

Copyrights by non-human entities

Is it time Kenya?



Story by: Perpetua Njeri Mwangi

The throes of technology, if they are anything to go by, showcase a change in the field of creation and innovation. A great departure can be seen, especially in copyright ownership, warranting discussions on whether non-humans should be vested with such rights. Non-humans in this context refer to animals and Artificial Intelligence (AI). Copyrights are a bundle of legal intellectual property rights conferred on humans whose ideas are expressed in tangible format for a specific period. Copyright works include literary works, films, music, photographs, broadcasts, and sound recordings.

Discussions around ownership of copyrights by non-humans were entertained in the popular case, *Naruto v Slater*,¹ popularly known as the “Monkey Selfie case”. The California district court and the Court of Appeal of the Ninth Circuit were tasked with determining if Slater and Wildlife Personalities Limited infringed upon a macaque’s photographs (copyright works). The macaque, Naruto, had used Slater’s camera to take pictures of itself which were later reproduced in a book by the latter called *Monkey Selfies*. While the matter was primarily decided

¹ *Naruto v. Slater* | Case Brief for Law School | LexisNexis. (n.d.). Community. <https://www.lexisnexis.com/community/casebrief/p/casebrief-naruto-v-slater>



Story by: Laretta Oyile

on legal standing, the macaque and animals lacking legal standing, it also observed that animal works were not copyrightable.

The Spanish painter Pablo Picasso was known globally for his paintings, and while Pigcasso (a South African pig) does not come close to him, the latter took the world by surprise by being the first non-human to host an art exhibition for its works; paintings.² For some pigs, usefulness is limited to ham, sausages, and pork, but it wasn’t until Joanne Lefson discovered Pigcasso’s odd behaviour, eating everything save for paint brushes, that she decided to nurture its talent in painting. Pigcasso and Joanne Lefson have notable works, such as the Swatch-watch design, Peacock, Snowman, and Mouse, under their belts which have solved for large sums of money.

Are animal works, therefore, copyrightable?

For any piece of art to be eligible for copyright, originality and fixation must be satisfied. Originality is the touchstone of copyright and relates to both authorship and novelty. In Kenya, for instance, under section 23 of the Copyrights Act (2001), authorship is

² Wikipedia contributors. (2023). Pigcasso. Wikipedia. <https://en.wikipedia.org/wiki/Pigcasso>.

limited to a human being or a corporate body. The same position has been adopted by our contemporaries in the United States of America (USA), South Africa, and the United Kingdom (UK). Per sections 306 and 312 of the US Compendium of Copyright Practices 3rd Edition, authorship must relate to a human author. Section 9 of the UK Copyright, Designs, and Patent Act reiterates the need for human authorship in copyrights. Fixation, on the other hand, refers to expressing the art in a tangible format. The import of the fixation requirement is that ideas are not copyrightable.

Animals do not qualify as human beings or corporate bodies; hence fall short of the prerequisites of copyrights under the current legal landscape. This qualifier also separates AI-generated works from copyrightability.

Like animal works, AI-generated works are two-fold, those created independently and with human intervention. Machine learning technologies have been adopted in the training of AIs by inputting data through prompts that are studied. This is possible because an AI is capable of intelligence. The question that follows in tow is who owns the work the AI generates after training the AI, and the latter produces an art?

To clear the blur between what is AI-generated material from that of a human author, the US Copyright Office set out two questions that an applicant must disclose at the point of registration. The first question is whether the work is one of human authorship, with the computer merely being an assisting instrument. The second question is whether the traditional elements of authorship in the act were conceived and executed by a human author and not the AI. Where the answers to the two questions are such that the traditional elements of the authorship



are attributable to the human author's creative thinking and the AI was used for mechanical process, the work shall be copyrighted. The converse shall render the work non-registrable, which makes the work available for public use.

