International Council on Archives
Conseil International des Archives

Intellectual Property and Artificial Intelligence

International Council on Archives Position Statement

Introduction

The International Council of Archives is a not for profit organisation, funded by its members and based in France, and its mission is to promote the preservation and use of archives around the world. In pursuing this mission, ICA works for the protection and enhancement of the memory of the world and to improve communication while respecting cultural diversity. The association represents 1500 archivists, archival professional associations, archives and national archives from all over the world. Since 2010, the ICA has been represented at WIPO's Standing Committee on Copyright and Related Rights to ensure that exceptions for archives are defined and maintained in order to protect access to information for accountability, transparency and research purposes.

In January 2020, ICA received the WIPO document 'WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence' and the position of the ICA and its experts on the topic is set out below.

ICA Position

Artificial intelligence (AI) raises significant ethical and legal challenges to governments and society and there is little guidance in case law or legislation around the applications of emerging technologies such as AI. ICA understands that the document developed by WIPO was intended to begin a discussion about Intellectual Property and AI, however there are considerations that need to be factored into further discussion and decisions.

Artificial Intelligence, archives and exceptions

The WIPO issues paper states that "one of the main aims of IP policy is to stimulate innovation and creativity in the economic and cultural systems." (¶1). However, ICA would highlight that a balanced copyright system is also about acknowledging the role of exceptions which allow cultural heritage organisations like archives to facilitate access to innovative and culturally significant materials. AI and AI processes are the historical records of the future. AI is used by governments to make decisions that impact citizen lives. Moreover, private companies are influencing and participating in public policy development. As such WIPO must be careful, it has a responsibility not only to protect rights holders, but also to ensure that citizens can exercise their right to access information in order to hold governments and private companies to account for decisions they make using their data.

Archives and archivists will need to ensure the sustainability and reproducibility of these technologies for the purposes of accountability, transparency and history. To do this we will need appropriate exceptions to preserve these computational archival records and make them available however, at this point the discussion on exceptions on AI and IP in ¶13 (i), (ii), (iv) is limited. Moreover, it is not the algorithm alone that must be preserved and disclosed but the data input into the algorithm along with all the audit logs documenting data amalgamation, streamlining and clean up decisions (¶ 10 (iv) and ¶12 (i)). It is essential that WIPO provide sufficient exceptions for archives and cultural heritage institutions so as to enable archives to ensure the integrity and accessibility of computational records like AI algorithms.

Artificial intelligence, data and algorithmic accountability

There seems to be an implicit presumption in parts of the discussion paper that WIPO, or at least some parties in WIPO, consider artificial intelligence algorithms are sentient and that they knowingly make connections between data. This was especially evident in discussions related to non-

obviousness and inventive steps (¶6 and ¶9). This discussion fails to understand the basic operations of an artificial intelligence algorithm. These systems are entirely reliant on the data input into the system for their output. The data is selected, cleaned and updated by humans, the machine is a tool which examines vast amounts of data, previously impossible for a single human to process. However, it is a fallacy to think that such linkages would have been inconceivable in an analog world, just very difficult. Furthermore, the algorithm outputs may change over time, not by the machine's own agency, but because new data has been input into the system to arrive at specific output. All these interventions require a human(s) to identify new data, assemble it and load it for the algorithm to compute. Thus, it is impossible for it to do its work without human creators that make conscious decisions throughout the process of what will or will not input into the systems.

The more problematic aspect of assigning authorship to a machine for artistic reasons, is what precludes it being ascribed responsibility for poor decisions that impact people's lives? WIPO should look closely at work related to algorithmic accountability and transparency by such organisations as Association Computing Machinery (https://www.acm.org/binaries/content/assets/public-policy/2017_usacm_statement_algorithms.pdf) and the Montreal Declaration on Responsible AI (https://www.declarationmontreal-iaresponsable.com/).

The lifeblood of any AI system is data and there is a detailed discussion about IP and data in sections ¶17-¶23, with bulk of questions WIPO is seeking guidance on in¶23 (i)-(viii). ICA would recommend that WIPO look at the FAIR data principles (https://www.force11.org/group/fairgroup/fairprinciples) There has been widespread uptake of these principles in the computer science, research data, archives and library sectors to promote data sets are findable, accessible, interoperable and re-useable, and it is quickly becoming a *de facto* standard for the exploitation and re-use of data. Adherence to FAIR principles further reinforces the need for exceptions, especially to ensure that these records can be preserved and made accessible for research purposes. The questions around IP, data and AI will need to take account these principles to ensure the rights of creators, researchers and the cultural heritage communities.

Finally, tied with algorithmic accountability and transparency, and FAIR principles are concerns about data protection and right of access. As mentioned in the opening paragraph, more private companies are involved in policy decisions or decision-making processes that affect people's lives. Individuals should have the right to demand access to their personal data if held in private or public hands, along with the ability to make corrections or have their data removed from algorithms and related training data sets. IP rights and AI should not be used to abrogate basic human rights of movement, employment, access to education or any other rights as described: https://www.un.org/en/sections/issues-depth/human-rights/ ICA would strongly recommend WIPO study these questions with international experts in data protection and human rights (see ¶12 (i), ¶13 (i) and ¶15 (i)).

Scope of WIPO IP definitions and discussion timing

WIPO asks in the discussion paper if it is too early to be having discussions about IP and AI (¶ 11 (ii)). The ICA believes that it is not too early to have these conversations, but WIPO must avoid arriving at definitive conclusions at such an early stage of deployment for this technology. ICA believes that there is much more exploratory work that WIPO should engage in and more wide-ranging conversations, not simply with rights holders but with the communities concerned with algorithmic

accountability and transparency, human rights and AI, digital preservation, data protection and access to information.

As mentioned earlier there is lack of guidance in both the legal and legislative sectors at the national or member country level on AI and its applications. IP and copyright are managed at the national level, but we live in a borderless world of digital information exchange. The AI-related issues must be addressed at the international level to create a level playing field by means of a binding international treaty to address matters such as cross-border uses. It is the position from ICA that these issues cannot be left up to national lawmakers, especially when we consider the vastly different legal and legislative systems. That said, WIPO needs to look carefully at its own definitions to see if they are still fit for purpose in a complex and evolving digital world; otherwise they risk trying to force analog definitions into the digital realm.

Conclusion

In conclusion, much more study is needed, and it is too soon to provide definitive approaches to some thorny and complicated problems. However, what ICA would ask of WIPO is to have an open, balanced and fair discussion with all communities that are affected by IP, not simply rights holders. WIPO's approach to IP and AI could have unintended and far reaching impacts on accountability, transparency, democracy, human rights and history. Moreover, WIPO must develop a robust and considered approach to IP exceptions related to AI, without such exception archives will not be able preserve records for research and accountability. IP should not be considered in isolation but in the full context of human knowledge.