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Artificial intelligence, copyright and related rights

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ITALY

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 legal definition of AI exists in Italian Law as yet.

1.2 - Can you provide some examples of current uses of AI and its productions in the cultural sector of your country?

No specific examples in Italy. The public debate concerns essentially internationally known examples, such as those decided by USCO or the position of Universal Music on AI generated music performances; also the Music Artistry campaign has had a certain echo.

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

The recent recurring news on the application of generative AI have raised questions in the specialized press concerning challenges for several categories of creative workers, above all journalists, visual arts authors, including photographers and performing artists. In general, the comments have been mostly driven, however, by news from the US concerning AI generated works.

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

As in other EU member states, the apparent trend is to refer to EU legislative initiatives rather than introduce national norms, considering that there is a EU Regulation to be issued before the end of this year.

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 . . .)?

It is likely that at least some components of AI systems are protected by IP rules.

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?

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

The EU directive on copyright in the digital single market (CDSM) was implemented in Italy at the end of 2021 and the articles on Text and Data Mining were inserted almost literally into the Italian copyright law through the new articles 70-ter and 70-quater, that introduce two distinct mandatory exceptions to copyright and to neighboring rights. The Directive and the amendments of the copyright law are based on the assumption that Intellectual property rights (at least reproduction right, but arguably also adaptation right) are affected by AI training.

It is not tested yet, whether the mentioned EU Directive (and the national implementation in member states) must be interpreted as not inclusive of machine learning for the purpose of generating new "original" content. The examples in recital 9, that specifies "Text and data mining makes the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible."

In Italy, no case law exists, however, that helps defining the interference between activities like machine learning, deep learning or web scraping and copyright.

The introduction of the TDM exceptions was not preceded by open discussions on the consequences for cultural creations of the development of AI system trained through the access to massive quantities of texts and works, whether protected or in public domain. In fact, it can be understood from the recitals that the exceptions for TDM aim at making possible only data analytics and similar processes. The wording of the new article 70-quater of the Copyright law is equivalent to article 4 of the CDSM directive and the exception allows TDM carried out to entities other than the research and cultural institutions specified in article 70-ter. Two major aspects of article 70-quarter are not explicitly covered:

- How (or if) the reservations of the rightowners can be indicated for the works are protected materials made available on the internet before the coming into force of the exception;
- Whether licensing clauses and terms of usage can validly reserve the usage of protected works and materials for generative AI or even for AI in general; more importantly, how these clauses can be effective and enforceable.

As to the Italian implementation, this distinction may be argued comparing the new art. 70-ter para. 1 and art. 70-quater para. 1 that read[1]:

[1] Art. 70-ter, para. 1 - 1. Sono consentite le riproduzioni compiute da organismi di ricerca e da istituti di tutela del patrimonio culturale, per scopi di ricerca scientifica, ai fini dell'estrazione di testo e di dati da opere o da altri materiali disponibili in reti o banche di dati cui essi hanno lecitamente accesso, nonché la comunicazione al pubblico degli esiti della ricerca ove espressi in nuove opere originali.
Art. 70-quater, para. 1 - Fermo restando quanto previsto dall'articolo 70-ter, sono consentite le riproduzioni e le estrazioni da opere o da altri materiali contenuti in reti o in banche di dati cui si ha legittimam[ente accesso ai fini dell'estrazione di testo e di dati. L'estrazione di testo e di dati è consentita quando l'utilizzo delle opere e degli altri materiali non è stato espressamente riservato dai titolari del diritto d'autore e dei diritti connessi nonché dai titolari delle banche dati.

Art. 70-ter, para.1

1. *for the purposes of scientific research, research organisations and cultural heritage institutions are allowed to make reproductions of works or other subject matter available in networks or data bases to which they have lawful access for the purposes of text and data mining* ***and to communicate to the public of the results of their research where these are expressed in original works***.[emphasis added]

Art. 70-quarter, para.1

Leaving intact the provisions of art. 70-ter, the reproductions and extractions of works and other subject matter contained in networks or databases to which one has lawful access are allowed for purposes of text and data mining. Text and data mining is allowed when said use of works and other subject matter has not been expressly reserved by the owners of the copyright or of the related rights or by the owner of the data base.

The paragraphs reported above differ in two specific points, one is the possibility to express a reservation, as provided also by the CDSM Directive, the second one is that only research and cultural heritage institutions have the right to communicate to the public the results expressed in a new original work.

Non hints are made in the preparatory documents or in parliamentary discussions concerning this difference. *I*n accordance with the directive "leaving intact the provisions of art. 70-ter" aims at ensuring the large scope of research TDM; on the contrary, the limitation of the general purpose TDM exception to temporary reproduction and extraction indicates that TDM for generative purposes is not covered by the exception, not least because the communication to the public is considered only for research purposes by the institutions defined in article 3 of the directive.

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 distinct proposal concerning AI systems, TDM or related technological processes exists in Italy, in addition to the EU rules; we can assume that any initiative in this field would be led by the EU, as in the case of the proposal of EU Regulation on Artificial Intelligence.

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 are not aware of platform terms of usage that contain express reference to machine learning for the creation of AI outputs. However, it is common that the terms of usage provide that the user grants a non-exclusive perpetual license to use the user's own content, including for the purpose of creative derivative works. The broad provision would very likely cover also generative AI systems.

The only global platform containing express reference to TDM in the terms of service is Twitch, in article 7- License, lett. d, that forbids "(d) use of any data mining, robots, or similar data gathering or extraction methods".

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, we are not aware of any licensing scheme in place or under negotiation for machine learning.

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?

Machine learning has started being deployed for the matching of works and protected materials to metadata made available on the Internet for more than 10 years. Machine learning processes have been put in place by content service providers and have progressed steadily in cooperation with rightowners and collective management organizations. The sophistication of the tools and the size of the data bases set up by machine learning have developed exponentially and the relevant processes have improved through AI applications.

Metadata and AI tools are the core of several identification systems applied by content sharing services such as You Tube and by CMOs or by rightowners of various types of content, especially music, to allow the identification of protected works or material and their extensive monetization. These identification tools are necessary to ensure not only the monetization of the content, but they are key also against unauthorized usages, for example for so-called take-down and stay-down procedures.

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?

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.

AI tools support the selection of content in playlists according to the user's attitude profiled by the service and/or the user's genre requests. There is also a certain level of manipulation carried out in the selections of AI playlists.

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

As some studies on music streaming show, the recommendation systems applied by music platforms can be easily used to offer playlists whose song selection helps decreasing royalty payments. This can be done in different ways, for example inserting one or more "library" songs or songs by fake artists in popular playlists.

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?

Not yet.

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?

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?

According to the interpretation of the Berne Convention and of the Copyright Law, a natural person must be the source of the work. Pure AI generated outputs, even when they are equivalent to an intellectual work, are not protected by copyright. On the contrary, AI assisted works are copyrightable, provided that they possess the relevant requirements.

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?

There is no clear answer neither on the threshold nor for its assessment.

A recent decision of Italian Corte di Cassazione concerns a computer assisted work of visual art that was used by the public broadcaster RAI as the opening image for Festival di Sanremo in 2017. RAI sustained that a computer generated work cannot be attributed to a human artist when the form, colors and details are elaborated by means of a software mathematical algorithm. In that case, the human contribution consisted in the selection of the algorithm and the approval of the computer generated output.

In their decision, the Italian Supreme Court abstains on the one hand, from any assessment concerning the artistic activity carried out using digital technology as a part of the creative process or of the artistic expression. On the other hand, the Court reiterates the legal concept of creativity specifies that it refers to the personal and individual expression in the types of works indicated in principle by article 1 of the copyright law, being understood that copyright protection is granted only

to works implying a creative act, even at a minimal level, provided that it can be detected in the external world. The Court indicates, therefore, that the threshold can be quite low but must include human creativity and not consist just in an original new expression.

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

We are not aware if tools are available to distinguish between AI assisted outputs and AI generated outputs.

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?

