

# Malaysia: Legal Impact of AI Generated Content on Intellectual Property

Muhammad Azrul Abdul Hamid  
External Expert, South-East Asia IP SME Helpdesk  
Partner, Azrul, Liew & Co  
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# Speaker's Bio

**Name:** Muhammad Azrul Abdul Hamid

**Firm:** Azrul, Liew & Co

**Location:** Malaysia

Azrul has gained more than 23 years of litigation experience dealing in a wide range of litigious matters at the High Court and the Appeal Courts involving intellectual property claims including inter alia, patent, trade mark, copyright, trade secret, passing off and trade libel. Azrul also deals with many tortious claims such as unlawful interference with trade and negligence claims.

Azrul has advised clients on the multiple facets of public policy and government engagement including dealing with government agencies and local authorities in relation to business related issues for start-ups, SMEs and MNCs. Throughout the years Azrul has worked closely with many government agencies and especially the Ministry of Domestic Trade and Costs of Living in joint efforts to eradicate piracy and counterfeiting in Malaysia.

Azrul is a member of the EuroCham IP Committee and is an IP External Expert of the South-East Asia IP SME IP Helpdesk. Azrul is also a member of the Technology, Cyber and Privacy Law. Committee of the Malaysian Bar.

He was ranked in band 3 of the Chambers and Partners 2020, 2022 and 2023 publication where it was commented that "Muhammad Azrul Abdul Hamid is well recognised for his IP practice by market sources. He has expertise in relation to enforcement matters".



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# Agenda

1. Different types of IPRs.
2. Potential infringements in relation to AI.
3. What's next?

# 1. INTRODUCTION TO INTELLECTUAL PROPERTY

## TYPES OF INTELLECTUAL PROPERTY

- TRADEMARKS
- COPYRIGHT
- PATENT
- INDUSTRIAL DESIGN
- CONFIDENTIAL INFORMATION
- DATA PROTECTION

# TRADEMARKS

- **Section 3(1) of the Trademarks Act 2019:** Trademark means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.
- **Section 2 of the Trademarks Act 2019:-**
  - Sign – any letter, word, name, signature, numeral, device, brand, heading, label, ticket, shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination thereof.

## Do I have to register?

- Registration of a trademark would mean that you are the owner of the trademark.
- Common law also protects trademarks that are not registered.
- Application to be made to the Malaysian Intellectual Property Corporation.

# TM registration

## First-to-file vs. First-to-use

- “first to file”- the grant of a trademark right lies with the first person to file a trademark application for protection, regardless of the date of using the mark.
- “first to use” - the actual use of the first entity in trade of the particular trademark is the one that has right
- ✓ Malaysia adopts “first-to-use” system
- the first applicant who uses a trademark is entitled to registration and has better rights, in the absence of any prior user of an identical or substantially similar trademark in Malaysia.

## Benefits of TM registration

- ✓ Proof of ownership with Certificate of Registration.
- ✓ Duration of protection is forever if properly maintained.
  - Registration is for 10 years, renewable every 10 years for an indefinite period.
- ✓ **Cheaper and simpler to enforce.**
- ✓ Rights protected even if no use yet (common law rights).
- ✓ Provides exclusive right to use.
- ✓ Blocks registration of subsequent conflicting marks.



# COPYRIGHT

- The exclusive right to control the doing of certain acts over creative works created by the author, copyright owner and performer for a specific period governed under the Copyright Act 1987.
- The Berne Convention 1886 at [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html)
- Requires sufficient skill and effort.
- It does not protect ideas.
- Arises automatically upon creation: Original, Material form, Qualified person.

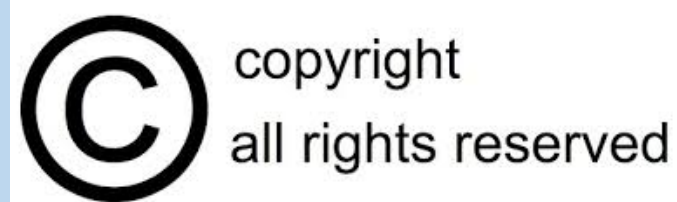
# COPYRIGHT

## Who owns?

- General rule – author is the first owner
- But Author ≠ Owner
- Commissioned persons
- Employees- Do not cover interns, freelancers, independent contractors

## Do we need to register?

- Not compulsory to register
- Voluntary notification wef 1 June 2012
- Prima facie evidence of copyright:-



# Categories of Protected Works

- Literary
- Artistic
- Musical
- Films
- Sound recordings
- Broadcasts
- Derivative works



# Duration of protection

- ❑ Literary, musical or artistic works – author's life + 50 years after death.
- ❑ Film, sound recordings and performer's rights – 50 years from publication/fixation/performance.
- ❑ Broadcast – 50 years from when broadcast first made.

# Confidential Information

- Not a registrable right
- Common law – tort of breach of confidential Information
- Include:
  - Competitive intelligence
  - Customer information (profile, ranking)
  - Marketing strategies and ideas
  - Pricing information (profit margins)
  - Sales and distribution methods
  - Innovative ideas to conduct business



# Protection Requirements

## ❑ 3 elements:

- Information is confidential in nature.
- Communicated in circumstances imparting obligation of confidence.
- Unauthorised use.

