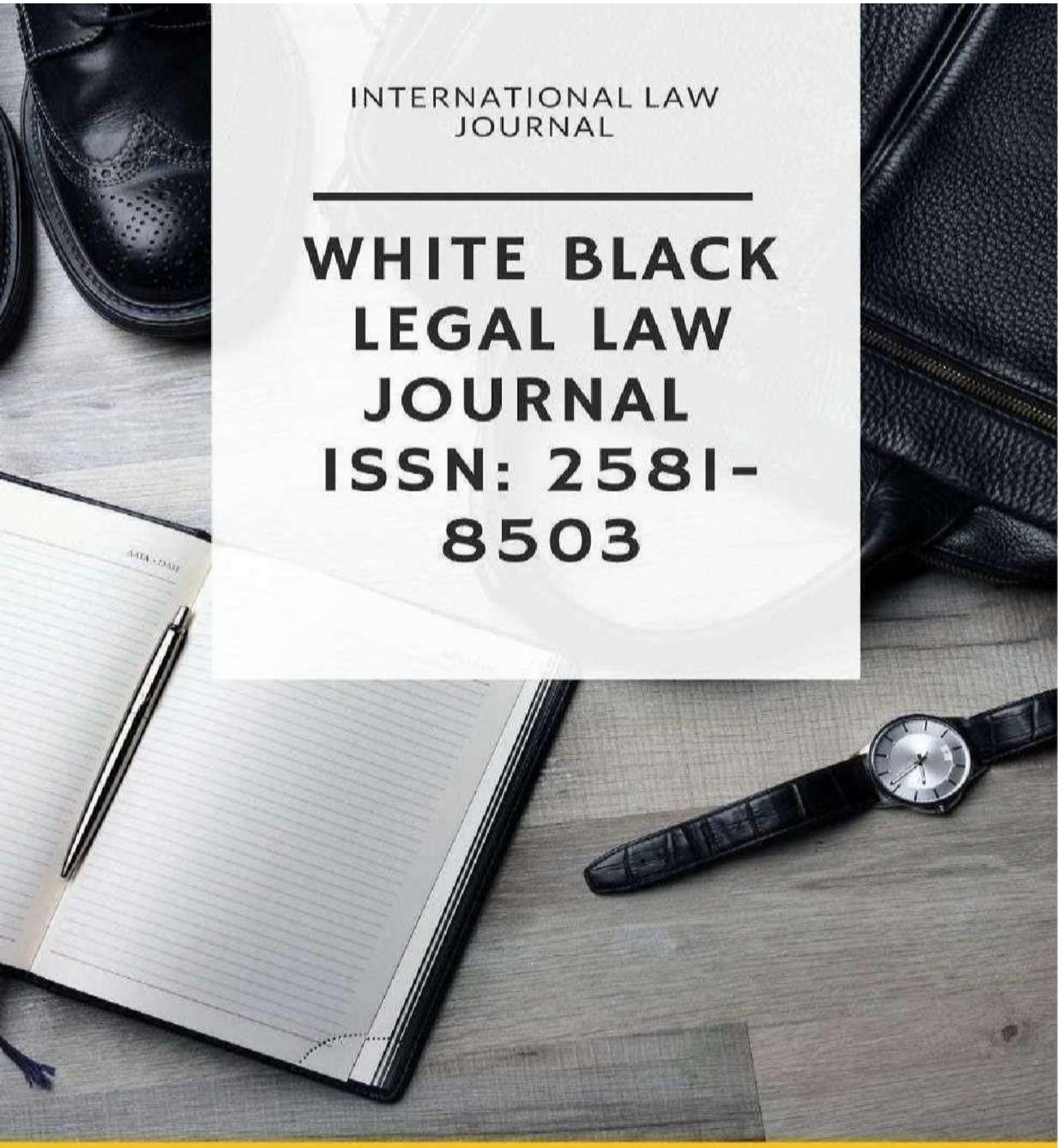

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

A STUDY ON THE NEW FRONTIER OF INTELLECTUAL PROPERTY & REGULATING DEEPFAKES AND DIGITAL PERSONHOOD

AUTHORED BY - SAMEEKSHA DAS

ABSTRACT

The rise of deepfake technology has introduced an unprecedented challenge at the intersection of artificial intelligence, intellectual property, and digital identity. While copyright law struggles to define authorship in AI-generated works, trademark and publicity rights fail to cover the broader spectrum of personal digital identity. Current copyright and IPR frameworks, designed around human authorship, are insufficient to address these challenges. This study, using a multi-perspective approach, explores GenAI's disruptive potential in replicating or transforming copyrighted materials, challenging established IPR norms. Findings highlight gaps in legislation and the opacity of GenAI platforms. This paper argues that deepfakes signal a new frontier of intellectual property, where the human self's face, voice, and digital presence must be reconceptualized as protectable intellectual assets.

Keywords - Artificial Intelligence, Intellectual Property, Gen AI, Deepfakes, Copyrights

INTRODUCTION

Deepfakes are media images, text, audio, and videos — altered or generated to make it appear that people did or said something that they never actually did or said. Threat actors use artificial intelligence (AI) and deep-learning techniques to manipulate real media to create synthetic media.

Deepfake technology has been available since at least 2017. Since then, we've seen rapid improvement in the technical quality of deepfakes and easier means to access and create them. In 2023, popular generative AI platforms such as Midjourney 5.1 emerged as widely available tools for threat actors to conduct deepfake campaigns.

As this technology has evolved, so too have the criminal tactics to exploit it. Threat actors are

using it to create synthetic media that can be used in a variety of destructive ways, creating a new and frightening reality in the 2023 cyber threat landscape.