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

No. In the prevailing interpretation, a work is attributed to the person that creates it even if that person had no willful intention to produce a work. Authorship is granted, therefore, also to persons who are mentally incapacitated, insane or unconscious during the creative act. On the contrary, the rights can be exercised only by persons who are legally capable to act. Article 108 of the copyright law indicates 16 years of as the age when the author attains the capacity “of accomplishing all legal acts relating to works created by him, and of instituting any action in respect of them”.

This excludes that the rules on authorship of works created without willful intent can apply by analogy to works generated by AI systems.

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?

This aspect is not under discussion.

- ***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?

The necessary human nature of performers has not drawn the attention of legal experts until recently, but the wording of article 80 para. 1 of the copyright law defines expressly as “persons” the various categories of performers entitled to related rights. The wording corresponds to article 3 of the Rome Convention, that Italy has ratified by law of 22 November 1973, n. 866.

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?)

The link between intellectual works authored by a natural person and the grant of performers' rights derives from art. 80, para. 1 of the Italian copyright law that reads:

Actors, singers, musicians, dancers and other persons, including voice actors, who play, sing, act, recite or perform in any manner intellectual works, whether protected or in the public domain, shall be considered performers under this Law.

However, the case of an intellectual work, not authored by a natural person and therefore not copyrightable, is not been expressly regulated; considering the AI output in public domain would allow to grant related rights to performers pursuant to the above mentioned article of the copyright law.

- ***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?

No answer in the law; however, non-copyrightable materials are deemed to be in the public domain; no other qualification exists in Italy, although, generally speaking public domain is intended for works and materials whose term of protection expired.

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?

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

There is no legal obligation for authors to indicate when their works are AI-assisted or AI-generated; until recently, there has been a limited awareness about generative AI and its legal implications or challenges for authors.

It is evident, however, that a harmonized clarification of the legal regimes applicable to AI assisted works and to AI generated work is needed. The distinction between AI assisted and AI generated works and the relevant threshold of human intervention should also be defined at least at EU level, otherwise, national gaps would affect the making available of works in the digital single market and create possible competitive distortions.

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"?

As to my knowledge, currently the internal rules of none of the Italian CMOs make it mandatory to release a declaration that the work is not AI generated. A transparency obligation could raise the authors' awareness, but it could not be easily enforced absent transparency obligation and effective threshold of creativity required to grant copyright and to register a work. Even when this threshold is established, there would be serious enforcement problems.

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, it is not.

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?

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?

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?

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?

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)?

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

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

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?

- AI and violation of rights: the choice of remedy

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

In principle, it is possible that an AI output infringes copyright of third parties, for example in the form of plagiarism. It may be possible that an AI generated work reproduces the recognizable core concept of or shows remarkable similarities to a previous work, in cases where the machine learning process is carried out by mining the works of a certain author or a certain genre, therefore basing on a limited quantity of data.

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?)

The application of legal provisions of general nature as those mentioned has not been tested in Italy.

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?

The physical aspect is protected as relevant to the person's identity; the authorization is always required when the image is published or shown in public and when the acts may be detrimental to the person's honor or reputation (article 10 civil code). Moreover, article 96 of the copyright law states that the portrait of a person may not be displayed, reproduced or commercially distributed without the consent of such person.

Voice and image of a person are protected also under the law on the treatment of personal data, when they allow the identification of said person; this principle has been confirmed by a number of decisions of the Authority for the protection of personal data. Pursuant to the Regulation, the publication of photos of people is different from the simple collection for the purpose of private use, that does not require the person's consent.

More specifically, an unauthorized production using the voice and physical aspect of a performer would infringe the economic interest in the exploitation of his or her image, as stated clearly in several judgments. The performers' rights extend to the exploitation of their likeness, when the reproduced elements unequivocally evocate them, while on the contrary parody or current events may justify the reproduction. It is practically non-existent case law concerning the performer's voice.

- 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?

It seems fair that some transparency requirements are introduced also for intellectual property, although it may be quite difficult to operate a distinction between works according to their "generation" method without the cooperation of the person in charge of the AI process.

- 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?

7.2 **-** 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?

[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-forpromoting-safe-ai-that-respects-fundamental-rights/