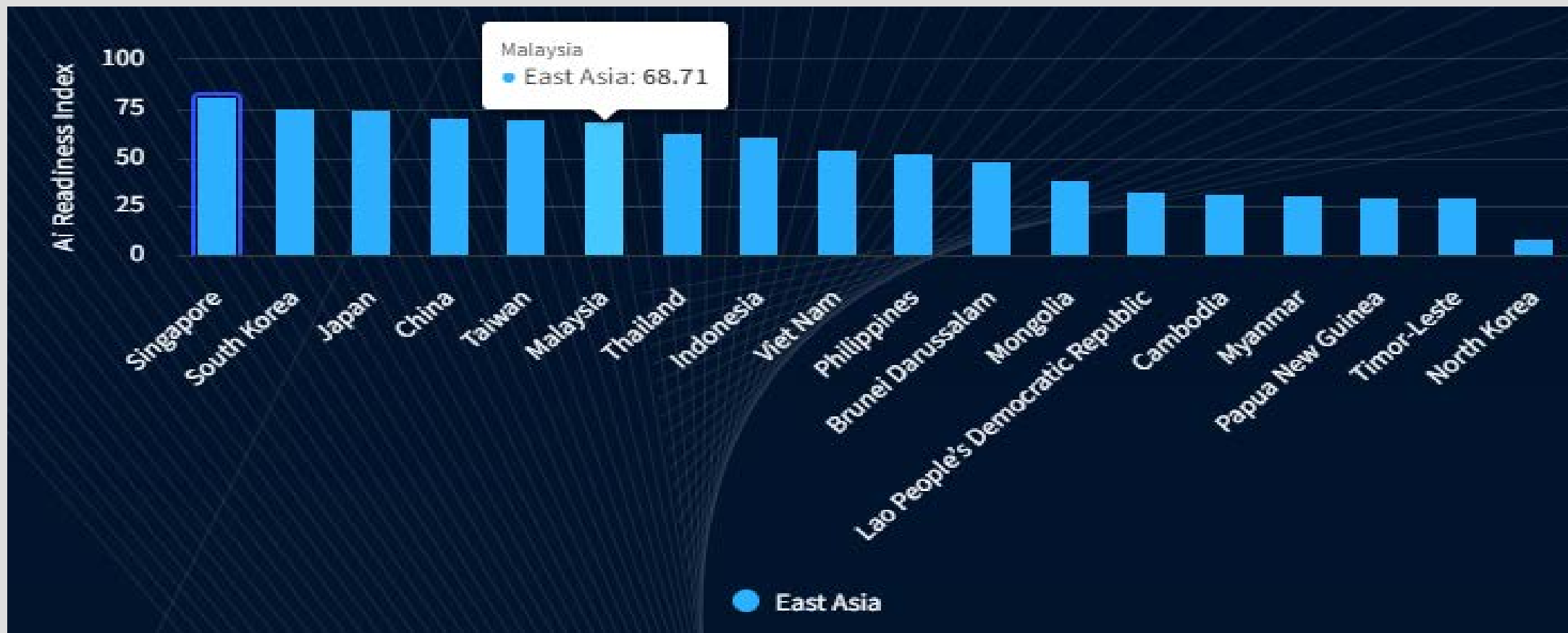
## 2. IP Rights & Potential Infringements in relation to AI

- Copyright infringement
- Database right infringement
- Violations of data protection rules
- Trade mark infringement
- Passing off

# Legal Landscape of AI in Malaysia

- As of this date, Malaysia does not have a specific legislation dealing with AI governance and any issues arising from AI
  - The application of the same will be limited to the existing statutes & regulations
  - Establishing AI governance falls under the purview of the Ministry of Science, Technology and Innovation (“MOSTI”)
  - MOSTI initiated the ***National Artificial Intelligence Roadmap 2021 – 2025***: to oversee and manage the development and deployment of AI technologies in Malaysia
  - MOSTI has also indicated that there are plans to enact a comprehensive AI Bill/ possibility of regulating AI applications in Malaysia
- ❖ Source: <https://conventuslaw.com/report/legal-landscape-of-generative-ai-governance-in-malaysia/>  
<https://www.thestar.com.my/news/nation/2023/07/23/law-on-ai-being-studied>

# Malaysia AI Readiness in 2023



Source: <https://oxfordinsights.com/ai-readiness/ai-readiness-index/>

# Data Protection

## Potential violations

- AI usage may collect and process personal or confidential data.
- May result in unauthorised access & release of large amounts of personal data.
- Significant amounts of data are used/required to train AI's machine learning.
- Overlook the need to obtain the data subject's consent before processing data.



# Data protection considerations

- As with other jurisdictions, data protection is one of the main issues that arise in the implementation of a national digital identification initiative.
- In Malaysia, the **Personal Data Protection Act (“PDPA”)** 2010 was enacted to govern the collection and processing of personal data in respect of commercial transactions. The PDPA sets out seven data protection principles that data users must comply with in order to collect and process the personal data of individuals.