The greatest danger posed by deepfakes is their ability to spread false information that appears to come from trusted sources. While deepfakes pose serious threats, they also have legitimate uses, such as video game audio and entertainment, and customer support and caller response applications, such as call forwarding and receptionist services. Deepfakes aren't edited or photoshopped videos or images. In fact, they're created using specialized algorithms that blend existing and new footage. For example, subtle facial features of people in images are analyzed through machine learning (ML) to manipulate them within the context of other videos.

DEEPFAKES AND CHALLENGES TO INTELLECTUAL PROPERTY

HOW DEEPFAKES WORK

Deepfake technology utilizes advanced AI techniques to create highly realistic yet synthetic media, including videos, images, and audio recordings. The foundation of deepfakes lies in machine learning algorithms that analyse and manipulate large datasets to generate new content that appears authentic. One of the most widely used AI models for deepfake generation is Generative Adversarial Networks (GANs)[1]. GANs consist of two competing neural networks: a generator, which creates synthetic media, and a discriminator, which evaluates its authenticity. Through continuous training, the generator improves its ability to produce high-quality fake content, making it increasingly difficult to distinguish from real media. Another AI technique used in deepfake creation is autoencoders, which compress an image or video into a lower-dimensional representation and then reconstruct it in a manipulated form. This method allows deepfake models to swap faces seamlessly while maintaining realistic expressions and movements. Additionally, Recurrent Neural Networks (RNNs) and transformers play a crucial role in voice cloning and speech synthesis. These models analyse vast amounts of voice data, enabling them to replicate speech patterns and tones with high accuracy. As deepfake technology advances, these AI-driven techniques continue to evolve, making it easier to produce hyper-realistic yet entirely artificial media.

[1] https://www.cvisionlab.com/cases/deepfake-gan/

THE LEGAL GREY ZONE

Unlike traditional creative works, deepfakes straddle originality and reproduction. A deepfake of a celebrity, for instance, is neither wholly original (since it relies on existing likeness) nor purely derivative (as AI introduces new elements). This ambiguity challenges IP regimes that rely heavily on originality, creativity, and authorship.

Deepfakes sit in an undefined space under Indian law. There's no consensus on what constitutes a deepfake or how to classify its various uses, satirical, pornographic, political, or malicious. Sections like 65B of the Indian Evidence Act require specific certification for electronic records.[2] With deepfakes, verifying authenticity becomes far more complex, often requiring expert analysis or forensic tech. Courts have only recently begun commenting on deepfakes. In one Delhi family court case, a judge rejected photographic evidence submitted in a divorce case, citing concerns about the prevalence of fabricated media. Many deepfakes originate outside India, complicating enforcement. Legal processes are slow, while deepfake creation and distribution are almost instantaneous.

INTELLECTUAL PROPERTY FRAMEWORKS AND DEEPFAKES

The emergence of Generative Artificial Intelligence has made it easier to alter or re-create an individual's persona in the digital space with remarkable accuracy, and this raises questions about the ethical implications of the evolving technology. Indeed, the use of AI assists in the creation of deep fake images and videos, which subsequently impacts the Intellectual Property rights that individuals may have over their persona in the digital space. In this article, we discuss the intersection of AI, deep fakes, and intellectual property rights.

Deepfakes are a type of synthetic media created using AI technologies, particularly generative adversarial networks (GANs). GANs involve two neural networks: a generator that creates synthetic content like images, videos, or audio, and a discriminator that checks these outputs against a dataset of real data to determine their authenticity. Deepfakes can take various forms, such as face swaps, attribute edits, or face re-enactments, allowing for significant manipulation in digital media. Although the term "deepfake" commonly refers to videos, it can also include altered images and audio. This technology's unique feature is its high degree of realism, often making it difficult to distinguish deepfakes from genuine content. The potential consequences

[2] Protection of intellectual property rights in Ukraine: design solution,"

of deepfakes are serious, ranging from privacy violations and reputational harm to political misinformation and other forms of deception.

Recently, the National Stock Exchange (NSE) and the Bombay Stock Exchange (BSE) issued cautionary notices after deepfake videos falsely depicting their CEOs giving stock/ investment recommendations circulated online. In politics, deepfake videos caused confusion during the Lok Sabha elections, with a fake video of Bollywood actor Ranveer Singh criticizing a political party going viral, and a deepfake of Aamir Khan appearing to support a specific party. These incidents highlight the technology's potential to spread misinformation, influence public opinion, and impact democratic processes.

Personality rights for celebrities or high-profile individuals are protected under IP laws. In Indian jurisprudence, the recognition of publicity rights occurred in the Auto Shankar case.[3] The Supreme Court has recognized a person's right of control over the commercial use of their identity. Personality rights attach to those who have attained the status of celebrity, and the infringement of the right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable.[4] Where the voice, face, and other personal attributes are protected within the ambit of personality rights, they are not distinctively recognized in the Indian jurisprudence; rather, they attract the application of copyright and trademark laws. This inference is supported vide the case Anil Kapoor Vs. Simply Life India & others,[5] where the court examined the unauthorized use of actor Anil Kapoor's persona, including deep fake videos and merchandise featuring his image without consent, and ruled that this unauthorized use violated his personality and publicity rights, emphasizing that celebrities' livelihood often depends on endorsements and public image. Judge Prathiba M. Singh's decision reinforced the point that celebrities are entitled to legal protection against such unfair practices, which can infringe upon their rights and impact their earnings.

Copyright Law

It is a legal concept that grants the creator of an original work exclusive rights to its use, distribution, and reproduction. In contrast to its basic rights, copyright is a type of intellectual property protection that safeguards creative works such as literary, dramatic, musical, and

[3] R. Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632
[4] Shivaji Rao Gaikwad, (also known as Mr. Rajinikanth) v. Varsha Productions 2015 (62) PTC 351

artistic works. Because copyright law gives writers exclusive rights over their creations, it promotes artistic expression. Copyright owners can enforce their rights through legal action, seeking damages, injunctions, and other remedies. It allows the creator to use, distribute, publicly display, and create derivative works. For copyright protection, a work must be original and expressive.

Copyright protects original works of authorship. Yet, deepfakes complicate this protection. If AI autonomously generates content, who is the author: the programmer, the user, or the AI itself? A deepfake built on an existing performance may qualify as a derivative work, requiring consent from the original rights holder.

