

Comparative Analysis Regarding the Copyright Law on AI-Generated Art Between Indonesian and the United States: Unpacking Indonesian Legal Framework Conundrum

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Abstract

Transforming every industry, artificial intelligence (AI) is influencing how people will live in the future. In this modern era, AI art generators have advanced to generate ultra-realistic art from text popularly known as prompts, where the generators could generate art that is abstract or astonishingly realistic to the point where people have difficulties distinguishing it from real-life photographs. AI doesn't have common sense and original ideas since it only works according to the database where copyrighted arts are stored, lacking uniqueness and personality that only can be derived from human's intellectuality. Protection is needed in the form that gives the creator exclusive rights over their intellectual property. There are several reasons why a computer-generated work autonomously doesn't fall under the protection of both state's copyright laws. Both states vest exclusive rights of a work to a person, which generally is the author or a legal entity. Meanwhile, AI is not acknowledged by both laws as neither a legal person nor a legal entity. Moreover, the essence of copyright includes originality, creativity, and tangible form. AI-generated art is not protected under copyright laws because of its lack of originality and creativity which can only be generated by human-created art. In conclusion, AI-generated art shouldn't be protected under any copyright laws because it lacks human authorship and involvement. If The Indonesian government should take action to protect the intellectual property rights of their people, this is possible by amending the current copyright law to be more adaptive to the new technological advancements.

1. Introduction

Currently, there are more than 25 international treaties regarding IP regulated by the World Intellectual Property Organization (WIPO). The reason behind this is that Article 27 of the Universal Declaration of Human Rights states that everyone has the right to freely participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits," which also protects IP rights. Various legal systems in the past have recognized such rights. The Berne Convention and Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, established by WIPO members, aim to provide legal certainty for safeguarding the exclusive rights of IP owners.¹ The Berne Convention regulates the rights of the authors of copyrighted work, granting control to artists, including writers, musicians, poets, and painters, over the use of their works. The question of who should hold the copyright for Artificial Intelligence (AI)-generated artwork is not explicitly addressed in

¹ Niteesh Kumar Upadhyay and Mahak Rathee, "Impact of Artificial Intelligence on Intellectual Property Rights," *Proceedings of International Young Scholars Workshop* 9 (2020): 52-71, <https://doi.org/10.47344/iysw.v9i0.192>.

the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), as AI authorship was not a consideration when it was drafted.

The copyright implications of AI-generated work centre on the requirement for human creativity. Pure AI outputs without significant human input may not qualify for copyright protection, as copyright law traditionally requires human originality. However, works that integrate AI capabilities with human creative choices in substantive ways may be eligible for protection. In the context of AI-generated work, the primary consideration is that current AI systems function as tools that necessitate human input and direction rather than autonomous creative entities. While AI demonstrates the capability to process extensive datasets and identify patterns, creative decisions and meaningful expressions continue to rely on human guidance and curation.

In this era, technology has advanced to the point where individuals rely on it. A controversial development of 2023 revolves around AI. AI is defined as the simulation of human intelligence processes by machines, especially computer systems.² AI systems typically operate through processing large-scale information, analyzing patterns and connections to predict future outcomes. Chatbots, programmed to mimic human interactions and patterns, exemplify this approach. The core focuses of AI programming encompasses three cognitive abilities: learning, reasoning, and self-correction.³

AI art generators have advanced to generate ultra-realistic art from text or prompts. AI art generators could generate art that is either abstract or astonishingly realistic to the point where people have difficulties distinguishing it from real-life photographs.⁴ Generators such as DALL-E and Imagen gain popularity due to their online accessibility. Users input text descriptions of their desired outcome into the text-to-image generators, which then produce images closely aligned with the provided prompt.

AI's art generator offers numerous benefits, especially in the entertainment sector such as movie production.⁵ It produces unprecedented, intricate, and creative art that can serve as an inspiration for large-scale initiatives, providing fresh perspectives. Professionals in the art industry can quickly express their words or ideas visually, within a few seconds, and AI-generated images extend utility to areas not limited but including marketing, designing, simulation, and education.⁶

However, the discussion on the usage of AI to generate art often divides opinion. Artists who support the notion argue that the assistance provided by AI aids artists to save more time

² Zúñiga M.G., Durotoye T., *A Scholarly Definition of Artificial Intelligence (AI): Advancing AI as a Conceptual Framework in Communication Research*, "Political Communication" 2024, vol. 41(2), pp: 317-334, DOI:10.1080/10584609.2023.2290497.

³ Xiao Liu et al., "GPT Understands, Too," *AI Open* 5 (2024): 208-15, <https://doi.org/https://doi.org/10.1016/j.aiopen.2023.08.012>.

⁴ Patricio Masbernat, "Artificial Intelligence and Its Problematic Impact on the Law," *Revista De Educación Y Derecho. Education And Law Review* 28 (2023), <https://doi.org/https://doi.org/10.1344/REYD2023.28.43934> Inteligencia.

⁵ Fité F.J.C., *The Improvement of Compulsory Education with the Application of Artificial Intelligence. Ethical Principles, Human Rights and Necessary Legislation*, "Revista de Educacion y Derecho" 2023, vol. 28, DOI:10.1344/REYD2023.28.42583.

⁶ Lesperance R.J., *What Is Intellectual Property?*, "Canadian Veterinary Journal" 1994, vol. 35(3), pp. 185-187, DOI:10.4324/9781315592343-9.

to create art in larger quantities.⁷ The arts created by the AI will also have fewer human errors to maintain the standard.

A creator's work is derived from their intelligence, it has the essence of originality that warrants protection. AI art generators are not capable of doing such things, they can't create art with the essence of originality and as a result, they will create art according to the data it stores.⁸

Contrarily, artists who believe otherwise argue that AI lacks understanding of human behavior, resulting in art of remarkable quality, yet devoid of emotions which is a crucial element in creating art. Additionally, AI's lack of common sense and original ideas is due to operating solely based on the data it stores.⁹ This standpoint is exemplified in the submission of AI-generated art at the Colorado State Fair art contest, which sparks debate regarding ethics and human authorship.¹⁰ This proves that the trend of using AI will cause issues in many aspects.

Similar to other AI art-generators, they draw data and inspiration from the open internet. As AIs are not able to generate art in a vacuum, therefore it will frequently analyze or even incorporate reproductions of existing artwork into the new artwork, potentially resulting in unauthorized derivatives which is considered a copyright infringement.¹¹ With multiple users profiting from AI-generated art, hence this will cause a legal issue.

Modern AI is more sophisticated and has a far greater impact. Protection is needed in the form that gives the creator exclusive rights over their intellectual property. For instance, this protection grants exclusive rights to creators, enabling them to supervise, control, prohibit, and legally sue unauthorized use of their copyrighted works without permission.¹² Therefore, government intervention is required to guarantee legal safeguards, providing protection over intellectual property and its creators.

Moreover, generative AI is reshaping content creation, enabling widespread access to tasks previously limited to a select few. Users must respect the rights of those who enabled the development of this developing technology, i.e., the content producers who may be replaced

⁷ Zhuo Su et al., "Lightweight Pixel Difference Networks for Efficient Visual Representation Learning," *IEEE Trans. Pattern Anal. Mach. Intell.* 45, no. 12 (December 2023): 14956–14974, <https://doi.org/10.1109/TPAMI.2023.3300513>.

⁸ Fangneng Zhan et al., "Multimodal Image Synthesis and Editing: The Generative AI Era," *IEEE Trans. Pattern Anal. Mach. Intell.* 45, no. 12 (December 2023): 15098–15119, <https://doi.org/10.1109/TPAMI.2023.3305243>.

⁹ Gary Myers, "The Future Is Now: Copyright Protection for Works Created by Artificial Intelligence," *Texas Law Review* 76, no. 1 (1997): 1–76, <https://texaslawreview.org/the-future-is-now-copyright-protection-for-works-created-by-artificial-intelligence/>.

¹⁰ Andres Guadamuz, "Artificial Intelligence and Copyright," *WIPO Magazine*, 2017, https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html.

¹¹ Matthew Sparkes, "AI Copyright," *New Scientist* 256, no. 3407 (2022): 17, [https://doi.org/https://doi.org/10.1016/S0262-4079\(22\)01807-3](https://doi.org/https://doi.org/10.1016/S0262-4079(22)01807-3).

¹² Mackenzie Caldwell, "Note What Is An 'Author' — Copyright Authorship Of Ai Art Through A Philosophical Lens," *Houston Law Review* 411, no. 2 (2023): 411–42, <https://houstonlawreview.org/article/92132-what-is-an-author-copyright-authorship-of-ai-art-through-a-philosophical-lens>.

by it.¹³ Additionally, people must be aware of the serious threat that generative AI poses to a portion of the creative class's means of support, it also puts brands whose identities have been painstakingly crafted using imagery at risk.

The human touch in artwork is fundamental to creative expression, involving not only the physical manipulation of materials but also the emotional depth, personal experiences, and cultural contexts artists bring. This manifests in deliberate creative choices, from color selection to unique imperfections.¹⁴ The urgency of copyright protection for AI-generated artwork stems from the rapid advancement of AI technology and its increasing ability to produce creative works. This raises complex questions about authorship, originality, and the nature of creativity and intellectuality itself.

As humanity is progressing towards new copyright frontiers, it is with great urgency that legislators can protect the essence of originality and creativity. The presence of AI undoubtedly has the potential to assist artists in creating art, however, it is contradictory to the Copyright Law which promotes the essence of originality and creativity of mankind.¹⁵

To understand the intricacies inherent within the comparative legal framework governing Copyright Law in both Indonesia and the United States, the primary objective of this paper is to comprehend the distinctions within the legal frameworks overseeing copyright in both jurisdictions, particularly emphasizing copyright ownership of AI-generated art. Additionally, beyond such examination, the main purpose of this paper is to provide legal certainty and contribute to legal findings pertaining to copyright ownership of AI-generated art in harmony with the existing regulations, thereby making a substantive contribution to the ongoing discourse regarding the extent and limits of law and AI. Given the increasing digitalization in the 21st century, this research is expected to promote awareness among the public regarding the importance of safeguarding copyright for artworks.

2. Methods

The Authors use the comparative analysis approach to compare and contrast Law Number 28 of 2014 on Copyright and the United States Copyright Act of 1976. This writing uses the normative legal research which limits its subject matter to the study of the law as an object and excludes all non-legal materials. This writing aims to assess the quality of the consistency, fairness, and usefulness of the law itself.¹⁶

¹³ Kelvin Chendrawan and Nathaniel Hardynatha, "Legal Analysis on The Digital Works Generated by Artificial Intelligence Under the Indonesian Copyright Law," in *Anthology: Inside Intellectual Property Rights*, vol. 2, 2024, 270–83, <https://ojs.uph.edu/index.php/Anthology>.

¹⁴ atilla kasap, "Copyright and Creative Artificial Intelligence (AI) Systems: A Twenty-First Century Approach to Authorship of AI-Generated Works in the United States," *Wake Forest J. Bus. & Intell. Prop. L.* 19, no. summer (2021): 337–58.

¹⁵ Michele Corazza et al., "Hybrid Classification of European Legislation Using Sustainable Development Goals," in *ACM International Conference Proceeding Series*, 2025, 105–18, https://doi.org/10.1007/978-3-031-80607-0_9.

¹⁶ Agus Budianto, "Legal Research Methodology Reposition in Research on Social Science," *International Journal of Criminology and Sociology* 20, no. 9 (2020): 1339–46, <https://doi.org/10.6000/1929-4409.2020.09.154>.

3. Results and Discussion

3.1. The Comparative Legal System in terms of Copyright Law in Indonesia and the United States

Table 1. Comparison of the Components within both Copyright Laws

Component	Indonesia	United States
Copyright Owner/Holder	According to Article 1 of the Copyright Law, a copyright holder refers to the creators as copyright owners, parties who receive these rights legally from the creator, or other parties who receive further rights from parties who legally receive these rights.	According to §101 of the Copyright Act, a "Copyright owner", with respect to any one of the exclusive rights in a copyright refers to the owner of that particular right ¹⁷ .
Exclusive Rights	Article 4 of the Copyright Law mentions that copyright is an exclusive right consisting of moral rights and economic rights. Moral rights are eternally inherent in the author. Moral rights cannot be transferred while the creator is still alive, but the exercise of these rights can be transferred after the creator dies.	§106 mentions the copyright owner is entitled to the economic right to their original works ¹⁸ . §106A mentions the moral rights that are only given to the author of visual arts, namely rights of attribution and integrity ¹⁹ .
Essence of Protected Works	Article 40 (2) & (3) mentions the important criteria for a work of authorship to be protected by copyright. Those are fixation and originality. One important criterion that is often overlooked is minimal creativity, which means not only the work must be fixated, but intellectual abilities must also exist in the work ²⁰ .	As soon as a work is formed and fixed in a tangible medium of expression, copyright protection is automatically present. Works at any level of development (from early drafts to finished works) as well as published and unpublished works are protected. A work must fulfill two fundamental requirements to be protected: originality and fixation in tangible form ²¹ .

¹⁷ The United States Copyright Act 1976, Section 101.

¹⁸ The United States Copyright Act 1976, Section 106.

¹⁹ The United States Copyright Act 1976, Section 106A.

²⁰ Israhadi E.I., *The Impact of Developments in Artificial Intelligence on Copyright and Other Intellectual Property Laws*, "Journal of Law and Sustainable Development" 2023, vol. 11, DOI:10.55908/sdgs.v11i11.1965.

²¹ The United States Copyright Act 1976, Section 102.

Protected Works	Article 40 explains that Protected Works include scientific, artistic, and literary works, consisting of: a. books, pamphlets, typographical arrangement of published written work, and all other written works; b. talks, lectures, speeches, and other similar Works; visual aids made for educational and scientific purposes; d. songs and/or music with or without lyrics; e. dramatic works, musical dramas, dances, choreography, puppet shows, pantomimes; f. fine art works in any forms such as paintings, drawings, engravings, calligraphy, carvings, sculptures, or collage; g. applied art works; h. architectural works; i. maps; j. batik art works or other patterns art; k. photographic works; l. Portraits; m. cinematographic works; n. translations, interpretations, alterations, anthologies, databases, adaptation, arrangement, modification and other works resulting from transformation; o. translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions; p. compilation of Works or data, whether in a readable format by Computer Program or by other media; q. compilation of traditional cultural expressions as long as the compilation constitutes an original work; r. video games; and s. Computer Programs.	The following categories of works of authorship are included: (1) Works of literature; (2) Works of music, including any accompanying words; (3) Works of drama, including any accompanying music; (4) Pantomimes and choreographic works; (5) Works of art; (6) Works of audiovisual or other media; (7) Works of sound; and (8) Works of architecture.
Scope of Protected Work	§102 establishes that copyright protection extends to "original works of authorship" fixed in a tangible medium. It outlines seven broad categories of protected works: (1) literary	Article 40 provides protection for works in the domains of science, art, and literature. It specifies the categories of works eligible for copyright protection, including:

works; (2) musical works, including accompanying lyrics; (3) dramatic works, including accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings. These categories are illustrative rather than exhaustive, allowing for the inclusion of other creative forms.

- a. Books, pamphlets, typographical designs (artistic arrangements of literary works), and other literary creations;
- b. Public speeches, lectures, and similar presentations;
- c. Visual aids created for educational or scientific purposes;
- d. Songs and music, with or without lyrics;
- e. Dramatic works, musical dramas, dances, choreography, puppet shows, and pantomimes;
- f. Fine art works, such as paintings, drawings, engravings, calligraphy, sculptures, statues, and collages;
- g. Applied art works;
- h. Architectural designs;
- i. Maps;
- j. Batik designs or other patterned and motif-based artworks;
- k. Photographic works;
- l. Portraits;
- m. Cinematographic creations;
- n. Transformative works, including translations, interpretations, alterations, anthologies, databases, adaptations, arrangements, and modifications;
- o. Translations, adaptations, or modifications of traditional cultural expressions;
- p. Compilations of works or data in formats readable by computer programs or other media;
- q. Original compilations of traditional cultural expressions;

		r. Video games; and Computer programs.
Compulsory Recordation	Article 64(2) mentions that the Recordation of Works and Related Rights products as referred to in section (1) is not a requirement to obtain Copyright and Related Rights. However, the copyright registration can be used as initial evidence in court if a dispute arises in the future regarding the work ²² . Copyright registration can be used as legitimate evidence that is useful for transfer of legal authorization, the development of information and communication technology impacts the process of recordation to be quicker, more precise, more accurate, and more accountable. Article 66 explains that the application to receive the registration of copyright shall be written in Indonesian by the Author, Copyright Holder, Owner of Related Rights, or their Proxy and is submitted to the Minister of Law and Human Rights in Indonesian. Further, the application must deposit examples of the Work, Related Rights products, or their replacements; attach a statement of ownership of the Work and Related Rights; and pay fees.	Copyright protection subsists "immediately" when "original works of authorship are fixed in any tangible medium of expression," so long as certain criteria are met ²³ . In the event of a legal claim of infringement or plagiarism, the copyright owner can provide copyright registration as initial evidence. §408 states that the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by §409 and §708. However, such registration is not a condition of copyright protection ²⁴ .
License	Article 1(20) defines license as written permission given by the Copyright Holder or Related Rights Owner to another party to exercise economic rights to their Creation or Related Rights products with certain conditions.	§903 mentions that the owner of the exclusive rights in a mask work may transfer all those rights, or license all or less than all of those rights, by any written instrument signed by such owner or a duly

²² Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright.

