Paris Congress

ALAI 2023

Artificial intelligence, copyright and related rights

June 22-23, 2023

Reply of the Finnish ALAI Group

Prepared by Dr Juha Vesala and prof. Rainer Oecsh

To National Reporters:

The questionnaire uses the neutral term AI "production" to refer to content generated by an artificial intelligence system. As opposed to the term "work (of the mind)" which is the one that describes the classical object of copyright protection. This means that the content we are interested in is content produced by the artificial intelligence machine (or "system"), itself fed upstream by works of the mind, reproduced in a training data base. The margin of intervention of the final user is thus a priori very limited, but not always non-existent. The hypothesis concerned by this Congress is thus closer to what the ALAI once studied as "computer-generated creations" than to "computer-assisted creations" (see the 1989 Quebec City Congress).

In the mind of the editors of this questionnaire, an "artificial intelligence system" is defined as a computer system that allows, with a certain autonomy, automated decision making or predictions influencing real or virtual environments[1].

The questions raised are numerous because of the disruptive nature of the phenomenon, the multitude of issues and the theoretical, economic and social importance of the stakes.

Some of the questions will undoubtedly be accompanied by brief negative answers, which is already a useful answer for the General Reporters. Simply indicate these ("no", "none").

In other cases, the answers may be uncertain. In these cases, it is easiest to follow the classic pattern: "1) What do statutes and regulations say? 2) What does the caselaw say? 3) What does the national group think? To questions 1 and 2 above, the answer will often be "Nothing specific about AI but the relevant reference text/principle might be ...". Regarding 3), the national group is not obliged to have taken a position.

It is of this uncertainty and diversity that we will try to draw together, in June, a clear picture.

The team of the Scientific Committee (Alexandra Bensamoun, Jane Ginsburg, Silke von Lewinski, Pierre Sirinelli) is of course at your disposal to explain a question that might not seem, because of the particular context, immediately clear.

Thank you all and we look forward to seeing you in Paris.

Note: the questionnaires must be returned by the national groups no later than May 8, 2023. They will be sent to Pierre Sirinelli (pierre.sirinelli@univ-paris1.fr) and Sarah Dormont (sarah.dormont@u-pec.fr).

[1] *This definition is comparable to the one retained by the European Union in the discussion on the AI Act (proposed regulation COM(2021) 206 final, March 2023 position), itself inspired by the 2019 OECD Recommendation on AI.*

Artificial intelligence, copyright and related rights

The contours of the relationship

1. Understanding

1.1 **-** Has your national or regional law adopted a legal definition of AI?
No

1.2 **-** Can you provide some examples of current uses of AI and its productions in the cultural sector of your country?
AI has been used to produce press articles and visual arts.

1.3 **-** *(Optional) What are the issues that have been exposed in your country on this subject: stakes, difficulties, orientations, proposals...?*
There is ongoing public discussion about the use of AI in the cultural sector. Also stakeholders and policy makers are considering the recent technical developments, but no concrete proposals have been made so far as regards AI and copyright.

1.4 **-** Are there any initiatives in your country or region aimed at regulating the use of AI in the cultural sectors?
There are no governmental initiatives in Finland that aim at regulating the use of AI in the cultural sector.
Universities have prepared ethical recommendations and quidelines on the use of AI for instance in studies.

2. Understanding the upstream

2.1 **-** Are the AI system or its components likely to be protected by intellectual property rights (copyright and/or industrial property – patents, trade secrets . . .) ?

AI systems and their components can be protected by patents under the Finnish Patent Act, provided patentable (technical) inventions are concerned.

Computer programs are protected as literary works under the Finnish Copyright Act. Also (sui generis) databases and catalogues are protected under the Finnish Copyright Act, but as neighboring rights with shorter protection term. When AI systems or components constitute such subject-matter, they can be protected accordingly.

AI systems and components can further be protected under Finnish Trade Secrets Act, to the extent they are regarded as trade secrets. For example, certain data involved and the models may constitute trade secrets.

2.2 **-** Can rights under copyright be enforced against the use of protected contents by AI training?

Yes.

Does the insertion of a pre-existing work into the computer system implicate rights under copyright? **Yes. To "insert" a work into a system can constitute reproduction. Moreover, that work may be made available to the public in a way implicating these rights. However, it should be noted that it depends on how a pre-existing work is fed into a system, how it is processed and how the system is used whether reproduction or making available of works likely takes place. For example, training AI and using it subsequently may raise different issues.**

Commenté [ORK1]: oliko tämä tarkoitus ? pitäiskö vielä sanoa by reproducing or making available.. ?

If so, in order to avoid a finding of infringement, are the copying or storage covered by an exception?

Reproduction may benefit from the newly introduced text and data mining exceptions, the temporary reproduction exemption or some other exceptions. However, all conditions of the invoked exception need to be met for them to apply. This depends on the situation and technical processes concerned, and it is not clear how broadly the exceptions would apply in these situations to AI. There is no specific exception in Finnish copyright law covering AI.

Commenté [ORK2]: hyvä nosto tuoda text and data mining esiin

2.3 - In your country, are there any proposals to change the law and in which direction?

For example, by deeming that the incorporation of preexisting works into AI systems does not create an actionable "reproduction" of the works? Or by creating a new exception? Or by implementing a compulsory licensing system? Other solutions?

Currently, there are no proposals or plans in this regard.

2.4 - Do the "terms of service" of the platforms available in your country authorize the copying and storage for the purpose of constituting "training data" and the creation of "AI outputs" of the works posted by the users of the platform? If so, give examples of the relevant Terms of Service.

N/A

2.5 - Are you aware of the conclusion of individual or collective licenses on this point? If yes, in which fields of creation? Under what conditions? If so, give examples.

N/A

3. Using AI as a tool for rights management and administration

3.1 - To what extent is AI used to locate or identify protected content, to moderate it, or even to fight against infringement?

Platforms operating in Finland, such as YouTube, apparently use AI to detect infringing content.

Commenté [VJ3]: TTVK :lla voisi olla tietoa tästä.

3.2 - If computer tools are used for this identification, are there rules to allow the evaluation of the tools used in order to verify the relevance of the results produced by the AI system? (For example, in the framework of the European Digital Services Act, platforms have an obligation of transparency, notably on the tools used and the results they produce - art. 15).

If the answer is yes, are these rules derived from practice (usages, contracts, softlaw...) or imposed by legislation or regulation, or by case law?

We are not aware of specific rules in Finnish law in this regard. EU legislation, such as the DSA mentioned in the question, do contain such rules. Recently, the Finnish Parliament adopted a government proposal (145/2022) concerning automated decision-making the public sector. While the provisions introduced by this would not typically be relevant in this context, it does contain some general requirements on making automated administrative decisions using certain methods of automation.

3.3 - To what extent is AI used as a tool to recommend protected content? For example, the proposal of "playlists" by Pandora or any other online communication service making recommendations of works.

N/A

3.4 - Should we fear, through this recommendation, a risk of dilution of contents and revenues due to a possible opacity of the system?

N/A

3.5 - Does your national or regional law contain transparency obligations on the use of an AI system for rights management in your national or regional law (e.g. the European Digital Services Act)? What are they?

We are not aware of any Finnish legislation to this effect.

3.6 - In general, do these tools have to comply with rules in terms of product safety or conformity? Are there procedures for certification of these tools by an authority or by professional associations? Are suppliers subject to specific due diligence obligations?

N/A

Artificial intelligence and literary and artistic property

The contours of protection

The status of AI Outputs

1. Access to protection

- ***Characterization of the AI output as a "Work" of authorship***

Note: If an AI output has all the external aspects of a work of authorship, is it possible to consider it as a work of authorship protected by copyright?

Yes, provided that there is a human being to be identified behind the end result (the creator of the computer program, the user of the program or somebody else).

4.1 - Does a "Work" always imply the presence of a physical person?

Yes. You cannot say that an AI system is the independent creator; the author always needs to be a human being.

4.2 - From what threshold is it possible to consider that there is a human intervention giving rise to an original work in the realization of an AI output? What types of intervention would allow to know if this threshold has been crossed?

The traditional originality threshold for work protection. A human being needs to contribute to the protectable expression by some means for a protected work to be concerned.

4.3 - How can we distinguish between AI-assisted outputs and outputs generated by an AI?

This can be very difficult in practice. However, the burden of proof may in some situations resolve this question: the party claiming protection may need to establish that a protected work is concerned (not fully automated AI generated output), especially if the opposing party has questioned whether any human was involved in creating that output.

4.4 - In some countries, it is asserted that there can only be a work of authorship if the form obtained is the result of creative work by the author in the sense that the latter is aware of the result (work) he wants to achieve even if this result is a little different from his hope/expectations. This requirement, for example, would exclude the quality of author of a person deprived of discernment (for example, an insane person, a very young child, a somnambulist...) or would entail the refusal of protection of a production which would be only the fruit of random forces.

Does this condition exist in your country? **No, an author need not be an adult, mentally well, or otherwise be aware of the results sought or intentionally aim for those results. However, whether completely random artefacts (e.g. wholly random results from using AI) receive protection is another matter – it depends on whether the person has created a work (see above).**

If so, is it a statutory or administrative requirement? Does it derive from caselaw? From secondary authorities (e.g. academic writings)?

It is derived from the very concept of a work as such. So this is a quite traditional view.

4.5 **-** Are the criteria traditionally considered to be irrelevant (such as merit, or purpose) taken into account in the framework of protecting an AI output?

They are considered irrelevant.

- Characterization of a performer's performance

4.6 **-** In order to be vested with a neighboring right, does the performer necessarily have to be a natural person? **Yes.**

In other words, is an "interpretation" from an artificial intelligence protectable under neighbouring rights? **Performance by a natural person involving the use of AI could receive protection (e.g. a singer's voice manipulated with AI technologies). If only AI has been used to produce a "performance" (e.g. vocals) but no natural person was involved (e.g. no singer sung them in the first place), the performer's right would not likely protect that "performance". Another matter is if the AI based "performance" is constructed from earlier recorded performances by a natural person (e.g. in a way comparable to sampling).**

4.7 **-** In order to be vested with a neighbouring right, must the performer necessarily interpret a work created by a natural person?

Yes (or interpret a piece of folkfore)

In other words, is the interpretation, by a human being, of a production of artificial intelligence protectable under neighboring rights? (Suppose an AI-generated musical composition: if performed by a human being, would the performance be protectable?) **Yes, if the AI generated musical constitutes a work.**

4.8 **-** Are the productions generated by AI, that are not covered by copyright, in the public domain?

Not necessarily as other IPRs may in some cases apply to the outputs and their exploitation (e.g. trademark, trade secrets) or the use of a person's name, appearance etc. may be affected by other legislation, and outputs of AI may be subject to contractual obligations (e.g. limiting their use or disclosure).

4.9 **-** In your country, could the productions generated by AI be qualified as "commons" (it being understood that, in some countries, the notion of "commons" has a different meaning than "public domain")? Under what conditions or according to what criteria?

N/A

4.10 **-** How can we be sure that the creation presented as realized by an author is not an artificial production?

That's true, it is very difficult.

4.11 **-** Usually, a collective management organization (CMO) manages a catalog attached to an author without making distinctions between "works" / "productions". How to manage the case of an author whose usual works belong to his repertoire but who would also use an AI system to generate other "productions"?

N/A

2. The rights regime

- The choice of the right (nature, ownership, regime, limitations)

** As your legislation currently stands:*

5.1 **-** Is the output generated by an artificial intelligence system likely to be protected by copyright in your country?

It can be if it meets the conditions for protection as works or by related rights. As noted above, however, a natural person needs to be involved for protection as works to arise. Many (but not all) related rights would also appear to require that a natural person is involved.

5.2 **-** If applicable, does the production generated by an artificial intelligence system benefit from a full copyright, in particular as regards the duration and scope of the rights, or from a modified or special right?

Any protected subject matter would receive full protection.

5.3 **-** If there is a protection by an adapted or special copyright (as it exists sometimes for certain works, as for example, in Europe, concerning computer programs), what are the modifications or adaptations?

N/A

5.4 **-** Who is the author? Who would be the owner of the rights? Could the output be considered a joint work? If so, between whom and in what cases?

There may be one or several right holders, if they have contributed to a work (e.g. joint works). An agreement between them would be the optimal solution but not always realistic.

5.5 **-** Is there a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations; see for example, art. 9 (3) Copyright, Designs and Patents Act (CDPA) in England)?

No.

** In the event of a possible legislative change:*

Are there any concrete proposals in your country related to the items listed below? If so, answer questions 5.6 and following.

If not :

i) the national rapporteurs can give their personal opinion while making it clear that these are mere proposals of secondary authorities (e.g., academics) and not positive law;

ii) or they can go directly to the questions numbered 6 and following.

We doubt that this kind of provision could solve all the problems. But in case the formulation is clear, it could be an advantage for some groups of creators by creating clarity in this sense of who is considered the rightsholder.

5.6 **-** What would be the criteria to be retained to allow access to copyright protection for AI outputs?

N/A

Commenté [VJ4]: Ilmeisesti voisi jättää tyhjäksi vastaukset ja vastata vasta 6-kysymyksestä alkaen taas.

5.7 **-** Should a specific copyright be created for these productions?

N/A

5.8 **-** With what particularities (e.g., duration and content of the rights) ?

5.9 **-** Can there still be a moral right ?

5.10 **-** Should there be a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations)?

Maybe. In some situations this could clarify the situation.

5.11 **-** Should a deposit be required? / A declaration of "origin"?

That would be one idea to try to solve the problems in the area.

5.12 **-** Should a kind of neighbouring right or a sui generis right be created?

One idea to create clarity, but this would also lead to more a fragmented situation and it is not clear what the benefit of such a right would be.

5.13 **-** What would be its characteristics?

N/A

5.14 **-** The rights covered?

N/A

5.15 **-** Generally speaking, what would be the limitations on or exceptions to this new right?

N/A

5.16 **-** How should this protection be articulated with other existing protections?

N/A

5.17 **-** In the absence of protection by a property right, are there any compromise solutions?

For example, a kind of paying public domain for them: collection of royalties paid to a collective management organization for distribution among authors continuing to create works in the traditional way? What else?

N/A- ***AI and violation of rights: the choice of remedy***

6.1 **-** Can an AI output infringe, and to what extent? Who would be liable?

Of course. The natural and legal persons who engage in the infringing reproduction or making available of a work (e.g. publishes the output). This can include the provider of the AI system (e.g. reproduction in its system) and the user of the AI system. Which persons are liable for infringement depends on their role and the circumstances.

6.2 **-** Are there other legal means (e.g. unfair competition, parasitism) to engage the liability of the person responsible for the AI output? (Who would that person be?)

Of course, such as under legislation concerning unfair competition. The threshold for e.g. so-called slavish imitation has been relatively high in Finland, but in principle could apply when AI generated outputs are concerned if criteria set in case law are met.

6.3 **-** Beyond copyright, can personality rights prevent the realization by an AI of a production using the voice or physical aspect of another person?

Of course, but this is normally beyond copyright (personality rights and privacy legislation).

- Question of transparency and remuneration

7.1 **-** In your country, is there a requirement (legal, administrative, jurisprudential, arising from practice) that AI-generated content in general be declared as such (see for example in Europe, the AI Act of April 21, 2021[2] and the more nuanced position of the Council of the European Union of November 2022[3])?

(Optional) If not, do you think that such a solution should be adopted?

We are not aware of such a requirement.

7.2 **-** If applicable, how is the sharing and payment of remuneration carried out when AI is involved in the creative process?

(Optional) If there is no existing solution, what solution do you think should be adopted?

N/A

7.3 **-** If applicable, how is the sum linked to the AI allocated (cultural action? payment to other rights holders...)

(Optional) If there is no existing solution, what solution do you think should be adopted?

N/A

[2] https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021PC0206
[3] https://www.consilium.europa.eu/fr/press/press-releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights/