WIPO Consultation on Artificial Intelligence and Intellectual Property Policy

Submission by Creative Commons

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General comments

Creative Commons (CC) is pleased to submit comments on the WIPO document entitled “Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence” (document WIPO/IP/AI/2/GE/20/1), specifically regarding issues in connection with copyright and related rights (issues 6 to 9) and data (issue 10).

Artificial intelligence (AI) is an extremely rapidly evolving field of technology and is relatively new in terms of assessing and understanding its impact and possible use. CC urges WIPO and its members to tread lightly at this nascent stage in the development of AI technology. Rather than prematurely applying an antiquated copyright system that has yet to even adapt to the digital environment, CC encourages WIPO and its members to exercise restraint and instead methodically assess the proper framework for its regulation as AI evolves and becomes better understood.

First, at the present moment, one is hard pressed to fully and accurately appreciate the complexities in which AI operates and will operate in the future.[1] Any attempt to articulate an intellectual property (IP) framework around AI is premature at best, if not flawed altogether. There is a pressing need for AI to be understood and defined first, then (if necessary) regulated. This includes considering the public policy and ethics perspectives. These discussions are essential before an IP framework is considered. By way of example, it is not presently clear how much human involvement is required in the production of content by AI and whether AI applications can really independently and autonomously generate content. Without clarity

[1] Currently, what is termed AI includes everything from simple algorithms which suggest the most probable next word as we type an email, to sophisticated neural networks that seem to produce coherent answers to abstract questions and even amusing banter. The spectrum including these examples represents more than 60 years of progress in research and technology, and it is only one dimension of the complex space commonly referred to as AI. AI algorithms differ in the depth and breadth of input required to produce coherent output, and it’s not clear how to judge the originality of a work essentially composed of random snippets of thousands or millions of input works. Clarity on these and other basic definitions in the ‘AI’ space is a prerequisite to competent regulation in this arena.

around such key concepts as AI itself, machine autonomy and the creation process, it is at this point ill-advised to force the application of the copyright system onto AI.

Second, it remains unclear whether copyright is an appropriate let alone the ideal vehicle for regulating AI. Copyright is fundamentally centered on human creativity. Copyright is ill-equipped to handle the barrage of additional “related rights” that have been thrust upon it in the recent past, such as press publisher rights and the ongoing debate over broadcasting rights. Using copyright as the means for regulating these other issues -- including AI as is understood at present -- is dangerous and unwise, and is a disrespect of copyright’s original design, particularly without the needed larger public policy debate having taken place first.

Third, assuming WIPO and its members are settled on using copyright to regulate in this arena despite the several well-accepted concerns raised above, CC strongly advises that WIPO approach the question of regulation conservatively, set a high bar for the creation of such new rights, exercise restraint with an eye on copyright’s fundamentals, and consider a lesser term of protection than that provided to the original works created by human authors. This means ensuring that appropriate exceptions and limitations exist for creative works that are used in the AI process, and only extending copyright to outputs that directly involve human creativity. While the creativity bar for purposes of copyright is low -- arguably too low -- it does in fact exist and must be respected before the exclusive rights granted by copyright can be said to apply to a work and before new “copyright-like rights” are created. This also means that a long term of copyright protection such as that afforded to human authors should be avoided, as explained in more detail below.

Finally, Creative Commons looks forward to the opportunity to respond to further requests for comments and other inputs from organizations and individuals, in support of a thoughtful, intentional and well-informed process before decisions are made. We encourage a deliberative process where all ideas are vetted and shared openly before decisions are made and next steps established.

Copyright and related rights

Issue 6: Authorship and Ownership

Paragraph 12, chapeau

The dignity of human creativity is central to CC's philosophy that there should be direct human, authorial involvement for a work to be considered worthy of copyright protection. As mentioned above, the creativity bar is low, but it does exist and must be respected. Extending the scope of subject matter of copyright protection to outputs only indirectly influenced by individuals undermines access to that content and decreases or eliminates the legal ability to use a work without seeking permission first. Extending copyright protection to AI-generated content would

amount to creating a further enclosure of the public domain, thereby impoverishing it and posing a serious threat to its vitality.