²³ United States District Court for the District of Columbia, *Thaler v. Perlmutter* No. 22-CV-384-1564-BAH 2023.

²⁴ The United States Copyright Act 1976, Section 408.

		authorized agent of the owner. Such rights may be transferred or licensed by operation of law, may be bequeathed by will, and may pass as personal property by the applicable laws of intestate succession ²⁵ .
Exceptions	§107 to §112 governs the Fair Use Exception	Chapter VI, Articles 42 to 51, outlines exceptions to copyright protection. These include the announcement, distribution, communication, judicial rulings, and reproduction of state emblems. Additional exceptions are provided for purposes such as education, research, writing scientific works, preparing reports, critiques, or case reviews, provided they do not harm the legitimate interests of the author (reasonable interests). Other exceptions include: <ul style="list-style-type: none"> s. Use for state security; t. Non-commercial or personal use (limited to a single copy); and u. A prohibition on creating or distributing works that contravene moral values, religious principles, decency, public order, or national defence and security.

A. The United States Copyright Act

In terms of copyright ownership, the Copyright Act vests the copyright of the protected work to the initial owner, who is the author or authors of the piece. However, the author of the work doesn't always become the copyright holder. Work made for hire is defined in §101 of the Copyright Act as work prepared by an employee within the scope of his or her employment or work that was particularly commissioned or ordered for usage if the parties expressly agree in a written agreement that the work shall be considered a work made for hire, the work may be used 1. as a contribution to a collective work, 2. as an element of a motion

²⁵ The United States Copyright Act 1976, Section 903.

picture or other audiovisual work, 3. as a translation, 4. as a supplemental work, 5. as a compilation, 6. as an instructional text, 7. as a test, 8. as answer material for a test, or 9. as an atlas.

Works that are subjected to copyright protection are original works of authorship preserved in any physical form of expression currently known or later developed, from which they may be perceived, reproduced, or otherwise transmitted, either directly or with the aid of a machine or mechanism. The following categories of works of authorship are included: (1) Works of literature; (2) Works of music, including any accompanying words; (3) Works of drama, including any accompanying music; (4) Pantomimes and choreographic works; (5) Works of art; (6) Works of audiovisual or other media; (7) Works of sound; and (8) Works of architecture. §104 of the Copyright Act discusses the subject matter of copyright according to the national origin. For unpublished works, despite being unpublished, the works listed in §102 and §103 are protected by this act regardless of the author's citizenship or place of residence²⁶.

In terms of published works, the works listed in § 102 and 103 are protected by this title if: (1) at the time of first publication, one or more of the authors is a citizen or resident of the United States, a national or resident of a treaty party, or a stateless person, wherever that person may be residing; or (2) The United States or a foreign country that was a treaty party on the date of the work's first publication; (3) The work is a sound recording that was initially fixed in a treaty party; or (4) The work is an architectural, pictorial, or graphic work that is embodied in a building and is located in the United States or another treaty party; (5) The work is first published by the Organization of American States, the United Nations, or one of its specialized agencies; or (6) The work is covered by a Presidential proclamation²⁷.

§102 (b) explains that no idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is presented, explained, illustrated, or embodied in such work, is ever protected by the copyright for an original work of authorship.

Table 2. Copyright Protection Duration of Various Creations in the United States

Date of Creation	Date of Copyright Becomes Effective	Copyright Duration	Protection
Created before 1978, but not published	January 1, 1978	The life of the author and 70 years after the author's death ²⁸	
Published between 1923-1963	From the date the work was first published	28 years, with the option to renew the protection for a further term of 67 years. If no application is made, then it will become public domain ²⁹	

²⁶ The United States Copyright Act 1976, Section 102.

²⁷ The United States Copyright Act 1976, Section 102.

²⁸ The United States Copyright Act 1976, Section 303.

²⁹ The United States Copyright Act 1976, Section 304.

Published between 1964-1977	From the date the work was first published	95 years
Created in 1978 or afterward	From the date the work was fixated	For single authors, as long as the author lives + 70 years. For multiple authors, 70 years after the death of the last surviving author and during that author's lifetime ³⁰

§106 of the Copyright Act states that the Copyright owner of the work has the exclusive right of economic right to do and to authorize any of the following: (1) to make copies or phonorecords of the copyrighted work; (2) to create derivative works based on the copyrighted work; (3) to sell or otherwise transfer ownership, or to rent, lease, or lend copies or phonorecords of the copyrighted work to the public; and (4) to publicly perform the copyrighted work in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works; (5) to publicly display the copyrighted work in the case of sound recordings; (6) to publicly perform the copyrighted work via digital audio transmission in the case of pantomimes; and (5) to publicly display the copyrighted work in the case of literary, musical, dramatic, and choreographic works; pantomimes; and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work³¹.

The exclusive rights to use a work in a variety of ways, such as copying, publishing, performing, translating, and altering it, are granted under the economic rights. When a work is first created, the author is given economic rights that are valid for their lifetime plus an additional 70 years. Due to the transferrable nature of certain rights, the author is not always the exclusive owner of those rights³².

§106A discusses the moral rights, rights of attribution and integrity, that are vested exclusively to the author of visual art, and it is not vested to authors of other works, namely literature or music. The right of attribution states that regardless of who utilizes the economic right of a work that is protected by copyright, the creator still has the right to be acknowledged as the creator. On the other hand, the right of integrity states that the creator of a work has the right to prevent any action that might destroy the “integrity” of his work³³. Consequently, if the creator feels that modifying his work could damage the creator’s creative intent, or the creator’s “vision”, then the creator has the right to prevent such changes from being made, regardless of any economic rights held by other people who have the license or is the copyright holder of the work.

³⁰ The United States Copyright Act 1976, Section 302.

³¹ The United States Copyright Act 1976, Section 106.

³² Wan Y., Lu H.Y., *Copyright Protection for AI-Generated Outputs: The Experience from China*, “Computer Law & Security Review” 2021, vol. 42(2), DOI: <https://doi.org/10.1016/j.clsr.2021.105581>.

³³ Giovanni Maria Nori and Matteo Girolametti, *Blockchain and Private International Law, Blockchain and Private International Law*, Internatio (Leiden: Brill | Nijhoff, 2023), <https://doi.org/10.1163/9789004514850>.

Under §201, the ownership of a copyright may be transferred entirely or in part through any conveyance method or by operation of law. It may also be bequeathed in a will or pass through intestate succession according to the appropriate intestate succession laws as personal property. Any economic right mentioned in §106 may be granted and owned separately. §204 regulates the exercise of copyright ownership transfer which requires that any instrument of conveyance, note, or memorandum of the transfer must be in written and signed by the owner of the rights transmitted or that owner's lawfully authorized agent before a transfer of copyright ownership, other than by operation of law, is legitimate³⁴. Despite not being necessary for the validity of a transfer, a certificate of acknowledgment is prima facie proof that it was carried out if – (1) In the case of a transfer that is carried out domestically, the certificate is issued by a person qualified to administer oaths in the United States; or (2) In the case of a transfer that is carried out internationally, the certificate is issued by a diplomatic or consular officer of the United States, or by a person qualified to administer oaths whose authority is evidenced by a certificate from such an officer.

Despite the provisions in §106 and §106A, anyone who engages in the fair use of a copyrighted work by reproducing copies of the work or other methods mentioned in both sections with the intention of news reporting, commentary, educating, scholarly work, or research, is not committing copyright infringement. Moreover, the criteria to be taken into account when deciding whether a use of a copyrighted work is a fair use in a certain situation include: (1) the intent and nature of the use, including whether it is for profit or nonprofit educational purposes; (2) the characteristics of the copyrighted work; (3) the size and significance of the portion used in comparison to the copyrighted work as a whole; and (4) the impact of the use on the copyrighted work's potential market or value.³⁵

The Copyright Act views that, even when an author holds copyright, their protection is often subject to various limitations. In the United States, one of the key limitations to copyright protection is the Fair Use doctrine. Fair Use essentially allows the public to copy an author's work for purposes such as criticism, parody, or education, without requiring the author's permission. It is often defined as the "privilege of others than the owner of a copyright to use the copyrighted material reasonably without consent, despite the monopoly granted to copyright owners."³⁶

The fair use doctrine was first judicially recognized in 1841 in *Folsom v. Marsh*. In that case, the court stated that determining fair use involves considering factors like the nature and purpose of the use, the amount and value of the materials used, and whether the use harms the market or profits of the original work.³⁷ These criteria continue to serve as the fundamental considerations in fair use cases.

³⁴ The United States Copyright Act 1976, Section 204.

³⁵ Nafila Andriana Putri, "Copyright Protection for Internet Memes: The Doctrine of Fair Use in Indonesia," *JIPRO: Journal of Intellectual Property* 6, no. 2 (2023), <https://doi.org/10.20885/jipro.vol6.iss2.art3>.

³⁶ Holger Postel, "The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law," *The Chicago-Kent Journal of Intellectual Property* 5 (2006): 142, <https://api.semanticscholar.org/CorpusID:150847016>.

³⁷ Case No et al., "FOLSOM et Al. v. MARSH et Al.," <https://law.resource.org/pub/us/case/reporter/F.Cas/0009.f.cas/0009.f.cas.0342.2.pdf>.

Fair use is classified as an affirmative defence in copyright infringement claims. As noted by the court in *Storm Impact*, fair use "legally empowers a person to use the copyrighted works in a reasonable manner without the consent of the copyright owner."³⁸ Uses deemed fair typically provide a productive benefit to the public that goes beyond the original work's contribution.

When Congress introduced the fair use statute in 1976, it acknowledged that while the doctrine had been used as a defence in numerous copyright cases, no formal definition had been established. However, the courts had developed a set of criteria, which were codified in Section 107. To determine if a use is fair, courts must evaluate four factors outlined in this section.³⁹

The first factor, "the purpose and character of the work," differentiates between commercial and non-profit use and considers how much the new work transforms the original. The second factor, "the nature of the copyrighted work," asserts that more creative works are granted stronger copyright protection, while derivative works or compilations are afforded less. The third factor, "the amount and substantiality of the portion used," assesses how much of the "heart" of the original work is utilized. Finally, the fourth factor, "the effect on the market value of the original," is often regarded as the most significant. In evaluating fair use, courts consider and weigh all four factors in light of the overarching goals of copyright protection, ultimately determining whether the use of a copyrighted work is fair.⁴⁰

As an assessment of fair use, Judge Leval initially proposed that "transformativeness" should be central to fair use, suggesting a test to assess whether a new work "adds something new" or merely "supersedes" the original. However, in practice, "transformativeness" has introduced complexities. Over time, courts have expanded fair use in ways that sometimes blur its original boundaries, creating uncertainty about when appropriation art falls under fair use.⁴¹ Although fair use aims to encourage creativity, the current interpretation, emphasizing "transformativeness", has occasionally skewed decisions, overshadowing other essential factors in fair use analysis.

Three main issues arise in today's fair use landscape. *First*, courts have overly relied on "transformativeness" as a near-determinative factor, even though Judge Leval advocated a balanced analysis of all fair use factors. This approach can disproportionately favour secondary users, disregarding the copyright owner's rights and ultimately affecting the public interest. A fairer assessment would consider the need for licenses while balancing original owners' rights with broader public benefits.

Secondly, courts have begun interpreting the meaning or message of both original and appropriated works, an inherently subjective and potentially biased task. In assessing visual art, a court's judgment of the work's message or artist's reputation could unfairly influence

³⁸ Postel, "The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law."

³⁹ Betsy Rosenblatt, "Considering The Role Of Fairness In Copyright Fair Use," *Houston Law Review* 261 (2023): 261-93.

⁴⁰ Justin Hughes, "The Respective Roles of Judges and Juries in Copyright Fair Use."

⁴¹ Jane C Ginsburg, "Fair Use In The Us Redux : Reformed Or Still Deformed ?," *Singapore Journal of Legal Studies* 1183, no. March (2024): 1-38, <https://law.nus.edu.sg/wp-content/uploads/2022/12/20230131-KGC-Lecture-Flyer.pdf>.

the fair use determination, potentially leading to biased outcomes.⁴² This is problematic, as determining the value of art should not fall within a court's purview, nor should it suppress diverse or controversial viewpoints.

Thirdly, the focus on message in “transformativeness” downplays other aspects of an artist’s intent and character of use, often reducing fair use to a binary judgment of whether a work is transformative. A more nuanced approach, viewing “transformativeness” along a spectrum, could help courts more effectively weigh this factor. Courts should resist “factor counting” and instead assess the weight of each factor in context to avoid skewed results.⁴³

In rebalancing fair use, courts would ideally use a spectrum to evaluate “transformativeness” rather than a rigid dichotomy. They should consider whether the use of the original work is essential or could be achieved without infringing upon another’s copyright. If an artist can achieve a similar result without relying on copyrighted materials, their fair use claim may weaken.

Ultimately, fair use is intended to be flexible, and while complete certainty is impossible, a more nuanced assessment of “transformativeness” would help. By focusing on whether fair use is necessary to foster creativity or risks harming the original work, courts can more effectively balance the rights of all artists without overextending fair use. Although ambiguities will remain, a fair use framework that limits “transformativeness” to necessary contexts could help protect artistic expression while preserving copyright integrity.

B. The Indonesian Copyright Law

Indonesian Copyright law generally grants ownership to the author of a work ⁴⁴. However, in specific instances termed "work made for hire," the copyright may not reside with the author. Article 34 of the Copyright Law recognizes such cases, stating that if a creation is designed by one individual and executed by another under the direction and supervision of the designer, the designated creator is the person who designed the creation.

The types of works that are protected under the Indonesian Copyright Law are scientific, artistic, and literary works, consisting of: a. books, pamphlets, typographical arrangement of published written work, and all other written works; b. talks, lectures, speeches, and other similar Works; visual aids made for educational and scientific purposes; d. songs and/or music with or without lyrics; e. dramatic works, musical dramas, dances, choreography, puppet shows, pantomimes; f. fine artworks in any forms such as paintings, drawings, engravings, calligraphy, carvings, sculptures, or collage; g. applied artworks; h. architectural works; i. maps; j. batik artworks or other patterns art; k. photographic works; l. portraits; m. cinematographic works; n. translations, interpretations, alterations, anthologies, databases, adaptation, arrangement, modification, and other works resulting from transformation; o. translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions; p. compilation of Works or data, whether in a readable format by Computer

⁴² Niva Elkin-Koren and Neil Weinstock Netanel, “Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of US Opposition,” *Hastings LJ* 72, no. 4 (2020): 1121.

⁴³ Barton Beebe, “An Empirical Study Of U.S. Copyright Fair Use Opinions Updated, 1978-2019,” *Journal of Intellectual Property and Entertainment Law* 10, no. 1 (2020): 39, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3758229.

⁴⁴ Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright.

Program or by other media; q. compilation of traditional cultural expressions as long as the compilation constitutes an original work; r. video games; and s. Computer Programs.

The law gives copyright protection for: a. all Works and Related Rights products of Indonesian citizens, residents and legal entities; b. all Works and Related Rights products are not created by Indonesian citizens, not Indonesian residents, and not Indonesian legal entities that are being announced for the first time in Indonesia; c. all Works and/or Related Rights products and users of Works and/or Related Rights products are not Indonesian citizens, not Indonesian residents, and are not Indonesian legal entities with the following provisions: 1. The country has a bilateral agreement with the Republic of Indonesia regarding the protection of Copyright and Related Rights; or 2. their country and the Republic of Indonesia are parties or participants in the same multilateral agreement regarding the protection of Copyright and Related Rights.

Furthermore, Articles 41 and 42 mention works that are not protected by the Copyright Law. Works that are not protected are: a. works that have not been fixed in tangible form; b. every idea, procedure, system, method, concept, principle, finding, or data despite having been expressed, stated, described, explained, or incorporated in a Work; and c. tools, objects, or products that are created solely to resolve technical problems or of which form only serve functional needs. There is no copyright for works of a. results of open meetings of State institutions; b. laws and regulations; c. State speeches or speeches of government officials; d. court decisions or judge provisions; and e. scriptures or religious symbols.

The author's entitlement to the economic right to a work is stipulated under Paragraph 2 of the Copyright Law. There are two types of copyright protection duration under the Copyright Law, namely 70 years and 50 years. Different works might have different copyright protection durations.

Article 58 mentions the copyright protection on works of a. books, pamphlets, and all other written works; b. talks, lectures, speeches, and other similar Works; c. props made for education and scientific purposes; d. songs or music with or without lyrics; e. dramatic works, musical dramas, dances, choreography, puppet shows, pantomimes; f. fine artworks in all forms such as paintings, drawings, engravings, calligraphy, sculpture, sculptures, or collage; g. architectural works; h. maps; and i. batik artworks or other pattern arts begins on January 1st of the following year and lasts for a term that includes the author's lifetime and 70 years after the author's death. In instances where the aforementioned works were created by multiple authors, the copyright protection will begin on January 1st of the following year, and the copyright protection will last for the duration of the last living author's life and 70 years after that author's death. Additionally, if the works are owned or held by a legal entity, the copyright protection will last for 50 years since its first publication.

