



WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI) Second Session

Comments on the Draft Issues Paper on Intellectual Property and Artificial Intelligence

Submitted on behalf of COMMUNIA and WIKIMEDIA DEUTSCHLAND on February 14, 2020.

The World Intellectual Property Organization (WIPO) requests comments on a list of issues concerning the impact of artificial intelligence (AI) on intellectual property (IP). The request specifies that the WIPO Secretariat is seeking comments on the questions themselves, rather than answers to the questions and that there will be a future opportunity to provide answers to the identified questions.

We welcome the conversation on intellectual property and artificial intelligence initiated by WIPO and welcome the invitation to a broad range of different stakeholders to engage in conversation on the aspects of AI relevant for IP and aspects of IP relevant for AI.

This submission of comments was prepared by Maja Bogataj Jančič¹, Justus Dreyling², on behalf of COMMUNIA and WIKIMEDIA DEUTSCHLAND.

In addition to this submission we also endorse in their entirety the comments submitted by the Program on Information Justice and Intellectual Property at the American University Washington College of Law and the Global Expert Network on Copyright User Rights.

We have a number of general remarks in relation to the topic and the questionnaire, including remarks on what is missing from the questionnaire, as well as comments addressing specific issues.

1. General remarks

1.1. Implications for other fields of law and public policy

We recognize that many of the issues identified in the Draft Issue Paper have important implications for other fields of law and public policy. We express concern that their focus in the Draft Issue Paper is only on the allocation of intellectual property rights.

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While we understand that this is due to WIPO's mission of promoting intellectual property, we believe that such a conversation cannot be had without hearing from experts and scholars in other fields of law, from experts and scholars in other fields of science (including machine learning, philosophy etc.), as well as from the main stakeholders (i.e. citizens, users, consumers).

1.2. Identification of issues, explanation of problems and justification for IP protection

WIPO is seeking comments on the questions regarding certain issues that have been determined in advance, while other issues are missing and still other issues are under-defined.

Many of the questions seem to start *in medias res*, even though problems are under-defined and justifications for solving such problems via an IP regime are missing. Many of the follow-up questions seem to foreshadow the outcome of the debate (i.e. that new protective rights are needed).

Issues with the current state of IP law should be stated more clearly and justification for the amendment of the IP regime to solve these problems should be provided.

1.3. Overlapping Intellectual Property Rights

The Draft Issues Paper discusses the introduction of new protection rights on multiple levels: patents for AI systems, copyright or related rights for IP-generated output, and even rights of protection in relation to data. If new protection rights are introduced on multiple levels, these layers of protection will interact, which may lead to unintended consequences. Introducing multiple new layers of protection (as exemplified by patent thickets) may also undermine one of the principle goals of intellectual property rights, which is to foster creativity and innovation. More studies on these subjects would be needed.

1.4. Definitions

1.4.1. Definition of Artificial Intelligence

The Draft Issues Paper does not properly define Artificial Intelligence, namely the distinction between AI that serves as a tool for inventors and creators and AI that produces the result autonomously, more specifically “finds a technical solution to a technical problem autonomously” or “autonomously produces results or outputs that look like a work of art”.

Academics highlight the need for AI to show the ability to carry out autonomous production of output before even starting the conversation for justifying the granting original IP rights to AI.³

This distinction is additionally important because some legal regimes recognize IP protection for “computer generated creations” from more than 20 years ago⁴, when AI was not able to produce outputs autonomously but was only used as a tool by the person who organized the creative process. The mere existence of such regimes can influence the current conversation around justifications for IP protection of for AI autonomously produced outputs.

1.4.2. Inventions, works vs. outputs of process

³Gervais, Daniel J., *The Machine As Author* (March 25, 2019). *Iowa Law Review*, Vol. 105, 2019; Vanderbilt Law Research Paper No. 19-35. Available at SSRN: <https://ssrn.com/abstract=3359524>

⁴UK Copyright, Designs and Patents Act 1988 (<http://www.legislation.gov.uk/ukpga/1988/48/enacted>)

Work is a specific category in copyright law. The Berne Convention⁵, which establishes a “Union for the protection of the rights of authors in their literary and artistic works”, defines works as “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” and then lists different categories of works.

Defining outputs of the AI processes as “AI generated works” or “literary and artistic works autonomously generated by AI” predetermines the direction of the debate in the field of copyright.

Similarly, defining the outputs and results of AI processes as “AI generated inventions” or “inventions autonomously generated by AI” predetermines the direction of the debate in the field of patents.

1.5. Legal personality of AI

Academics assessing the appropriateness and feasibility of legal personhood for AI system warn that it is premature to introduce AI Personhood.⁶

The question of legal personality in the Draft Issues Paper is raised only in connection with copyright. While we do not agree that these fundamental questions concerning the core of the whole legal system should be addressed only in regard to copyright, we understand that these questions touch the fundamentals of the copyright system, namely the requirement for originality which is the “*sine qua non* of copyright”⁷ around the world. The work is original if it reflects “free and creative choices” by humans.

If granting legal personhood to AI is premature, further analysis of the state of the art of AI is needed to assess whether addressing some of the core issues identified in the Draft Issues Paper that concern the amendments of IP regimes or with assigning new IP rights to AI output is unjustified or just premature.

1.6. Algorithm transparency and AI and omission of Trade Secrets

In some instances, arguments relying on IP rights and IP protections are used to deny the “opening of the black box of algorithms”.

While business may have or can have a legitimate interest in protecting proprietary information, such as the method by which a decision is made, individuals have a legitimate right to know that AI algorithms are created and applied in a fair manner.

⁵ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) <https://wipolex.wipo.int/en/text/283693>

⁶ Mireille Hildebrandt: Legal Personhood for AI?, Law for Computer Scientists, Published on: Jun 02, 2019 Updated on: Aug 30, 2019 (<https://lawforcomputerscientists.pubpub.org/pub/4swyxhx5>), Ugo Pagallo: Vital, Sophia, and Co.—The Quest for the Legal Personhood of Robots, Law School, University of Turin (https://www.researchgate.net/publication/327567440_Vital_Sophia_and_Co-The_Quest_for_the_Legal_Personhood_of_Robots), Bendert Zevenbergen, Mason Kortz, Jana Schaich Borg, Mark A. Finlayson, Ugo Pagallo, Tjaša Zapušek: APPROPRIATENESS AND FEASIBILITY OF LEGAL PERSONHOOD FOR AI SYSTEMS (https://users.cs.fiu.edu/~markaf/doc/w16.zevenbergen.2018.procicres.3.x_camera.pdf?fbclid=IwAR1ugavKMx9OcSc3b5sdt-soqJNC3p5yDNCO2t92M-s7PudvQR1o_ZxUscw)

⁷ 499 U.S. 340 (111 S.Ct. 1282, 113 L.Ed.2d 358) FEIST PUBLICATIONS, INC., Petitioner v. RURAL TELEPHONE SERVICE COMPANY, INC.

WIPO should consider playing a role in defining these issues and establishing policy that will fairly balance human rights and IP rights, including trade secrets in this context.

In this respect we need to have a conversation about the role of trade secrets as one of the relevant categories of IP protection in this context, especially since it has a special legislative regime in many jurisdictions.

2. Copyright and related rights

It can be misleading to start posing questions related to a potential new copyright and related rights protection related to AI with a statement that: *“AI applications are capable of producing literary and artistic works autonomously”*. This very statement can unjustifiably predetermine the direction not only of the questions related to these issues but also the answers to such questions. The statement should instead be transformed into several questions, namely:

- Is AI - as we know it today - autonomously capable of producing outputs that “look like” literary and artistic works?
- What should be the level of human involvement required to make a distinction between “AI assisted human creations” versus “AI autonomously produced outputs”?

Consequently, the question *“Should copyright be attributed to original literary and artistic works that are autonomously generated by AI?”* should also be corrected in several aspects.

Firstly, the term “original literary and artistic works” in relation to autonomous AI should be substituted by the more accurate and neutral term “AI autonomously produced outputs” in all aspects of discussion. See also point 1.4.2. above.

