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

Dear Madam or Sir,

The Bundesverband Musikindustrie (BVM) – Federal Association of the German Music Industry) represents the interests of more than 200 labels and music companies, accounting for more than 80 percent of the German music market. The Association advocates the music industry's interests in German and European politics, and serves the public as a central point of contact for the music industry. In addition to publishing market statistics and establishing industry structures such as the B2B platform PHONONET, the BVM portfolio also includes industry-related services. Since 1975, it has presented GOLD and PLATINUM, since 2014 also DIAMOND, to the most successful artists in Germany, since 1977 the Official German Charts have been compiled on behalf of the BVM. The PLAYFAIR initiative provides guidance for consumers when using music online. www.musikindustrie.de, www.playfair.org

We are grateful for the opportunity to provide comments to WIPO on its draft Issues Paper on Intellectual Property Policy and Artificial Intelligence dated 13 December 2019 and we look forward to working with WIPO and other stakeholders as these discussions develop.

GENERAL OBSERVATIONS

As emphasised in the draft Issues Paper, the copyright system has always been intimately associated with the encouragement of human creativity. This human creative expression is at the core of the recorded music industry, and maintaining adequate levels of protection for copyright is vital to this.

In harmony with this, our members are also constantly working with new technologies and innovations, and working with artists to develop and use new tools to advance the creative process. This includes the

use of artificial intelligence (“AI”) technologies, from the use of machine learning to analyse and predict user behaviour and preferences to systems that assist in the creative process.

This highlights a central principle which should be upheld in any discussions concerning AI and Intellectual Property: progress in AI innovation and adequate copyright protection are not mutually exclusive. On the contrary, AI processes which depend upon the “input” of protected works or subject matter derive their purpose and value from the very existence of those works or subject matter. Accordingly, a reduction in the protection of works (for example by broadening or introducing new exceptions to copyright), which reduces incentives for the creation of new works, would ultimately harm innovation and investment in AI processes. Supporting thriving creative sectors through adequate legal frameworks should be a central pillar of any policy aimed at stimulating developments in AI.

Unfortunately, certain questions raised in the draft Issues Paper appear to be based on assumptions, which lack an evidential basis, and, as a result, risk prematurely prescribing the parameters of this valuable conversation in a way that is not conducive to the open conversation that WIPO is seeking to facilitate.

Therefore, we propose that as a first step and to provide the information necessary to facilitate a well-informed conversation, WIPO conducts a “baseline” study aimed at:

1. Better understanding AI processes which involve the use of existing protected works and subject matter and/or which produce content which may or may not qualify as copyright works.
2. Identifying the likely application of the international and national copyright and related rights frameworks to uses of works or subject matter by AI processes, and to the outputs of AI processes.

This exercise would provide a solid foundation on which to base future discussions and, in particular, would facilitate the identification of the appropriate questions for those discussions.

Finally, the consultation paper focuses on copyright, and it should be recalled that the rules – at international and national level - applicable to subject matter protected by related rights may differ to those applicable to works protected by copyright. Therefore, for the sake of clarity, it is worth clearly setting out which rights (copyright / authors' rights or related rights) and/or protected subject matter (works, sound recordings, performances, etc) are being analysed.

OBSERVATIONS ON ISSUE 6: AUTHORSHIP AND OWNERSHIP

Observations on the preamble to the draft questions presented under Issue 6

The text preceding the proposed questions under issue 6 includes two significant assumptions. The first is that AI acts *autonomously* and the second is that content “produced” during the course of the application of an AI process can qualify as a literary or artistic work, which assumes the potential

subsistence of copyright. We submit that this may be an unnecessarily narrow perspective as in many, even most cases, AI does not act autonomously, and the questions regarding human involvement and human creativity, may be more complex.

We propose that WIPO could facilitate further research on this topic to further inform the policy discussion proposed by WIPO, as suggested above.

Draft Question 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?

We suggest that a discussion of such a question would be most productive once a clear starting point has been established. In other words, once it is better understood how the existing international and national legal frameworks might apply to the output of an AI process. For this reason, it would be beneficial to all stakeholders if WIPO were to provide stakeholders with an analysis to that effect.

If, as may be anticipated, the majority of national laws require that copyright works (as opposed to subject matter protected by related rights) must have a human author to be protected as copyright works. For example in Germany only original personal (human) creations are protected with regards to Sec. 2 para 2 German Copyright Law (UrhG). Sound recording produced using an algorithm or an automated process without human intervention would most likely be protected under the ancillary copyrights (Leistungsschutzrechte) in Germany. Also natural and artificial sound material is protected under Sec. 85 German Copyright Law (UrhG). But an author's right arises only in case of human creations.

Therefore it may then be appropriate to ask:

- What degree of human involvement in the production of AI output is necessary for that output to qualify as a work protected by copyright?

However, the following question should also be asked:

- Is there any evidence to suggest that the answer to this question can or should be prescribed, or are courts best-placed to make this assessment following a case-by case fact inquiry, applying existing law?

Draft Questions 12(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?

We understand that these questions are intended to address a scenario in which copyright can subsist in the output of AI even in cases where there has been no (or insufficient) human involvement. We would suggest that – once the baseline study proposed above is complete and it is better understood whether and to what extent human involvement is required for copyright to subsist – it would be more appropriate for question 12(ii) to ask:

Are existing laws on ownership of copyright adequate to address the ownership of copyright in content produced during the application of an AI process? If not, what areas are not addressed by existing laws and how might those areas be addressed?

Draft Question 12(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?

Currently there are basically no exceptions or limitations which specifically apply for intelligence processes in Germany. Quotations are only permitted in very exceptional cases. A quotation must have the intention of entering into 'dialogue' with that original work, which normally will not be the case. Also a parody exception is very limited and most likely not applicable in an AI process. Without knowing how and which existing rules would apply to AI outputs (again, see the recommendation above to carry out a baseline study), it would be premature to proceed to a discussion on whether any separate *sui generis* rights should be established. We suggest that this question should not be posed at this stage. It must first be established *whether* there are gaps in the existing legal framework to warrant a discussion on if and how to fill those gaps.

GENERAL OBSERVATIONS ON ISSUE 7: INFRINGEMENT AND EXCEPTIONS

Unclear or inadequately specific terminology

At the outset, the terminology used in this section needs to be clarified. For example:

- “*Data*” - the term “data subsisting in copyright works” obscures what is actually meant, which is “**copyright works**”. The terminology must be clear so as to avoid inadvertently misrepresenting the central question that is asked by certain questions in issue 7. For example, draft Question 13(i) is asking whether using copyright works in AI processes infringes copyright.

- “Machine learning” and “Train” – the “machine learning” and “training” activities described in 13(i) and 13(ii) are potentially extremely far-reaching and, as a consequence, the utility of the questions is compromised. For instance, an all-encompassing exception to “train” AI would fall at the first hurdle of the three-step-test. It should be clarified which activities are intended to be covered by these terms.

Unclear assumptions on which the questions are based

Draft Question 13(ii) seeks to ascertain the impact of infringing uses of copyright works in AI processes “*on the development of AI and on the free flow of data to improve innovation in AI*”. It is concerning that the questions focus only on the potential impact of the application of copyright to the development of AI. The questions should also seek input on what the impact of, for example, new exceptions might be on the creative sectors, including on ensuring a fair competitive marketplace, and on the incentives to create and reinvest into new creators and creations.

We suggest that WIPO should re-assess some of the terminology used in, and assumptions underpinning, certain questions in this section so as to ensure that this valuable conversation is not prematurely or inappropriately narrowed in scope.

In particular, it should not be assumed that the promotion of the development of AI and adequate protection of copyright and related rights are mutually exclusive.

Draft Question 13(i) – 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?

First, in Germany the use of copyright works basically are only allowed with authorization of the said rights holders. The phonogram producer’s right also covers protection of (small) parts of the phonogram (ECJ, C-476/17, Metall auf Metall). This should be kept in mind regarding this issue.

Furthermore, we refer to our observation above about the term “data subsisting in copyright works”. What is actually meant here is “copyright works”. This point applies also to the other questions under Issue 7. Second, these questions are far too broad (for example, “use” is not defined). Third, these questions are premature.