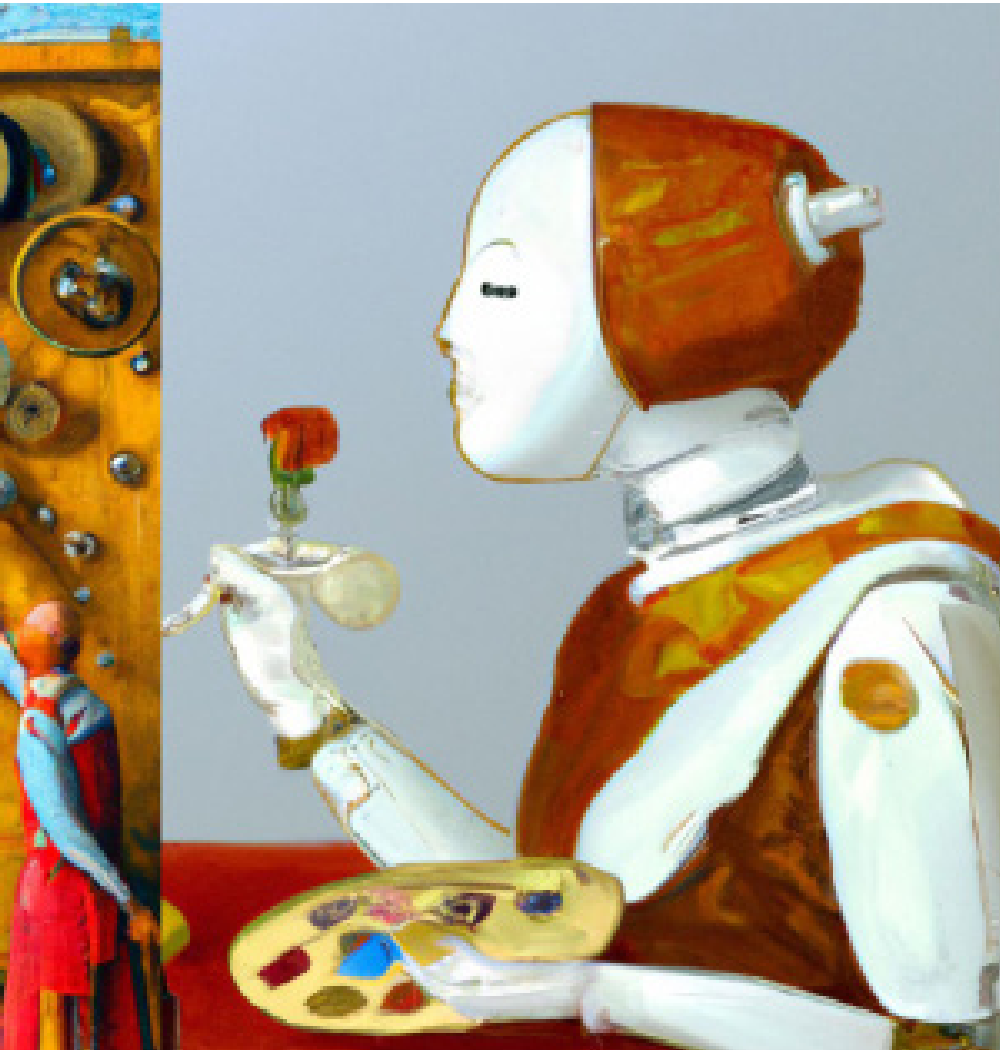
Some notable examples of AI-generated works include; the novel *Zarya of the Dawn* by Krista Kashtanova, whose images were generated by AI MidJourney, the next Rembrandt, music "Heart on my sleeve" or the Beethoven's 10th symphony completed by an AI.

While AI-generated works (output) may be novel, the lack of human authorship shall prevent them from registration; similarly, the Beijing Court in *Feilin v Badu* took this position.

Registration of works is not absolute.

However, registration affords the creator several benefits in a bundle of rights, i.e., moral rights, rights to translate, make adaptations to works, performance rights, recital rights, broadcasting rights, reproduction rights, and the rights to use audiovisual works. Commercially, works are a means of income generation through royalties and residuals. Copyrights may also be used as collateral; the Movable Property and Security Rights Act recognizes intellectual property as collateral.

The implications of extending copyrights to non-human entities may yield a myriad of benefits, including improving innovation and investment in technology. Innovation and creativity are set to improve by extending copyright to non-human entities; given



that AI software is now available to end users like you and me, the reality of new inventions is not inconceivable. Investors of AI and their programmers will be incentivized to continue investing in AIs if their creations are copyrighted. In Malaysia, for instance, copyrightable AI-generated material can be registered as authored by the programmer or investor of the AI. However, our Malaysian counterparts are alive of the implications of this approach, especially where the AI is available to end users.³

On the converse, the downside to

³ Cheng Peng, S. & World Trade Organization. (2018). ARTIFICIAL INTELLIGENCE AND COPYRIGHT: THE AUTHORS' CONUNDRUM. WTO. Retrieved April 29, 2023, from https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2018/chapter_13_2018_e.pdf.

extending copyrights to non-humans is weighty, mainly due to the lack of a substantive legal framework. The lack of regulation presents a challenge in addressing cases such as infringement by a non-human. A right is only as good as it can be redressed. As earlier stated, non-humans lack standing, making it difficult and impossible to litigate or negotiate with them. To echo the Ninth Circuit in *Naruto v Slater*,

“ a human being cannot act as the representative of an animal the doctrine of standing is the gatekeeper; standing decides who has rights, for a right without recourse is no right at all.”

The other danger of extending copyrights to AIs is that they lack any personality to which integrity can be

pegged. Moral rights in copyrights in some jurisdictions cited in this paper reserve these rights to individuals to the exclusion of non-human entities. This right allows the author the right of attribution and not to have their creations derogated from.

The challenges notwithstanding, with the rubric of the benefits that stand to be realized, Kenya should consider enacting a sui-generis regime for works by non-humans. A journey of a thousand begins with a step; perhaps, the first step Kenya should make would involve borrowing from our contemporaries in the USA and issuing guidelines around the registrability of works by non-humans with human intervention and without. The sui-generis regime should also consider limiting the life of copyright protection for non-human works to not more than 50 years. This will safeguard against perpetual ownership of copyrights and facilitate access to such works to the public; the protection of such works could be limited to fifty (50) years. Additionally, the regime should be clear on the commercialization of works by non-humans to safeguard against the monopoly and stagnation of such works.

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