Trademark and Passing off

Deepfakes used for satire may fall under fair use, further complicating enforcement. Deepfakes can misuse a person's likeness in commercial advertising, raising issues of false endorsement. Celebrities and public figures may invoke trademark-like protections under the doctrine of "passing off" or through the right of publicity to prevent unauthorized exploitation.

PERSONALITY RIGHTS AND RIGHT TO INDENTITY

The most affected area is the protection of identity itself. Personality rights safeguard an individual's name, likeness, and voice from unauthorized use. Deepfakes directly infringe these rights, yet legal remedies differ globally.

In India, with the rise of the entertainment industry, the concept of personality rights gained prominence along with the right to privacy. In 1995, the emergence of personality rights was catalysed by one notable case, R. Rajagopal v. State of Tamil Nadu.[6] Famously known as the Auto Shankar case, where the Supreme Court recognized a person's right to control the commercial use of their identity. This case marked a pivotal shift, acknowledging that individuals, including celebrities, possess a legitimate interest in controlling the exploitation of their persona for commercial gains. The Court explained that the 'freedom of the press flows from the freedom of speech and was subject to reasonable restrictions provided in Article 19(2), and that it was important to strike a balance between the freedom of the press and the right to privacy'. The Court held privacy to be a 'right to be let alone' and that no one could publish

[6] (1994) 6 SCC 632

anything referring to an individual's private affairs without the consent of the concerned person unless it was based upon public records.

As the concept developed further, another question came before the Hon'ble Delhi High Court regarding whether the personality rights shall vest with a corporation or not, in the landmark case of ICC Development (International) Ltd. v. Arvee Enterprises[7], wherein the Delhi High Court stated that the right to publicity emerged from the right to privacy and only pertains to a specific person or any indication of their personality. Therefore, non-living creatures are not covered by the right of publicity. By involvement with an event, a person may obtain the Right of Publicity; however, neither the event in question nor the event's organizer is covered by this right. Any attempt to transfer a person's right to publicity to the event's organizer (a non-human entity) would be a violation of Articles 19 and 21 of the Indian Constitution. In 2011, the Delhi High Court went ahead to define the concept of 'Publicity Right' of a celebrity in Titan Industries Ltd. v. Ramkumar Jewellers[8] as 'The right to control commercial use of human identity is the right to publicity'. The Court in this case further provided guidelines regarding the liability for infringement of the right of publicity.

In 2015, the Madras High Court in Shivaji Rao Gaikwad (also known as Mr. Rajinikanth) v. Varsha Productions[9], while relying on the above two judgements, opined that the personality right vests in those persons who have attained the status of celebrity. It further added that 'Infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable' and adjudicated that prima facie the plaintiff is liable to receive an order in its favour.

In the order passed in the case of Anil Kapoor v. Simply Life India & Ors. The Delhi High Court tried to cater to those areas that were earlier not addressed. That is, personality rights associated with an individual's persona, such as their name, voice, photograph/image/likeness, manner of speaking and dialogue delivery, gestures, and signatures, etc. While pronouncing the judgement in favour of the Plaintiff, the court stated 'reputation and fame can transcend into damaging various rights of a person, including his right to livelihood, right to privacy, right to live with dignity within a social structure, etc. There can be no doubt that free speech

[7] 2003 (26) PTC 245
[8] (2012) 50 PTC 486
[9] 2015 (62) PTC 351 (Madras)

in respect of a well-known person is protected in the form of the right to information, news, satire, parody that is authentic, and also genuine criticism. However, when the same crosses a line, and results in tarnishment, blackening, or jeopardizes the individual's personality, or attributes associated with the said individual, it would be illegal. The court further stated that the 'Plaintiff's name, likeness, image, persona, etc., deserves to be protected, not only for Plaintiff's own sake but also for the sake of his family and friends who would not like to see his image, name and other elements being misused, especially for such tarnishing and negative use. It is pertinent to mention that this judgment shows how elements of intellectual property that protect the attribute of an individual, in fact, have other dimensions, including rights protected by the Constitution of India.