# Data protection considerations (Cont.)

1. **The General Principle:** Data users must obtain consent of data subjects before collecting their personal data.
2. **The Notice and Choice Principle:** Data users must inform data subjects, by way of a written notice, regarding the use of their personal data.
3. **The Disclosure Principle:** Data users must not, without the consent of data subjects, disclose personal data for any purpose, other than for purposes for which they were collected.
4. **The Security Principle:** Data users must take practical steps to protect personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration, or destruction.

# Data protection considerations (Cont.)

- 5. **The Retention Principle:** Data users must not keep personal data for a period longer than is necessary for the fulfilment of the purposes for which the personal data was collected and processed.
- 6. **The Integrity Principle:** Data users must take reasonable steps to ensure that personal data is accurate, complete, not misleading, and kept up-to-date.
- 7. **The Access Principle:** Data users must give data subjects access to their personal data and allow data subjects to correct personal data that is inaccurate, incomplete, misleading, or not up-to-date.

# Violation of data protection rules

- The existing Personal Data Protection Act (“PDPA”) 2010 can be used as a foundation to guide the management of data in relation to the development of AI.
- Compliance with 7 Personal Data Protection Principles under PDPA 2010 :-
  - General Principle- consent of data subject
  - Notice & Choice Principle- inform data subject
  - Disclosure Principle- obtain consent before disclose
  - Security Principle- protect personal data from loss/misuse/modification/destruction
  - Retention Principle- not to be kept longer than necessary
  - Data Integrity Principle- accurate, complete & up-to-date
  - Access Principle- give data subject the right to access & make correction

# Copyright Infringement

- Issue: Whether AI-generated works are copyrightable in Malaysia under the existing legislations
- Always subject to debate

## Malaysia position

- The definition of “author” under Copyright Act 1987 does not seem to extend to non-humans/non-legal entities
- **S.3 CA 1987** defines an author as:-
  - Literary works- writer/maker of works
  - Musical works- composer
  - Artistic works- artist
  - Photographs- person by whom the arrangements for the taking of photos were undertaken



# Copyright Infringement

- S.3 CA 1987 defines a “qualified person” as:-
  - Individual- citizen/permanent resident in Malaysia
  - Body corporate- a body corporate established & vested with legal personality in Malaysia

## Copyrightability of AI-generated works in Malaysia

- Remains a grey area
- AI-generated works highly unlikely to be entitled for copyright protection under CA 1987- not produced by a natural person/body corporate
- Remains to be tested in Malaysia courts

# Copyright Infringement

## UK approach

- UK copyright law defines a computer-generated work as a "work generated by a computer in circumstances such that there is no human author of the work."
  - The "author" of a computer-generated work- the person by whom the arrangements necessary for the creation of the work are undertaken.
  - Such provisions could be invoked to identify AI developers as authors of AI-generated works.
- ❖ Source: ARTICLE: Redesigning Copyright Protection in the Era of Artificial Intelligence, 107 Iowa L. Rev. 1213

## US approach

- Requires sufficient level of "human authorship" for copyrightability
  - **Thaler v. Perlmutter, 2023 U.S. Dist. LEXIS 145823:** P attempted to register works generated by AI. The District Court held that the Copyright Office acted properly in denying copyright registration for a work created absent any human involvement.
  - AI-generated works are not copyrightable
- ❖ UK & US offered a different view on the copyright protection of AI-created works

# Can AI help IP practitioners in future?

- AI present both a “threat and an asset” to IP practitioners
- Assist but not replacing IP practitioners
  - Legal research
  - Quick contract drafting
  - Contract review & due diligence in broad terms
  - General legal writing & admin work
  - Perform searches
  - Predict outcome of cases
- **Bar Council Malaysia (Circular No 342/2023) dated 24 Nov 2023**
  - The Risks and Precautions in Using Generative Artificial Intelligence in the Legal Profession, Specifically ChatGPT
  - Reminder: AI operates as a guidance tool only. Advocates and solicitors must apply reasoning to the questions, answers, problems/solutions

### 3. What's next?

- Malaysia is still exploring for policy measures & yet to establish any legislation to regulate AI applications
- **National Artificial Intelligence Roadmap 2021 – 2025** available at:  
<https://mastic.mosti.gov.my/mosti-related-policies/artificial-intelligence-roadmap-2021-2025>
- A growing need for regulations to address the legal issues arising from AI use
- Possible challenges:-
  - 1. Challenges between AI companies/developers and creators
  - 2. Difficult to attribute the ownership/authorship for AI-generated works (no provisions for the same)
- Humans may no longer be the only source of creativity/innovation.
- Redesigning IP protection in the era of generative AI.

# South-East Asia – Snapshot of our publications



<https://op.europa.eu/en/publication-detail/-/publication/2ceaf0a4-fbe1-11eb-b520-01aa75ed71a1>



<https://op.europa.eu/en/publication-detail/-/publication/08b4df01-525d-11ec-91ac-01aa75ed71a1/language-en/format-PDF/source-256274000>



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Azrul Hamid: [azrulhamid@alico-law.com](mailto:azrulhamid@alico-law.com)

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