Paragraph 12, item (i)

AI programs are not authors. Copyright protection must only extend to works in which sufficient human creativity is manifested, i.e. works that are the result of a human creative process. There is almost never sufficient creativity in the sense intended by copyright law in outputs generated by AI.[2] To the extent human involvement arguably exists, that involvement cannot reasonably be viewed in most if any cases to be of a creative nature but is rather mechanical and non creative. Expanding copyright to include outputs of the AI process would be a mistake.

Material produced by AI is not original. Copyright ought only protect works that meet the originality requirement, and originality is a reflection of the creative choices made by a human mind. Content that is not produced by a human fails to pass the originality threshold. AI-generated products should not, therefore, be considered works protected by copyright.

The current minimum duration of copyright is not appropriate for machine-produced content. Assuming copyright should be expanded to cover AI-generated products, calculating the term of protection is problematic. Assuming the term is calculated from the death of the author, it would be confounding to calculate the date of "death" of an AI application or process. Assuming however that the term would be calculated from the date of production of the AI-generated content, copyright protection would be disproportionately long in comparison with the investment needed to produce the content. Were AI products to be granted any copyright protection, CC recommends considering a much reduced term of protection, such as that proposed by several organizations regarding the creation of new broadcast rights.

Paragraph 12, item (ii)

Copyright should not vest in AI-generated content. Assuming, however, that copyright or related rights are extended to AI-generated content, then CC licenses as well as the CC0 public domain dedication can be used to publicly license or dedicate such works to the public domain.

Paragraph 12, item (iii)

CC believes that there should be no new *sui generis* right established for AI-generated content. Incentives and rewards in recognition of the innovation brought about by the humans involved in the development of AI itself should be found outside of the copyright system. Other areas of law are perfectly suited for handling investments by organizations and individuals who have devoted resources in products they create that are not copyrightable. This includes trade secret laws and laws protecting against unfair competition. In the hypothetical event that *sui generis* rights were

[2] See footnote 1, above. There exist myriad processes and definitions for "AI", and in the absence of an agreed-upon definition that is predicated on direct human involvement, regulation in this arena under the rubric of copyright is not advised.

to be afforded to AI-generated content, the public interest and user rights would need to be upheld and fairly balanced with the scope of protection (whether exclusive rights or remunerative rights). Robust exceptions and limitations would need to be available to safeguard user rights and ensure a strong a vibrant public domain. Likewise, a reasonable duration of protection intended squarely to allow developers to recoup their investment should be established.

Issue 7: Infringement and Exceptions

General Comment

Regarding the points for comments raised by WIPO and addressed below, we think it important to reconsider the premise of the overall question: whether an AI application "can produce creative works by learning from data with AI techniques such as machine learning." Please see our comments above regarding whether outputs from a mechanical process without direct human involvement and creativity should constitute a work protected by copyright.

Paragraph 13, chapeau

The data used for training the AI application may consist of creative works that are subject to copyright, and some might even be licensed under a CC or other public license. This content should be distinguished from the outputs of the AI process. On the input side, Creative Commons' FAQs clarify how the licenses work in the context of openly-licensed content that is used to train AI tools.[3]

"The licenses grant permission for reuse in any situation that requires permission under copyright and similar rights. There are many ways in which CC-licensed work works and even all rights reserved works can be reused without permission. This includes uses that are fair uses, for example. If someone uses a CC-licensed work with any new or developing technology, and if copyright permission is required, then the CC license allows that use without the need to seek permission from the copyright owner so long as the license conditions are respected. This is one of the enduring qualities of our licenses — they have been carefully designed to work with all new technologies where copyright comes into play. No special or explicit permission regarding new technologies from a copyright perspective is required."

As stated above, CC urges the application of standard exceptions and limitations to the use of copyrighted content ingested during the AI process, at a minimum to encourage use of broader sets of data in order to avoid bias in outputs. As to outputs, CC cautions WIPO and its members

[3] https://creativecommons.org/faq/#artificial-intelligence-and-cc-licenses

from creating a default that all outputs should be protected by copyright, for the reasons discussed above.

