

FROM

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TO

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**EBU Reply to the
“Draft issues paper on Intellectual Property Policy and Artificial Intelligence”**

The European Broadcasting Union (EBU) welcomes the opportunity to take part in the World Intellectual Property Organization (WIPO) Secretariat’s consultation on the issues concerning the impact of artificial intelligence (AI) on intellectual property (IP) and to provide comments on the draft issues paper (the “Issues Paper”).

The EBU is the world’s leading alliance of Public Service Media (PSM) organisations.¹ It is a not-for-profit organisation that represents 116 member organisations in 56 countries. PSM organisations, which vary significantly from one country to another (e.g. in terms of size, level of funding, regulatory requirements, including public service obligations, etc.), are entrusted with the provision of high-quality content that fulfils the cultural and democratic needs of the society they serve.

To fulfil their remit, PSM organisations may use AI technology to increase their productivity in order to convey information to viewers quickly, accurately, automatically and autonomously. In the broadcasting industry, PSM organisations are already using specific AI technologies and this use is likely to surge in the near future.

For this reason, the EBU wishes to bring to the attention of the WIPO Secretariat certain issues that are common to PSM organisations. More particularly, the present contribution will address issues related to the areas of copyright and related rights, data and accountability for IP administrative decisions.

For ease of reference, the present contribution follows the numbering in the Issues Paper.

¹ More information about the EBU can be found on the website: www.ebu.ch.

COPYRIGHT AND RELATED RIGHTS

Issue 6: Authorship and Ownership

12. The audiovisual sector uses AI applications to produce media content autonomously. Although the parties usually rely on contract law to define potential rights and obligations for the use of AI-generated works, PSM organisations would welcome the proposed study to clarify as to whether AI-generated results (hereafter referred to as “works”) would *de lege lata* or should *de lege ferenda* benefit from copyright and/or related rights protection. Should it be the case, it would be crucial to determine the scope of the protection and the type of rights granted.

In the event that the study’s preliminary conclusions are that, under certain circumstances, AI-generated works may already benefit from copyright and/or related rights protection, the EBU suggests extending the consultation to the following points:

- Would there be IP policy reasons for granting AI-generated works only a related rights protection, rather than copyright?
- Should AI-generated works be treated similarly to computer programmes?
- Should any new type of related right apply to AI-generated works? If so, who should be entitled to exercise them?
- Should moral rights be recognised in AI-generated works? If so, who should be entitled to exercise them?
- Should a different term of protection apply to AI-generated works?
- Would there be a need for specific contract law provisions for AI-generated works?

Issue 7: Infringement and Exceptions

13. AI applications use large volume of data, which may be protected by copyright, for training AI models. For example, data sharing² may enable broadcasters to serve audiences with new content tailored to the users’ needs and/or improve the functionalities of already existing services. In that case, one preliminary issue is to determine if broadcasters should have access to data and how the copyright-protected data may be used. Then, subsequently, one needs to clarify who should have ownership of the new data produced by an AI using the raw data from another party.

In view of the above, the EBU suggests extending the consultation to the following points:

- Should companies that control large reserves of user data be under an obligation to grant access to these data? If so, under which conditions?
- How copyright-protected data may be used and by whom?

² Such as a data sharing agreement between a PSM organisation and a platform that enables the former to reach its audiences.

- Who should have ownership on the new data produced by an AI using the raw data from another party?

As to limitations and exceptions, the EBU encourages the WIPO Secretariat to ensure the study addresses the following questions:

- Should the existing limitations and exceptions apply?
- Should AI-generated works benefit from specific new limitations and exceptions to copyright and/or related rights?
- Should there be any limitations and/or exception in relation to the use of large volume of (copyright and/or related rights protected) data for training AI applications? Would this require a distinction between certain types of data?

Issue 8: Deep Fakes

15. As stated above (see Issue 7), one preliminary question would be to determine the ownership of the resulting work generated with copyright-protected data.

Moreover, due to potential harm resulting from the unauthorised use of personal and/or copyright-protected data, the EBU suggest extending the consultation to the study of limitations that may apply to the production of Deep Fakes.

Issue 9: General Policy Issues

16. The EBU would like to strongly emphasise the need to address ethical aspects of AI as well as their interactions with IP rights. The EBU encourages the WIPO Secretariat to extend the consultation to:

- The meaning and purpose of copyright regulation from both traditional approaches (*i.e.* Continental and Anglo-Saxon), and;
- If copyright and related rights should be transferable to AI at all.

DATA

23. Many businesses rely on platforms to reach online users³ and, at the same time, these businesses significantly contribute to the platforms' success by generating a vast amount of data. However, in many cases, platforms refuse to share data with the businesses that are present in their ecosystem. This may be attributed to different reasons, including the fact that both platforms and businesses compete in downstream or adjacent markets. This

³ This increasing reliance on platforms has given rise to what is called "relations of economic dependence".

situation raises a number of questions notably with respect to property and competition law issues.

Issue 10: Further Rights in Relation to Data

(vii) This question refers to the interaction with other areas of law, namely privacy and security. It does not however address competition law, which is an important area that needs to be considered for two reasons:

- a. In many jurisdictions, in cases where the valuable input that drives competition is subject to copyright protection and the dominant firm refuses to share this information with competitors, the dominant firm might be compelled to grant access to this information provided specific (strict) conditions are met (e.g. the refusal must prevent the creation of a new product requirement, there must be no objective justification for the refusal, the refusal may eliminate competition in adjacent markets).⁴
- b. In cases of data subject to copyright protection, businesses might be required to grant access to data on FRAND terms. This may be the outcome of competition proceedings; in a number of (antitrust and merger) cases, dominant and merging firms were required to grant access to a valuable input driving competition in the affected markets.

On this basis, the EBU suggests extending the consultation to the following points:

- Clarifying the categories of data that are considered here (e.g. platform's, business user's, other?).
- Clarifying the conditions under which copyright-protected data must be shared.
- Clarifying the applicable principles underlying licensing mechanisms to ensure that competition is not distorted.

If these points fall outside the intended scope of the proposed study, the EBU encourages the WIPO Secretariat to envisage a follow-up study that would include these issues.

ACCOUNTABILITY FOR IP ADMINISTRATIVE DECISIONS

27. The use of AI applications in administration and prosecution of IP applications may lead to detrimental impacts on the rights and freedoms of individuals. For instance, AI-tools may interfere with due process and lead to discriminatory treatment and arbitrary, non-transparent decisions. It is therefore crucial that AI-tools are designed in a way that ensure the respect of all applicable laws and regulations as well as ethical principles and values. To

⁴ European Commission, Competition Policy for the digital era, reference to Special Advisers' Report on new interest balancing exercise to prove abuse of dominance in such cases, pp. 98-101, available here: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

that extent, the use of AI-tools must comply with fairness, accountability, transparency and ethics, allowing human oversight of the decision-making process.

In view of the above, the EBU supports the approach of the WIPO Secretariat and suggests extending the consultation on the policies and measures to be adopted to ensure compliance of IP administrative decisions with due process and accountability obligations.

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