Moreover, Article 59 states that works of: a. photographic works; b. Portraits; c. cinematographic works; d. video games; e. Computer programs; f. typographical arrangement of written works; g. translations, interpretations, alterations, anthologies, databases, adaptations, arrangements, modifications, and other work resulting from transformation; h. translations, adaptations, arrangements, transformations, or modifications of traditional cultural expressions; i. compilation of Works or data, either in a readable format by a Computer Program or other media; and j. compilation of traditional cultural expressions

insofar as the compilation is an original work, will be protected under the copyright law for 50 years since its first publication. Furthermore, the copyright protection for applied arts has lasted for 25 years since its initial publication.

Article 5 explains the moral right that is vested eternally to the author to: a. continue to include or to exclude their name on the copy concerning the public use of their Works; b. use an alias or pseudonym; c. change their Works to comply with appropriateness in society; d. change the title and subtitle of their Works; and e. defend their rights in the event of distortion of Works, mutilation of Works, modification of Works, or other acts which will be prejudicial to their honor or reputation. While the moral rights mentioned cannot be transferred while the author is still alive, the exercise of these rights is transferable through a will or for other reasons in conformity with the rules and regulations once they have passed away. If moral rights are transferred, the recipient may release or refuse to exercise such rights under the condition that the release or refusal is made in writing. The Copyright Law grants the author to possess: a. Copyright management information and/or b. Copyright electronic information to defend the moral rights mentioned in the aforementioned article.

The economic right is explained in Article 8 as the sole and exclusive right of the author or the copyright holder to profit financially from the works. The economic right that is vested unto the includes a. publication of the works; b. Reproduction of the works in all its forms; c. translation of the works; d. adaptation, arrangement, or transformation of the works; e. Distribution of the works or their copies; f. performance of the works; g. declaration of the works; h. Communication of the works; and i. rental of the works.

Everyone who makes use of the mentioned economic rights is required to get consent from the author or the copyright holder. It is forbidden for anybody to engage in Commercial Use or Reproduction without the author's or the copyright holder's consent. For anyone to engage in the commercial use or reproduction of a work, they must receive a license to do so. According to Article 80, unless stipulated otherwise, the author or the copyright holder shall give the license to another party in the form of a written agreement to engage in the economic rights in Article 9(1) and/or the economic rights of performers in Article 23(2) and/or the economic rights of phonogram performers in Article 24(2) and/or the economics rights of broadcasting institutions in Article 25(2).

The duration of the License Agreement is limited and does not go beyond the duration of the Copyright and Related Rights. Unless specified otherwise, acts under the agreement require the Licensee to pay Royalties to the Copyright Holder or Related Rights owner throughout the License period. The amount and process of granting Royalties are determined by the License agreement between the parties involved. However, there are some instances in which it is lawful for anyone to use, take, duplicate, and/or modify a work and/or related rights work as a whole or in a substantial part. Article 44 explains the exception in which the person isn't considered in committing copyright infringement if they mention the source or cited it in full with the intention of: a. Education, research, scientific writing, report writing, writing a critique or review of a problem – all of which do not adversely affect the reasonable interests of the Author or the Copyright Holder; b. security, governance, legislative, and judiciary; c. talks solely intended to advance science and education; d. free performances or shows – all of which do not adversely affect the author's reasonable interests.

The term "reasonable interests" is detailed in the elucidation of Article 44 as interests balanced in acquiring economic benefits from a work. It emphasizes that in copyright law, the concern extends beyond commercial intent. It's crucial to assess whether an action harms the copyright holder's reasonable interests⁴⁵. Thus, even if reproducing a work lacks the intention to gain profit, if it adversely affects the copyright holder's reasonable interests, i.e., monetary interests, it may be deemed copyright infringement.

In regard to the concept of fair use, In Indonesia, it is governed by Articles 43 through 49 of the Indonesian Copyright Law. These provisions state that non-commercial uses, with the consent of the original author, are not deemed copyright violations. When a work or related rights product is used, reproduced, or modified in substantial parts, it is not considered an infringement if the source is duly credited.⁴⁶ However, it is crucial to ensure that such use does not interfere with the legitimate interests of the author or rights holder, particularly in educational contexts. For personal gain, only one copy of a work may be reproduced without the author's consent, provided it does not involve a substantial portion of the original work and does not conflict with the author's or rights holder's legitimate interests.⁴⁷

Article 44, paragraph (1)(a) of Indonesian Copyright Law addresses "reasonable interest," as a general exception, striking a balance between the economic benefits of a work and its use under exceptions to copyright protection. Despite this, the application of the fair use principle is subject to certain limitations.⁴⁸ These include factors such as the purpose and nature of the use, the nature of the creation, the amount and portion used, and the impact of the use on the market or the value of the work.

C. Comparative Result

Since both states adhere to the TRIPS agreement and are members of the WTO, there are some similarities in their laws regarding copyright share. The most notable similarities are that both Indonesia and United States Copyright Laws recognize the economic and moral rights that are owned by the author and/or the copyright holder and copyright registration is not compulsory or required because the copyright is already attached to a work or creation when it takes on an intangible form. The sole purpose of registering a copyright with the copyright office is to give the author or copyright holder a stronger bargaining position if a copyright dispute arises in the future.⁴⁹ However, WTO enables the state members to have the freedom to pursue their domestic policy goals, some policies are different. The key elements that can be compared and analyzed between the United States Copyright Act and the Indonesian Copyright Law are:

⁴⁵ Christiani T.A., Qureshi M.I, Kosasih J.I., *Artificial Intelligence (AI) In Copyright Law In Indonesia*, "Journal of Positive School Psychology" 2022, vol. 06(3), pp. 418–423.

⁴⁶ Putri, "Copyright Protection for Internet Memes: The Doctrine of Fair Use in Indonesia."

⁴⁷ Sardjana Orba Manullang et al., "Limits of the Concept of Fair Use in Law Number 28 of 2014 Concerning Copyright," *Jurnal Hukum Dan HAM Wara Sains* 2, no. 03 (2023): 181–87, <https://doi.org/10.58812/jhhws.v2i03.251>.

⁴⁸ Margaritha Rami Ndoen, Hesti Monika, "Prinsip Fair Use Terhadap Cover Version Lagu Dalam Perspektif Perlindungan Hak Cipta (Perbandingan Antara Undang-Undang Hak Cipta Indonesia Dengan Amerika Serikat)," *Paulus Law Journal* 1, no. 1 (2020): 1–8, <https://doi.org/10.51342/plj.v1i1.42>.

⁴⁹ Nazhif Ali Murtadho, "International Legal Resolution of the Recognition Dispute over the Intellectual Property Rights of the 'Reog Cultural Dance' by Malaysia," *Jhbhc* 7, no. 2 (2024): 69–85, <https://doi.org/10.30996/jhbhc.v7i2.10525>.

1. The Author's Exclusive Rights

As previously discussed, both Copyright Laws vest both economic and moral rights to the original author of a certain work. However, the major difference is that while the Indonesian Copyright Law vests moral rights to authors of any works, the United States Copyright Act only vests moral rights to authors of visual works. The additional rights owned by authors of visual works are rights of attribution and integrity. The right of attribution is the right of an author to be credited as the author of their work and the right of integrity is to prevent prejudicial distortions of the work⁵⁰. Both rights are referred to as additional rights because it is only given to authors of visual works, therefore authors of non-visual arts like music and poetry won't receive the rights.

The Copyright Act of 1976 defines visual arts as a. a painting, drawing, print, sculpture, or a photograph produced only for exhibition purposes (not a personal album); b. The work must exist in one copy or in a limited edition of no more than 200 copies which are consecutively numbered and signed by the artist⁵¹. The art that doesn't qualify for the visual arts right is any work that isn't aforementioned and/or art that was made for hire. A work made for hire is when the employer for whom the work was created is considered as the author and unless the parties have expressly agreed otherwise in a written contract signed by them, owns all of the rights included in the copyright⁵².

The exclusive rights given by the Copyright Act of 1976 are the rights of attribution and the rights of integrity. The rights of attribution give an author of visual art: a. the right to claim authorship of that work, and to prevent the use of their name as the author of any work of visual art which he or she did not create. Moreover, the right to integrity gives an author of visual art to: a. prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to their honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and b. to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

The rights of attribution and the rights of integrity are similar in comparison to the Indonesian Copyright Law's moral rights, the only difference is the Indonesian Copyright Law vests the rights of attribution and integrity to artists of any art.

