Paris Congress

ALAI 2023

Artificial intelligence, copyright and related rights

June 22-23, 2023

To National Reporters:

The questionnaire uses the neutral term AI "production" to refer to content generated by an artificial intelligence system. As opposed to the term "work (of the mind)" which is the one that describes the classical object of copyright protection. This means that the content we are interested in is content produced by the artificial intelligence machine (or "system"), itself fed upstream by works of the mind, reproduced in a training data base. The margin of intervention of the final user is thus a priori very limited, but not always non-existent. The hypothesis concerned by this Congress is thus closer to what the ALAI once studied as "computer-generated creations" than to "computer-assisted creations" (see the 1989 Quebec City Congress).

In the mind of the editors of this questionnaire, an "artificial intelligence system" is defined as a computer system that allows, with a certain autonomy, automated decision making or predictions influencing real or virtual environments[1].

The questions raised are numerous because of the disruptive nature of the phenomenon, the multitude of issues and the theoretical, economic and social importance of the stakes.

Some of the questions will undoubtedly be accompanied by brief negative answers, which is already a useful answer for the General Reporters. Simply indicate these ("no", "none").

In other cases, the answers may be uncertain. In these cases, it is easiest to follow the classic pattern: "1) What do statutes and regulations say? 2) What does the caselaw say? 3) What does the national group think? To questions 1 and 2 above, the answer will often be "Nothing specific about AI but the relevant reference text/principle might be ...". Regarding 3), the national group is not obliged to have taken a position.

It is of this uncertainty and diversity that we will try to draw together, in June, a clear picture.

The team of the Scientific Committee (Alexandra Bensamoun, Jane Ginsburg, Silke von Lewinski, Pierre Sirinelli) is of course at your disposal to explain a question that might not seem, because of the particular context, immediately clear.

Thank you all and we look forward to seeing you in Paris.

Note: the questionnaires must be returned by the national groups no later than May 8, 2023. They will be sent to Pierre Sirinelli (pierre.sirinelli@univ-paris1.fr) and Sarah Dormont (sarah.dormont@u-pec.fr).

[1] *This definition is comparable to the one retained by the European Union in the discussion on the AI Act (proposed regulation COM(2021) 206 final, March 2023 position), itself inspired by the 2019 OECD Recommendation on AI.*

Artificial intelligence, copyright and related rights

The contours of the relationship

1. Understanding

1.1 **-** Has your national or regional law adopted a legal definition of AI?

We are not aware of any generally applicable definition. The term is defined for the (merger regulation) purposes of the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021/1264. Schedule 3 'Artificial intelligence', para 1 states

> '"artificial intelligence" means technology enabling the programming or training of a device or software to—
>
> (i) perceive environments through the use of data;
>
> (ii) interpret data using automated processing designed to approximate cognitive abilities; and
>
> (iii) make recommendations, predictions or decisions; with a view to achieving a specific objective;'

The UK Government's National AI strategy paper referred to this, but defined AI more simply for its purposes as

> "Machines that perform tasks normally performed by human intelligence, especially when the machines learn from data how to do those tasks."

At a less formal level, the Alan Turing Institute publishes an on-line glossary of terms, see https://www.turing.ac.uk/news/data-science-and-ai-glossary

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

Examples are given in the UK Parliament's May 2022 'Postnote' research briefing " The impact of digital technology on arts and culture in the UK", esp at nn 81-122

https://researchbriefings.files.parliament.uk/documents/POST-PN-0669/POST-PN-0669.pdf

Those cited from the UK include the National Gallery's 'Virtual Veronese' augmented/virtual reality exhibition, whereby visitors could view Veronese's 'Consecration of Saint Nicholas' in its original 1561 setting https://www.nationalgallery.org.uk/exhibitions/past/virtual-veronese

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

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

One such is the UK Government's policy consultation stream 'Plan for Digital Regulation', available at

https://www.gov.uk/government/publications/digital-regulation-driving-growth-and-unlocking-innovation

See also projects listed at
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1125185/National_AI_Strategy_-_Some_of_the_achievements_in_2022.pdf

