

### WIPO draft issues paper on intellectual property and artificial intelligence Response from the British Copyright Council

#### **Introduction.**

The British Copyright Council (BCC) represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collecting societies which represent right holders and which provide licensed access to works of creativity. A list of our members can be found [here](#).

#### **General.**

We welcome the opportunity to comment on the WIPO draft issues paper on intellectual property policy and artificial intelligence. Individual artists have been working with technologies including artificial intelligence for many years, using it as an instrument for the expression of their human creativity. Our comments focus on the use of artificial intelligence both as a tool (AI assisted) and a “creator” (AI generated). We do not comment on the protection of AI itself, e.g. by copyright as computer programmes, by patents as innovative technology, by trade secrets, trademarks etc.

We welcome the approach of the WIPO Secretariat following the discussions amongst others in September 2019 leading to a draft list of issues that might provide the basis for a shared understanding of the main questions relating to intellectual property policy and artificial intelligence. This relation is not mutually exclusive. Given this objective and the variety of applications; we strongly recommend a more open and less conclusory approach at this stage.

In this context the initial statement on copyright and artificial intelligence in paragraph 12 is problematic: “AI applications are capable of producing literary and artistic works autonomously”.

Firstly we assume that reference to literary and artistic works is as wide as defined under Article 2 of the Berne Convention, encompassing every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression. The debate is relevant for the world of musical compositions, cinematographic works, photographs, and works of applied art alongside the other works described in Article 2. A clarification of the scope would be helpful.

Furthermore, reference to autonomous creation by artificial intelligence requires further qualification, given the differentiation in the application of artificial intelligence as a tool for human expression or for “autonomous creation”. Such “autonomous creation” is based on the ingestion and analysis of existing works created by humans. Such “creation” will often be the result of extensive training of artificial intelligence applications by humans. A general statement referring to autonomous creation is deficient given that human creativity is involved in many stages leading to the “autonomous creation” by AI applications.

**Any policy initiative needs to differentiate the various and very different applications of artificial intelligence. A one size fits all policy approach to such a general-purpose technology with widespread applications is inappropriate. The scope needs to be clearly defined and elucidated to enable appropriate analysis in terms of future impact on the creation, production and distribution of economic cultural goods and services.**

**Specific questions.**

**Paragraph 12**

(i) *Should copyright be attributed to original literary and artistic works that are autonomously generated by AI or should a human creator be required?*

Many creative works founded upon human endeavor are involved before AI applications are “autonomously creating” works. This might be different for entrepreneurial (related) rights which seem outside the scope of this issues paper.

It is a fundamental tenet of copyright that the author of *original literary and artistic* works is a human creator; this has been acknowledged by international, regional, and national laws, e.g. referring to the author’s own intellectual creation reflecting the author’s personality. In similar cases concerning copyright for nonhumans (in this case monkeys - [Naruto v. Slater, April 23 2018](#)) copyright authorship has been rejected. Distinctions are needed for copyright ownership which can be transferred to legal entities, for instance under the US work for hire doctrine; but this ownership nevertheless requires a human creator as author at the outset. Granting copyright protection to machines devalues the fundamental reason for copyright protecting the human endeavor and spirit (LeChapelier: “La plus sacrée, la plus personnelle de toutes les propriétés, est l’ouvrage fruit de la pensée d’un écrivain ...”).

**Existing copyright laws already cover most of the activities involved in AI applications given the involvement of a human creator; their input needs to be at the core of any future initiatives.**

(ii) *In the event copyright can be attributed to AI-generated works, in whom should the copyright vest? Should consideration be given to according a legal personality to an AI application where it creates original works autonomously, so that the copyright would vest in the personality and the personality could be governed and sold in a manner similar to a corporation?*

**No; there is no need for any legal fiction protecting AI applications as a separate legal person; it would devalue copyright rewarding human endeavour.**

The approach to authorship provided for literary, dramatic, musical, and artistic works in section 9 (3) of the UK Copyright Designs and Patents Act 1988 (and which is in any case an entrepreneurial (related) right) applied to computer-generated works, i.e. works “generated by computer in circumstances such that there is no human author of the work;” might merit further study.

However we note that this provision is over 30 years old and has only been only referred to in one UK case of 2006 (*Nova Productions Ltd v Mazooma Games Ltd & Ors [2006] EWHC 24 (Ch.)*) in which the court also proceeded on the basis that the person by whom the arrangements necessary for the creation of the works were undertaken also owned copyright in the traditional, true copyright sense by reason of his original authorial contribution.

*(iii) Should a separate *sui generis* system of protection (for example, one offering a reduced term of protection and other limitations, or one treating AI-generated works as performances) be envisaged for original literary and artistic works autonomously generated by AI?*

This depends on the details of the *sui generis* system and its contextualisation with copyright; i.e. whether *sui generis* protection exists in addition to copyright. This is the case for databases under UK Copyright law providing *sui generis* protection for databases (implementing the EU Database Directive 1996) as well as copyright protection if the relevant criteria are met (Section 3A CDPA).

**Any new system of protection for artificial intelligence must not interfere with the protection of original literary and artistic works.**

#### **Paragraph 13**

We challenge the terminology used in the draft issues paper by appearing to replace recognition for “original literary and artistic works” by a general reference to “data”. Such terminology is unfortunate in a WIPO document not least in view of the main purpose of WIPO being “to promote the protection of intellectual property throughout the world through cooperation.” Whilst creative works may include, or be presented alongside, data which supports further uses, this should not replace recognition of a copyright work behind the data.

