IFLA Response to the WIPO Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence (AI)

IFLA welcomes the opportunity to respond to the draft issues paper. As the global organisation for libraries, with members in 153 countries and representing all types of libraries, we have a strong engagement in questions around research, equity and access to information.

Given the nature of our members' work, we focus in particular on questions around copyright and related rights. We trust that WIPO's work on Artificial Intelligence will help lead to a mature discussion around the role of intellectual property in AI, and ensure that governments choose to act – or not to act – on the basis of sound reflection.

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Issue 4 – Disclosure

The topic of deposit of algorithms is in question 10.iii. However, the subject of *legal* deposit has relevance outside of the patent system, in particular when the decisions made by AI as used by companies and governments affect people's lives. Indeed, this is a principle that underpins the work of archivists – that it should be possible to go back and understand the basis of decisions taken.

We therefore suggest a sub-question following question 10.iii could ask: 'Should algorithms be subject to legal deposit/archiving, and what issues may this raise?'

Furthermore, the issues paper assumes that patents are a more appropriate instrument than copyright for protecting algorithms themselves. Nonetheless, in some cases, copyright has been used as a justification not to share algorithms with people who have been affected by their activities – something we believe should not be allowable.

Therefore, and regardless of the type of intellectual property right used to protect algorithms, it is important to address the question of the use that others may make of them. IP rules should not be used to create secrecy, to prevent the testing of algorithms and consultation of their source code in the interests of exploring their workings, or to take preservation copies in order to allow for archiving and future access.

We therefore suggest a further question 10.vi: Regardless of the IP regime under which algorithms themselves fall, what guarantees should be offered in terms of the use that third parties can make of algorithms, in particular when these are used to take decisions that affect them.

Issue 6: Authorship and Ownership

We appreciate the focus in paragraph 12 on the fundamental question of whether it can be appropriate to award copyright to works produced by AI. Given libraries' mission to provide access to creative works to the benefit of users, we have a strong preference for rules which are both straightforward, and which do not given rise to new barriers to acquisition and use of works.

First of all, we would recommend taking care in paragraph 12 in referring to the 'attribution of copyright to AI-generated works' – it would be better to talk about the 'attribution of copyright protection'.

Secondly, we believe that it is important not to over-estimate the idea that AI autonomously generates works. Arguably, the concept of a truly 'autonomously' generated work remains a long way off. In reality, artificial intelligence remains highly dependent on extremely high levels of human input – writing algorithms, programming algorithms, selecting training and test data, and making incremental improvements to algorithms. Polls of scientists regularly underline that genuinely original works by artificial intelligence are many years away.

Given this we would question any stance that the results of AI at the moment are much different than a creative work for example being produced with the assistance of any other form of software or computer programme. The crucial inputs remain entirely human, much in the same way as any digital art other computer aided photograph, music artwork etc. As such, any determination of whether copyright exists in an AI-generated work would need to be based on an assessment of whether the contribution of the programmers counts as original.

It should be made clearer in the introductory paragraph to the question that there are significant questions about how autonomous AI really is as opposed to (creative) human input.

Thirdly, doubt about the question of whether AI can be incentivised should be made clearer. The introductory paragraph seemingly assumes that this is the case (rather than the incentive being to the people or company who produce the AI).

We would therefore suggest posing a direct question could focus on whether the traditional logic behind copyright – to incentivise creativity – can really apply to a machine.

Fourth, a crucial question in any discussion about potential legislative action is whether there is a demonstrated need for this. In this case, is there evidence of a market failure? There is active patenting of AI, and licensing of AI outputs in B2C and B2B markets, which at least at first glance indicates that the market is doing well[1].

In the light of this, we would recommend including a question asking what evidence there is of current market and licencing possibilities not working.

Finally, there have been too many examples in the past of laws passed in haste which have either been ineffective (the EU's Database Directive) or even harmful (the broad protection afforded to Technological Protection Measures (TPMs) in the WCT without clear carve-outs allowing for circumvention of those which prevent enjoyment of exceptions and limitations, even as they have been widely abandoned in the music and games sectors). In the case of AI, there remain many complex and immature issues, and in the interests of avoiding unintended consequences, there is a strong argument for restraint in legislating.

As a result, we would suggest replicating the question in 11.ii, namely: Is it too early to consider these questions because the impact of AI on both science and technology is still unfolding at a rapid rate and there is, at this stage, insufficient understanding of that impact or of what policy measures, if any, might be appropriate in the circumstances?

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[1] https://www.musicbusinessworldwide.com/ai-in-the-music-industry-is-nothing-to-be-scared-of-its-a-step-towards-an-exciting-new-future/

Issue 7 – Infringement and Exceptions

Question 13.i: Libraries have a mission to facilitate access to – including use of – works in their collections. As a result, when a work has been legitimately accessed, there is no conflict with the normal market exploitation of works or unreasonable prejudice to the legitimate interests of rightholders, we will favour the application of unremunerated exceptions. As such, we have a strong preference for clear exceptions allowing for the use of data in legitimately acquired works for the purpose of machine learning.

This is already the case in Japan (through law) and the United States (through interpretation of the Fair Use doctrine) and will be shortly in Singapore. In the European, an exception for Text and Data Mining (TDM) by research institutions and libraries exists that cannot be overridden by contract or TPMs. In the US, for example, it has been made clear that the mining of works is entirely transformative, and does not trade on the artistic expression of the works concerned.

Therefore, in 13.i, we would therefore recommend adding in the clarification that the copyright works dealt with are legitimately accessed. We would also recommend a sub-question which asks whether provisions on contract override and the circumvention of technological protection measures are needed to make such an exception effective.

We would also add in a sub-question along the lines of: 'What impact does the use of legally accessed works for the purposes of text and data mining have on demand for the original works'?

Question 13.ii: A key argument for the text and data mining exceptions that facilitate AI is that this helps to level the playing field between actors and between countries. An exception will tend to benefit smaller players who do not have the resources or market power to obtain authorisations otherwise.

We would therefore, in 13.ii, include a question along the lines of the following: 'In particular, what differences in impact would treating use of data for machine learning without authorisation as copyright infringement have on users according to their size, resources and geography?'.

Question 13.iii: This question addresses the issue of drawing lines between permitted and non-permitted uses of works for machine learning. This has proved to be a complicated question in Europe in particular, with ongoing discussions focusing on how this distinction is make.

To reflect this point, we would suggest a sub-question to 13.iii: 'What issues does the creation of such a distinction create, and what solutions may be available to overcome these'?

Question 13.iv: Cross-border cooperation has become a norm both in the research and business worlds, with such partnerships often leading to more rapid innovation and higher impact studies. As such, when considering the impact of laws that could complicate text and data mining, we should take account of impacts on cross-border cooperation.

This could be done by adding: 'and what impact would this have on cross-border cooperation drawing on AI for research or other purposes?'

Question 13.v: We would be very concerned about the idea of obliging licensing in order to carry out text and data mining for the purposes of machine learning. Given how much text and data

mining uses the open internet as a source material, the number of rightholders involved is immense, and the likelihood of many of them ever receiving royalties is low.

As such, we would add to the end of the question: 'what other barriers may there be to the use of licensing in this context?

Issue 8 – Deep Fakes

While there are certainly important questions around deep fakes, copyright, related rights, or indeed sui generis rights do not seem to be a suitable means of tackling them. We believe that the issues raised in paragraph 14 are tangentially related to copyright at best. There are other existing laws, such as defamation, which may be more appropriate.

Therefore, making more explicit the question in the introduction to paragraph 15, we would therefore add a question, ahead of 15.i: 'what evidence is there that efforts to tackle deep fakes on the basis of copyright law adds value compared to other legal bases, such as defamation, libel or data protection'?

Issue 12 – Capacity Building

As highlighted previously, the creation and enforcement of rights over data and their use risks working out in favour of larger players rather than smaller ones. In the latter category will fall many users in developing countries. Furthermore, in the light of the internationalisation of business and research, it is important to be clear about situations where cross-border action is required.

Therefore, in paragraph 26, we suggest adding 'competition' to the list of other policy areas. In the question in 26.i, we would add in two further sub-questions: 'What value would such measures have vis-à-vis interventions using other policy tools?', and 'To what extent would such measures need to have cross-border effect?'

Issue 13 – Accountability for Decisions in IP Administration

Given the apparently growing role of algorithms in decision making – both within IP administration and government more broadly – there is a strong need for transparency and accountability. It is therefore welcome that this suggestion of the issues paper addresses this topic.

One issue not addressed here, but which is certainly relevant is the use of use of algorithms in copyright enforcement. There is much talk currently of using artificial intelligence to identify copyrighted work, notably in the context of discussions around the implementation of the European Union's Directive on Copyright in the Digital Single Market. While there is some debate about how much information is needed to make a 'match' (i.e. how many seconds of a video or song), it seems relatively clear that such tools do have the potential to identify copyrighted content.

However, it is important not to over-sell the potential of AI-supported tools in this field. First of all, there are still error rates which bring with them the possibility of preventing legitimate

expression. Secondly, it is clear that such AI-powered filters are not able to recognise context, and so are not able to identify when a work is making use of a limitation or exception to copyright. Finally, it has become clear that the companies that offer such tools make no effort to verify if the moral of physical person claiming to hold the rights actually does so.

We would therefore suggest a further question, along the lines of: 'What issues does the use of AI in the context of copyright enforcement raise, and to what extend can such issues be mitigated?'