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 *Thaler v Comptroller General of Patents Trademarks and Designs* [2021] EWCA Civ 1374, a majority (Arnold LJ, Elizabeth Laing) held that the Patent Office had been correct to treat an application for an AI-generated patent had been withdrawn on the basis that no human inventor had been identified. For a history of the invention and the fate of patent applications in the UK and other Offices, see Ryan Abbott & Elizabeth Rothman 'AI-generated output and intellectual property rights: takeaways from the Artificial Inventor Project' [2023] EIPR 215

In *Software Solutions Ltd v 365 Health and Wellbeing Ltd* [2021] EWHC 237 (IPEC), HHJ Melissa Clarke (sitting as a judge of the High Court) made a finding of infringement of copyright in a mental health app derived from the claimants' 'Integrated Development Environment for Applications', a computer software application development framework.

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?

Not surprisingly, it seems that many with an interest in copyright consider this is so, whilst big-tech users assert that no consent is needed.

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

The UK has a rather limited Text and Data Mining exception, for non-commercial research, in section 29A of the Copyright Designs and Patents Act 1988. A proposal to extend this to a wide range of commercial purposes was withdrawn after critical comment from the UK Parliament's House of Lords' Committee; see House of Lords Communications and Digital Committee Paper 125 'At risk: our creative future' 17 Jan 2023, ch 2, paras 26-35, available at
https://publications.parliament.uk/pa/ld5803/ldselect/ldcomm/125/12505.htm#_idTextAnchor017

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?

A proposal to extend the TDM copyright exception to a wide range of commercial purposes was withdrawn after critical comment from the UK Parliament's House of Lords' Committee; see House of Lords Communications and Digital Committee Paper 125 'At risk: our creative future' 17 Jan 2023, ch 2, paras 26-35, available at https://publications.parliament.uk/pa/ld5803/ldselect/ldcomm/125/12505.htm#_idTextAnchor017

I understand that the UK Government is currently consulting interests to try to identify areas for voluntary agreements on good practice, and opt-in or opt-out permissions

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.

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.

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?

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.

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

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?

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?

The Copyright, Designs and Patents Act 1988, s9(3) contemplates that a work may be computer-generated. See responses under section 5.1 below. The UK Government after consultation decided to make no changes to UK law on this; according to para 6 of the executive summary of consultation outcomes: "For computer-generated works, we plan no changes to the law. There is no evidence at present that protection for CGWs is harmful, and the use of AI is still in its early stages. As such, a

proper evaluation of the options is not possible, and any changes could have unintended consequences. We will keep the law under review and could amend, replace or remove protection in future if the evidence supports it." https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/outcome/artificial-intelligence-and-intellectual-property-copyright-and-patents-government-response-to-consultation

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?

This has not been explored in UK case law under s9(3) as far as I know

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

The distinction seems to be between AI as a tool for a human creator, and AI as an originator. Reference is sometimes made to the early case of *Express Newspapers v Liverpool Daily Post & Echo 1985] 1 WLR 1089* [1985] FSR 306, a case about copyright in bingo cards. For example, writing about computer-generated works, the editors of *Copinger and Skone-James on Copyright* (18th edn, eds Gillian Davies, Nicholas Caddick, Gwilym Harbottle & Uma Suthersanen, 2021 Sweet & Maxwell) state at 3-238: "It is not clear how the requirement of originality is to be applied in these circumstances, in particular the requirement that the work be the product of at least some skill and labour [citation omitted]. The difficulty will often be overcome by a readiness to find a human author, even in a process which is highly computer-assisted [reference to *Express Newspapers*]"

4.4 **-** In some countries, it is asserted that there can only be a work of authorship if the form obtained is the result of creative work by the author in the sense that the latter is aware of the result (work) he wants to achieve even if this result is a little different from his hope/expectations. This requirement, for example, would exclude the quality of author of a person deprived of discernment (for example, an insane person, a very young child, a somnambulist...) or would entail the refusal of protection of a production which would be only the fruit of random forces.

Does this condition exist in your country? No

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

4.5 **-** Are the criteria traditionally considered to be irrelevant (such as merit, or purpose) taken into account in the framework of protecting an AI output?

- 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?

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?)

- 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?

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?

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"?

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?