Can digital avatars own IP in their own creations?

The growth of technology and computers has led to the establishment of certain eminent industries that would have otherwise been unforeseeable. One of them is the upsurge of the high-flying video games industry. This Industry has effectively established itself and has been growing exponentially since the release of its first commercially viable game, Pong by Atari in the year 1972. The Industry's development has further soared in the past decade with the popularization of mobile gaming. The Industry, consequently, is expecting to see an enormous boost in its growth despite the global fiscal slowdown. Many companies have recognized this and have accordingly invested heavily in their expansion. The video game includes various parts that, when incorporated, compose the final product: the game code, the characters, the dialogue, audio/music, the video, and the storyline. All elements are independently copyrightable following the Indian Copyright Act, 1957. With the evolution of open-world and online multiplayer games, concerns about serious intellectual property rights as the vital and perpetual interactive environment need a more intricate mechanism for protection. Further, the user-generated content in such interactive games raises questions regarding the authorship of such work, i.e., whether it belongs to the user or the publisher. Players frequently create original content — including items, characters, movies, and maps — based on their favorite games, often integrating that content back into the same game.

Ethical and Societal Safeguards

The core ethical principle in the context of deepfakes is autonomy. Individuals must have the right to control how their likeness, image, and voice are used. Creating or disseminating deepfakes without consent, especially in sensitive contexts like pornography or political

speech, undermines autonomy and dignity. Ethical guidelines should mandate explicit, informed consent before using a person's likeness in any AI-generated content. This extends to celebrities and public figures, balancing their commercial exploitation rights with the need to prevent unauthorized harm.

Deepfakes have been misused in numerous harmful ways: non-consensual pornography disproportionately targeting women, fake political speeches that destabilize elections, and fraudulent scams impersonating CEOs. These harms are not hypothetical; they are already realities. Ethical frameworks should impose "do no harm" principles on creators and platforms, requiring rigorous risk assessment before releasing deepfake tools to the public. Developers should build in restrictions preventing the use of their technology for malicious impersonation. At the heart of ethical concern lies the erosion of truth. When seeing is no longer believing, trust in media, journalism, and even personal interactions may collapse. Content creators and platforms should implement disclosure requirements, such as watermarks or digital signatures, so that users can distinguish real from synthetic. Transparency not only prevents deception but also upholds the principle of authenticity.

The harms of deepfakes are unevenly distributed. Women, minorities, and marginalized communities face higher risks of exploitation. In addition, individuals with fewer resources may struggle to pursue remedies when their likeness is misused. Ethical safeguards should emphasize equity in protection, ensuring vulnerable groups receive stronger safeguards and easier access to remedies. For instance, AI companies could be required to provide free takedown support for victims of non-consensual deepfake abuse. Ethics requires assigning responsibility. While some argue deepfakes are merely "tools," responsibility for misuse cannot be ignored.

Developers should adopt ethical codes of conduct, and platforms should bear responsibility for moderating harmful deepfakes. This includes proactive monitoring, prompt takedown mechanisms, and liability for willful inaction.

Conclusion

Deepfakes signify both the creative promise and the ethical peril of artificial intelligence. While they open unprecedented avenues for entertainment, education, and innovation, their misuse threatens individual autonomy, identity, and societal trust. Current intellectual property frameworks, though partially adaptable, remain ill-equipped to address the full spectrum of issues raised by deepfakes. There is a pressing need for reform and adaptation in intellectual property (IP) laws to address the challenges posed by Artificial Intelligence (AI). As AI-generated content, inventions, and innovations continue to emerge, traditional IP frameworks are struggling to keep pace. While AI offers remarkable advancements in innovation and creativity, it also introduces fair use, protecting human creators, and preventing monopolization of technologies. Striking a balance between encouraging AI-driven innovation and safeguarding the rights of human creators is crucial to ensuring an equitable and thriving intellectual property ecosystem. Ultimately, a balanced approach is necessary to ensure that IP laws promote innovation, innovation and progress while addressing the unique challenges posed by AI.

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