

A graphic of a neural network or circuit board with gold nodes and lines.

# ARTIFICIAL INTELLIGENCE

## HUMANKIND AND THE LAW!



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# **ARTIFICIAL INTELLIGENCE, HUMANKIND AND THE LAW!**

These are fascinating times. The idea of our capability and intelligence being surpassed by machines has always gripped humankind. However, this is no longer the talk of science fiction. Artificial Intelligence has truly arrived, and it is here to stay!

Among the great opportunities to humanity today is the use of technology, data, and automated systems in ways that will disrupt the way we think, live and do business. These tools provide access to information at a scale and speed, which was unimaginable even a decade back.

It is fairly evident that Artificial Intelligence (AI) has moved from theoretical realm and now creating economic contribution. It is predicted by a reliable report that leading AI economies, spending more than 2% of GDP on R&D/ innovation will see an additional 20% to 25% addition in their GDP (McKinsey & Company 2018). From autonomous vehicles to medical diagnostics, to weather forecasting AI now has potential to impact every aspect of human life. This is fairly evident from the fact that AI patents are found in many different classes.

Although there are several ways of defining what “Artificial Intelligence (AI)” is, the version of the EU AI-Act as proposed by the European Commission in April 2021 (*pending confirmation from the finalized version that will be submitted by the EU presidency*) defines it as ‘artificial intelligence system’ (AI system) means **software** that is developed, with the ability to generate content, predictions, recommendations, or decisions influencing the environments they interact with.

To the non-specialist, Artificial Intelligence is simply the ability of a computer, or software to perform tasks that normally require human intelligence.

**Techniques to develop AI** - Broadly speaking, the various techniques to develop an AI model that have evolved over time to solve various problems are Machine Learning (ML) (which includes supervised learning, unsupervised learning, and reinforcement learning); and Deep Learning (DL). AI applications using these techniques include Predictive Analysis, Natural Language Processing (NLP) and Computer Vision.

The advent of ChatGPT in November 2022 brought the latest buzzwords, i.e., Generative AI. Generative AI are AI systems that generate text, audio, image, or video etc., in their output. ChatGPT as it generates text as output, is broadly categorized as a Large Language Models (LLMs). LLMs use Deep Learning, which is also a subset of Machine Learning.

**Stages of AI** – AI is predicted to evolve in several stages, with each stage being more intelligent than the previous. From rule-based contextual and expert AI systems today that are trained to achieve specific tasks, broadly categorized as Artificial Narrow Intelligence, it is expected that AI may evolve towards self-aware AI categorized as Artificial General Intelligence (AGI), Artificial Super Intelligence (ASI) to Divine AI in future.

But what exactly is intelligence? If we live amidst Artificial Intelligence today, then what facets of intelligence is AI expected to emulate? Today, AI can learn, reason, create, comprehend, predict, communicate. But it is yet to develop emotion, perception, intuition, consciousness and will.

**Opportunities** - AI is expected to be the biggest agent of change for the world, after the Industrial Revolution. It is expected to be even more revolutionary than the internet. Opportunities for market economy are limitless, with several trillions of USD attributed to AI in the next 5 years alone.

**Risks** – Where there is opportunity, there’s also risk, which needs mitigation, more so in the context of AI, because of the drastic, irreversible, and universal impact that the technology poses. It is not every day that hundreds of world leaders from all sectors, write open letters (to Open AI) seeking a pause on the dizzying pace of development of the next stage of Generative AI. It also isn’t every day that AI-first companies such as Google, make an open declaration that their technology will not be used for development of lethal autonomous weapons (LAWS).

Besides global risks, there are also risks at the individual level. Bias, lack of transparency in AI models, and hallucinations by AI are major concerns. There are increasing incidents of unfair employment decisions taken by AI due to racial bias in training data, or false incrimination of innocent persons due to errors by visual recognition AI.

And of course, the risk of job losses, with increasing intelligence of AI, which in several fields, already exceeds human capability. Time will tell whether the threat is tremendously alarming or is this Luddite fallacy repeating itself. While existing jobs will be taken away, several new ones will be created because of AI. The World Economic Forum predicts 97 million new jobs through AI by 2025, such as prompt engineers, AI compliance officers, data detectives etc.

**Intellectual Property** - An IP firm talking about AI, and leaving out AI? Can you imagine that? We certainly can’t! As we consistently say – IP is everywhere. In the books we read, the tools we use, the food we eat, and most certainly, the technology we develop. As far as legal regimes go, any discourse on AI without discussing how it impacts Intellectual Property and vice versa, is incomplete.

Both the development and use of AI technologies will be tremendously impacted by several identified challenges when it comes to IP law. For example: How can we efficiently protect investment through intellectual property protection within a company developing new AI technologies? How can a company’s training data set and pre-trained model be protected. Does it need a separate trade-secret statute, or are general principles enough? What kind of intellectual property rights will be created, and how will ownership of such IP be organized and monetised? How can a company address the different regulations which govern the same subject, but in very different ways?

IP Law in India has come a long way, and until there comes a legislation which regulates AI comprehensively, the existing IP law and the foundation of common law have infused sufficiently flexibility in the system to adapt to changing times.

2023 saw the Delhi High Court pass decisions, which have cleared the legal position on niche aspects of generative AI.

In *Anil Kapoor v. Simply Life & Ors.*, (CS (COMM) 652 2023), the Court held that deepfakes are fine as far as parodies go, but they are unlawful when they humiliate, harm an individual or strip him of his right of personality and right of endorsement. Similarly, *Christian Luboutin v. Shoe Boutique*, CS (COMM) 583 2023 recognized the wonders of ChatGPT and other LLMs but held that the output content cannot be relied upon for judicial decisions, due to lack of clarity on the input data, as also the very real possibility of the output being completely fictitious (AI hallucinations). The case of *Aaradhya Bachchan v. Bollywood Time*, CS (COMM) 230 of 2023 has advocated zero tolerance for intermediaries who remain passive when obscene or otherwise harmful content targeting young children is posted on their platform. That decision has opened the debate on whether the Court can obligate big platforms to resort to AI to pre-screen and disable such content.



**Regulating AI** - Different jurisdictions have differing viewpoints if, and how AI needs to be regulated currently. For instance, with the latest development of the European Parliament and Council reaching a provisional agreement, and the Parliament passing the EU AI Act, the EU has passed the world's first umbrella or horizontal legislation, that regulates a very wide range of aspects of AI.

Other jurisdictions such as the USA have only recently started passing executive orders, which set a framework and envision principles, which will be further fleshed out through further regulations and laws.



While China has specific rules and regulations covering narrow applications of AI, such as the new menace "Deepfakes", most jurisdictions are using existing privacy, defamation, and other broad laws to analysing their legality.

It is clear that each country or region is taking its own approach on crafting the rules of AI. Because AI is borderless, the same application will have different treatments, rights, and liabilities in different regions. The next section gives a bird's eye view of how different aspects of AI are being treated in some prominent jurisdictions of the world.

## AI ASPECTS: A CROSS-JURISDICTION COMPARISON

	AUSTRALIA	SINGAPORE	USA	INDIA	EU	CHINA
<b>DEEPPFAKES</b>						
<b>Specific Legislation</b>	<b>X</b>	<b>X</b>	<b>X</b>	<b>X</b>	 EU AI Act, 2021 <sup>1</sup> <b>(Proposed legislation)</b>	 Provisions on the Administration of Deep Synthesis Internet Information Services (Nov. 2022)
<b>Other laws or policies</b>	Online Safety Act, 2021  Privacy Act, 1988  Applicable IPR law	Protection from Online Falsehoods and Manipulation Act (POFMA) 2019	No federal laws, but only state legislation  Eg- California's Assembly Bill 602, 730	Information Technology Act, 2000  Intermediary Guidelines, 2021  Tort law principles		
<b>Key highlights of the above laws</b>	Prohibits non-consensual use of images or videos.	Prohibits false or misleading images, videos, sound etc.	(i) Prohibits use of deepfakes of political candidate within 60 days of election  (ii) Criminalizes	(i) Obscenity, impersonation criminalized.  (ii) Satire, parody permitted provided no harm,	(i) All content must proclaim (through sound, visual etc.) that it is AI generated.  (ii) Deepfakes permitted for creative tasks, parody, satire so long as it doesn't	(i) Deepfakes to be labelled for public's benefit  (ii) Deepfake companies to take user consent before altering their voice, face etc.

<sup>1</sup> Subject to change based on revised text of the legislation submitted by the EU presidency for ratification by EU member states.

