

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 environments¹.

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.*

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| Artificial intelligence, copyright and related rights The contours of the relationship |
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Report of the Hungarian Group of ALAI**Contributors: Klaudia Franciska FODOR, Eszter KABAI, Péter MEZEI, Anett POGÁCSÁS****1. Understanding****1.1 - Has your national or regional law adopted a legal definition of AI?**

There is no adopted legal (statutory) definition. However, Hungary's Artificial Intelligence Strategy for 2020-2030 (published in May 2020) states, that "In this document, artificial intelligence is understood to mean "narrow" AI, i.e., systems only capable of mapping specific areas of human intelligence. Research into "general" AI – capable of mapping the entire human intelligence – remains underdeveloped and uncertain, and is therefore not applicable within this context."²

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

- music sector (using AI as 'co-author' for lyrics of songs, or intuition, making 'collaborative loopers', creating covers for albums on streaming platforms);
- Hungary's Artificial Intelligence Strategy deals mostly with the industrial and agricultural use of AI, it also has a chapter that deals with the creation of language processing technology for the Hungarian language and incorporating its potential resources into the support service of public and private customer services, with the intention of safeguarding the Hungarian language and culture in the digital age. The aim is to create a language technology solution supporting the Hungarian language as well, one that can be integrated in all customer service processes in the way of "zero level support", to facilitate administrative processes. The resulting technology will be key to preserving the Hungarian language culture as well.³

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

Hungary's Artificial Intelligence Strategy outlines the main objectives (chapter 3.), things to watch out for (chapter 2.3.), specific sector focus areas (chapter 4.2.).⁴ As to copyright law, there are some recently published papers which explore possible directions, raising the possibility of creating a special neighbouring right for AI-generated content.⁵

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

As far as we know, there are no specific initiatives aimed to regulate the cultural sector. Existing

² Hungary's Artificial Intelligence Strategy 2020-2030 (published in May 2020), <https://ai-hungary.com/files/e8/dd/e8dd79bd380a40c9890dd2fb01dd771b.pdf>, p. 9. (last retrieved on May 17, 2023)

³ Hungary's Artificial Intelligence Strategy, p. 44.

⁴ *ibid*, p. 16-17., 23.

⁵ Grad-Gyenge Anikó: A mesterséges intelligencia által generált tartalmak értelmezésének lehetőségei a szerzői jog útján [The possibilities of interpreting AI-generated content through copyright] MTA Law Working Papers, AI and Law Series, 2023/2. (Available in Hungarian)

initiatives are of a more general nature. The Ministry of Justice has set up a ‘Digitalisation and Artificial Intelligence Group for Justice’, which monitor digitalisation efforts and developments in the field of justice and the regulation and application of AI for justice, in particular the work of the Council of Europe, the UN and other international organisations on AI regulation, performs professional coordination tasks related to the digitalisation of justice and the regulation and application of artificial intelligence for judicial purposes, and carry out the coordination tasks necessary for the work of the Council of Europe, the United Nations and other international organisations on the regulation of artificial intelligence, for the development of positions and for the implementation of domestic measures.⁶

Furthermore, there are other collaborations, like Artificial Intelligence National Laboratory (<https://mi.nemzetilabor.hu/research-fields>) and Artificial Intelligence Coalition (<https://ai-hungary.com/en/content/ai-coalition#mission>) which make valuable work to support also cultural sector.

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 . . .) ?

In case the AI system itself complies with the statutory requirements of Hungarian copyright law (that is, an original work of expression is created by a human), the system might be protected by copyright, typically as a software and a database. Theoretically, this can be equally true for patent law – as long as the AI system (e.g., a software-related invention) meets the patentability requirements, the existing rules shall cover them.

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 issue is heavily depending upon the proper interpretation of the facts related to the operation of an AI algorithm. There is no clear consensus regarding the nature of the “use” of training data – whether the “prediction” of relevant elements or the memorizing of training data represents a reproduction (or any other subsequent) activities. It is possible that the machine learning component of the procedure does not lead to more than transitory acts of reproduction; although in some cases (especially under the Getty Images proceedings) facts seem to indicate that the machine learning can lead to the permanent memorization (reproduction) of the training data. In case the permanent reproduction of the training data would be evidenced, there is still a great chance that machine learning fits into the scope of the commercial or scientific text- and data-mining exception.

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?

⁶ 2/2023 (10.III.) IM Instruction amending IM Instruction 4/2022 (11.VI.) on the Organisational and Operational Rules of the Ministry of Justice, point 1.1.1.1.

The national reporters are unaware of any such public (regulatory) proposals.

- 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.

Based on the sample review of the terms of use of various copyright-relevant service providers domiciled in Hungary, the majority of general terms and conditions do not exclude the use of available data for machine learning purposes (see for journalism: Telex.hu; 24.hu; video-hosting platform: videa.hu; database of legislative documents: jogtar.hu). As a rare example of the sample, the real estate search engine (ingatlan.com) clarifies (§9.4.8)⁷ that the automated or any other download, storage, use or sale of the whole or any part of the contents or the database available via the platform is prohibited. This term itself is definitely not in line with the opt-out privilege of the rights holders under Art.35/A(1)(b) of the Copyright Act [which is the transposition of Article 4(3) CDSM Directive], especially its prong related to the machine-readable nature of the reservation of uses. At the same time, the national reporters were unable to review the robots.txt files of the reviewed websites; hence, it is hard to predict whether the service providers complied with the said statutory provisions in their "code".