Secondly, the question should be changed:

- Should “AI autonomously produced outputs” that merely “look like” literary and artistic works deserve copyright protection only on the basis that they look like original literary and artistic works created by humans?
- Should, in cases of “AI autonomously produced outputs”, IP rights be allocated at all? What are the justifications for granting new exclusive rights in such cases? Do machines need incentives to create or do they deserve a reward?
- Should copyright protection, which is founded on the principle of originality which requires “free and creative choices”, be changed so fundamentally as to justify copyright protection of “AI autonomously produced outputs”? In other words: Do we need to change the global standard of originality, which is the *sine qua non* for copyright and determines that only literary and artistic works which are the result of human creative processes and in which a reflection of human creative choices are manifested deserve copyright protection, to be able to grant copyright protection to the outputs of processes in which no human creativity is manifested?

If the answer to the above questions is negative, further question should be asked, namely:

- Is the regime of related or neighboring rights or some sort of regime of sui generis rights justifiable in order to grant a new type of such rights to autonomously produced AI outputs? What would be the appropriate scope and duration of such rights to fairly balance user rights and public interest? How should such rights be allocated?

Or, consequently, if the answers to all of the above questions are positive, the further question should be:

- What should be the appropriate scope and duration of copyright in AI autonomously produced outputs (in this case the term “AI creations” would probably be appropriate) to fairly balance user rights and public interest?

Additional question related to AI and copyright and related rights:

- What should be the level of human intervention determined to define AI produced outputs as AI assisted human creations?
- What is the definition of AI as a tool in relation to the AI assisted creation? What is the scope of copyright protection for AI as a tool in such cases?
- Who should own copyright or related rights in the cases of AI assisted creations?
- What would constitute a fair and balanced scope of protection for AI assisted creations?
- Should there be specific exceptions and limitations to the exclusive rights granted to AI assisted creations?

3. Deep fakes – intersection of copyright and personal rights

Deep fake concerns the personality rights of the person that is being “deep faked”. The redress mechanism for exploitation of likeness of one person should lie in the realm of personality rights. It would be wrong to address this issue with copyright

In this respect it is important to note that some jurisdictions recognize special provisions in copyright laws that require from persons that disseminate or commercially exploit portraits of other persons to get permission in advance. However these provisions rely on legal regimes that protect personality rights and should not be misunderstood as special copyright solutions for the problem of commercialization of someone’s likeness.

Does the output of the deep fake process results in a derivative work is questionable. To address this issue it is important to understand the technological process used to produce deep fakes better, to be able to assess firstly) scope of copyright relevant uses and amount of data involved in the process and b) the autonomy of the production process itself.

4. Data in the context of text and data mining, machine learning and AI

Please consult the comments submitted by the Program on Information Justice and Intellectual Property at the American University Washington College of Law and the Global Expert Network on Copyright User Rights, which we endorse.

5. Data

We argue that new rights of protection in relation to data are neither justified nor necessary. Instead, we would welcome a discussion on how to improve access to data to facilitate research and foster innovation. Considering the level of market concentration in data-intensive industries we suspect that an additional layer of protection would further improve existing platforms' market standing and raise barriers to entry for competitors.

From our perspective, three fundamental questions are absent from the list:

First, what would be the specific purpose of new rights of protection in relation to data?

We are skeptical that a *sui generis* right of protection in relation to data would facilitate innovation. We urge the secretariat to discuss this question more broadly to allow for the development of tools, including a data access right, that would truly facilitate the free flow of data that is necessary for further innovation in the field (see Issue 10, question vi).

Second, what is the policy record for existing rights of protection for data and databases?

It is worth noting that the EU Directive on the Legal Protection of Databases (1996) remains controversial. In a recent consultation round, the research and academic sector have deemed the *sui generis* "right to be unclear and too broad and the exceptions to the *sui generis* to be too restrictive."⁸ This is particularly significant as text and data mining are likely to increase in importance as research tools in the near future.

Third, how would a new right of protection in relation to data affect market concentration in the sector?

Importantly, the document does not differentiate between personal data and non-personal data. We believe that all questions regarding personal data should be subordinate to personal rights and data protection concerns. We are concerned that a commercial right of protection for personal data could put platform operators in a stronger position than they already are, as it might create scenarios where users of platforms inadvertently sell out their personal data. We believe that additional questions should be directed at experts from other academic fields to avoid such a scenario.

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⁸ European Commission. Synopsis report of the public consultation on the evaluation of Directive 96/9/EC on the legal protection of databases (<https://ec.europa.eu/digital-single-market/en/news/synopsis-report-public-consultation-evaluation-directive-969ec-legal-protection-databases>).