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SG20-0055
Source Language: English
Published on: 14/02/2020

CISAC Comments to WIPO Draft Issues Paper on Intellectual Property and Artificial Intelligence

The International Confederation of Societies of Authors and Composers (CISAC) thanks the WIPO Secretariat for the opportunity to submit comments in response to the Draft Issues Paper on Intellectual Property policy and Artificial Intelligence (the "Paper").

CISAC shares the view that the international community should engage in discussing the challenges posed by artificial intelligence ("AI") to the copyright framework. AI is no longer science fiction. AI technologies impact our daily lives. They are progressing quickly, particularly in the fields of creation and innovation. Economists consider that AI will drive the future of the global economy. It is therefore logical and necessary to delve deeper into the issues raised by AI, in particular as regards the copyright and authors' rights (hereinafter referred to as "Copyright" for ease of reading) landscape. This will in turn help ensure that the law keeps pace with the rapid evolution of technology and provide legal certainty.

In light of the above, the key question that needs to be addressed is whether protection should be granted to AI-generated works and what kind of protection.

It should be recalled in this respect that the central purpose of Copyright is to incentivize creation. Copyright creates value that drives the economy by encouraging investment in the development of intellectual resources and the creative activity of authors. Accordingly, Copyright protection should be provided each and every time there is creation, whatever its form, however it is achieved.

While it is premature to construe a definitive position on these important issues especially as there is a need to analyse concrete and tangible examples in different sectors (Music, Books, Movies, Graphic arts, etc) in order to avoid considering the issue in a mere abstract way and not taking into account that AI may work differently in different sectors, CISAC looks forward to contributing proactively to the ongoing discussions to help policymakers find the best way forward.

With this in mind, CISAC notes that the WIPO Secretariat has already started to properly address the key challenges to the copyright framework posed by the AI. In support of this process, CISAC would like to provide a few suggestions and additional topics that should be addressed in the course of the discussion. These suggestions should be considered more as food for thought in this debate than as a CISAC position.

1. Issue 6: Authorship and Ownership

CISAC believes the following additional questions should be included in the list of issues relating to authorship and ownership:

- Definition of AI and scope of AI-generated works: AI comprises many types of technologies and applications, already existing or to be developed in the near future. It is of utmost importance to clarify what the scope of the discussion is. This involves defining not only "AI" itself, but also the types of works created by AI applications in order to have a common understanding of the debate, and to develop workable rules. The Paper refers to works produced by AI as "autonomously generated works" ("AI-generated works"), as opposed to AI-assisted works, but it is necessary to define the concept and level of autonomy as applied to AI and clarify the main terms related to policy issues[1].

- Scope of rights: what right(s), if any, does the human creator of the AI have with respect to the works generated by the AI?

- Distinction between "input", software and "output" in AI-generated works: AI-generated works involve three elements which raise questions as to a possible protection, whether Copyright or protected works or related subject matter, database or software based. These are: the input, the

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[1] As an example, the term "artistic and literary works" (see Issue 6 / paragraph 12, p. 4 of the WIPO Paper) may be too limiting – the inquiry should extend to all subject matter currently covered by Copyright.

output and the software. It is of great importance to ensure there is clarity regarding the regime applicable to each of these elements, particularly when it comes to rules applying to authorship and ownership. The question of authorship for the input and the software as well as the selection of any data on condition that the selection is per se individual/original[2] should be already covered by the existing legal framework and, at a first glance, this should not be called into question because they are used in the context of an AI-generated works To the extent applicable, existing Copyright laws must be respected in the context of AI and should not be subject to any specific exception but should follow the general regime of voluntary licences, i.e. an author should always be in a position to refuse to feed AI with its works. .

- Moral rights: the Paper is silent on the question of moral rights. If Copyright protection is recognized, the possible need for moral rights should be discussed as well as possibly their adaptation.

In relation to questions already listed by WIPO, CISAC would like to add the following comments:

- Criteria for Copyright protection:

  - Based on the current Copyright framework present in many countries, the requirements of originality/"human" creation could be seen as contrary to Copyright protection of AI-generated works. It is however CISAC's point of view that, given the recent evolution in such criterion, especially in caselaw, appropriate criteria for AI works to gain copyright protection could be developed.

  - To complete the reasoning related to elaborating the criteria enabling Copyright protection, reference can be made to the questions raised by the US Patent and Trademark Office (USTPO) in the consultation published in the Federal Register on October 30, 2019[3]. CISAC thinks the following questions are of particular interest and may be added to the ones listed by WIPO:

    "Assuming involvement by a natural person is or should be required, what kind of involvement would or should be sufficient so that the work qualifies for copyright protection? For example, should it be sufficient if a person (i) designed the AI algorithm or process that created the work; (ii) contributed to the design of the algorithm or process; (iii) chose data used by the algorithm for training or otherwise; (iv) caused the AI algorithm or process to be used to yield the work; or (v) engaged in some specific combination of the foregoing activities? Are there other contributions a person could make in a potentially copyrightable AI-generated work in order to be considered an ''author''?"

- Term of protection: given the specificities of AI generated works, the question of the term of protection should be addressed, including with respect to the possible adaptations to be made.

2. Issue 7: Infringement and Exceptions

The key issue here is whether a license to use Copyright protected works (or recognizable fragments thereof) as input for deep learning/machine learning should or should not be subject to the exclusive right (*i.e.* reproduction/adaptation rights). If it should, should this exclusive right be limited? The questions raised by WIPO in this regard are already well defined, but the following should also be added:

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[2] In Europe also quantitatively or qualitatively substantial parts of all databases and entire databases (a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means) are protected subject matters on condition that the database is the "product" of a substantial investment.

[3] https://www.govinfo.gov/content/pkg/FR-2019-10-30/pdf/2019-23638.pdf

- <u>Infringements</u>: a fundamental issue is whether there is Copyright infringement when the AI-generated works are similar to the Copyright protected content ingested for machine learning under authorization. It is considered by some that use of Copyright protected works for AI ingestion automatically constitutes a transformative use. Although this may be the case for some AI-generated works , the question needs to be addressed. Likewise, the issue of who should be subject to liability needs to be explored.

- <u>Exceptions and application of Digital Rights Management (DRM) solutions</u>: some academics promote the idea that the Copyright system should recognize strong, and possibly remunerated, exceptions or limitations, which cannot be overridden by contract or DRM, so as to enable specific machine reading/learning uses of works that do not have a negative impact and build a strong and competitive AI sector. This question should be raised and debated since Copyright owners would likely insist that the use of pre-existing Copyright protected content as input for AI should be subject to exclusive rights.

3. Issue 8: Deep Fakes

CISAC suggests adding the following question: should there be an exclusive authorization from the original person depicted? Or should exceptions, such as for example parody and pastiche, be allowed?

Also, since there are multiple legal systems providing for personality rights (which, at least in the U.S., arise under tort law), there is a query as to whether and how any developing Copyright legislation on deep fakes would interact with these existing personality rights regimes?

4. Issue 9: General Policy Issues

While it is clear that the more AI technologies evolve, the more the line between "traditional" human creations and AI-generated works will blur, there is a need to preserve "traditional" human creations, and for this purpose it is necessary to think about the ways to achieve this.

WIPO should also include the private international law perspective to the general policy issues. Indeed, it should also be discussed which courts would be competent in AI Copyright matters, the determination of the applicable law, and what the forum would be. Also, the question as to whether an international treaty on AI is needed should be raised as well as more short-term solutions.

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CISAC is interested in participating in this debate and will contribute as much as possible to the next steps of the consultation process. We remain at your disposal should you need any further information or clarification of the considerations outlined in this submission.