Paris Congress

ALAI 2023

Artificial intelligence, copyright and related rights

June 22-23, 2023

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?

No

1.3 - *(Optional) What are the issues that have been exposed in your country on this subject: stakes, difficulties, orientations, proposals...?*

1.4 - Are there any initiatives in your country or region aimed at regulating the use of AI in the cultural sectors?

No

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 . . .) ?

Yes, AI systems are likely to be protected. First, they can be protected as software (copyright protection). It is possible that there may be computer implemented inventions involving AI. It is certainly possible that the know-how related to operating and developing an AI system could be protected as a trade secret. Finally, it is possible that some aspects of e.g. AI training could be protected under copyright law, if the selection of the training data is creative.

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

Does the insertion of a pre-existing work into the computer system implicate rights under copyright?

Such an insertion would necessarily involve reproduction. Therefore, the act of insertion is relevant for copyright and would require a specific exception. As realized during the discussion concerning text and data mining, it is difficult to find a pre-DSM exception or limitation that would be applicable in such cases, but that would depend on the circumstances (e.g. the scale, who performs such, an act, etc.).

As regards moral rights, it should be assumed that if the work is not recognizable in the AI output, (in principle) no infringement of moral rights could have occurred. The fact that some authors could oppose their works being fed to AI systems would not be sufficient to argue that a moral right has been violated.

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

No, in principle, the copying and/or storage [storage without copying is perhaps not a copyright use, but in order to be stored data must have been copied] are not covered by any exception. Poland has not implemented the DSM Directive so far, therefore even the TDM exception is not available.

There have been voices in legal literature arguing that some exceptions introduced in the InfoSoc directive could be relevant for AI training. This would be e.g. the case with the temporary reproductions (art. 5.1).

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?

No, there are no serious proposals concerning such issues.

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.

We have not noticed terms explicitly referring to "training data", but the scope of many licenses is broad enough to accommodate such purposes. For example, YouTube's T&Cs in Poland provide for the following scope of license: "By making Content available on the Service, you grant YouTube a worldwide, non-exclusive, royalty-free, transferable, sub-licensable license to use such Content (including reproduction, distribution, modification, display and performance) to operate, promote and improve the Service". It seems that copying to train YouToube's AI algorithms could be interpreted as performed in order to "operate, promote and improve the Service"

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.

No

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?

We do not have such knowledge. However, many services available in Poland are global (e.g. Google, Youtube, Netflix, etc.) so one would imagine that they use the same tools in Poland as elsewhere.

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?

There are no internal rules of this type (The Digital Services Act will be applicable in Poland directly)

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.

Again, it must be assumed that international players use the same tools in Poland as in other markets. It is for example common knowledge that services such as Netflix use AI in their algorithms suggesting recommended content.

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

One would have to compare AI systems with automated non-AI systems and human operated systems. We are not aware of any such comparisons or studies done in Poland. However, it seems that it is possible that such recommendations will not be transparent (as is the case with many other AI-made decisions).

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?

There are no special (non-EU derived) obligations of this kind.

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?

No

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?

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

We are not sure whether "presence" is necessary (it depends on how one would understand this requirement), however according to the absolutely prevailing view in Poland, a copyright work must be a manifestation of human creativity.

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?

It is possible to consider such cases. In our opinion there are two ways this could happen. First, if the so-called "prompt" is so detailed that it to a certain extent co-determines the AI created output. The result would then resemble a work of co-authorship, but only a part (layer) of it could be protected. Second, the selection of data and other material AI will use to train itself or otherwise rely on could be creative and have impact on the desired result, so that the content created by AI would still display at least traces of this creativity in choice and selection.

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

On a theoretical basis (though probably difficult to implement in practice) the answer seems fairly simple. The difference should be whether the output (production) generated by AI retains or in some other way displays creative choices made by a human in a way that would be similar to deciding whether a person could be a co-author (if the remaining parts were also created by humans).

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

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

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?

Since AI created content is not protected such additional elements could not change its status under the current copyright regime. Perhaps, such factors could be considered in unfair competition law, but this is a completely different type of protection.

- 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?

> In other words, is an "interpretation" from an artificial intelligence protectable under neighbouring rights?

Although the Copyright Act does not define the term "performance", it is widely believed that only humans can benefit from this protection.

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

> 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?)

According to the Polish Copyright Act an artistic performance must be a performance of a work. Since the term "work" does not encompass non-human productions, it follows that there can be no protected performance of something that is not a work of copyright (such as AI output).

- If the AI output does not qualify for copyright protection

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

Productions generated by AI, not protected by copyright, could be theoretically protected in some other way (although in the context of this question these would be rather rare cases). It therefore depends how one understands "public domain", but for practical purposes the answer should be: yes.

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?

Polish law does not explicitly refer to either the public domain or commons, nor does it provide for any distinction between these concepts.

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

One can never be certain, however this issue can in fact remind courts and other stakeholders that the authorship and ownership of rights must be proven (too often this is overlooked in litigation). It should be expected that anyone who wants to protect a work of copyright should prove its status, e.g. by providing evidence of the process of creation. Whether and how long this could be helpful remains to be seen (more sophisticated AI systems could probably crate such evidence). The other option would be to use technology (if, as some claim, AI could recognize AI created content).

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"?

We do not have the answer, but since CMOs manage "rights" and there are (at least not know) no rights in AI productions, there would be no legal ground for a CMO to manage such content. CMOs

would therefore have to engage in examining what is provided to them as protectable subject matter (the problem would be the same as in 4.1.0.)

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?

No

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?

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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?

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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?

Before such questions are answered, it deserves to be asked whether AI creations should be protected at all and what evidence there is to introduce such protection. Any type of exclusive right (or even a remuneration right) must be justified and in the case of AI it is difficult to find such reasons. One should note that despite AI creations not being protected in the vast majority of jurisdictions, there has been unprecedented investment in this field. That would suggest that output protection is not necessary. Most providers of AI systems could obtain adequate remuneration simply for charging for access to their AI-based services. It is therefore too early to discuss any specific form of protection. It seems certain that simply extending copyright protection to AI productions would be absurd. An issue that has not attracted enough attention is slightly different: the scale, volume and sophistication of AI productions could have an impact on the criteria of protection of works made by humans (that are extremely liberal in most jurisdictions).

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)?

** 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.

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

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

It is too early to decide, but if at all, this would have to be a sui generis right (not a type of copyright)

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

Much shorter duration, probably just remuneration (no exclusive rights).

5.9 - Can there still be a moral right ?

No. But there could be some equivalents, such as modification rights.

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

For practical purposes, this could be considered (if any such rights were to be created). However, the nature and scope of this prospective protection would determine the need for such rules (and their concrete shape).

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

Probably yes.

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

See 5.7.

5.13 - What would be its characteristics?

5.14 - The rights covered?

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

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

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?

Again, before entertaining such questions, convincing reasons why any protection is warranted should be put forward.

- AI and violation of rights: the choice of remedy

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

AI output can infringe. For example, if it incorporates protected content, there is no reason to argue that it should be treated differently. The liability question is more complicated. There would be two principal types of actors: Creators/operators of AI systems and users using infringing, AI generated content.

Under Polish Copyright law, liability for copyright infringement is in principle objective. A person, who organizes an AI system that engages in unauthorized copying would be liable for the committed infringements. Similarly, a user who e.g. communicates to the public a production generated by AI, but infringing third party rights, would be liable for this infringement.

What seems more difficult, is the very question of infringement, e.g. whether AI has indeed copied or just generated a similar creation independently. In many cases evidence such as Getty watermarks will not be available.

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?)

In Poland, there is an Act on Unfair Competition that contains both specific torts and a general clause Parasitism has been considered one of the torts of unfair competition under this Act. However, whether this regulation could be applied would depend on many circumstances relevant for a particular case. However, it is very controversial whether the scope of parasitism should be adjusted to issues related to AI-creations, such as e.g. protecting a certain style of writing, etc. In principle, such attempts would be dangerous.

This also applies to determining the liable person. It is possible that this could be the person responsible for the creation of an AI system, but there could be scenarios in which unfairness would manifest itself in the way the AI-generated content has been used (by the user).

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?

Yes, if AI used a person's likeness (image) or voice, this would have to be considered (at least in principle) infringing. In Poland, extensive protection of the so-called personal interests is recognized in civil law (art. 23-24 of the Civil Code) and the use of AI to interfere with the content of these rights could not, in our opinion, change their scope of protection.

- 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?

No. In our opinion, it is dubious whether, in the light of the proposed EU legislation, national legislators should come up with their own ideas.

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?

[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/

Some authors have argued in favour of a general remuneration for using copyright works to train and operate AI systems, however many practical problems have been signaled and no specific proposal of how such a system could be implemented has been put forward.

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?