Artificial Intelligence – Malaysian Legislative Framework and Key Legal Challenges

Malaysian Legal Framework

Artificial intelligence systems and big data have captured the world's attention, especially in the past six months, due to the rise of ChatGPT, a generative AI software that produces conversational answers to text inputs using deep learning algorithms. However, like many other countries, Malaysia requires the development and establishment of more comprehensive legislation that regulates various facets of AI and big data usage. Any governance in this field relies on existing statutes and industry codes of conduct as guidelines for best practices, including the law of torts, Consumer Protection Act 1999 ("**CPA**"), Personal Data Protection Act 2010 ("**PDPA**"), Sale of Goods Act 1957 ("**SGA**"), and Contracts Act 1950 ("**CA**").

The Malaysian government is considering further regulatory measures by enhancing existing legislation and formulating a national framework to regulate these new technologies. Initiatives such as developing an AI Governance Framework, establishing a cybersecurity policy, creating an AI Code of Ethics, and collaborating with various industries to create privacy, security, and other ethical standards have been included in this project. The government may also need to establish additional regulations for using ChatGPT in all sectors. For instance, if ChatGPT is used in the future to provide medical advice in a healthcare setting, it may be subject to healthcare legal regulations in Malaysia, such as the Medical Act 1971 or Medical Regulations 1974.

The Malaysia Digital Economy Corporation ("**MDEC**") is also leading the National Big Data Analytics Framework, which intends to create a national big data analytics ecosystem for Malaysia's economic growth across all industries. MDEC is also developing a national AI framework, and the government is considering adopting a national data-sharing and AI policy.

Liability

Software that operates with AI would be treated the same way as other consumer items since there is no governance framework for it yet. Liability would be addressed under the SGA and CPA if the technologies break down. Both legislative frameworks address implied terms that cover topics such as quality, fitness for purpose, price, guarantees and conditions

regarding title, and repairs that cannot be contractually excluded. Depending on the degree of non-compliance with representations and guarantees made to the supplier and consumer regarding the software, the manufacturer or supplier of the AI software would be held accountable in the event of a malfunction arising from breaches of these implied terms.

The CA would be relevant in determining liability for AI malfunctions, and contractual provisions regarding AI usage may be included to apportion liability for AI malfunctions. However, it must be borne in mind that ChatGPT has explicitly disclaimed any liability to the greatest extent possible, and no claims may be made against OpenAI, the software developer company of ChatGPT, even if the AI tool is bound to produce factual inaccuracies that potentially may be harmful to the user. To illustrate, using the medical advice example mentioned above, a medical practitioner who acts on the medical advice generated by ChatGPT does so at their own risk and is responsible for any consequences thereafter.

Recently, it has been reported that several employees of Samsung inadvertently leaked sensitive proprietary data via ChatGPT. The allegedly leaked information includes the software source code for measuring semiconductor equipment. Liability for the leak would likely fall on the creator of the AI model, as they are responsible for ensuring that their product does not infringe on the intellectual property rights of others. The creator of ChatGPT could potentially be liable for copyright infringement and misappropriation of trade secrets. Users of ChatGPT could also potentially be liable for trademark or patent infringement if they generate text that includes copyrighted material without obtaining the necessary permissions.

Data Protection

The operation of AI software and big data analytics, ChatGPT included, will involve the collection and analysis of vast amounts of data, which could give rise to concerns such as consent from the data subjects. For example, larger data sets are more prone to severe breaches, which can result in unauthorised access and the release of significant amounts of personal data. Implementing adequate security mechanisms, such as those provided in the PDPA and the Personal Data Protection Standards Standard, would be crucial.

Big data analytics and AI can also trigger related data protection issues, such as the Personal Data Protection Principles under the PDPA, in which personal data is kept longer than necessary or shared with parties unknown to the data subject and without the data subject's consent. Significant amounts of data are also required to train AI's machine learning ("**ML**") subset. Such practices easily trigger the applicability of the PDPA when personal data is involved. In this AI-driven

generation, where technologies rely heavily on data analytics, big data, and the Internet of Things, adherence to the PDPA is continually violated unknowingly or intentionally, resulting in individuals being identified during the process of data being exchanged or processed.

According to the OpenAI product and service privacy policy, they collect user information when a user uses the AI tool. This information can be offered to other associated services where the company uses the data for analysis and testing to support their new goods and services. This is rather critical as automated ML systems could overlook the need for written consent before processing data, which is a prerequisite to process the personal data of a data subject, not to mention that ChatGPT does not offer procedures for individuals to check on or request for deletion of their personal data.

Intellectual Property ("IP")

Taking into account the speed of advancement of technology, the existing regulatory framework in the IP field is hard-pressed to keep up with the regulation of the most recent technological advancements. To begin with, the term "inventor" is not defined in patent legislation, and to make matters worse, the language used in the Patents Regulations 1986 ("**Patent Regulations**") and the Patents Act 1983 ("**PA**") insinuates that AI may be exempt from coverage thereunder. The Patents Regulations state that personal identification of the inventors, or a signed written declaration where anonymity is sought, must be included in patent applications. This creates a barrier as the inventors must be natural persons. Several European countries, such as the United Kingdom and Germany, have refused to allow patent applications in which humans are not listed as inventors. A United States case, *Thaler v Vidal, No 21-2347 (Fed Cir 2022)*, affirmed that inventors in patent applications must be confined to natural persons only. Despite these challenges, similar positions are expected to be adopted locally due to similar formalities.

