



KING & WOOD
MALLESONS
金杜律师事务所

30 Days Series 25 by Zhang Kaihui

OCTOBER 2022

AI GUIDES

OWNERSHIP OF AI GENERATED WORKS

WHO OWNS A WORK CREATED BY AN ARTIFICIAL INTELLIGENCE (AI) COMPUTER PROGRAM?

AI is already being used to create art, music, architectural floor plans and poetry. AI is being used to assist in the inventive process. Challenging questions arise around who owns the intellectual property (IP) rights (like copyright or patent rights) in works and inventions created by AI.

At present in Australia, there is no specific law dealing with ownership of IP in computer-generated works. What is clear based on the current law in Australia is that there will be no copyright protection without a human author. Similarly, to obtain a patent, a human inventor is needed.

There is no general definition of “author” in the Australian Copyright Act.¹

To take an example that interacts with AI technology, for a photograph, the author is defined as the person “who took the photograph”. This simply raises the question of who took the photograph.

- For example, who took a photograph from a camera on a drone, where one person controls the flight path of the drone (and the overall position of the camera), another person controls the camera via remote control, a third person selects a photograph from a burst of photos, and a fourth person runs the photo through a series of filters and photo editing software?
- Does it make any difference if the drone’s position and flight path is controlled by an auto-pilot computer program and the photograph’s colour palette and brightness is automatically corrected by the computer program in the camera? If a CCTV camera is fixed to a post and takes a photo every 30 seconds, is there a person taking that photo, and if so, who?

For a work that is created by an AI program, there are often many humans involved, for example humans who wrote the AI program, trained or configured the AI program, collected the data, own the hardware, pay for the electricity, operate the AI program, and so on.

In some ways, the creation of an AI work is like the creation of a movie – there are many people involved in making a movie and, for a movie, the producer usually is regarded as the maker of the film and the copyright owner.

¹ Copyright Act 1968 (Cth)





CURRENT STATE OF PLAY

While currently in Australia there is no specific provision of copyright or patent legislation dealing with computer-generated works, a recent Federal Court decision has considered some of these issues in the context of AI.

In a recent appeal, the full Federal Court of Australia determined that only a natural person can be an inventor under the Patents Act.² The case involved an AI system named DARBUS, a system that incorporates artificial neural networks – an algorithm that is designed to simulate the way in which the human brain processes and generates information. In the first Federal Court decision, it was held that DARBUS was capable of being the inventor of a patent on the basis that an ‘inventor’ is an agent noun and an agent can be a person or thing that invents.³ The full Federal Court disagreed with this finding, and considered the statutory language, structure and history of the Patents Act, as well as the underlying policy objectives, to find that only a natural person can be an inventor.⁴

This decision comes at a time when the patentability of AI is being considered around the world. South Africa remains an outlier, granting a patent with DARBUS as the inventor. The US, UK and Europe have confirmed that the inventor of a patent must be a natural person. A recent UK consultation on AI determined that AI is not advanced enough to invent without human intervention at this stage.⁵ WIPO has released a revised draft issues paper that questions whether law should permit AI to be named as an inventor on a patent application.⁶ Discussions held by WIPO warned against any hasty legislative or policy changes.⁷

In Australia, copyright law has not been applied to recognise non-human authors of AI-created works as copyright owners of those works. As a recent example, an Australian group used AI to create a song titled ‘What a Beautiful World’, that went on to win the Eurovision AI Song Contest in 2020. The team wanted to list the AI as a contributor and were unable to, as Australian copyright law does not recognise non-human authors.

Under current Australian copyright law, for a work that is created by an AI program, the following are possible outcomes:

- Because there is no human author, there is no copyright protection for the AI created work.
- The human most associated with the creation of the expression in the work is the owner of the copyright in the AI created work.
- The group of humans who work together and are involved with the creation of the expression in the work are joint owners of the copyright in the AI created work.
- The producer or alternatively the director of the work (using film concepts) is the owner of the copyright in the AI created work.

Until the law is reformed or clarified, the question of ownership of IP in AI created works is uncertain in Australia.

² *Patents Act 1990* (Cth); *Commissioner of Patents v Thaler* [2022] FCAFC 62 [113]. At first instance, the Federal Court found that a non-human inventor, such as AI, can be listed as an ‘inventor’ on patent applications: *Thaler v Commissioner of Patents* [2021] FCA 879 [132].

³ *Thaler v Commissioner of Patents* [2021] FCA 879 [10].

⁴ *Commissioner of Patents v Thaler* [2022] FCAFC 62 [117].

⁵ Intellectual Property Office UK, *Artificial Intelligence and Intellectual Property: Copyright and Patents: Government Response to Consultation* (28 June 2022).

⁶ World Intellectual Property Organisation, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence* (WIPO/IP/AI/2/GE/20/1 REV, 21 May 2020).

⁷ World Intellectual Property Organisation, *Summary of Second and Third Sessions of the WIPO Conversation on Intellectual Property and Artificial Intelligence* (WIPO/IP/AI/3/GE/20/INF/5, 8 January 2021).

KEY CONTACTS



BRYONY EVANS

PARTNER
SYDNEY

TEL +61 2 9296 2565
MOB +61 428 610 023
EMAIL bryony.evans@au.kwm.com



REBECCA SLATER

SPECIAL COUNSEL
BRISBANE

TEL +61 7 3244 8147
MOB +61 426 833 769
EMAIL rebecca.slater@au.kwm.com



KAI NASH

SOLICITOR
BRISBANE

TEL +61 7 3244 8157
MOB +61 401 250 434
EMAIL kai.nash@au.kwm.com

ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 2000 lawyers in 30 global locations, we draw from our Western and Eastern perspectives to deliver incisive counsel.

With 30 offices across Asia, Europe, North America and the Middle East we are strategically positioned on the ground in the world's growth markets and financial centres.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.

Disclaimer

This publication provides information on and material containing matters of interest produced by King & Wood Mallesons. The material in this publication is provided only for your information and does not constitute legal or other advice on any specific matter. Readers should seek specific legal advice from KWM legal professionals before acting on the information contained in this publication.

Asia Pacific | Europe | North America | Middle East

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See kwm.com for more information.

www.kwm.com

© 2022 King & Wood Mallesons



JOIN THE CONVERSATION



SUBSCRIBE TO OUR WECHAT COMMUNITY.
SEARCH: KWM_CHINA