Originality as an Obstruction for Copyright Protection over AI-generated Contents in China

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Structure

- The capacity of AI in the field of copyright

- The copyright problems caused by AI in China

- Solutions and the way forward?

Aim

- whether the current level of AI 'creativity' is destructive to the international and national copyright legal frameworks, and the legal and philosophical assumptions behind, and whether – and how – the law should react considering the capacity and potential impact of AI technology.
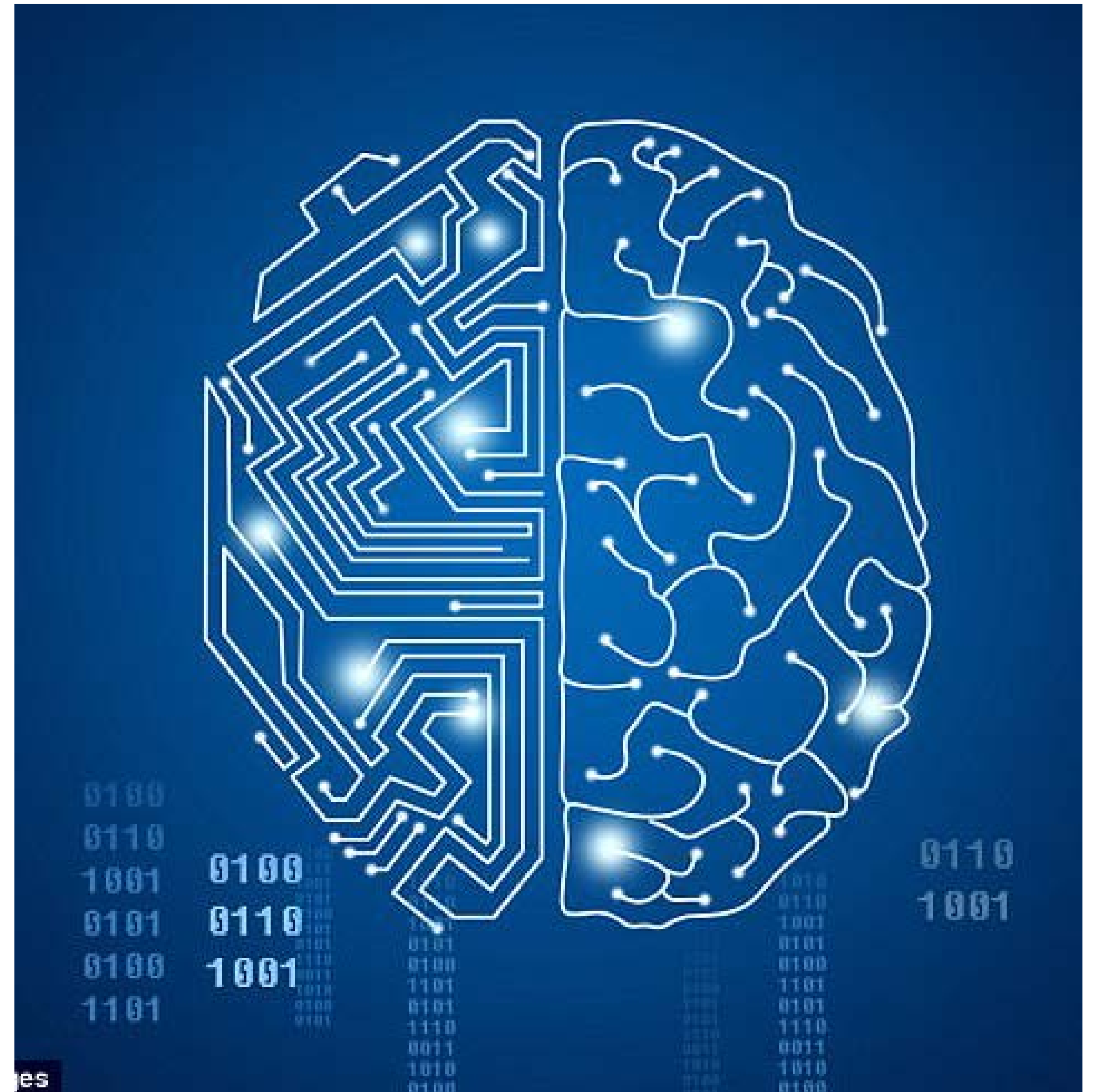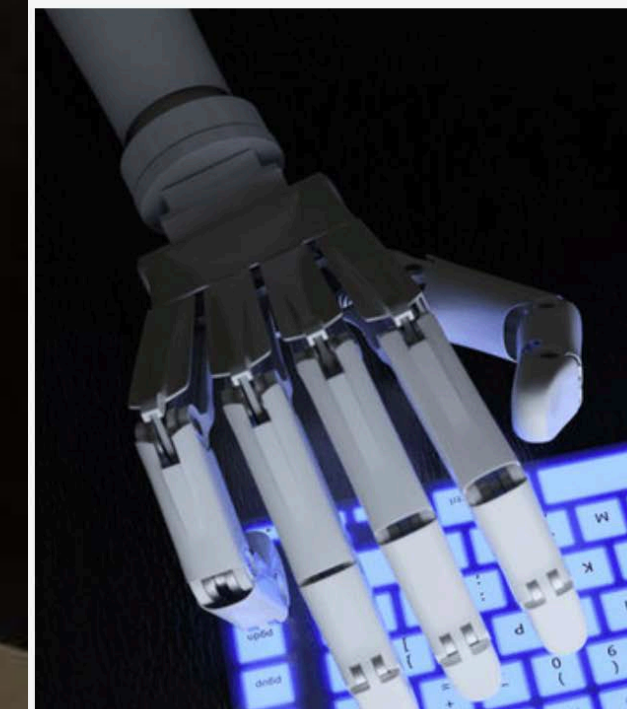
AI-generated works

EMERGING TECH

A Japanese AI program just wrote a short novel, and it almost won a literary priz[e]

IBM Watson Beat AI

South China Morning Post   HK CHINA ASIA WORLD COMMENT BUSINESS TECH LIFE CULTURE SPORT WEEK IN ASIA POST MAG STYLE .TV

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Daddy's Car: a song composed by Artificial Intelligence - in the style of ...
YouTube · Sony CSL

AMPER MUSIC

melodrive
adaptive music generation

3 issues

- is there a need to regulate?

- in what way can we offer copyright protection?

- is copyright the only solution?

Regulation is needed

- AI can create much **faster** than human alone (in the case of random tunes and poem, a few minutes maximum)

- huge investment involved, if no protection, then no incentives to reinvest.

Can we regulate AI-generated contents under copyright law?

- whether AI-generated contents can be regarded as **works** under copyright law of China?

- whether computer/machine can be regarded as **copyright owner** in China?

Originality

- the understanding of originality varies from country to country: "Sweat of the Brow" to "individual character" (UK, EU)

- Article 2 of the Regulations for the Implementation of the Copyright Law:

  - *The term "works" as referred to in the Copyright Law means intellectual creations with **originality** in the literary, artistic or scientific domain, insofar as they can be reproduced in a tangible form.*

- Article 15 of the SPC Interpretation 2002 on Copyright:

  - *With regards to a work created by different authors on the basis of a same topic, the authors shall enjoy independent copyright if the expression of the work is **completed independently** and is **creative**.*

  - China: the work originated from the author + the lowest level of creativity (独+创)

Subjective v. Objective path

- objective standard in assessing the originality of AI-generated contents: If **the lowest degree of creativity can be found on the work**, it is then considered original

  - Beijing Film Law Firm v. Baidu [2018] Beijing Internet Court, J0491MC. No. 239.

  - Tencent v. Shanghai Ying Xun [2019] Shenzhen Nanshan District Court, Y0305MC. No. 14010.

- subjective standard which believes that the **creative process** is decisive when assessing originality rather than the end product

  - Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc. et al, 191 F.2d 99 (2d Cir. 1951)

The justifiable subjective path

- If we merely based on the end product to determine originality, then we may not be able to distinguish between **the work of nature** and **the work of humans**, if no evidence concerning the creative process can be garnered.

- AI-generated content will be even more thorny, as the quality is good enough to mislead the public about its origin, if the creative process is not considered.