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			deepfakes, especially in pornographic context	defamation caused. (iii) Intermediaries obligated to inform users not to impersonate, defame etc. (iv) Significant social media intermediaries to pre-screen and delete content already held unlawful	cause significant harm.	(iii) Deepfake company bears responsibility of clarifying rumours (iv) Deepfake companies to do thorough identification of users through mobile number, social security, ID cards etc. (v) Unverified users disabled from making deepfakes
<b>GENERATIVE AI</b>						
<b>Specific Legislation on Generative AI</b>	<b>X</b>	<b>X</b>	<b>X</b>	<b>X</b>	 EU AI Act, 2021 <sup>2</sup> <b>(Proposed legislation)</b>	 Interim Measures for the Management of Generative Artificial Intelligence Services (2023)

<sup>2</sup> Subject to change based on revised text of the legislation submitted by the EU presidency for ratification by EU member states.

	AUSTRALIA	SINGAPORE	USA	INDIA	EU	CHINA
<b>Illustrative General Policies applicable to Generative AI</b>	(i) Australia's AI Action Plan (National AI Strategy) (2021)					
	(ii) Australian govt.'s AI Ethics Framework	(i) National AI Strategy (2019)	(i) AI Bill of Rights (October 2022),	(i) National AI Strategy (2018) (ii) Principles of Responsible AI (2021)		
	(iii) Interim Guidance on Generative AI for Government Agencies	(ii) A.I. Verify Toolkit for Fair, Explainable and Safe	(ii) Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (2023)	(iii) (Draft) Standard for achieving fairness and unbiased AI (2023)		
	(iv) National Science and Technology Council's Rapid Research Report on Generative AI	(iii) A Model AI Governance framework		(iv) TRAI recommendations on leveraging AI and Big Data in Telecommunications (2023)		
	(v) Safe and Responsible AI in Australia (White paper)					

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<b>Broad or specific principles applicable to Generative AI from legislation or case-law</b>	(i) Human well-being, Fairness, Privacy, Reliability, Safety, Transparency, Contestability.		(i) Safe, effective, ethical AI systems	(i) Equality, safety, reliability, inclusivity, transparency etc.	(i) Secure, Trustworthy . Ethical, Transparent, Reliable and Accurate AI systems.	(i) Safe, transparent, accurate Generative AI systems	
	(ii) Govt. to use AI services if they have cleared security and safety assessment	(i) Fairness, Transparency, Explainability .	(ii) Govt. to devise guidelines for content authentication and watermarking of AI content.	(ii) Use of Generative AI for parody, satire is part of free speech. However, defamation or causing harm not allowed.	(ii) State of the art safeguards against generation of content in breach of EU laws to be practised by AI developers.	(ii) Manual tagging of data in the AI model must meet be standardized; must do spot checking to verify accuracy of tagged data	
	(iii) Govt. departments should try and build their own AI models to prevent sharing of data to external vendors	(ii) Human agency and oversight	(iii) Developers of AI foundation models that may pose a risk to share results with government of adversarial testing (red-team tests)	(iii) Use of someone's image or likeness, <u>without consent</u> , leads to interference with right to endorsement t.	(iii) Developers must conduct risk assessment, adversarial testing and incident reporting	(iii) Output content must be labelled as being AI generated	(iii) Applicable to providers of Generative AI tools as also the underlying technology (APIs)
						(iv) Non-compliant foreign AI tools can be blocked	
						(v) Training data should be lawful, respective of IPR, accurate	
						(vi) Output should not promote	



	AUSTRALIA	SINGAPORE	USA	INDIA	EU	CHINA
						<p>violenecce, obscenity etc.</p> <p>(vii)</p> <p>Service providers to curtail misuse (obscenity, harmful content etc.) of Gen AI by users by issuing warnings, or suspending services.</p> <p>(viii)</p> <p>Output should be labelled as AI generated</p> <p>(ix)</p> <p>Output should not discriminate, or harm mental health</p> <p>(x)</p> <p>AI developers must not collect unnecessary personal data or retain information which identifies an individual</p>

	AUSTRALIA	SINGAPORE	USA	INDIA	EU	CHINA
<b><u>AI INVENTORSHIP</u></b>						
<b>Specific Legislation</b>	✓ Patents Act, 1990	✓ Patents Act, 1994	✓ Patent Act, 35 U.S.C.	✓ The Patents Act, 1970	✓ European Patent Convention (EPC)	✓ Patent Law of the People's Republic of China (1984)
<b>Position</b>	<p>AI cannot be an inventor.</p> <p>The law recognizes only a natural person as an inventor.</p> <p><i>Commissioner of Patents v. Thaler, (2022 FCAFC 62)</i></p>	No decision yet	<p>AI cannot be an inventor.</p> <p>The law recognizes only a natural person as an inventor.</p> <p><i>Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. 2022)</i></p>	<p>No decision yet</p> <p>However, the 161<sup>st</sup> Parliamentary Committee Report (2021) had recommended creating a new category of rights for AI innovations.</p>	<p>AI cannot be an inventor</p> <p>Only a human can.</p>	No decision yet

