Submission of Comments
Impact of Artificial Intelligence on IP Policy

Sabatellini & Associats is a law firm specialized in IP & IT since 1996. We have and are advising clients in industry in general and mainly and widely in entertainment. We say widely because we render services and advise from author to producers-national and international-, from publishing, music, theater, film, videogames,... The matters hereby responded are sensible issue that as a law firm we have to deal at the present and short term period.

COPYRIGHT AND RELATED RIGHTS

Issue 6: Authorship and Ownership

12 (i) From our point of view, currently AI is a product of human creation and thanks to human participation who is behind the software and content to the dumping of data, the AI can generate a work; thus, the contribution by AI creation is not purely 100% AI or machine creation but with the contribution of human beings.

These days we have already many examples where combination of technology and human persons can generate the creation of works, for example videogame, electronic music,... Human hand is still necessary and for the time being technology has not created a work *ad hoc and ex novo*. Notwithstanding, the news published in the media many example of this artificial creations such as the New Rembrandt or more recent case in China 1. In this case, the Court has recognised to the article the same rights as if the article would have been written by an individual.

Therefore, a work generated by a machine should be under apply for the same requirements in order to be protected; we refer to the originality. The current legal systems, national laws and international conventions, require the originality. It can not be given for granted the protection of a machine creation *per se*, but subjected to overcome the originality test.

12 (ii) Accepting that an AI work could be copyrightable, the rights stem from such AI work can not be attributed to the AI work itself. This potential attribution of rights it opens another debate which is the status of a machine and if it has rights or not, and if

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1 https://elpais.com/economia/2020/01/31/actualidad/1580472914_468275.html -1 -

Comments to WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI)
WIPO/IP/AI/2/GE/20/1
these rights include personal rights as those associated to copyright, mainly, within droit d’auteur system; thus the relationship between robots and human beings.

These machines depend on and are owned by a company. Therefore, if any right has to be vested because of this creation, it shall belong to the company. In our opinion, it can not be assimilated the rights to be vested to the company because of origin of the creation, a machine, and those rights vested to an author.

12 (iii) There is already a sui generis rights recognition for databases (EU Directive), but the way to path its regulation should follow new criteria. Despite the fact that in this case, it raises several meaningful issues which somehow they have been already pointed priorly out; besides it poses the confrontation and competition between human being creation and machine creation which is not, at all, a bagatelle:

- A script writer or novel writer alone at home trying to come out with something original and singularly different; such effort has to be compensate not only in terms of economic revenues but also in terms of rights and duration of such rights and information of the origin; it is necessary that the consumer, as reader, film-watcher,... know the origin

Versus:

- A machine which processes a huge range of data either previously selected or selected by the machine. We do not see that the owner of such machine has to enjoy the same rights and entitlements than a human being creator.

- It deserves a profound analysis about the machine itself and its contribution to a new stage of progress and intellectual enrichment.

- Owners of machines and human being creators, they do not play the same match with the same tools. The disadvantage is big and can get bigger with a monopoly of creation and stream of thinking.

Issue 7: Infringement and Exceptions

13. (i) This is one of the highlights of AI, the algorithms are using many data which generates an unfair disadvantage from the rest of creators, human; following the chain of rights theory, they need to have a license with strict scope of use. In practice, it means that any piece of copyrighted work has to be marked for its future surveillance if any non-solicited use happens.
13. (ii) In our opinion the question is mistaken. Artificial Intelligence can be used in many areas which may contribute to the well-being of humanity: healthcare, insurance sector,.... Even it can be a helpful tool for the dinamisation of human capabilities but in can not be the replacement of human capabilities. Further AI innovation is a word commonly used for patents but not for creativity in terms of copyright. Copyright belongs to originality. This demonstrates that AI is technology, not creation, in terms of copyright.

13. (iii) and (iv) Modestly, this AI is using massively and timelessly a huge amount of data which every second is amplified. The future consumer of this content has to know the ingredients used and the original authors have to be paid for their previous contribution. In copyright domain, it is hardly impossible to see which advantage can bring AI which could be exceptionated for being granted a license and paid for it.

Data mining should be framed under investigation and school domain, but not for commercial purposes.

13. (v) Coherently with the previous responses, the expression authors is understood as human authors which are entitle to deny the authorization and it has to be accepted as demonstration of the rights granted by copyright; no body can be forced to give any license; additionally, moral rights should have an important role.

13. (vi) The answer is on the algorithms. The companies should be obliged to show and permit auditings of such algorithms. Collective Societies can have an strong role on this matter, they need to be empowered for these new defeats.

Issue 8: Deep fake

14. We are on the opinion that this kind of activity does not contribute to a better well-being and can not be cover under the freedom of speech status; thus it should be banned and some conducts punish by criminal law. Depiction rights, personal rights is many States are ruled as fundamental right and they can not be deleted because a new technology which as matter of fact contributes to spread fake news and may be unbalance the democratic systems.

It is a common and standard practice that documentary or audiovisual works if they use depiction rights they need to have a prior authorization; further they should inform the consumer of such manipulation, with the final billing credits.

15. If the depiction is contemplated as in point 14, paragraph 2, the compensation is required. We have doubts if this use has to be ruled under an equitable remuneration
system or by direct remuneration via license from the depicted person, being understood that the image of person is a fundamental right.

**Issue 9: General Policy Issues**

16. This question should not be the last one but the first of this survey. As they say, the last but not the least.

To answer this question, we should contemplate the time and spirit of the birth of copyright and droit d’auteur and the purposes which were supposed to be served and if currently these purposes still legitimate. In our opinion most of the principle are still alive.

We think that the encouragement of innovation is praiseworthy but it can not be a visa for everything, *ad libitum*. Mainly in terms of creation, intellectual creation has to be above AI, AI has to be treated as a tool or in secondary role, a mean but not the assessment and ultimately the replacement with reward.

Further, nowadays, it is necessary to have in mind, the company market players such as filmmakers, publishers, company producers, they apply the standard and the law; but new comers, new players, like Netflix and Amazon, which are not used to the process of creation because they are keen on selling and monetizing whatever, they find AI monetizable, shortening the chain of creation, production and distribution and cutting costs, no other matter concerns them.

**DATA**

17. It can be additionally said that this collection of data is done by almost a few bunch of entities, data-oligopoly which imperils creativity as a true freedom due to the dictates of algorithms.

18. Please see our comments to this point, on Issue 7 above.

**Issue 10: Further Rights in Relation to Data**

10 (i) We think that before granting rights to data, the copyright system should have strong instruments not only to face the digital use defeats but as well to be fairly compensate for the uses and resuses; this matter does get solved with a contract or
passing law but digging into the heartcore of the issue which are the algorithms. Authors, actors, producers need to have access to these algorithms and need to know the numbers and all information generated thanks to their content. It is the key of the golden rule.

**10 (ii)** If any protection should deserve, database protection should be contemplated as a path to rule, but again it should be not even understood and ruled as a neighbour right like the performance of an actor or artist but something below which by no means can imperil the rights of the author, actor and producers. This imperil can come true if those oligo-data mentioned above own not only the data but the content because they acquire it. The true is that it is fact, Amazon or Netflix they acquire and own content.

**10 (iii)** Difficult to sustain as it is stated on ground 19 of this DATA section.

**10 (iv)** Difficult to sustain except if they explain the needs and worries for having such protection. For the moment, it seems that they are dealing well with no regulation. They have already a lot of information with an almost non-conscious-consumer/user.

Before giving further rights to those oligopolies, it is important to know and make aware to consumer/user of the impact to her/his life, not only in terms of benefits but dangers and risks.

Further competition and unfair competition laws should contemplate the data not only from the basis of price or commercial value but as well on educational, learning or entertaining purposes; the opposite will mean to disregard and exclude what it is not mainstream but it may enriches the society.

**10 (v)** Please see our response on point 10 (iv).

**10 (vi)** Rights, free flow of data and AI are the sides of the same coin, they drag us to a new kind of society. As the scholarships say the pillars of this new society are not shown and less consciously ruled. Thus, it deserves a profound, transparency and public debate, it touches the welfare-state and it implies a new kind social-contract.

**10 (vii)** Publicity, transparency and acceptance are the principles which have to serve creators and consumers/citizens and bind the processors and data collectors or data owners- including AI machines.

**10 (viii)** No rights and no enforcement if the comments to the above points are not unveiled and fairly ruled serving the citizens.
Again it is in the other way round, it is required auditing of algorithms and the data assessment.

To sump up, in our opinion, AI as much as benefits can be evidenced, it can not have an independent status from human being but secondary and subject to obligations.

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Barcelona, February 13th, 2020