Rather than seeking opinions as to whether new exceptions should be introduced, the first question should be whether there is evidence indicating the need to consider new exceptions at all and, if in what specific scenarios. Only once an evidence-based problem has been identified can the conversation turn to the question of appropriate solutions to that problem. Again, a baseline study is essential to understand how existing laws might apply to uses of works (and other protected subject matter) in AI processes, and what the impact would be of different policy options.

Draft Question 13(ii) – 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?

First, we refer to our observation above about the term “data subsisting in copyright works”. What is actually meant here is “copyright works”.

Second, issues relating to “*the free flow of data*” are not relevant to the question of the scope of copyright protection. It is essential to distinguish between laws and regulations concerning data transfers etc., and those relating to copyright, and not to conflate the issues.

The question is also too broad. Crucially, it fails consider that AI is used with vastly differing purposes and contexts. Further, it refers to the “development of AI”, which potentially covers a range of technological developments. For this question to usefully contribute to the discussion, it should clarify what AI processes and applications are targeted by the question. Therefore, it would be beneficial for WIPO to seek information on AI processes and applications which use protected works, how they use protected works, and for what purpose. The baseline study which we recommend above would address the application of copyright - including exceptions and limitations to copyright – to such processes and application.

Furthermore, it is essential to also probe whether the market might address, or may already have addressed, the use of works in AI processes. The relevant question should therefore make reference to the possibility of uses of copyright works in AI process being authorised by right holders, as follows:

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 [IN THE AREAS TO BE IDENTIFIED BY WIPO] ~~if such authorisations could not be obtained~~ and on the free flow of data to improve innovation in AI?

As indicated in the introductory observations to this issue, a corresponding question should also be asked as to the impact upon copyright and related rights holders if their works or subject matter could be used in AI processes without their authorisation.

Draft Question 13(iii) – 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?

First, we refer to our observation above about the term “data subsisting in copyright works”. What is actually meant here is “copyright works”.

We respectfully submit that any questions concerning possible exceptions must be more precise and, as stated above, should not be posed until an analysis of existing practices and legal frameworks has been conducted (for example, the suggestion that an exception for “non-commercial user-generated works” should be considered indicates a lack of adequate research into existing digital markets). Indeed, **Question 13(iv)** begins to address these questions and we proposed that Question 13(vi) should be broadened to cover any possibly relevant existing exceptions and limitations. We therefore recommend that Question 13(iii) should be merged with Question 13(vi).

Draft Question 13(iv) – 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?

See above.

Draft Question 13(v) – 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?

First, we refer to our observation above about the term “data subsisting in copyright works”. What is actually meant here is “copyright works”.

This question assumes that it may be necessary to “facilitate licensing”, but we are not aware of any research having been done into existing or potential licensing practices. In the music industry, for example, record companies are constantly innovating and working with artists to develop and use new tools and techniques to spark creativity, produce great music and better engage with music fans. Therefore, uses of recordings in AI processes is an area in which record companies would and do have a legitimate interest in licensing or controlling.

We recommend that before asking questions which assume some degree of market failure, WIPO should first seek information on existing and potential practices from the various stakeholders. If appropriate, specific areas could then be identified for further discussion.

Draft Question 13(vi) – 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?

First, we refer to our observation above about the term “data subsisting in copyright works”. What is actually meant here is “copyright works”.

This proposed question addresses the important issue of detection of infringements. However, it should be amended to clarify the terminology used as follows:

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?

OBSERVATIONS ON ISSUE 8: DEEP FAKES

At this early stage in the discussion, we would recommend a more general approach to the issues surrounding “deep fakes”. In particular, it would be useful if WIPO could gather information on existing laws that may be relevant, such as those relating to personality rights, passing off, data protection and copyright, so as to inform future discussions.

Having said that, this is also an area where challenges may arise over detecting unauthorized uses of copyright works. It may therefore be appropriate to consider record-keeping obligations when copyright works are used in processes relating to “deep fakes”.

We thank WIPO for the opportunity to provide these comments on this important subject, and we look forward to participating in this ongoing discussion.

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