

Portuguese Reply
Patricia Akester (Section 4)

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?

The Portuguese Copyright and Connected Rights Code, 1985 (hereinafter Portuguese Copyright Code) offers protection to original and expressed works of the spirit.

In practice, though, the Portuguese Copyright Office will not negate the registration of an AI output where it is not aware that what is at stake is an AI production rather than an intellectual creation.

4.1 - Does a “work” always imply the presence of a physical person?

That is implied in both the letter and the spirit of both the Constitution and the Portuguese Copyright Code.

Article 42 of the Portuguese Constitution subsumes copyright within the constitutional principle of freedom of artistic and scientific intellectual creation, guaranteeing, at the level of the Law of laws, creations of the spirit. Copyright is therefore a human right.

Furthermore, copyright protection presupposes the existence of a «work», which as per Article 2 (1) of the Portuguese Copyright Code consists of an intellectual creation of its author. Thus, the relevant work necessarily results from the creative effort of the human spirit, that is, it is the fruit of ingenuity of a human author. Considering the cultural benefits resulting from intellectual creation, copyright is granted to its intellectual creator – unless there is a contractual stipulation to the contrary.¹

The human requirement may be found in case law too. For example, according to the Supreme Court for a work to be classified as an intellectual creation it

¹ Patricia Akester, *Código de Direito de Autor e Direitos Conexos Anotado* (2ª edição, Almedina, Coimbra, 2019), 37-52.

should reflect, to a greater or lesser extent, the personality of its creator.² And the Court of Appeals of Lisbon has explained that a protected work should capture the spirit of its creator, their unmistakable and indelible personality traits.³

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 seemed appropriate to obtain clarification from the Head of Portuguese Copyright Office,⁴ Dr. Luís Silveira Botelho, in this connection. He kindly noted that (i) it is up to the registration requester to indicate whether the production in question is a work of the spirit or an AI output, (ii) to the extent of his knowledge no registrations requests have been made in connection to AI outputs, (iii) it is difficult to reconcile the concepts of «work», «originality» and «author» with the registration of AI outputs (iv) the registration of AI outputs seems to be blocked too by Decree Law 143/2014, 26th September, which regulates the registration of literary and artistic works, (v) but nobody knows with certainty what the future holds.

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

AI-assisted outputs include some level of human intervention (for example, user prompts) whereas outputs generated by AI do not entail such intervention.

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

² Supreme Court of Justice, Case nº. 079712, 09/28/1989.

³ Court of Appeals of Lisbon, Case nº 8713/2006-7, 11/28/2006.

⁴ Inspeção Geral das Actividades Culturais (IGAC).

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)?

There is no such requirement under the Portuguese Copyright Code. Having said that, the Supreme Court has declared that the requirement that the work must result from the author's intellectual activity presupposes the subsistence of a will to create, consciousness and awareness, leading to intellectual effort and, finally, to a sensorially perceptible result.⁵

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?

The Portuguese Copyright Code does not pay homage to the literary, scientific and artistic merit of a «work». In fact, article 2 (1) expressly excludes merit - seen as a manifestation of an aesthetic or artistic judgment about a work - as a protection requirement.⁶ As the Court of Appeals of Évora once affirmed «it does not matter whether a work is more or less valuable, whether it has been created to a lower, higher or average artistic, literary or scientific standard (whatever that means), in order for it to deserve copyright protection».⁷

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?

Under the Portuguese Copyright Code a performer must be a natural person. Performing artists are actors, singers, musicians, dancers and others who sing, recite, interpret or perform in any way literary or artistic works. Also, they are granted both economic and moral rights.⁸

⁵ Supreme Court of Justice, Case nº 855/07.8TVPR.T.P1.S1.

⁶ Patricia Akester, *Código de Direito de Autor e Direitos Conexos Anotado* (2ª edição, Almedina, Coimbra, 2019), 37-40.

⁷ Court of Appeals of Évora, Case nº. 526/07-1, 10/07/2007.

⁸ Patricia Akester, *Código de Direito de Autor e Direitos Conexos Anotado* (2ª edição, Almedina, Coimbra, 2019), 41-51.

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?)

Under the Portuguese Code a performer will be granted protection where they perform a «work». It follows that the performance by a human being of an IA output will only be protected where either the law or the Portuguese Copyright Office enable such protection- by classifying the output in question as a «work».⁹ As it stands, as explained above, that is not the case.

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. Productions generated by AI, that are not covered by copyright are in the public domain.

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?

Such notion is not present in the Portuguese Copyright Code.

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

We cannot, unless technology comes to provide such certainty. If so, the answer to the machine will yet again be, as Clark once proclaimed, in the machine.

4.11 - Usually, a collective management organization (CMO) manages a catalog attached to an author without making distinctions between "works" /

⁹ Patricia Akester, *Código de Direito de Autor e Direitos Conexos Anotado* (2ª edição, Almedina, Coimbra, 2019), 37-52.

"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 major collective management entities have not yet developed guidelines 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».