2. Protected Works

§201 of the Copyright Act of 1976 and Article 40 of the Copyright Law mention the art that is protected under each law. The protected subject matter of both Copyright Laws is similar, however, there are some dissimilarities. The works that are protected by the Indonesian Copyright Law but not the United States Copyright Act are extemporaneous speeches or speeches with no recollection or written form, batik in the form of applied arts, a compilation of traditional cultural expressions as long as the compilation is an original work and computer software.

⁵⁰ The United States Copyright Act 1976, Section 106A.

⁵¹ The United States Copyright Act 1976, Section 101.

⁵² The United States Copyright Act 1976, Section 201.

3. Copyright Protection Duration

The copyright protection duration in Indonesia depends on the nature of the art and/or the copyright holder. The arts mentioned on Article 58 have copyright protection that lasts for as long as the author's lifetime with the addition of 70 years. In instances where the author of the art is more than 1, that protection lasts until the last remaining author's death with the addition of 70 years, effective on January 1st of the following year. If the copyright of the same art is created by a legal entity, the protection will last for 50 years since the first publication.

On the other hand, the copyright of the art mentioned in Article 59 lasts for 50 years since the first publication. In addition, the copyright protection for applied arts lasts for 25 years since its first publication. Whereas the copyright protection of arts in the form of folklore or traditional cultural expressions is owned by the state with no duration period.

Meanwhile, the validity period of copyright in the United States varies, depending on the date of creation and/or the copyright holder. For works created before 1978, but is not published, it lasts for as long as the life of the author with the addition of 70 years; for works published between 1923-1963, it lasts for 28 years, with the option to renew for a period of 67 years, and if not renewed it will enter the public domain; for works published between 1964-1977, it lasts for 95 years; for works created in 1978 or later: a. for a single author namely as long as the creator lives with the addition of 70 years, and b. for creators in the form of legal entities or anonymous creators, the protection lasts for 95 years since its first publication or 120 years from creation, whichever is shorter).

As an effort to further protect the economic rights and moral rights of creators and owners of related rights as an important element in developing national creativity, the bill of the Copyright Law of 2014 was passed. With it, the copyright protection is carried out over a longer period in line with the application of regulations in various countries so that the copyright protection period in certain fields is enforced during the life of the creator with the addition of 70 years after the creator dies, where it was initially as long as the author's lifetime with the addition of 50 years.

3.2. The Indonesian Copyright Law Compared to the United States Copyright Act of 1976 in terms of the Ownership of AI-Generated Art

A. AI-Generated Art according to the United States Copyright Act

The United States, which adopted the common law legal system, adheres to John Locke's notion of the concept of ownership, which strongly ties to the Basic Human Rights with his dictum: "Life, liberty, and property". According to Locke's "fruit of labor theory", everyone deserves to benefit from their labor, regardless of how they put in their effort⁵³. In his book, *Two Treatises of Government*, John Locke states that all of God's creations were bestowed to people as a common property to be shared⁵⁴. However, each person possesses different properties in each of their own bodies. One of the principles that Locke mentioned is when

⁵³ Morgan A., *Universal Declaration of Human Rights (UDHR)*, "1-4 Encyclopedia of American Civil Rights and Liberties: Revised and Expanded Edition" 2017, Volumes 1-4, DOI:10.4337/9781789903621.universal.declaration.human.rights.

⁵⁴ Kleidosty J., Jackson I., *Two Treatises of Government*, *Two Treatises of Government*, 2017, pp. 1-91, DOI:10.4324/9781912282234.

someone puts their labor into something shared, they turn it into their property⁵⁵. Therefore, when a property is created out of the world, only the creator himself possesses the right of the property.

In spite of this theory, an AI-generated art is not able to be protected under copyright. The reason behind this is it doesn't fulfill the essence of a creation under the Copyright Act, namely originality, creativity and tangible form. While the AI-generated art may be in a tangible form, it wouldn't have the essences of creativity and originality since it is created according to the data it stores and it lacks unique creativity which is only possessed by humans.

One of the famous cases in the intellectual property field is *Naruto v. Slater* or as widely known as the "Monkey Selfie". The case offers valuable insight into how modern courts assess the eligibility of non-human authors for copyright protection. When David J. Slater was in Indonesia, a macaque named Naruto grabbed up the camera and took numerous selfies. The People for the Ethical Treatment of Animals sued to have Naruto recognized as an author, but the court rejected their claim. The logical conclusion is that human creativity is what the Copyright Office and courts require.

In August 2023, Judge Beryl A. Howell ruled on the case of *Stephen Thaler v. Shira Perlmuter*, Register of Copyrights and Director of the United States Copyright Office (USCO).⁵⁶ When Plaintiff Stephen Thaler attempted to register a piece of visual art created by his computer software called the "creativity machine", with his computer software listed as the author, the USCO denied the application. He initially argued that the copyright should be transferred to him as the owner of the computer system. However, the ground for the denied application is that the submitted piece of work lacked human authorship, which is a crucial criterion for a valid copyright to be issued⁵⁷. This caused the plaintiff to challenge the decision which led him to file a lawsuit against United States Copyright Office and Shira Perlmuter, as the Register of Copyrights and Director of the USCO.

The plaintiff contends that his computer program is an AI that can produce unique works of visual art that are comparable to those produced by humans. Plaintiff tried to register his work with the USCO after it was created. The plaintiff sought to claim the copyright of the "computer-generated work" himself "as a work-for-hire to the owner of the Creativity Machine", according to his application, which named the Creativity Machine as the author and explained the work had been "autonomously created by a computer algorithm running on a machine"⁵⁸. After his initial attempt to file for copyright protection of his artwork was denied, he asked for a reconsideration, which confirmed that his work was autonomously produced by an AI and lacked human authorship. However, he disputed the USCO's requirement for human authorship, contending that AI should be recognized as an author where it otherwise meets authorship criteria, with any copyright ownership vesting in the AI's

⁵⁵ Kleidosty and Jackson.

⁵⁶ United States District Court for the District of Columbia, *Thaler v. Perlmuter* No. 22-CV-384-1564-BAH https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2022cv1564-24.

⁵⁷ United States District Court for the District of Columbia.

⁵⁸ United States District Court for the District of Columbia.

owner.⁵⁹ The Copyright Office once more declined to register the work, using the same justification as before: "Because copyright law is confined to 'original intellectual conceptions of the author', the Office will refuse to register a claim if it judges that a human being did not produce the work."

In the lawsuit, the plaintiff supports his argument by stating that according to the work for hire doctrine. However, by refusing registration, the Register came to the conclusion that there was nothing to register and that there was no doubt as to whose registration it belonged as no legitimate copyright had ever existed in a work produced without human input.

The US Copyright Office has stated that works generated entirely by AI without human intervention are not eligible for copyright protection.⁶⁰ However, if there is an element of human creativity in the process, then protection may be granted. This is in line with the decision in *Feist Publications v. Rural Telephone Service Company*, where the court affirmed the importance of human creativity in determining copyright ownership so that a creation relies heavily on the "transformativeness".⁶¹

The fair use doctrine's primary goal is to "guarantee breathing space within the confines of copyright"⁶². The following factors should be considered when determining whether a copyrighted use is fair use in a particular circumstance: (1) the intent and nature of the use, including whether it is for profit or nonprofit educational purposes; (2) the characteristics of the copyrighted work; (3) the size and significance of the portion used in comparison to the copyrighted work as a whole; and (4) the impact of the use on the copyrighted work's potential market or value⁶³.

The first and the last criteria are widely considered as the most significant among court decisions⁶⁴. The first criterion entails determining whether the allegedly infringing usage is transformative and whether it is commercial in character. Fair use is substantially supported by a finding of transformative use and strongly opposed by a judgment that the use is commercial. The act of transformation entails "altering the original with new expression, meaning, or message." Works are only deemed transformative when altered or used in a different context such that the work is transformed into a new creation. Instead, transformation entails adding new or distinct goals or functions to the allegedly infringing work that are not present in the original⁶⁵.

⁵⁹ Zhonghui Shao et al., "Authorship Style Transfer with Inverse Transfer Data Augmentation," *AI Open* 5 (2024): 94–103, <https://doi.org/https://doi.org/10.1016/j.aiopen.2024.08.003>.

⁶⁰ Hafiz Gaffar and Saleh Albarashdi, "Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape," *Asian Journal of International Law*, 2024, 1–24, <https://doi.org/10.1017/S2044251323000735>.

⁶¹ Niki Kuckes, "From Andy Warhol to Barbie : Copyright ' s Fair Use Doctrine After Andy Warhol Foundation v . Goldsmith," *Roger Williams University Law Review* 29, no. 2 (2024).

⁶² U S Copyright Office, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 Justia US Supreme Court Center 569–600, 1994. <https://supreme.justia.com/cases/federal/us/510/569/>.

⁶³ The United States Copyright Act 1976, Section 107.

⁶⁴ Gaffar H., Albarashdi S., *Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape*, "Asian Journal of International Law" 2024, vol. 24(1), pp.566, DOI:10.1017/S2044251323000735.

⁶⁵ U S Copyright Office, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 2d Cir. 2014. <http://copyright.gov/fair-use/index.html>.

B. AI-Generated Art according to the Indonesian Copyright Law

Article 1 (2) of the Indonesian Copyright Law defines an author as a person or several people who individually or together produce a creation that is unique and personal. In this instance, a person is referred to as a rights holder, or legal subject, under the Indonesian Civil Law. In addition, Subekti clarified that everyone is essentially the bearer of right from the moment of their birth until their death. However, not every bearer of right can be regarded as competent in court, for instance, a person will be considered competent once they reach the age of 21. Article 1 (27) of the Copyright Law states that a "person" can be an individual or a legal entity. Both can bear rights and become legal subjects.

The Copyright Law doesn't elucidate the "unique and personal" characteristics that is mentioned in Article 1(2). However, precedent, as illustrated in *Banjarnahor v. PT Holcim* case, the court at the Judicial Review stage determined copyright ownership of a computer program by asking the parties of the dispute about how the computer program operated. The plaintiff, possessing exclusive understanding of the software's operation, was deemed to have the "unique and personal" characteristics⁶⁶. Therefore, the plaintiff was recognized as the creator of the software.

Based on the precedent, the "unique and personal" characteristics are closely related to the creator's knowledge of their creation. In addition, determining whether a work is unique and personal hinges on the claimant's knowledge of their work. The individual who knows how to make the software operate is considered to have the "unique and personal" characteristics in copyright disputes involving software.

"Could an AI explain the work that it generated?" is the question that could determine whether an AI is deemed as an author under Article 1(2) of the Copyright Law. The AI programmer alone is the only one who can describe how an AI generates something. Consequently, it is impossible to say that AI-generated work possesses "unique and personal" qualities of its work under the current laws. Therefore, AI cannot meet the two conditions for copyright ownership listed. Since AI is not human and lacks unique personal traits that could be connected to the art, it cannot be regarded as the creator of a creation under the terms of the Copyright Law⁶⁷. AI cannot be regarded as the creator of a creation under the "unique and personal" characteristic criteria if it is still believed that only the creator can explain how a creation operates.

In Indonesia, AI-generated art is currently not submitted to the Directorate General of Intellectual Property because, under the Copyright Law, AI-created works are not deemed protectable creations, and AI itself is not recognized as a creator⁶⁸. The main concern regarding AI pertains to its illicit use, particularly in manipulating personal data. This has led to an increase in class-action lawsuits against AI development firms, take Microsoft's GitHub, for instance. Even though Indonesia already has a legal foundation for tort cases, small businesses find it difficult to understand technology and disclose data to safeguard their privacy interests.

⁶⁶ DK PM. BANJARNAHOR, M.Sc., VS PT HOLCIM INDONESIA, 23 PK/Pdt.Sus-HKI/2015. <https://putusan.mahkamahagung.go.id>

⁶⁷ PM. BANJARNAHOR, M.Sc., VS PT HOLCIM INDONESIA. <https://putusan.mahkamahagung.go.id>

⁶⁸ Lim D., *Generative AI and Copyright: Principles, Priorities and Practicalities*, "Journal of Intellectual Property Law & Practice" 2023, vol. 18(12), pp. 841-842, DOI:10.1093/jiplp/jpad081.

Amid uncertainties about AI's legal status, visual artists in Indonesia shouldn't be afraid of the infringement caused by AI. As mentioned earlier, AI needs a database to generate art. There are many examples of the use of creations, such as musical compositions, drawings, photos, or books, which become input data for training and developing AI so that it can generate art. If the art that is stored in the database had entered the public domain or used an open license, then there wouldn't be an issue.⁶⁹ However, if it is discovered that the art stored inside the database is protected by copyright, and the AI uses it for reproduction by creating art, it will be a legal problem.

Copying or commercial use of a work without the creator's or copyright holder's consent is strictly prohibited. Violating this prohibition may lead to civil and criminal legal consequences.⁷⁰ The process, act, or method of reproducing one or more copies of the work in any way, in any form, and for any duration is referred to as reproduction by the Copyright Law.

The use of any creation for input data in AI development can be considered as reproduction. If it is for commercial purposes, it is considered a Reproduction for Commercial Use⁷¹. Therefore, parties developing AI in Indonesia are required to obtain permission from the creator or copyright holder when using the work as input data.⁷²

However, the Copyright Law also outlines limitations allowing, under specific circumstances, the use of others' works without owner's consent. For instance, utilizing a work for research and education, safeguarding the author's or copyright holder's legitimate interests, is not considered infringement, commonly known as the fair use doctrine.⁷³ Thus, it is essentially possible to use copyright protected works as input data for AI development in Indonesia for educational and research purposes without obtaining owner's consent, though the author's or copyright holder's reasonable interests should still be respected. If such use proves counterproductive to their legitimate interests, it may be deemed copyright infringement.⁷⁴

The issue is that, despite the explanation that a "reasonable interest" is an interest grounded in fairness in making use of the financial advantages of a creation, this "fairness" is not clearly measured.⁷⁵ Yet, Indonesia has no legal precedent that serves as a benchmark for determining the "fairness" between these legitimate interests.

In addition, referring to the provisions of Article 43(d) of the Copyright Law, the creation and dissemination of copyrighted work belonging to other parties through non-commercial

⁶⁹ Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019."

⁷⁰ Enas Mohammed Alqodsi and Dmitry Gura, "High Tech and Legal Challenges: Artificial Intelligence-Caused Damage Regulation," *Cogent Social Sciences* 9, no. 2 (December 15, 2023): 2270751, <https://doi.org/10.1080/23311886.2023.2270751>.

⁷¹ Trepanier L., Syeda A., El Asaleh R., *Embracing Integrated Tech in Graphic Communications: Industry 5.0 Perspectives*, "Journal of Print and Media Technology Research" 2024, vol. 13(1), pp. 17-34, DOI:10.14622/JPMTR-2320.

⁷² Maya Ruthiani, "Transferring Copyright Ownership of Nft," *Perspektif* 1, no. 3 (2023): 216-24, <https://doi.org/https://doi.org/10.30742/perspektif.v28i1.845>.

⁷³ Putri, "Copyright Protection for Internet Memes: The Doctrine of Fair Use in Indonesia."

⁷⁴ Bingqiao Luo et al., "AI-Powered Fraud Detection in Decentralized Finance: A Project Life Cycle Perspective," *ACM Comput. Surv.* 57, no. 4 (December 2024), <https://doi.org/10.1145/3705296>.

⁷⁵ Putri, "Copyright Protection for Internet Memes: The Doctrine of Fair Use in Indonesia."

information and communication technology media is not considered a copyright violation, thus this can support the creation of works in digital format to be used as input data in the development of non-commercial AI in Indonesia. However, if the original creator objects to the creation of a digital format for his work, then this action is considered a copyright violation. This provision can be an obstacle to the development of AI for non-commercial purposes in Indonesia because the creator can object at any time for any reason, which could then obstruct the ongoing AI development program for non-commercial purposes in Indonesia. Furthermore, Article 46 (1) of the Copyright Law stipulates that reproduction for personal purposes of works that have been publicized may be done by only making a single copy without the permission of the creator or copyright holder. This can support engineers in collecting data that is needed for work protected by copyright belonging to another party in preparing input data for developing AI in Indonesia.

C. Comparative Result

1. AI Cannot be an Author or a Copyright Owner

AI cannot be deemed as an author by both Copyright Laws. Both laws only recognize natural persons to be an author and vest copyright ownership exclusively to natural persons or legal entities.⁷⁶ AI is neither a natural person nor a legal entity, therefore it cannot receive copyright ownership. In the United States, this conclusion is supported by §101 of the Act defines anonymous work, as a work on the copies or phonorecords of which no natural person is identified as author. Moreover, the case of *Burrow-Giles Lithographic Company v. Sarony*, the Court defines the author as "...he to whom anything owes its origin; originator; maker; one who completes a work of science or literature"⁷⁷.

Similarly, in Indonesia, only a person can receive copyright ownership. Article 1 (27) of the Copyright Law states that a "person" can be an individual or a legal entity. Both have the capacity to bear rights and become legal subjects, while an AI is unable to bear rights and is not a legal subject.

According to § 101 of the U.S. Copyright Act, a "copyright owner" refers to the individual or entity that holds any of the exclusive rights included in a copyright. In contrast, Article 1 of Indonesian Copyright Law defines a copyright holder as the creator, those who legally obtain the rights from the creator, or other parties who receive these rights from those who legally possess them. § 102(a) of the U.S. Copyright Act explains that copyright protection is granted to original works of authorship that are fixed in any tangible form of expression. The key elements defining copyright in the U.S. are originality, works of authorship (creations), and tangibility. In contrast, Indonesian law does not explicitly mention "originality," but this concept is implied in the definition of a "creator," who is described as someone whose work is "unique" and "personal." Additionally, unlike the U.S. Copyright Act which protects both published and unpublished works, Indonesian law incorporates the declaratory principle, which requires works to be declared publicly to receive copyright protection, without the need

⁷⁶ Fajar Sugianto, Astrid Athina Indradewi, and Yohanie Maretta, "Book Pirates and Copycats : Infringement That Speaks For Itself," *Anthology: Inside Intellectual Property Rights* 2, no. 1 (2024): 259–69, <https://ojs.uph.edu/index.php/Anthology>.

⁷⁷ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 1884 <https://supreme.justia.com/cases/federal/us/111/53/>.

for prior registration. This protection does not apply for unpublished work. Thus, a lawful copyright owner enjoy the exclusive rights vested to the authors or creators of works. Both Indonesian and U.S. copyright laws recognize economic rights for creators, allowing them to control the reproduction, distribution, and sale of their works. If AI ability is lacking of more specifically direct or adjust visual elements show it only replicate existing works, meaning it has no personalization and shows no uniqueness of intellectuality, thus it cannot be considered as author.

2. AI-Generated Art isn't Eligible for Copyright Protection

Both countries share a similar opinion on the copyright protection of AI-Generated Art. The basis of their argument is that AI-Generated Art is not qualified for copyright protection. This is because, as defined by the Copyright Act, a creation must meet three requirements to be considered valid: originality, creativity, and tangible form. Even while AI-Generated art could exist in a tangible form, it would lack the essential elements of originality and creativity because it is produced based solely on the data it retains and lacks the kind of unique creativity that only humans can possess⁷⁸.

The rejection of the copyright protection of AI-Generated Art is precedent in the case *Stephen Thaler v. Shira Perlmutter*, Register of Copyrights and Director of the United States Copyright Office. The judgment of the case will be the fundamental ruling on the copyright protection of AI-Generated Art in the United States. The reason for the rejection of the claim is that the judge deemed AI-Generated Art as a work that lacks human authorship. The work was rejected because there was nothing to register and there was no doubt as to whose registration it belonged as no legitimate copyright had ever existed in a work produced without human input.

Currently, there is no case regarding the copyright protection for AI-Generated Art in Indonesia. However, precedents regarding copyright supports the argument that AI-Generated Art isn't eligible for copyright protection in the future. Moreover, Article 1(2) of the Copyright Law is the fundamental law that defines an author as a person or several people who individually or together produce a creation that is unique and personal. It has been understood that AI is not eligible to be considered as an author by the Copyright Law because it couldn't generate art that has "unique and personal" characteristics.

3. The Usage of Copyrighted Art for Input Data in the Database

Although it is not possible to be granted copyright protection for AI-Generated Art, it is legal for engineers to use copyrighted art for input data in the AI's database. Both countries adhere to the fair use doctrine which allows engineers to utilize copyrighted art as input data. This doctrine is mentioned in both the United States and Indonesian Copyright Laws. The fair use doctrine is mentioned in §107 of the Copyright Act and in Article 44(1) of the Copyright Law. However, the usage of copyrighted art to train AI might be permitted as long as the usage of the copyrighted art is used for research & education and fulfills the 4 determining factors which are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole,

⁷⁸ Congressional Research Service, *Generative Artificial Intelligence and Copyright Law Do AI Outputs Enjoy Copyright Protection?*, 2023, <https://crsreports.congress.gov>.

and the effect of the use upon the potential market for or value of the copyrighted work.⁷⁹ Increasing the permissible utilization for copyrighted works in machine learning enables engineers to keep advancing computer science and technology, which is both socially and lawfully acceptable.⁸⁰

In Indonesia, the fair use doctrine is addressed in Section V, "Limitations of Copyright," which states that certain uses of copyrighted works are not considered copyright infringement, provided that the source is attributed, and that the use is limited to non-profit or non-commercial purposes, such as social activities in education, knowledge, research, and development.

One challenge in addressing copyright infringement in Indonesia lies in the lack of specific factors to define fair use boundaries. Unlike the U.S., which relies on a four-factor test to assess fair use,⁸¹ Indonesia does not have such a structured framework. While Indonesia cannot directly replicate the U.S. legal system, there are valuable insights to be gained from the U.S. approach to both national and international fair use disputes.

In contrast, Indonesian Copyright Law, as outlined in Article 40 (2) & (3), also requires fixation and originality for a work to be protected by copyright. However, one additional and often overlooked criterion in Indonesian law is the requirement of "minimal creativity." This means that, in addition to fixation, the work must also demonstrate some level of intellectual effort or creativity, ensuring that the work reflects the creator's intellectual abilities. Moreover, in terms of protected works, Indonesia outlined a more comprehensive list of protected works compared to that of the United States'

4. Conclusions

The major differences between the Indonesian and United States Copyright Laws are the author's exclusive rights, the protected works, and the protection duration. The United States Copyright Act vests moral rights exclusively to artists of visual art, while the Indonesian Copyright Law vests moral rights to artists of any works. Works in the form of extemporaneous speeches and computer software are protected under the Copyright Law, but not under the Copyright Act. AI itself is protected under the Patent Law in the United States. Lastly, according to the Copyright Law, the copyright protection period depends on the nature of the art and/or the copyright holder. Meanwhile, the validity period of copyright in the United States varies, depending on the date of creation and/or the copyright holder.

The key similarities between the Indonesian and the United States Copyright Laws regarding the copyright ownership of AI-generated art are AI cannot be an author or copyright owner, AI-generated art isn't eligible for copyright protection, and the usage of Copyrighted Art for Input Data in the Database is permissible as long as it is used according to the fair use doctrine. AI can't be regarded as an author or copyright holder by both Copyright Laws because it isn't a natural person or a legal entity. Both Copyright Laws do not vest copyright

⁷⁹ Jane C Ginsburg, "Fair Use In The Us Redux : Reformed or Still Deformed ?," *Singapore Journal of Legal Studies* 1183, no. March (2024): 1–38. <https://law.nus.edu.sg/wp-content/uploads/2022/12/20230131-KGC-Lecture-Flyer.pdf>.

⁸⁰ Yu Yang and Shijun Liao, "Ultra-Chaos: A Great Challenge for Machine Learning and AI," *International Journal of Bifurcation and Chaos* 34, no. 16 (2024): 2450202, <https://doi.org/10.1142/S021812742450202X>.

⁸¹ Betsy Rosenblatt, "Considering The Role of Fairness in Copyright Fair Use."

protection to AI-generated art because it lacks human authorship and doesn't fulfil the 3 essential elements for a creation to be protected which are the elements of originality, creativity, and tangible form. Especially if AI ability is lacking of more specifically direct or adjust visual elements show it only replicate existing works, meaning it has no personalization and shows no uniqueness of intellectuality, thus it cannot be considered as author. However, it is legal under the fair use doctrine to use copyrighted art to input data in an AI database, as long as the usage of copyrighted art is used for research and/or education & fulfils the 4 (four) determining factors for fair use.

Indonesia cannot fully adopt the legal system of the United States, despite the many positive examples, such as how the U.S. resolves fair use disputes at both national and international levels. This is primarily because Indonesia's legal system differs significantly from that of the United States, and even within the U.S., the application of fair use in judicial decisions is not always consistent. Therefore, in developing its own copyright framework, Indonesia can refer to the U.S. Copyright Act and international copyright treaties, which provide more detailed provisions on protection and exceptions, such as fair use and the three-step test. However, this adaptation must also align with Indonesia's unique legal and cultural context by focusing on the originality test when addressing cases involving AI generated art that reduces the very essence of originality and creativity.

In developing a more rigorous framework, Indonesia can take steps to recognise the fair use test by amending the current copyright law, allowing adoption a transposed version through a ministerial regulation or other implementing regulations, serving as guidelines for relevant stakeholders. This approach would allow Indonesia to incorporate the principles of fair use while adapting them to its unique legal and cultural context.

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