- Obviously the most formidable hurdle for human beings is **to recognize that machines and humans can be equal subjects** in both practical (that machines can express feelings and ideas) and legal terms (that machines can be made a subject that can enjoy ownership).

Can AI own the copyright?

- only natural and legal person can enjoy copyright:

  - Article 2 of the Copyright Law of China; *Film v. Baidu, Tencent v. Shanghai Ying Xun* case **(China)**

  - s. 178 Qualification by reference to author of CO **(Hong Kong)**

  - In countries with a long droit d'auteur (authors' rights) tradition such as **Germany and France**, the personality theory, which holds that intellectual property (IP) is the materialization of one's personal traits, is deeply rooted in their copyright laws (especially in the form of moral rights), leading to their denial of non-human authorship.

  - *Naruto v. David Slater* case; the US Copyright Office: a work must be created by a human being **(US)**

Can we make machine the author?

- there can be two approaches: first, legally recognize machine as copyright owner; second, assign the rights to human beings.

  - Some academics have claimed that if legal entities can be, so can machine. Their proposal is to add machines to the copyright law so that they can be considered as copyright owners as well.

  - But that is different, as legal person is still within the concept of human, as the decision is still made by human, albeit collectively. But for artificial general intelligence (or strong AI) that can generate works by themselves, there is no human intervention/assistance at all.

  - machines cannot enjoy rights and bear liabilities, machines cannot be incentivized either.

  - **Empirical findings** also support this stand (Nadia Banteka, *Artificially Intelligent Persons*, 58 Houston Law Review forthcoming)

the suitable right owner?

- designer (programmer), operator, owner of the machine, co-ownership between Desinger and operator, and public domain

- Assigning the rights to the **operator** seems logical, as he is just like the author using AI as a tool to create. He/she is the one that selects the material and makes specific arrangements

- whether AI-generated works involve human input and to what degree will be crucial in determining it's copyrighability

Summary of current treatment

- first, there is no way for machine to be the right owner;

  - "I reckon that machine learning has made great achievements, but I will never confuse it with real AI, never…What we have done is just curve fitting, as Judea Pearl said…rather than understanding the data." (Alan Kay, BAAI Conference Beijing 2020)

- second, no matter who, there has to be a human owner, and his/her input must not be negligible. If not, then the AI-generated contents will be in the public domain.

Solution 1: Handling AI-generated works with the current model

- the 'creative' process of AI in generating 'works' are totally different from that of human

- AI-generated works may not pass the originality test in theory, but it will not create new problems to the copyright system in practice, as in essence, the challenges posted by AI-generated works are just a matter of evidence

- But: it is just a kind of interim solution as it fails to tackle the threat of direct and unfair competition between the human-authored works and contents generated by the AI machines 'disguised' in the form of human creations.

Solution 2: Legal fiction

- **(US)** Reconstruction of the 'work-for-hire' doctrine

- **(UK)** S9(3) CDPA: "In the case of a literary, dramatic, musical or artistic work which is **computer-generated**, the author shall be taken to be the person by whom **the arrangements necessary for the creation of the work are undertaken**."

  - *Nova Productions Ltd v Mazooma Games Ltd [2007]*

- But: the foundation for the 'work-for-hire' setting to work is that the content being generated can be considered as a copyrighted work; the 'double dipping' issue, the meaning of 'necessary arrangements'?

# The Future of AI-generated Contents Protection Model in China

- Can machine be regarded as an author in China? *NO*

  - the protection is needed but not necessarily in the form of copyrighted works

  - the cost to overthrow the anthropocentric ideas rooted in the CLC is just too high

  - Recognizing machine authors in the CLC will bring more trouble than good, giving machines equal status to human is destructive to our society. Recognizing machine as an author, even indirectly via a 'work-for-hire' setting, will not only open the floodgates to machines claiming copyright directly in the future, but will also render humans redundant and deskilled in terms of creativity.

The Future of AI-generated Contents Protection Model in China

- neighboring rights (related rights)? *YES*

  1. protecting AI-generated works under the CLC's neighbouring rights setting is consistent with its legislative purposes.

  2. the human-centred basis of the CLC will not be challenged.

  3. AI-generated contents fit perfectly with the CLC's current legal setting related to neighbouring rights.

  4. the specific design of the new neighbouring right can enjoy a degree of flexibility.

