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NOTE

From:	Presidency
To:	Working Party on Intellectual Property (Copyright)
Subject:	Policy questionnaire on the relationship between generative Artificial Intelligence and copyright and related rights

Delegations will find attached a Presidency policy questionnaire on the relationship between generative Artificial Intelligence and copyright and related rights. The questionnaire will be presented at the Copyright Working Party meeting of 3 July 2024, in view of discussion of this topic at this and future meetings.

ANNEX

POLICY QUESTIONNAIRE
ON THE RELATIONSHIP BETWEEN GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT AND RELATED RIGHTS

The application of generative artificial intelligence (AI) holds significant importance in the context of creative industries. AI presents both opportunities and challenges for creators, who can use these tools in their creative processes while also having to face competition from AI-generated content.

While the increasing prevalence of AI-generated content poses substantial challenges to the creative industry, other aspects of this development also require consideration. It is evident today that innovation, research, automation and technological advancement heavily depend on AI developments. Therefore, when introducing initiatives and policies related to AI, the EU must also consider their potential effects on competitiveness and innovation in the international context. A careful and balanced approach is required when assessing the possible need for any steps forward in establishing sectoral initiatives, such as in the area of copyright law.

Some aspects of the relationship between generative AI and copyright law are already covered by EU legislation. These include the reproduction of material protected by copyright and related rights under the text and data mining exceptions in the CDSM Directive[1] and the requirements related to the training of general-purpose AI models as set out by the AI Act[2].

Other aspects, such as the means and need for introducing possible protection for certain AI assisted creations, potential remuneration for the use of protected works in the context of AI-generated creation, or the liability in cases of unauthorized use concerning the functioning of generative AI tools have not yet been discussed at EU level. To enhance future decision-making on whether or how to intervene further at the European level, it seems beneficial to understand the possible developments occurring in Member States, gather views on certain relevant topics, and engage in discussions to identify areas of convergence in this field.

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1 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

2 Regulation (EU) 2024/… of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). See doc. PE-CONS 24/1/24 REV 1.

The Presidency, therefore, proposes a discussion to delegations based on the questions below. This discussion might also provide a useful addition to the process of assessing the appropriateness and modalities – whether in the short or long term – of potential interventions at the Union or international level on the relationship between copyright and generative AI.

I. State of play in the field of AI and copyright

Generative AI development and its relationship with the creative industry are highly evident. Various stakeholders and academic institutions have published numerous studies on related issues. Notably, an increasing number of landmark cases are emerging in some jurisdictions.

To inform further discussions and potentially inspire new European initiatives in this field, it would be beneficial to collect information on domestic research, studies, relevant AI policy developments, and case law focusing on the relationship between generative AI and copyright in EU Member States.

1.1. Have there been any relevant surveys, studies or research conducted on the relationship between generative AI and copyright in your Member State, that you would consider worth sharing?

1.2. Is there any relevant case law or court decision in your Member State in this field?

1.3. Have you introduced or are you thinking about introducing any national (legislative or non-legislative) initiatives beyond the national implementation of the DSM Directive and the copyright-relevant provisions of the AI Act to tackle the challenges of generative AI and copyright?

II. Training of AI models

Generative AI requires training with a significant amount of data. Such data may include extensive collections of works and other subject matter, such as databases protected by copyright and related rights. The preamble of the CDSM Directive, which introduces provisions on the text and data mining exception (hereinafter referred to as "TDM"), clearly distinguishes between TDM as the "automated computational analysis of information in digital form" (including legally protected works) and the act of use (reproduction) for this purpose, which directly affects the rights of rightholders.

While the CDSM Directive introduces exceptions related to reproduction in the context of TDM, it also establishes an opt-out system for the general TDM exception (Article 4), allowing rightsholders to object to the use of their works or other subject matter protected by copyright and related rights. Recital 18 of the CDSM Directive also provides for guidance on what is considered an appropriate way to reserve the rights for content publicly available online, i.e. applying machine-readable means, including metadata and terms and conditions of a website or a service. It also refers to other cases where it can be appropriate to reserve the rights by other means, such as contractual agreements or a unilateral declaration.

The AI Act confirms the applicability of the TDM exception, including the possibility of the opt-out in the context of AI training. It is worth mentioning, however, that some views suggest that this training process cannot always be classified under the right of reproduction, for which such an opt-out can be invoked.

Notwithstanding the previous legislative steps, there are still open questions regarding the exercise of the opt-out, for instance, in relation to the issue of who has the right to make a valid reservation, what the realistic scope of a valid reservation can be, and how the opting out can take place without the need to indicate this will for every tangible or digital piece in which the work was incorporated.

It is still to be determined what the agreeable technical requirements for a reservation by rightholders should be. According to some views, it could be beneficial to provide practical means to enable a uniform way of opting out, at least sectorally, which could be applied by all relevant stakeholders and affected service providers. To enhance the functioning of the opt-out system, practical infrastructure and elements such as common standards or even an EU-wide opt-out database could be of service.