In principle, yes.

Under Section 9(3) of the UK's Copyright, Designs and Patents Act 1988 ("CDPA") the author of "computer-generated" literary, dramatic, musical and artistic works ("CGW") is taken to be the person by whom the arrangements necessary for the creation of the work have been undertaken. The CDPA therefore anticipates that computer generated works are protected by copyright. A CGW is defined in Section 178 CDPA as a work generated by computer in circumstances such that there is no human author of the work. It is presently unclear how this provision can be reconciled with the requirement that the work in question is author's own intellectual creation.

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?

The scope of copyright for a CGW is the same as that for author generated works. However, the duration of protection is shorter, being 50 years from the end of the calendar year in which the work was made.

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?

See above.

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?

As indicated above in our response to 5.1, the author of a computer-generated work is *"the person by whom the arrangements necessary for the creation of the work are undertaken"* pursuant to Section 9(3) CDPA.

The CDPA does not clarify whether this person must be a human or if, for example, it can be a legal person such as a company.

The first owner is typically the author (i.e. . the person by whom the arrangements necessary for the creation of the work are undertaken). However, where the author is an employee acting in the course of their employment the employer will be the first owner, unless there are terms to the contrary in the employment contract.

There can be multiple joint authors of a CGW, if multiple persons were sufficiently involved in undertaking the necessary arrangements for the creation of the work. However, a work cannot be a mix of human-authored and computer-generated. Accordingly, it is not possible to have a scenario whereby a work has joint authors, some of whom are authors via their human input into the work and others are authors via Section 9(3) CDPA (and for which different periods of protection apply). Thus, it is an important first step to determine whether a work is human-authored or computer-generated before determining who the author(s) is/are.

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)?

Yes. See our explanations on Section 9(3) set out above.

** 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.

There are no concrete proposals in the UK in relation to these items. Where relevant, we have expressed our personal opinion 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?

We think that the creation of a sui generis right merits consideration, particularly having regard to the exponential rise in generative AI in recent months. The idea of a sui generis right is not new, but the case for introducing one may now be more compelling.

A sui generis right for AI productions would enable a distinction to be drawn between the underlying rationales for providing protection. For example, a sui generis right could be modelled on the investment of resources – human, financial and technical – rather than merely intellectual capital. It would also provide the opportunity to afford a shorter period and narrower scope of protection, having regard to the inherent advantages that generative AI has over human authors, such as the speed, accuracy and cost associated with the generation of AI productions.

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?

Assuming that a causal link can be established between the AI output and the alleged infringement, a claimant must satisfy section 16(3)(a) of the Copyright Designs and Patents Act 1988. This provides that there can be infringement by carrying out restricted acts (reproduction, communication to the public, etc) in relation to the whole or a substantial part of a copyright work. There can be inexact copying: *Designer's Guild v Russell Williams (Textiles)* [2000] 1 WLR 2416, but taking an insubstantial part of a work will not infringe. Attempts have made to argue for infringement by taking multiple (different) insubstantial parts. Such an argument is likely yo fail where the parts come from different works: *Newspaper Licensing Agency v Marks & Spencer* [2001] RPC 5 at [35]; *Electronic Techniques v Critchley* [1997] FSR 401 at 408. However, repeated and systematic takings from the same work may combine to make a substantial taking: *Newspaper Licensing Agency* at [33].

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?)

There is no doctrine of parasitism or slavish copying, absent intellectual property rights or consumer confusion, Richard Arnold [2013] 'English unfair competition law' [2013] IIC 63, 77.

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?

I am not aware of any instances; if such a development were to occur in the UK, it would likely take place in Scotland, where personality rights have been used to underpin privacy arguments. See, for example Hector MacQueen 'A hitchhiker's guide to personality rights in Scots law, mainly with regard to privacy', in Niall R. Whitty and Reinhard Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: Dundee University Press, 2009) 549.

- 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])?

I understand that labelling is being considered by the UK Government.

(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?

(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?

Alison Firth, BLACA chairman, with special thanks to Jake Palmer and Toby Headdon (Bristows) for section 5

[2] https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021PC0206
[3] https://www.consilium.europa.eu/fr/press/press-releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights/