

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