Vereniging voor Auteursrecht

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Artificial intelligence, copyright and related rights

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National report The Netherlands

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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.

[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.*

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).

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?

Not generically (beyond EU law AI Act)

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

Generative AI to produce text, audio, video / images such as CHATGPT, DALL-E are used in different domains and by different types of users. There are sector specific tools, e.g. for the legal profession, for graphic designers, game developers, software coders, translators, financial reporting. Of note, it is not always clear when a tool is really AI or 'just' software that assists creation, identification, curation, and accessing of content.

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

There are lots of issues that are being researched and considered in academia, policymaking and practice, notably around the risks that AI tools pose for democracy and political processes (misinformation, deep fakes, recommender systems impact, etc.), how it impacts jobs (also job losses in creative sectors, e.g. with automated production of music, images, text) and how to safeguard authenticity of works.

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

Not specific for cultural sectors.

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 . . .) ?

Components of AI systems, such as datasets and language models (i.e. software), can be protected as works under copyright if they meet the originality standard (creative choice), involve human intellectual effort and can be classified as expression. Where choices are informed by functional/technical needs, they do not contribute to the required original character. Trade Secret protection in the Netherlands is based in the Act on Trade secrets, which implements the Trade Secrets Directive. Although in principle (elements of) AI systems

can be subject to trade secrecy, a pertinent question is whether they are fit to be kept secret and if the holder can safeguard the necessary level of secrecy to be able to invoke protection. Under Patent law (EPC) AI is regarded as belonging to the class of "computer-implemented inventions", these can be eligible for protection if the usual criteria (notably novelty, inventive step, industrial application) are met. Software as such cannot be patented.

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?

In principle, when a protected work (e.g. in the form of music, text, image, software) or other protected subject matter (sound recording, film) is copied and stored to be used as training data, this constitutes a reproduction. The two most relevant exceptions are: temporary reproduction (art. 13a Copyright Act, implementing nearly verbatim the corresponding provision in the Infosoc Directive), and text- and data mining. In the latter case, when the input works are copied in the context of academic research (by academic institutions or cultural heritage institutions) on the basis of inputs to which there is lawful access, there will be no infringement and the copies may be stored for use in (further) research. For other instances of text- and data mining, right holders can reserve the right to prevent the use of their works (art 15n-o Copyright Act). The temporary reproduction exception requires that the making of a copy (for training purposes) is necessary for a technical process, justified and of no independent economic value. The latter question for AI. It could be argued that where the work is only one of many inputs used, there is no independent economic value to the act of copying temporarily the specific work.

Depending on the AI tool at play, it could be that in the output, a whole work (or part of it) is recognizable. Courts in the Netherlands will then assess whether traits that make up the original character of the work have been copied, often resorting to comparing the source work and allegedly infringing work on the overall impression of likeness. Artistic or other types of styles are not protected, so an AI produced output that results from a prompt like 'compose a blues melody in the style of artist x' will not infringe a particular work.

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 current plans exist for legislative change and due to the high level of harmonization at EU level, the Dutch legislator will likely not take new initiatives by itself (e.g. instead rely on measures that might be taken in the context of the proposed Artificial Intelligence Act) . The most relevant provisions remain the text and data mining exceptions of the DSM Directive. These have been implemented in the Dutch copyright act articles 15n and 15o, see above.

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.

> T*here are many different platforms active on the Dutch market, no general overview exists of the ToS. Earlier research (not specific to AI)*[2] *on social media and other platforms has shown that generally the ToS impose rather generic licenses on users, allowing the platform (and third parties it works with) to make free use of the user posted content for a variety of purposes. Arguably this includes using the content as training data*.

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.

> *Not aware.*

[2] See for example the analysis of ToS of large social media platforms in https://www.tweedekamer.nl/kamerstukken/detail?id=2021D27428&did=2021D27428

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?

Automated content identification is commonly used by rightholders, CMO's broadcasters, event organizers, digital platforms and anti piracy organizations for the purpose of detecting and reporting use of content and to detect infringement. AI is likely to be used to assist the identification process.

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 rules that specifically address the use of computer tools for content identification in copyright, beyond the obligations that the EU's Digital Services Act imposes on information society service providers (e.g. with respect to content moderation) and the specific rules for certain platforms as laid down in the Copyright in the Digital Single Market Directive ('CDSM' Directive 2019/79).

The relationship between the Digital Services Act and article 17 CDSM is very complex and not clear on all aspects (e.g. as regards the scope of transparency obligations imposed on service providers with respect to content moderation, including blocking/removal).

Large online content sharing service providers ("OCSSPs") use automated content recognition and on the basis of art. 17 have CDSM --inter alia-- an obligation to make best efforts with respect to ensuring that (on the basis of information supplied by rights holders) protected subject-matter is not made available on their platforms (unless there is consent, or the use is allowed on the basis of exceptions/limitations). There is a corresponding information duty towards rights holders. To what extent this implies the workings of specific tools used must be disclosed (and with what level of detail) is uncertain. Art. 17 CDSM is implemented in art. 29c Dutch copyright act, with no further specification on the extent or form of transparency.

Of note, Article 29b of the Dutch Copyright Act implements Article 7 of the InfoSoc Directive (Obligations concerning rights-management information). It provides a legal basis to address modification or removal of content management information in the context of AI (aided) tools and potentially to demand some level of transparency on the tools used and the results produced (where these may affect integrity of rights management information).

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.

We have no detailed information on this, but generally speaking the use of recommender systems is commonplace (e.g. in news media, music service providers, social media, etc). and it relies heavily on automated decision-making systems.[3]

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

This seems to be a normative question, based on the premise that recommender systems negatively affect the commercial value of cultural content for right holders. If it is traceable what content is recommended, to how many users and how many of those actually used the content, this could help create a more precise way of determining usage intensity/volumes . To the extent that recommender systems differ from how e.g. reviewers, radio show hosts, companies that create playlists, select and recommend content, this might indeed produce different outcomes in terms of which content gets presented more to users (which in turn affects actual use/consumption). We have no information on how much influence right holders currently have on 'traditional' recommender systems and to what extent this might diminish.

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 specifically, although for e.g. collective rights management organizations the general obligation to be transparent about how monies are collected and distributed (under EU copyright law) would also seem to apply in cases where 'AI' is used to aid collective management.

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?

AI systems of the sort used in cultural sectors are regarded more as services to which (old) product safety rules do not apply. This will change under the new EU legislation that specifically addresses liability for AI systems. Under general tort law (Dutch civil code), liability can also already exist.

[3] For a recent PhD on recommender systems see https://dev.ivir.nl/nl/publications/seeing-what-others-are-seeing-studies-in-the-regulation-of-transparency-for-social-media-recommender-systems/

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?

Yes, this is clear from the CJEU's concept of work as an intellectual creation.

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?

One would have to know more about the creative process involved in the actual production to be able to say whether there has been sufficient human intervention of the 'right kind' i.e. creative choices towards the work expressed. It is helpful to distinguish different phases of the creative process to see where the necessary original character arises: conception (the idea stage), execution, and redaction.[4] Where a prompt is 'merely' an idea it will not be of the right kind, in the execution phase it will depend on how autonomous the AI tool operates but typically the creative labour will not be in that phase but in the redaction phase where the person will make creative choices.

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

Prima facie by looking at the concrete work, it will often not be possible to distinguish. But already, most production of creative works involves the use of (digital) tools and their use can also not be seen directly in the end result. So it is a matter of degree. There is no legal obligation for authors to disclose what tools were used; if for AI generated outputs there would be for example an obligation imposed on providers of tools to label/watermark outputs as AI generated, that may aid identification.

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

[4] Based on the study by Hartmann, Allan, Hugenholtz, Quintais, Gervais, 'Trends and Developments in Artificial Intelligence Challenges to the Intellectual Property Rights Framework', EC 2021.

(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)?

The Dutch Supreme Court (Endstra tapes case, 2008) has ruled that : "there must be a form that is the result of creative human labour and thus of creative choices, and which is thus the product of the human mind. That excludes in any case everything that has a form so banal or trivial that behind it there is no creative work of any kind to be identified". It is not a requirement that the author "consciously intended to create a work and consciously made creative choices, which requirement, moreover, may pose insurmountable problems of proof for those involved. For the same reason, it cannot be required that the creator consciously chose the form the work was given."
[https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2008:BC2153] This judgment is controversial (the Court of Appeal had ruled that for a creation to qualify as work, there must be intent to create it), but still stands as subsequent judgments of the CJEU do not address this aspect of the harmonized work concept.

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?

No.

- 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?

*There is no case law on this, but the Neighbouring Rights Act, in conformity with EU Directives and art. 2 WPPT, defines performers as "**uitvoerende kunstenaar**: de toneelspeler, zanger, musicus, danser en iedere andere persoon die een werk van letterkunde, wetenschap of kunst of een uiting van folklore opvoert, zingt, voordraagt of op enige andere wijze uitvoert, alsmede de artiest, die een variété- of circusnummer of een poppenspel uitvoert »*
("performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore, as well as artists performing a variety, circus act or puppet play). This certainly implies only natural persons can be performers.

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

No, this is not an explicit requirement in the law. However, considering that the law refers to persons performing a work, circus-act, expression of folklore or puppet play, and considering that the creation of a work must involve creative labour by a natural person, it remains to be seen whether courts will

accept that the performance of an output created purely by AI (e.g. a song made on a simple prompt) is protected. From the perspective of the justification for protection of performers one could however argue that the manner of creation of the thing performed should not matter.

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?)

See above.

- 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?

Yes, unless of course they qualify as objects protected by other IP (e.g. design, trademark, sui generis database right). In extreme cases, under general tort law, copying such productions might qualify as slavish imitation.

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?

No clear distinction between commons and public domain is made.

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

We cannot be, unless there would be a system in place that obliges all providers of AI tools (and others in the value chain) to use fingerprinting or other technical means that can show the creation is made using AI. It would be very difficult to enforce such an obligation considering the global nature of cultural communications.

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"?

The question is whether it is necessary to make such a distinction? If the author creates a work, then use of that work is collectively managed, if the output is not a work, then on the basis of copyright no permission is needed to use it. So other productions would not be in the system.

2. The rights regime

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

** <u>As your legislation currently stands:</u>*

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

Will depend very much on production process and type of creation. See above.

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?

Yes, if it is a work.

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?

Not applicable

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?

The normal rules of copyright ownership would apply. Basic point is that the natural creative person is maker = author = first owner. In the case of several authors, copyright is shared. There are special rules on employers as first owners of copyright, and for legal persons that publish a work as originating from them without mention of an author (natural person). These are presumptions that copyright rests with employer resp. legal person (art. 7 -8 Dutch copyright Act).

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.

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?

See above, at 2. The Dutch copyright act assumes there is only direct liability for the primary infringer (person doing the unauthorized act), but facilitating infringement by third parties can under certain circumstances create liability under general tort law (Art. 6:162 Civil Code).

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?)

Under general tort law there may in exceptional circumstances be liability (on the part of the person responsible for causation of damage), but the Supreme Court has set the bar very high where it concerns protection through tort law to protect innovations/products for which intellectual property law does not provide a remedy (this is also called the 'negative reflex' effect of intellectual property law: what is not protected under statutory IP law should not be protected through the 'back door' of general tort law.

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?

There is no case law yet on this, but persons can invoke their so-called 'portrait right' contained in the Dutch copyright act to prevent the use of their portrait ie any image from which they can be identified (which is not just the face, but may also be a typical posture) if they have a reasonable interest in doing so. Such a reasonable interest can be privacy related or commercial. Apart from that, on the basis of the right to privacy (reputation, self determination) one could probably also prevent the use of one's voice for an AI production, if such use constitutes a tort. Art 6:162 Civil Code states 'He who commits a wrongful act towards another, which can be imputed to him, is obliged to compensate for the damage suffered by the other as a result'. A wrongful act can be infringement of a right or an act or omission contrary to a statutory duty or to what is proper in society, all this subject to the presence of a justification.

- 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[5] and the more nuanced position of the Council of the European Union of November 2022[6])?

Nothing specific (other than pending EU legislation).

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

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

Unknown if exists.

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

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?

[5] https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021PC0206

[6] 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/