2.4 - 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.

The national reporters are unaware of any such licensing practices. Indeed, the new text- and data-mining exception has been introduced in Hungary without any obligation to pay remuneration.

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?

As far as we are aware of, machine learning is increasingly being used to solve these issues in many different ways. These uses of AI also represent legal problems, but these are different from the ones arise in connection with generative AI.

Many well-developed solutions are used by service providers of protected content. The purposes and operation of these solutions are various. For example, AI might be used to identify and to manage content directly connected to its monetization or fulfilling obligations like filtering or specific removal (i.e., YouTube Content ID system), to identify content like sound recordings, pictures, and text (i.e., Shazam for music), to analyse user behaviour and to offer content (i.e., Spotify algorithm). The common feature of these solutions is that they are proprietary: rightholders (in our view either the major ones) do not have knowledge about the algorithm operation, which is neither accessible nor transparent.

AI solutions are used by rightholders and/or their organizations in certain areas also. For example, mass data processing regarding exploitation in streaming services requires mass identification of content metadata, which can be supported by using machine learning solutions (e.g., BMAT, which provides services to music collective management societies too).

⁷ See: https://info.ingatlan.com/wp-content/uploads/2023/02/20230207_ASZF.pdf (available in Hungarian).

AI may also be used to monitor and to identify online infringements by rightholders however we do not know any significant application for this purpose in Hungary. We suppose that, in general, this technology is still too expensive for most of the rightholders of copyrights.

In our view the use of AI for these purposes is increasing, however its use is not obvious and therefore not transparent for the public or for the interested parties. Its operation in the most important services forming the future of content exploitation cannot be either monitored or influenced by the rightholders who own the copyrights of the content subject to the operation.

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?

In this regard Hungarian Law is harmonized with EU legislation. In our view, the rules are too vague and mainly declarative they give a too wide room for interpretation with almost no practical results. More active national legislation or development of the EU case law could change this situation. We expect more clearly visible development in consumer protection law to provide for specific transparency requirements than in intellectual property legislation although in this regard the position of the rightholders is as weak as that of the consumers.

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.

In our view, the widespread use of these algorithms is quite evident and it is controlled by the service providers solely. Transparency is needed from the aspect of consumer protection law as well as to achieve a balanced (fair) access of different rightholders' content (repertoire).

For example, a market-leading service provider can influence via a non-transparent algorithm the content which is exploited („consumed”) by its consumers (i.e., customers of the service). Ultimately, the usage of this type of AI could eventually be able to change the revenue stream radically as it can privilege certain repertoires or even purely AI generated content (even AI generated content which is owned by the same interest group the service provider belongs to) over protected material. However even though the latter issue can be addressed by competition law, the market effect could happen fast and can ultimately be detrimental to copyright driven industries.

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

Yes, definitely. See 3.3. For example, it could be used to influence consumption and revenue streams in music services, prioritizing the consumption of buy-out music libraries and/or AI generated music.

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?

As an EU Member State, we will apply the Digital Services Act directly (as a regulation).

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?

Currently, no such measures apply.

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. Based on the Hungarian Copyright Code the author is always a natural person.

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 such threshold in the sense of this specific differentiation. As a main rule, authorship can be split between more people (e.g., 30%-70% shares) in accordance with the share of the contribution of the creative work. It is also possible, that shares of a work fall within copyright, and shares of it are public domain. Also, if a work of folklore (that falls 100% within public domain) will be adapted, then the adapted work of folklore will remain partly public domain, and partly subject to copyright (e.g., 30 % public domain/folklore and 70 % copyright due the creative work of the adaptation). With an analogy to the adaptation of folklore, we can say that if the AI generates parts of a work, that could fall within public domain, and the parts made by human, will fall within copyright. (e.g., 30% public domain/AI generated and 70 % copyright due the creative human work).

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

We are not aware of any such technology at the moment. The question itself, however, is a truly intriguing one. Authorship should be based on objective criteria i.e., ascertainable by external observers. Experience shows that this is not always possible in practice, which is a serious risk when dealing with AI-generated content.

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 such explicit condition exists. However, the identification of creative contribution always requires a case-by-case approach, allowing courts to weigh in, amongst others, the mental state of the person claiming authorship.

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

N/A

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, these criteria do not matter in the case of AI productions, either.

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?

No.