Furthermore, whether AI-produced works are protected by the Copyright Act 1987 ("**Copyright Act**") is debatable. Given that the terminology used in the Copyright Act seems only to cover the rights of natural and legal persons, potential issues regarding copyright ownership, the potential perpetual subsistence of copyright in AI-created works, the accordance of moral rights towards AI, and whether copyright protection is available for AI-created works are all subject to debate. As seen in Australia, the case of *Acohs Pty Ltd v Ucorp Pty Ltd (2012) FCAFC 16* held that since the products were not created by a human but with the aid of a computer, they shall not be protected under copyright laws. The Court of Justice in the European Union, in the case of *C-5/08 Infopaq International A/S v. Danske Dagbaldes Forening*, insisted on the position that copyright only applies to original works that are the product of the author's intellectual creation and reflects the

author's personality. Thus far, this suggests that copyright protection only qualifies for works that a human author produces. The Malaysian courts have yet to be presented with the opportunity to decide on whether AI-produced works are entitled to copyright protection, although case laws mentioned herein may be persuasive authorities for the judiciary's consideration in future decisions.

The current stance for content created by AI products that incorporate third-party works protected by copyright and for which authorisations have not been obtained before using such content is that the liability remains on the creator of the AI for such infringement under the SGA, CPA, CA, and tort law. This liability is also subject to any pre-existing contractual provisions that address liability between the creator and the user of the AI for such infringement caused by the AI.

As with ChatGPT, individuals using the tool could be liable for trademark or patent infringement. In other words, if a writer uses ChatGPT to generate text containing copyrighted material, such as a song lyric or a paragraph from a book, the writer could potentially be liable for copyright infringement. Legislators in several countries, including the European Union, have recognised this issue. Components of a regulatory framework addressing the problem were incorporated into the EU Digital Single Market ("**DSM**") Directive. Subsequently, national legislatures must enact rules allowing third parties to reproduce databases or works within the scope of copyright law for ML purposes to comply with the DSM Directive. The rightsholders can refuse to give authorisation for commercial usage of their works. To mitigate this risk, other users should ensure that any content generated by ChatGPT is either original or appropriately licensed by obtaining permission from the copyright owner or obtaining a license to use any of the copyrighted material. It is also essential to conduct a trademark and patent search to ensure that any content generated by ChatGPT does not infringe upon existing trademarks or patents.

The recent Samsung data leak via ChatGPT has also brought infringement of intellectual property rights via ChatGPT to light. Samsung's source code is protected by copyright, and the unauthorised disclosure of the code could be considered copyright infringement. In addition, Samsung may have trade secrets in its source code, which are protected under trade secret law. The code leak could be considered a misappropriation of trade secrets, which is also a legal violation.

AI has increasingly woven itself into our daily lives and is now more capable of being more than just a mere product. In 2020, the world-famous singer Rihanna teamed up with the algorithmic mood music startup Endel to create an AI-generated lullaby for her first child with SpaceX founder Elon Musk. John Meyer, a software entrepreneur, has created the Forever Voices bot on Telegram, allowing users to talk with it using the ChatGPT API. Meyer trained the AI to mimic the

speech and tone of celebrities. The famous Canadian singer/ musician, Grimes, has invited her fans to create music with her voice, and she offers 50% royalties on any successful AI-generated song that uses her voice. She has also launched a new AI voice software, dubbed Elf.Tech, which has been designed to help people duplicate her voice to create music. These may have far-reaching implications on copyright ownership and legal concerns on the imitation of natural persons, potentially resulting in identity theft issues arising in the future.

Job Displacement

Given the rapid advancement of AI and its potential to replace organisational functionalities, the integration of AI into the global economy has raised serious concerns about job displacement and a resultant bloated labour market. While AI may lead to some job redundancies, it also has the potential to create new job opportunities. One way to overcome this challenge is by providing adequate training and education to the workforce, allowing them to acquire the necessary skills to work alongside AI technologies. Governments and companies can also invest in re-skilling programs for affected workers and provide them with support in finding new job opportunities. Additionally, policymakers can encourage the development of AI applications that augment human capabilities rather than replace them, leading to a more productive and efficient workforce.

Necessity for Regulation

On 13 October 2022, the European Data Protection Supervisor published an opinion on the necessity for a Council of Europe convention on AI, human rights, democracy, and the rule of law. Recommendations include banning AI that poses excessive risks to individuals and putting compliance and control measures in place from a cross-border cooperative standpoint. In local settings, such ideas have yet to be made or implemented.

As AI becomes more integrated into our daily lives, there is a growing need for regulations that address the legal issues arising from AI use. The European Union has already taken steps in this direction with the DSM Directive, which requires national legislatures to enact rules allowing third parties to reproduce databases or works within the scope of copyright law for machine learning purposes. Further regulation will be necessary to address the legal issues arising from AI use in the Malaysian context.