In the context of AI models training, the diversity of the data applied and the inclusiveness of this process might also have relevance for the diversity of the output. In the longer term the lack of certain data and the more frequent use of generative AI tools might result in a detrimental effect on cultural diversity and less data available for innovation and public good.

2.1. Even though the EU legal framework provides legal certainty as regards the rules applicable to the training of AI, are there still, in your views, questions or doubts related to the use of copyright protected content in the training of AI models?

2.2. Do you think that practical means such as the introduction of certain standards or the development of an EU-wide database, etc., could be introduced in order to provide more legal certainty within the EU regarding the functioning of the opt-out system? If yes, what practical tools would you envisage in this field?

2.3. Do you have in place or plan to introduce any measures in order to ensure the diversity of the training data set used in the context of generative AI?

III. The protection of outputs

It is clear that subject matters created by generative AI tools have significant market, economic, and practical implications. Despite the fact that, due to the fast development of generative AI tools, it practically seems almost impossible to differentiate between human-made and AI-assisted works in certain cases, it can nevertheless be considered important that such a distinction is ensured from a legal and societal perspective.

It is established that generative AI itself cannot be considered an author. Thus, a machine-generated work created autonomously and without human intervention cannot be protected by copyright, at least not in the absence of a specific legal provision. Nevertheless, most artificial intelligence models are generated on human initiative, based on prompts from the end user, also providing further post-processing and authoring possibilities for the generated content. In some jurisdictions, such as China, case law has already granted protection to AI-assisted works (see Li vs. Liu case), and in other countries, such as Saudi Arabia, the law expressly stipulates that protection depends on the significance of human contribution to the creation. The case law of the United States also follows this approach. Additionally, some countries provide sui generis protection for AI-assisted works regardless of the level of human intervention.

Currently, the EU does not provide any AI-specific legislative provision on this matter. The EU acquis applicable regarding the eligibility for copyright protection, based on the principles of human authorship and level of originality, is to be applied on a case-by-case basis in this context.

3.1 Are you aware of any national legislation, landmark case law, guidance or soft law from your Member State that concerns the issue of protecting content created using AI?

3.2. In your view, what aspects might be considered when assessing the eligibility for copyright or related right protection of a subject matter created by AI tools?

3.3. In your opinion, is the rationale behind incentivising human creativity by providing exclusive rights in the form of intellectual property protection less relevant in the case of the creation of AI-assisted works?

3.4. According to your view, would it be adequate to introduce new copyright rules on AI-generated and/or AI-assisted works, such as creating a sui generis right, or other specific related rights in this context? If yes, what features might such protection entail?

IV. Transparency

Transparency as a requirement is relevant for both the input and output aspects of AI.

On the one hand, transparency in the context of training general-purpose AI is regulated by the AI Act. The practical requirements set forth to bind AI developers, using a template to indicate the information that needs to be included in the sufficiently detailed summary, fall under the competence of the AI Office.

On the other hand, when it comes to output, transparency is important for the differentiation between AI-created and human-created works in the copyright context (e.g., AI creations do not require licensing for use). In this regard it is also worth mentioning that the labelling requirement regarding AI output is not entirely foreign to EU legislation. The AI Act introduced an obligation for AI providers to embed in their systems watermarking and other technical solutions for all AI-generated and manipulated content, which would enable its detection and distinction from human-generated artefacts. The transparency obligations regarding deepfakes is also applicable for the deployers of such systems (see AI Act recital (133–134) and Article 3(60) and (50) in this regard). The transparency and watermarking obligations in the AI Act are without prejudice to how AI generated and manipulated content is treated under the Union copyright law.

When considering the introduction of a possible general labelling requirement, it must be assessed that generative AI creations are not unique, and that the feasibility of appropriate watermarking may differ based on the genres of the relevant content. The issue is further complicated by the fact that the depth and quality of human involvement in the AI generation process might also have significance. In the majority of cases, generative AI use does not lead to copyright protectability of the output. However, according to present case law, copyright protection might arise when a certain threshold of human contribution is exceeded. This might be the case when generative AI is used as a quasi-tool in creative human activity, assisting human creative work only as part of a larger production process. In such cases, even though AI was part of the creative process, the required labelling based on AI use would have a misleading effect with regards to how to treat the given content from a legal perspective.

Performers might be even more significantly affected by the use of AI generated content due to their personality rights (the use of their voice or their entire likeness can be the outcome of the use of such tools.)

4.1. Taking into account the labelling and watermarking provisions of the AI Act, do you consider that specific additional obligations should be considered for deployers (users such as creators using generative AI) to label other types of generative AI content and what would be the justification for this?

4.2. When considering such possible obligation, do you think it is necessary to differentiate between various types of works and other subject matter (e.g., audio, visual, audiovisual or textual content) from a watermarking/labelling perspective? Are there specific areas where such labelling (e.g., in the case of performances) would be more justified from a copyright perspective?

V. Remuneration

The process of creation using generative AI may involve the use of works in the training dataset, and the resulting content can compete in the same market as copyrighted works and performances. This phenomenon can, in some cases, negatively impact the legitimate economic interests of authors and other related rightholders.

To avoid such negative impacts, rightholders may opt-out of the TDM exception. However, from a practical and legal perspective, the case of material already used for training before the opt-out took place might also be considered, since in general it seems unclear how it can be extracted and removed from the AI training dataset.

Of course, the possibility of licensing can counterbalance some negative impacts on the rightholders. Therefore, even though it seems practically difficult to handle all use cases within the generative AI context by contractual means, it would be appropriate to further explore licensing opportunities in this context. The exercise of the opt-out, together with the transparency requirements under the AI Act, may facilitate the development of a licensing market between rightholders and AI providers. Such developments need to be monitored to ensure appropriate remuneration for rightholders and fair access to quality data for AI providers.

In the context of the introduction of the TDM exception, it is explicitly stated in the preamble of the CDSM Directive (recital 17) that Member States should not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by the Directive. On the other hand, the extensive use of copyright protected content in the training of generative AI, and the possible difficulties linked to licensing, might invite the consideration of the need for a possible remuneration scheme.

In addition to this, the uses of works in the AI generating process could also provide a basis for introducing a potential remuneration scheme for the benefit of rightholders.

The collection and distribution of potential remuneration scheme, however, raises practical questions. Collective rights management plays a critical and inevitable role in some areas. This mechanism allows for the effective administration of authors' and other related rightholders' rights in cases where individual licensing would not be a viable option for them. In some other cases, and for certain categories of rights owners, individual rights management is the best option for exercising exclusive rights.

When assessing the need for a possible remuneration scheme, consideration should be given to the circumstance that the copyright-relevant uses carried out by current market-leading AI providers do not, possibly to a major extent, take place in the EU.

5.1. In your view, what measures could be taken at EU level to facilitate the conclusion of licenses between rightholders and AI developers?

5.2 Do you consider that there is a justified reason to introduce any kind of a specific remuneration regime in the context of generative AI activities?

5.3. In your view, are there any specific sectors or aspects of the generative AI creating process where the setting up of such a remuneration scheme would be more appropriate?

5.4. Do you consider that specific measures would be needed in this context to ensure that small EU AI providers have access to quality data for training their models?

5.5. Are there any other aspects of this issue that are not addressed in the above paragraph and which you would consider appropriate to mention in this context?

VI. Liability for copyright infringements

The question of copyright liability may arise on different grounds in the context of generative AI. In some aspects, the applicable rules seem clear, and no intervention into the liability regime appears to be needed. For example, the question of liability for infringements occurring on the input side, such as the unlicensed use of opted-out works and other protected subject matter for training general-purpose AI, seems straightforward. Nevertheless, assessing the output aspect might lead to some less clear situations. The question about the infringing nature of the outcome produced by the generative AI service can arise if training data can be detected in the output.

The creation of AI-generated content is a multilayered process involving (i) the collection and compilation of the training datasets, (ii) the execution of the training, and where relevant, fine-tuning of the models, (iii) the provision of the generative AI model to customers and end users, and (iv) the making of the content generated by the generative AI available to end consumers. These activities may sometimes be carried out by the same entity or by different entities that are part of a complex value chain. However, in many cases, each of these activities is managed by different actors. Additionally, the consumer as an end-user may also carry out infringing acts simply by further using (not even knowingly) the infringing outcome of the generative AI process, e.g., by making it available online.

In view of this, the possibility of individual liability, the possible introduction of joint and several liability, or even the need to introduce exemptions from liability such as safe harbor rules might need to be considered. Focusing on the end user's situation, the liability regime in Article 17 of the CDSM Directive can also be further explored as an example useful for navigating the liability maze.

A shared or joint responsibility system, that could be introduced in order to cover the different actors (such as the creator of the dataset, the AI service provider) of the AI creation chain could also be considered. Such an approach could take into account the chain of uses in the creative process on the one hand and keep the liability regime simple on the other.

6.1. In your view, is there a justified reason to introduce any kind of specific liability regime in relation to copyright infringement in the context of generative AI activities or are the existing general rules on infringement of copyright and related rights sufficient?

6.2. If yes, in your view, does this regime need to be introduced regarding the input or the output related infringements?

VII. Policy and international context

Due to a relatively high number of directives and regulations, matters of copyright law have been significantly harmonized in the European Union. In this framework, two pieces of EU legislation specifically address the issue of generative AI and copyright: the copyright-related provisions of the AI Act and the TDM exceptions set out in the CDSM Directive. Beyond the European context, discussions are also underway on the international level, for instance in the context of the Standing Committee of Copyright and Related Rights at the World Intellectual Property Organization (WIPO).

7.1. Do you consider that, based on the discussions regarding the above topics, introducing further copyright-specific legislation on the aspects of the relationship between AI and copyright law on the EU level would be appropriate or needed?

7.2. In your view, would there be merit in international policy approaches in this field? If yes, in what context and what areas? What role should the EU take in this context?