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The artificial intelligence and data-led revolution of copyright and its wider implications

Final Report

The artificial intelligence and data-led revolution of copyright and its wider implications

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Moderator:

Dr. Ulrika WENNERSTEN, Lund University (Sweden)

Speakers:

Prof. Christophe GEIGER, University of Strasbourg (France)

Prof. Daniel GERVAIS, Vanderbilt University (USA)

According to Dr. Wennersten, last year's most discussed topic was AI and intellectual property. She highlighted two relevant European policy documents: the [European Parliament Resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies](#) (2020/2015(INI)); and the [European Commission's Report on Trends and Developments in Artificial Intelligence](#) - Challenges to the Intellectual Property Rights Framework of 25 November 2020.

Dr. Wennersten pointed out that while copyright has been able to adapt to the technological revolutions for 150 years, will it be able to adapt to the AI revolution?

1. How to treat the output

a. Could output that is created by a totally autonomous AI be protected by copyright?

Prof. Gervais stated that, as lawyers, we are trained to think by analogy, however, we are dealing with something unprecedented. Why is AI unprecedented? Let's look at originality. Originality which is a worldwide notion is defined as the result of creative choices. For the first time in history we have to assess the creativity of the choices made by AI.

Why would the machine creation deserve copyright protection? Why would they deserve a moral right? For some, it is like work made for hire in the US or corporate authorship. However, we are dealing with exactly the opposite. In a work made for hire, there is a transfer from human authors to a legal entity, whereas in the case of AI it is a machine creativity transferring to a human. Why these machines creations deserve some kind of protection?

b. Do you think all these different ways to create should be handled the same way legally?

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Prof. Gervais suggests treating it as a sliding scale. The software might make some choices, it might give you suggestions on how to improve your novel, for instance, but it necessarily does not reach a creative threshold. During the [European Study on AI and IP](#), cases such as the 'new Rembrandt' were studied, but still there is human involvement or more specifically a human cause. However, it is just a matter of time that AI starts to make substantive creative choices. At some point we have to be prepared to cross the line. And there it will be asked, does this work deserve copyright protection?

c. If we look at the process of AI, where in the process could you actually say you could have some sort of protection?

Prof. Gervais referred to the Turing test. Turing test aim evaluates if a machine can substitute a human in a conversation to a point where a human interlocutor cannot distinguish whether he/she is speaking to a machine or a human. The result of the test measures the machine ability to show human-like intelligence. However, the speaker is reluctant to grant protection to the ability of "fooling" a human.

The notion of causality might be useful to analyse borderline cases: the new Rembrandt example shows the involvement of humans all along the process, hence, there is a human cause. But we are reaching a point where the work created by a machine is not linked to the human, and there we will have some hard questions on the input side. Courts could rely on the notion of cause in these cases.

d. How about related rights protection?

Prof. Gervais stated that if you suggest there might be some protection we should always ask why. We want to protect the authors as authors because we value what they do for us in the society.

If you are a publisher, record company or a film studio, it might sound good, at least initially, not to have to pay human authors. But, as a species, we would lose the ability to develop as authors and artists, to train new authors, and collectively, we would not be able to communicate as well as now with other humans, which is a critical element of human self-fulfilment and human progress. It might thus not be advisable to create additional legal incentives to accelerate the replacement of human work.

Related rights are an easier doctrinal rule as they do not imply originality as copyright, but they do not solve the question.

Prof. Geiger called for caution with regard to the debate on the related right protection of AI. It seems there is always a call for some sort of IPRs when new technology emerges. If we do not protect by copyright what are the options? Neighbouring rights, sui generis rights.

If we look at the history, in the EU we create the rights very easily but once they are created there is very complicated to get rid of them. We are not sure of the expected result of such a right,

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maybe a new right could have a very detrimental effect on AI production and innovation works, then what's the merit? We need to find an added value to create a neighbouring right.

Creating neighbouring rights might have a blocking effect on creativity. We should assess the merit of creation this right closely before doing it. **Prof. Geiger** shared the example of the database sui generis right; other jurisdictions did not specifically protect databases and still companies have incentives to create them. Moreover, the subsequent [assessments of EU database protection by the Commission outcomes](#) have not being very positive.

e. Could we leave AI works in the public domain?

Prof. Gervais stated that copyright is about human authorship. On the incentive side: people say we need an incentive, but for what? We already have an incentive, works can be patents, and AI code written by humans is protectable by copyright, we already have an incentive. We do not have to create an incentive for machines to run code. The AI industry is already very dynamic without such an incentive. Do we need an incentive to have the machine replace human faster at the one thing which defines us more as people which is the ability to express ourselves and communicate?

Prof. Geiger stressed that we should not be so scared of not protecting. Is not like there is no legal protection, the question is: should we go for IPRs which could act as a blocking stone in dynamic markets? We should let the market develop.

f. Should we be scared about all this output could do? What if the room for human creativity becomes narrowed/smaller?

Prof. Gervais stated that we cannot prevent it, people will create these machines, but why should we create incentives for machines replacing people? Are we better off doing that? Why would we want more works created by AI?

Prof. Geiger stressed that we should focus on fix copyright system by helping creators, policymakers should get the priorities right.

2. AI's input

a. "Feeding" AI with copyright-protected work: Would the new limitation on copyright and data mining in the EU be relevant in this context?

Prof. Geiger stated the need of having a robust and well-functioning exception for text and data mining. Last EU policy documents all mention AI, but they totally forget about text and data mining and they are absolutely crucial when it comes to make AI functioning. When you are feeding AI you have to search and reproduce a huge amount of works. This becomes particularly relevant in the current COVID scenario: to develop new vaccines you have to do text and data mining.

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The [TDM exception](#) past last year by the Commission is very narrow in their application and have so much carve outs that they do not allow start-ups to feed AI works and also not allow them to search, and this is a major problem, because the right to research leads to innovation and is protected by the [Charter of Fundamental Rights of the European Union](#) and [European Convention of Human Rights](#). This is absolutely a missed point in the debate about AI.

b. If we look around the world text and data mining limitations look differently. How about collaboration across the world in research with the current European limitation?

Prof. Geiger stressed that this is not only a global problem, look at Europe with 27 different exceptions. How researchers in different countries can collaborate together when they do not have the same scope of rights/limitations.

c. Do you think post-Covid the limitations on data mining will expand?

Prof. Gervais stated that companies that do AI have to be sure that they will carry on data processing without infringing or being sued. Are we sure the outcomes will be better with over protection? If we have different standards of protection, we might end as the EU and US on the privacy field with different legal standards. It could be the same with data mining exceptions.

Prof. Geiger was on the opinion that in order to expand the text and data mining exceptions in the EU, we would need two things: either we revise the copyright directive, it can be easily be done within the action plan on AI; or, at the international level with WIPO within the context of exceptions and limitations on education and research we could introduce this discussion.

Another aspect would be to take the EU provision on text and data mining and try to interpret it in a fundamental rights compliance manner. We have 2 different provisions: one for research organization, and one broader exception that could apply to all kind of actors but of which right holders can "opt out".

While ultimately this must be addressed at policy level, courts can contribute to a better functioning of the system by interpreting the opt-out provisions in a very restrictive manner. Thus, if the exception applies on condition that the use of the works has not been expressly reserved by their right holders *in an appropriate manner*, 'appropriate manner' should include the possibility by a court to undertake some sort reasonableness assessment of this opt out; if not, we will have a general "opt out" of all publishers from this provision and it will never prosper.

Question from the audience: Whether or not autonomous generated work are protected, what effect do you think this technology will have on certain types of creations currently protected with the minimal level of creativity such as translations, map, and so on?

Prof. Gervais referred to automated journalism. A lot of the basic reporting is now done by machines, newspapers are saving money and journalist get replaced while AI gets better and

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better. However, journalism relevance goes beyond the mere protection of the authors, in so far as it is an essential activity in any democratic society.

Prof. Geiger took the example of journalists to point out that they are a category excluded from the text and data mining exception. The scandal of the "[Panama papers](#)" would not have been revealed without text and data mining, but this activity is allowed for journalists under EU law.

3. Automated enforcement. What's your opinion on art. 17.7 and 17.8 of the Copyright and related rights in the Digital Single Market Directive and the use of AI to filter content? Are AI systems today at a (technical) point where they could guarantee that freedom of expression?

Prof. Geiger stressed out that AI can contribute to solve the duties imposed to internet intermediaries by art. 17 re automated enforcement mechanisms. The major difficulty is that AI shows limitations when it comes to recognize whether an uploaded content is legal or infringing, leading to an over-blocking or over-enforcement problem. A lot of legitimate uses such as parody or quotations could be easily blocked affecting fundamental rights. This is a huge problem. Article 17 says you have to combine these best efforts to stop infringement on online platforms (Art. 17 (4)) with these exceptions (art. 17 (7)), but they do not tell you how. This unsolvable conflict is now in front of the Court of Justice because [Poland has questioned the validity of this part of the Directive with regard to fundamental rights](#).

Prof. Gervais stated that if you look at the automated notice and take down system, it is extremely difficult for whomever programs the machine to decide on whether what passes as parody for example is extremely hard to do. Actually, that person de facto is defining the legal standard. Who is going to take the burden to fight this in court?

Prof. Geiger finally stated that it cannot be acceptable in a democratic society that big platforms and right holders decide alone on what content is available online or not. The Court of Justice has the opportunity to have a say on this.

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