Paragraph 13, item (i)

The same exceptions and limitations that apply to copyrighted works should remain available when works are used to train AI systems. There is no rationale for discriminating against the particular use to the extent an exception or limitation otherwise applies. If anything, broader exceptions and limitations should apply to support the broadest possible use of copyrighted works in order to encourage the elimination of bias, as discussed below. However, issues regarding privacy and security still need to be addressed, but should take place in the policy arena where public concerns and other laws such as privacy laws can play their proper roles.

Paragraph 13, item (iv)

Text and data mining are pivotal in supporting innovation. Text and data mining activities are non consumptive uses, which are broadly considered to be outside the scope of copyright altogether or are allowed pursuant to an exception or limitation. Such activities should not be considered infringement of an exclusive right granted by copyright.

Paragraph 13, item (v)
Policy interventions from a *copyright perspective* should be irrelevant so long as proper exceptions and limitations apply to the use of copyrighted works in the manner described. Additionally, policy interventions should promote and encourage the use of CC licenses as well as respect for established exceptions and limitations. This said, it is properly within the scope of policy makers to discuss non-copyright issues related to the use of copyrighted works in this as well as in other similar activities. Those issues such as privacy and personality rights are valid concerns, but should be addressed outside the copyright framework.

Paragraph 13, item (vi)
There should be no digital rights management or technological protection measures to restrict or prevent access to the data. There should be ethical requirements for transparency in the modalities of use of data, however this should be established outside the boundaries of copyright.

Issue 8: Deep Fakes

Paragraph 14 and Paragraph 15, item (i)
Deep fakes are unlikely to meet the originality standard to qualify as protectable copyright works. They are unlikely to be derivative works of copyright protected material. Akin to the rules governing derivative works, copyright would subsist only in the added original elements - and in this case, only if there is enough human involvement to pass the originality threshold. This is not

squarely a copyright issue but rather involves personality, image and privacy rights, including concerns over defamation.

Issue 9: General Policy Issues

General Comments

Creative Commons encourages WIPO to exercise caution before attempting to address orthogonal issues such as bias in a discussion about expansion of copyright. Bias, like privacy, is not a copyright issue except in one very limited respect. Ensuring exceptions and limitations exist that allow any creative works to be used in AI processes will make more works available for inclusion, and thereby reduce bias in outputs. This does not mean that policy objectives should be disregarded, such as privacy issues, which we agree need to be addressed. This merely means that as a matter of copyright the barrier to use of content in AI-processes is eliminated. We explain this in more detail, below.

Paragraph 16, item (i)
By restricting access to creative content, copyright encourages bias as it limits the pool of material available to feed into AI systems. It therefore constitutes a barrier to free and unbiased representation of culture through AI-generated content. At the same time, exceptions and limitations such as fair use are mechanisms that contribute to reducing bias in the development of AI systems, by removing the barriers around content and providing more free and diverse content for AI developers. CC believes that preserving the dignity of human creation goes hand in hand with the encouragement of innovation in AI. It is important to expand the re-use of openly-licensed content as long as safeguards are put in place to coherently ensure ethical use of such content. Copyright is a poor vehicle for regulating these other very essential aspects of commerce.

Data

Issue 10: Further Rights in Relation to Data

The creation of new rights in relation to uncopyrightable data ought to be avoided at all costs. Use and exploitation of data should be governed by regulation and standards to address concerns over privacy, security and other ethical and moral concerns (such as bias) as well as matters of public policy, such as competition, consumer protection and public health, for example. Innovation should be encouraged, just like sharing should be encouraged. Indeed, the

use of publicly available data on the Internet has led to greater innovation, collaboration and creativity.[4]

Separately, the use of data should be subject to proper safeguards. However, copyright is not a good instrument for protecting individual privacy, addressing research ethics in AI development, or regulating the use of surveillance tools employed online. Those issues belong in the public policy arena. Healthy solutions will take into account both the law and the community norms for sharing content online in general.

[End of document]

[4] https://creativecommons.org/2019/03/13/statement-on-shared-images-in-facial-recognition-ai/