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

Yes, we came to this interpretation. The Hungarian Copyright Code does not define 'performer' and includes no explicit restriction that performance of an AI production falls outside of the scope of neighbouring rights. However, we can come to this conclusion based on the international treaties. The definitions of the international treaties such as the Rome Convention or the WIPO Performances and Phonograms Treaty directly apply to the Hungarian law. They say that performances of copyrighted works fall within the scope of neighbouring rights, and those works are created by humans. Consequently, the performance of an AI production falls outside of the scope of neighbouring rights. It is true that Art. 9. of the Rome Convention (under the heading Variety and Circus Artists) allows Contracting States to extend protection to artists who do not perform literary or artistic works, and Art. 2(a) of the 1996 WPPT and of the 2012 Beijing Treaty include in the subject matters of a performance also expressions of folklore. Neither of these treaty provisions, however, would lead directly to the recognition of a performance of an AI-generated musical composition being protected under the neighbouring rights regime.

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?)

No, in our present understanding.

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, this is our present understanding based on the Hungarian law.

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?

There is no such differentiation in the Hungarian law.

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

We do not know of any technique that could tell the difference.

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"?

Under Hungarian laws a piece of „work” or „production” generated by an AI without any creative human intervention does not fall under protection. On the other hand, a work having individual and original nature deriving from the intellectual activity of an author falls under the protection, including if or when the author uses AI in the creative process. A CMO should follow practical solutions, and even if its clear intention is to filter out those AI works which fall outside the protection, it is not possible to collect evidence on or against this fact on a case-by-case basis. For example, in Hungary, the CMO representing musical works applies the same process to AI involving works as to the traditional creations, but does not accept as repertoire works any work which was produced exclusively by AI. The data necessary for the rights management of a musical work is reported to the CMO by the author(s) (composer and lyricist) of the work. The author – by complying this reporting obligation – declares that the work is a creation – in other words, it falls under copyright protection. The reporting form allows the author to declare the use of AI in the creative process resulting in a work of art. In this case the composition is regarded to fall under copyright protection. If the product is AI generated and no added creative value is declared by the author, the product is not regarded to fall under protection, and it does not form part of the author’s repertoire. It is very similar to the already existing situation in which the CMO does not manage an arrangement (orchestration) or a product of sound engineering as a new composition protected by copyright and therefore it is not regarded being part of the composer’s repertoire, since these are not protected works but the results of other activities of the same person.

We have to emphasise that we do not know about any case in which the owner of a mass AI generated catalogues approached a CMO in order to register and manage these products within the traditional system of collective management of rights.

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?

Under Hungarian laws a piece of „work” or „production” generated by an AI without any creative human intervention does not fall under copyright protection.

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?

Not applicable.

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?

Not applicable.

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)?

Not applicable.

** 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.

In Hungary there has been no proposal at national level for any legislative change. As an EU member state, we are observing the recent „AI Act” going through the legislative process in the EU institutions. This legislation addresses a related matter, but it has also been clearly declared that there is no plan to go beyond this and reform the EU copyright laws in order to cover the topics touched upon by the questions below.

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?

An examination of the law in force shows that the Hungarian laws do not specifically regulate the rules on artificial intelligences, so that they can be derived from other general legal norms.⁸

In contractual relations, the responsibility for the operation of AI software may be borne by several legal institutions. In deciding who (developer, distributor, user, etc.) has a duty to take this responsibility, the nature of the problem and the causal link between their failure should always be the starting point:

- The user is responsible for the damage to property caused by software that is functioning as intended.

- The damage caused to the user by software which is not functioning correctly may be claimed by the user for compensation. The user may claim compensation for the damage caused by the defective software to the user from the developer (distributor) under the rules of defective performance. This is the case for damages full compensation for consequential damage and loss of revenue, subject to foreseeability.

- The user may also claim the correction of the defectively distributed software from its developer (distributor) on the basis of the institution of a warranty.

6.2 However, as the rules are essentially dispositive, the contract between the parties is the basic rule for risk-sharing. If the user, by running the AI software, causes damage to a third party, there is a known literature that suggests that liability for dangerous activities should apply. However, there are no known judicial decisions on this point.⁹- 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 theory, Article 2 and Article 6 (Prohibition on Unfair Competition) of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices can be used, but these instruments are not suitable for a broad enforcement against infringements.

6.3 - Beyond copyright, can personality rights prevent the realization by an AI of a production using

⁸ Erdélyi Dóra: The Examination Artificial Intelligence as a Software from the Aspects of Civil Law Regarding to Developing Technologies, Especially Autonomous Cars. <https://jogtudo.uni-miskolc.hu/files/17417/Jogtudo2022iss1art4.pdf>

⁹ Eszteri Dániel: A mesterséges intelligencia fejlesztésének és üzemeltetésének egyes felelősségi kérdése [Questions of responsibility for the development and operation of artificial intelligence] <http://real.mtak.hu/97079/1/eszteri.mi.felelosseg.final.pdf>

the voice or physical aspect of another person?

Although there is no court decision to refer to, the right to a person's image or voice and the right to a good reputation seem to apply under the general rules.

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, 2021¹⁰ and the more nuanced position of the Council of the European Union of November 2022¹¹)?

There is no requirement at this point.

(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?

There is no relevant applicable remuneration system in place.

(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...)

There is no existing system for this in Hungary.

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

¹⁰ <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021PC0206>

¹¹ <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/>