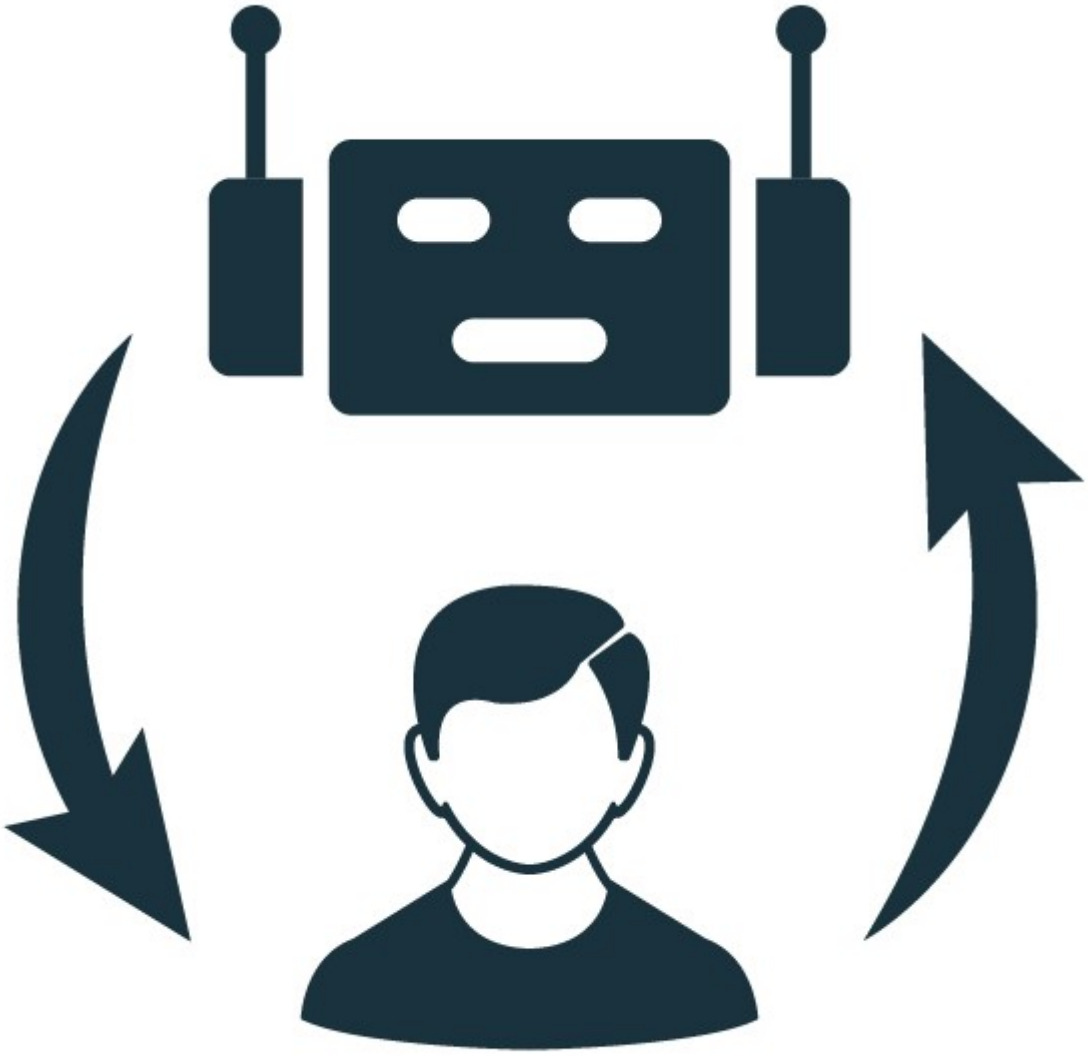
CAN A NATURAL PERSON IN SOUTH AFRICA COPYRIGHT WORKS CREATED BY AI SOFTWARE FOR SELF-BENEFIT?

Category: IT Law,Technology Law
written by Bareng Dona | July 25, 2023



By now we have all heard or come across the hype surrounding ChatGPT – an Artificial Intelligence ("**AI**") software designed to answer complex questions conversationally.[1]

ChatGPT is a powerful piece of software because it enables us to execute tasks such as work reports, school assignments, writing code or even songs with the click of a few buttons.

The question is to what extent does one have ownership over the information or work produced by AI software such as ChatGPT? To phrase this question in legal terms, can a natural person in South Africa copyright work created by AI?

To answer question, the *Copyright Act* 98 of 1978[2] ("**Act**") is our starting point.

The Act

As a general rule, copyright in South Africa does not need to be registered with any authority in order for it to be legally recognised under South African law.[3] The exception is cinematographic films which must be registered with the Companies and Intellectual Property Commission ("CIPC").[4]

Section 21(1)(a) of the Act provides that copyright automatically vests in the creator or author of the works. Copyright can legally be created by authors by placing the words "copyright", "copyright reserved", "copyright followed by the name and year", or even the copyright symbol on the work created.[5]

The Act further sets out certain requirements for work to be copyrighted.

The requirements in the Act?

The Act requires that:

1. the work must be an original, and reduced to material form; [6]
2. the work must be authored by a South African citizen or produced in South Africa;[7] or
3. the work must be authored by a foreign national whose country of origin is a member of the Berne Convention, within which member countries grant each other copyright protection.[8]

Considering our initial question, can one copyright work created by AI software? The answer turns on the definition of "author" in terms of the Act. If the AI software generated work at your request and in accordance with your idea, then who is the "author" of the work? Is it the AI software, or yourself?

The Act generally qualifies an "author" as the person who "*first" makes, creates, or composes the work* [9]. Therefore, although a natural person may have thought of the idea and made the request, the AI software would have been the "*first to reduce the work to material form*" by making, creating, or composing the work, which is the first requirement stipulated under the Act.

The U.S. Copyright Office held that *"works that are generated by AI technology are not the product of human authorship*" in a matter concerning an author named Kris Kashtanova who utilised AI generated images for her graphic novel.[10] This rationale that "authors" can only be natural persons under European and the United States law[11] may very well be used in South Africa when we take into account the requirement of "authorship" under the Act.

It must however be mentioned that the above perspective remains a supposition because to date, our courts have not yet dealt with a matter questioning the copyrighting of works created by AI, neither has our government compiled legislation and regulations regulating the usage of such work. Nonetheless, it is worth looking into the policies, as well as international law, for further guidance as to how copyright for works generated by AI may be dealt with in our country.

Policies

For example, OpenAI's policies not only stipulate that "*a user of the software is granted and assigned ownership of all the rights, title and interests pertaining to the output or work produced by the software*", but that "*a user will also be responsible for ensuring that the content produced does not violate any applicable law"*.[12] Therefore, in as much as the policies vest copyright to the user of the

software, these rights remain subject to the laws and regulations governing the user's country. This would mean that South Africa's laws and regulations would prevail in this instance.

Additionally, the policy further stipulate that the content produced by ChatGPT is not unique across users and could therefore generate the same or similar output for other users.[13] This immediately raises issues of plagiarism is considered unethical.

International Legal Systems

The European and United States legal systems do not recognize AI software as capable of being an "author" of works, capable of owning copyright, on the basis that AI software systems do not have the requisite "legal personality" to own intangible assets.[14] Furthermore, section 233 of the South African Constitution requires South African courts to interpret South African legislation in a manner consistent with international law.

Consequently, it is likely that should our courts be faced with the question of whether AI software can own copyright, they would lean towards the conclusions reached by the European and United States legal systems. Additionally, they would consider the policy of the AI software, as well as the provisions of the Act to reach a decision on whether works generated by AI software is capable of being copyrighted by a natural person in South Africa.

Conclusion

Before you decide to place a copyright symbol on a work produced by AI software like ChatGPT, or even seek copyright for its creations, you must exercise extreme caution, having thoroughly considered that the creation or work produced by the software could potentially be non-unique and fundamentally similar or even the same as works already produced and copyrighted.

Contact us for more good, clear, precise advice.

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[1] Roger Monti *"What is ChatGPT And How Can You Use It"* https://www.searchenginejournal.com/what-is-chatgpt/473664/#close.

[2] The Copyright Act 98 of 1978.

[3] Government Website *"Register Copyright"* https://www.gov.za/services/intellectual-property/register-copyright#:~:text=Copyright%20is%20secured%20automatically%20when,formalities%2C%20except%20for%20cinematograph%20films.

[4] Ibid.

[5] CIPC Website *"Register Copyright"* https://www.cipc.co.za/?page_id=4586.

[6] Section 44(1) of the Copyrights Act.

[7] Section 3(1) of the Copyrights Act.

[8] CIPC Website *"Register Copyright"* https://www.cipc.co.za/?page_id=4586.

[9] Section 1 of the Copyrights Act.

[10] Matt *Novak "AI-Created Images Aren't Protected By Copyright Law According To U.S. Copyright Office"*https://www.forbes.com/sites/mattnovak/2023/02/22/ai-created-images-in-new-comic-book-arent-protected-by-copyright-law-according-to-us-copyright-office/?sh=2693c7ac7ce4.

[11] European Commission – IP Helpdesk *"Intellectual Property in ChatGPT"* https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/intellectual-property-chatgpt-2023-02-20_en#:~:text=Indeed%2C%20under%20European%20(and%20US,%E2%80%9Cjust%E2%80%9D%20an%20artificial%20intelligence.

[12] OpenAI Terms of Use No. 3(a) https://openai.com/policies/terms-of-use.

[13] Open AI Terms of Use No. 3(c) https://openai.com/policies/terms-of-use

[14] European Commission – IP Helpdesk *"Intellectual Property in ChatGPT* https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/intellectual-property-chatgpt-2023-02-20_en#:~:text=Indeed%2C%20under%20European%20(and%20US,%E2%80%9Cjust%E2%80%9D%20an%20artificial%20intelligence.