	AUSTRALIA	SINGAPORE	USA	INDIA	EU	CHINA
<b>COPYRIGHT IN AI GENERATED CONTENT</b>						
<b>Specific Legislation</b>	✓ Copyright Act, 1968	✓ Copyright Act, 2021	✓ Copyright Act, 1976	✓ Copyright Act, 1957	✓ 13 directives, 2 regulations including Infosoc Directive  Rental and Lending Directive  Directive on Copyright and Related Rights in the Digital Single Market (DSM Directive)	✓ Copyright Law of the People's Republic of China  (2020 amendment)
<b>Position</b>	No judicial decision yet	No specific decision yet  But a 2011 case had held that copyright is only for human creations	Humans can claim copyright in their contribution to the AI output.  However, prompts alone may not qualify for copyright protection because users don't exercise control over how the AI model generates its output.	No decision yet  However, the 161 <sup>st</sup> Parliamentary Committee Report (2021) had recommended creating a new category of rights for AI innovations.	No judicial decision yet	Humans can claim copyright in AI generated content.  Prompts and human inputs are relevant for copyright.  <i>Li v. Liu, 2023 Beijing 0491 Republic of China, No. 11279</i>

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			<p>However, this is a case-by-case analysis</p> <p><i>(Zaryra of the Dawn, US Copyright Office)</i></p> <p><i>Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence (2023)</i></p>			

## **SOME CONCLUDING THOUGHTS**

The purpose of making the comparison previously is not to offer a commentary on which system is more practical, robust, or equipped to tackle the challenges that AI is throwing up. The exercise only presents a visual of the approaches that different governments and lawmakers, in their wisdom, consider most apt.

For instance, the European Union's AI-Act, 2021 (*and as recently approved by Parliament in December 2023*) is a prescriptive and "horizontal" approach. It is an umbrella legislation, that seeks to categorize AI applications on the basis of risk, and through such an approach seeks to tackle pretty much all forms of AI, present and future. By contrast, China is passing laws on separate applications of AI such as deepfakes, generative AI (a vertical or domain-specific approach).

The UK's approach too is not the same as the EU, as it intends to adopt a principles based and a sectoral approach. The UK also intends not to regulate with excessive, strict laws, but rather intends to let the market drive the growth of the sector. Its position, currently, is that it will hold the AI sector to the five principles of (1) safety, security and robustness; (2) transparency and explainability; (3) fairness; (4) accountability and governance; and (5) contestability and redress. The recent Bletchley Declaration is a step in that direction.

The USA was considered to have a "wait-and-see" approach until quite recently. However, with the White House announcing the "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" and the "Blueprint for the AI Bill of Rights", it has already put plans in the works for the creation of sound and specific principles that will govern the development and use of AI. How specific or flexible the rules and regulations will be, remains to be seen.

India has taken a fair number of initiatives on AI since the year 2018, when the National AI Strategy was published. In terms of a formal law covering AI, it has announced its intention to completely overhaul the existing Information Technology Act, 2000 with the new Digital India Act, which is expected to have specific regulations on the use of AI. However, currently, there is no bill tabled in Parliament or open for public comments.

No matter the difference in approaches, be it an umbrella legislation, or a subject-specific set of rules; a horizontal or a vertical approach, what is important is that the private actors (lawyers, academics etc.) and public actors (government, legislature etc.) in each jurisdiction, must continue collaborating and build a collective, deeper understanding of AI, the challenges it poses to mankind and the trajectory of its growth. It is only once one understands and confronts, does one stop to fear the unknown. This way, risks can be mitigated, and opportunities can be capitalized very efficiently.

Because of the borderless nature of AI rules and principles across jurisdictions should have a shared foundation. This will require international collaboration and an approach which ensures consistency, if not homogeneity across jurisdictions. Initiatives such as the G7 Leaders' Statement on the Hiroshima AI Process; the Bletchley Declaration; the G20 New Delhi Leaders' Declaration are therefore, of great importance.



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