The Future of AI-generated Contents Protection Model in China (cont.)

- **signature** will become more and more important

- require each and every piece of AI-generated works bear with a **digital signature** indicates the details of the piece, just like the EXIF information of a digital photograph
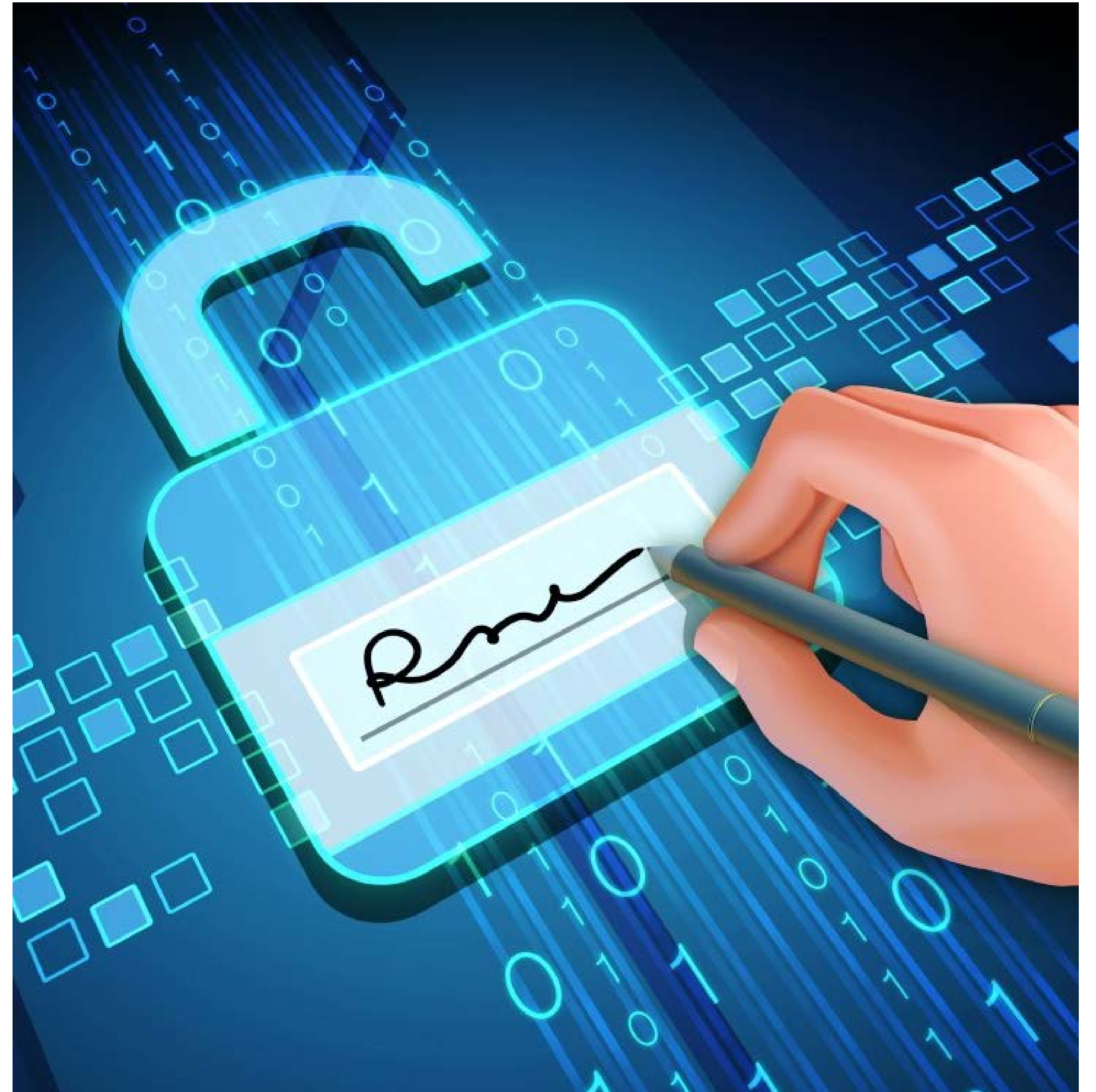
Thank you!

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