**The dismissive characterisation of original literary and artistic works as data should be rejected and removed. We stress the need to address the use of original literary and artistic works used to train artificial intelligence applications. Furthermore, ‘data’ is an unspecified term which requires careful consideration. A line or excerpt from a literary work can be a substantial part of that work and use without authorisation would amount to a copyright infringement. Calling this line or excerpt ‘data’ could have a severe impact on what would constitute a copyright protected work.**

*(iv) Should the use of the data subsisting in copyright works without authorization for machine learning constitute an infringement of copyright? If not, should an explicit exception be made under copyright law or other relevant laws for the use of such data to train AI applications?*

**Any such use of literary and artistic works without owner/author license or consent constitutes infringement of copyright, if no exception applies.** Exceptions are a fundamental part of copyright protecting the public interest. A good example is the exception for the benefit of visually impaired people internationally recognised in the WIPO Marrakesh Treaty 2013. No such interest exists concerning application of artificial intelligence; denying copyright protection for such activities would be inconsistent with the internationally agreed three step test.

Even incorrectly assuming that an exception for the use for artificial intelligence applications constitutes a specific case, such exception clearly conflicts with a normal exploitation of works (rightholders license users of the works) and also unfairly prejudices the legitimate interests of rightholders to be remunerated for their creativity.

**Therefore no explicit exception should be made generally for AI application since the purpose of exceptions is to balance the rights of creators with societal interests.**

(v) *If the use of the data subsisting in copyright works without authorization for machine learning is considered to constitute an infringement of copyright, what would be the impact on the development of AI and on the free flow of data to improve innovation in AI?*

Given the progress of development of AI applications there is no evidence of any, and specifically any negative, impact of copyright on the development of AI. Use of “data” should not be conflated with the free flow of data. Licensing solutions can be adaptable enough to cover the situations where developers working in the field of AI can obtain authorisation and licenses.

**Regular copyright law rules apply and authorisation is required.**

(vi) *If the use of the data subsisting in copyright works without authorization for machine learning is considered to constitute an infringement of copyright, should an exception be made for at least certain acts for limited purposes, such as the use in non-commercial user-generated works or the use for research?*

An unqualified exception concerning the use of original literary and artistic works to train artificial intelligence applications is not appropriate, aside from the challenge of defining “non-commercial user generated works” which do not compete with the original artistic and literary works and so would conflict with the three step test. An exception for the use in research needs clearly defined parameters, for instance excluding any further use if the research results have been sold to commercial enterprises.

**No; without clear parameters an exception will infringe the three step test; it also does not reflect a public interest in exploiting original literary and artistic works.**

(vii) *If the use of the data subsisting of copyright works without authorization for machine learning is considered to constitute an infringement of copyright, how would existing exceptions for text and data mining interact with such infringement?*

We recognise that the situation concerning the impact of text and data mining and training of AI applications seems at first sight similar. However, the objective of the exceptions for text and data mining established under both UK, and European Union copyright law is to enable examination by research organisations such as universities (c.f. Recital 8 of the Directive Copyright in the Digital Single Market). It is difficult to understand how this objective would apply to artificial intelligence. Moreover, the established UK exception for text and data mining requires, as we think it should, lawful access, mainly by authorisation.

**The existing text and data mining exception while addressing a similar system, is not an appropriate model for machine learning.**

*(viii) Would any policy intervention be necessary to facilitate licensing if the unauthorized use of data subsisting in copyright works for machine learning were to be considered an infringement of copyright?*

British Copyright Council members offer a wide range of licences for a huge variety of uses of literary and artistic works. We have been working with users to develop efficient licensing opportunities for their needs and look forward to further collaboration in the AI field.

The ultimate decision as to whether an artist licenses the use of his or her creative work ought to be a matter of his or her choice.

**The established licensing based approach should not be undermined by any policy intervention, such as compulsory licensing.**

*(ix) How would the unauthorized use of data subsisting in copyright works for machine learning be detected and enforced, in particular when a large number of copyright works are created by AI?*

We welcome the recognition of the challenges involved in detecting and enforcing copyright against unauthorised use of literary musical and artistic works. Ultimately, it will be difficult to prove copying of original such works judging from the output, i.e. the AI generated content. However, as has been the case with application of the sui generis right for databases, systems have evolved for identification of unauthorized uses. It is not inconceivable that such evolution will also be possible for works presented with the benefit of AI applications.

**The standards to assess copying should be the same as the ones established for the copying by humans; technology will play a key part in this process.**

Issue 8: Deep Fakes

Deep fakes raise wide challenges on cultural, ethical, and economical basis much wider than the area of artificial intelligence and copyright. As far as copyright is concerned deep fakes carry with them the potential to infringe moral rights as part of the personality rights of creators. For instance a book can be falsely attributed to an author against their wishes or political beliefs.

**Deep fakes need to be subject to strict legal oversight on all levels.**

Issue 9: General Policy Issues

*Are there seen or unforeseen consequences of copyright on bias in AI applications? Or is there a hierarchy of social policies that needs to be envisaged that would promote the preservation of the copyright system and the dignity of human creation over the encouragement of innovation in AI, or vice versa?*

We reject an approach which puts artificial intelligence higher in the hierarchy of social policies than the inalienable protection of human creativity. Creators and artists as well as creative industries have been using technology in the creative process since their inception; even as some form of random artificial intelligence (e.g. Mozart dice, 18<sup>th</sup> Century). Creators are the vanguard of technological and creative innovation.

We look forward to a more accurate and nuanced approach to artificial intelligence and copyright in the final issues paper and welcome the opportunity to engage with the debate in the future.

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