ReCreating Europe

FREQUENTLY ASKED QUESTIONS (FAQS) AND GUIDELINES FOR AUTHORS & PERFORMERS

Authors

JOOST POORT, JOÃO PEDRO QUINTAIS, ULA FURGAL AND THOMAS MARGONI

EXECUTIVE SUMMARY

This Information Sheet presents brief answers to 7 questions that are frequently asked by the authors and performers of cultural content regarding copyright or related rights. It aims to guide the authors and performers on issues such as the use of AI generated outputs, reversion rights and other digital developments.

The research in the work package on authors and performers contains four distinct studies:

1. A study on issues concerning copyright and related rights for AI generated output
2. A study on copyright issues concerning of training data for AI
3. A study on reversion rights
4. A survey among creators and performers.

Q1: HOW IS THE RESEARCH IN RECREATING EUROPE THAT FOCUSSES ON AUTHORS AND PERFORMERS (WP3) STRUCTURED?

The research in the work package on authors and performers contains four distinct studies:

- A study on issues concerning copyright and related rights for AI generated output
- A study on copyright issues concerning of training data for AI
- A study on reversion rights
- A survey among creators and performers.

This implies that for some of the questions below, up two four answers are given, numbered in line with these sub-studies.

Q2: WHAT IS THE MAIN TOPIC OF YOUR RESEARCH AND WHICH GROUP OF PEOPLE DID YOU TARGET?

A2-1: Our particular research in this project relates to the application of EU copyright law to outputs generated by or with the assistance of an artificial intelligence or AI system, tool or technique. We call these "AI outputs". Our focus is on outputs in the musical domain. Examples include musical compositions, lyrics, performances, sound recordings, and broadcasts or webcasts of such musical outputs that were generated with the assistance of AI tools. The targets of our research in this project are quite broad. First and foremost, the focus is on policy makers and courts, which are struggling with how to legislate, make policy and interpret existing law to the use of AI technology to produce creative content. But our research also aims at developers of AI systems and users like artists or performers as it tends to clarify how the law would apply to their interaction with these types of AI systems.

A2-2: Our research is investigating from a legal and copyright law point of view the specific technological steps involved with text and data mining (TDM). TDM is the extraction of information from literary and artistic works such as articles, poems, books, images, sounds, and from data, both in raw format and structured as databases. Therefore, the kind of groups of people involved in this type of research are all those who will either benefit or being somehow impacted by this specific process. This includes researchers, both academics and in the private sectors, artists, free-lance professionals like journalists or creators, tech companies and of course users generating content. So, naturally our specific analysis looked at the two specific TDM exceptions and limitations introduced recently at the EU level.

A2-3: Our work focused on rights revocation: the laws that allow authors, and performers, to reclaim their rights after they were transferred to third parties, usually publishers or content producers. Thus, in our research, we were focusing on creators: singer songwriters, performers, composers, audio-visual authors, translators such as literary translators, writers and others, as well as organizations representing creators.

A2-4: The fourth and final task also focuses on a wide range of authors and creators. It is a survey amongst creators and performers to find out about their experiences in the digital age with digital developments, with platforms, AI, and their earning developments, also during covid. So, for this work, the target group were all performers and creators in the various disciplines.

Q3: WHAT PROBLEMS DID YOU LOOK TO SOLVE IN YOUR WORK?

A3-1: Despite the rapid increase in the use of AI, there remains significant uncertainty about whether and how copyright law applies to AI outputs. Considering this uncertainty, we set out to examine how EU copyright law could protect AI music outputs. With this in mind, our main objectives can be grouped into three brackets:

1) to analyse the protection of AI outputs under EU copyright law;
2) to examine the attribution of authorship and ownership to natural and legal persons involved in the production of AI outputs, and
3) to formulate interpretative guidelines and policy recommendations on increasing legal certainty regarding the protection, authorship, and ownership of copyright and related rights on these AI outputs, in particular musical outputs.

However, much of the same questions in research are also valid for the current wave of AI image generators like Stable Diffusion, Midjourney, and to some extent, text generators like ChatGPT.

A3-2: Our main goal has been to address the complexity connected with text and data mining from a legal point of view. Probably the single most challenging aspect was to show how text and data mining is not “just” a copyright exception but in fact a way of regulating technological development at the EU level. And this is probably an aspect that goes beyond what was the initial goal of this type of legislation, and therefore it becomes particularly interesting to analyse the implications and the future developments in this area.

A3-3: Concerning rights revocation, we had two goals, and both of those goals were connected to existing knowledge gaps. First, rights revocation is a construct which is not widely known. We knew that some of member states have provisions allowing authors to reclaim their rights, but we were not entirely sure how many of those provisions are there; what their shape is; how they can be triggered; and who can actually exercise those rights and how. Thus, first we focused on the mapping of reversion provisions in all EU member states which are currently or were historically a part of the national copyright laws. Secondly, we focused on the knowledge gap associated with creators themselves. We tried to bring the knowledge that we gathered on reversion provisions which are available to creators, to creators themselves. We organized workshops and produced a resource page which hopefully creators will use to exercise their rights and claim their copyright back.

A3-4: The work on the fourth task in this work package isn't so much about solving a particular problem. It is really about fact finding. We wanted to find out what, concerns creators and performers in a digital age, their opinions, experiences, and to collect those in order also maybe find avenues for future policy.

Q4: WHAT ARE SOME OF THE KEY RECCOMENDATIONS TO ENHANCE ACCESS TO DIGITAL CULTURE FOR YOUR STAKEHOLDER GROUP?

A4-1: In our project, we have a number of recommendations. Contrary to existing calls for legal reform, we actually argue that there's no clear case for legislative action at the level of substantive rules in EU copyright law. In the short term, as regards AI outputs, there's simply not enough evidence that the existent rules are not fit for purpose. As regards private parties, we actually found that EU copyright law is sufficiently flexible to provide to AI providers, developers, and users some interpretative space that they're actually using in practice to explore different contractual arrangements for achieving legal certainty in rights attribution. During the course of our project, we did not see significant disputes among private parties on the matter. After we have concluded our research, however, there has been important legal action in the UK and US against provider of AI art-generator Stability AI.

Our study suggests that more research is needed in the private ordering practices of providers and users, and we make certain recommendations to this effect. We further note that future work in the policy arena would be better served not by legislative intervention but by developing or enabling co-regulatory and self-regulatory actions (e.g. stakeholder dialogues) that could identify developed practices and model clauses to guide AI service providers. These approaches would have the benefit of enabling a better understanding of the technology prior to any legislative intervention.

We offer concrete recommendations for the medium term relating to the presumption of authorship and ownership. For instance, as regards Article 5 of the Enforcement Directive, we argue that (human) users of AI systems that have sufficiently contributed to an AI output should retain the right to claim authorship over that output, as well as have recourse to legally affected means to disclaim authorship of those outputs or parts thereof. This recommendation is based on our legal analysis of how AI outputs can be protected under EU law and the role of the notion of the human cause in that assessment. The crux of our argument is that copyright right law should focus on and afford protection to human authors and human creation. In doing so, we offer arguments against proposals by others to attribute rights to machines or to create sui generis regimes of protection for AI outputs.

A4-2: In the short term it would be important to monitor how member states are implementing at the national level these two exceptions. This process has almost ended by now (although with a delay compared with the initial deadline set by the EU legislator). It is interesting to note that despite the precision with which the two exceptions have been formulated at the EU level, there is still some margin of discretion that the members state have exploited. Therefore, it will be interesting to see how what kind of real-life impact these deviations may have. At the same time, again in the short term, it is likewise interesting and important for the involved parties to rely on the private ordering tools such as licenses that have been employed or applied to the original training material. This can give a degree of certainty that goes beyond that afforded by the law in specific circumstances.

A great example here that we have found is Wikipedia, that in the field of natural language processing is probably the single most used (or at least cited) database in this case for text. In the long term – and probably here, especially at the EU level it is a very long term – certainly we would recommend reconsidering specifically the the impact that text and data mining exceptions or perhaps, even better a broader transformative uses or research right norm will have on the European creative and technological sectors. We

have found clear evidence that this exception is not “just” a copyright exception but has a direct impact in terms of the cost and the incentives that it creates to scientific, cultural, and technological development, especially in the field of data analytics. This includes AI and machine learning as well as the recently emerged cases of generative models and their impact on the creative sectors. Accordingly, it will be important when the time is mature, to reassess this specific area of law.

A4-3: The main recommendation stemming from our task concerns the meaning of ‘use’ in the digital environment. What we found is that the majority of reversion provisions that are currently in force in the European Union, as well as that introduced by Article 22 of the Copyright Directive, are revocation rights triggered by lack of use. However, we are not really certain what does it mean that the work is being used in the digital environment: whether it is sufficient to conclude a work is being used if it's simply made available or it can be made available on demand. Thus, something that we would recommend is a guidance or some other intervention into the interpretation of ‘use’ in the digital environment.

A4-4: The work on the fourth task wasn't about recommendations, but about fact finding. We did find some interesting facts. Some of them were known in previous literature, for instance, that most artists and creators would like to work substantially more hours in their creative profession than they actually do because they have to make a living combining jobs and doing other things. What we did find which was new to literature, of course, was the huge covid effect on their income. So many of them lost quite a significant share of their income because of the standstill in many professions as a consequence of covid.

Another thing that we did find, and we don't want to attach conclusions or recommendations to it, but that's what others might want to do, is that platforms nowadays are quite indispensable for creators and performers to promote their work to find an audience. In terms of income generation, however, it doesn't mean much for them yet, they don't get much income from platform. Many of them suffer problems with platforms because their content is demoted or removed for no reasons given or for the wrong reasons. For instance, art being mistaken for nudity or pornography. So, they have a complex relation, as an understatement, with the platforms.

Q5: WHAT COMMON MISCONCEPTIONS EXIST REGARDING COPYRIGHT IN YOUR STAKEHODLER GROUP?

A5-1: One common misconception, mostly among developers and users, is that current copyright law is woefully inadequate and does not apply to AI generated outputs at all. Although our research points to several elements of legal uncertainty, that is certainly not the case. Another related misconception, this one among some scholars and policymakers, is that there is an urgent need and clear case to reform the law, or to create a whole new regime for AI outputs. We see no clear normative or empirical case for such legislative interventions, even if some clarifications of the legal regime or even small-scale changes might be needed. To be sure, that does not mean that in the future more fundamental changes won’t be needed. However, our view is that the current legal framework is mostly fit for purpose.

Finally, there are a number of misconceptions among developers and users (e.g. artists using AI tools) about how copyright law works, especially regarding who is the author and owner of AI outputs. This was clear from our interviews with experts and from reading the terms of service of multiple AI system providers, especially in

the music field. The answers to these questions are not easy and will often require a case-by-case assessment. We hope our research will help somewhat in clarifying clarify these aspects.

A5-2: Probably the single most outstanding misconception is that the text and data mining exceptions are simply copyright exception. In fact, as we demonstrate in our analysis, there is a much more important and wider impact on both the creative process and the technological development that the regulation of training data has under this point of view. The situation has improved considerably especially for research and cultural institutions. A good degree of uncertainty remains regarding the categories that are not covered under Article 3 (such as journalists, artists, users, etc). Art. 4 has a very strong potential, but the possibility to opt-out from it, makes it difficult to foresee its future relevance. This probably helps to a certain degree, as science is somehow covered. But most of non-scientific activities remain in a sort of legal uncertain limbo. We hope that through the work we have been doing, we have clarified some of the enduring misconceptions in this area and identified where further work by the EU, MS, courts and the private sector may develop.

A5-3: The most common misconception about the revocation rights is simply that they're not available to the European artists. Currently we see many cases reported in the American media on authors reclaiming their rights after a particular period of time has passed. So a lot of creators believe that it is possible to reclaim your rights only in the United States. As such, the most common misconception is simply that revocation rights are not available, and even if they were available, they would not be beneficial to the creators because they apply only to the future contracts. This actually is not the case as revocation right, even the one just introduced by the Copyright Directive, apply to the agreements which are already in force. The agreements that are currently binding authors, in case that their works are not being exploited, can be terminated and authors can claim their rights back.

Q6: WHAT IS ONE OF THE MOST SIGNIFICANT FINDINGS OF THE WORK ON AI OUTPUTS?

A6: Among the different interesting findings of our research one that stands out is the apparent irrelevance of the existing legal rules protecting computer-generated works (e.g. in the UK and Ireland). These rules are often used by scholars as examples or models for proposals for new forms of protection of AI outputs. However, none of the consulted stakeholders and experts relies on or considers the existing national regimes of computer-generated works to be of particular importance for AI music production. In this regard, economic actors appear to rely on the familiar copyright and related rights protection rather than on the specific regime for computer-generated works. Our research found no evidence that the establishment of any AI music services studied in a particular jurisdiction was motivated by the existence of legal protection for computer-generated works. This finding suggests that policy proposals for a legislative change based on this legal model should be considered with particular caution.

Q7: WHAT IS ONE OF THE MOST SIGNIFICANT FINDINGS OF THE WORK ON TEXT AND DATA MINING?

A7: From a regulatory competition point of view, the restrictions imposed on EU based individuals, firms and governments to perform TDM activities may create perverse incentives whereby it may be economically or opportunistically attractive to develop AI applications (i.e. to train models) in “cheaper” legal systems (i.e. in

legal systems where broader TDM exceptions apply, such as US, Canada, Japan, Singapore, South Korea, Israel, etc), or to import into the EU already pre-trained models avoiding the economic or transactive costs present under EU law. Therefore, it is recommended to map and measure this phenomenon and the economic, cultural and technological implications of relying on AI applications trained abroad under unverifiable conditions.

Q8:WHAT IS ONE OF THE MOST SIGNIFICANT FINDINGS OF THE WORK ON REVERSION RIGHTS?

A8: We found out a number of interesting things while mapping reversion rights in Europe. However, the most striking finding is how little is known about the extent of revocation rights' use. While member states' laws offer a variety of provisions allowing creators to reclaim their rights, none of those provisions requires creators to notify the fact that they claimed their rights back to an intellectual property office, creators' organisation or other relevant body. Consequently, we have no straightforward source of knowledge on the scale of the revocation rights' use. This links to our generally low level of knowledge on the contractual practices within the creative industries. Consequently, assessing whether introduction of a new revocation right (and other creator contracts provisions) by the Copyright Directive improved creators' contractual position might be difficult if not impossible. Thus, a comprehensive review of contractual practices in the creative sectors in the context of the Copyright Directive implementation could provide valuable knowledge.

Q9: WHERE CAN I READ MORE ABOUT YOUR RESEARCH?

A9: All of our reports, publications, tutorials, blog posts, and related materials are available on the reCreating EU website. Additionally, we upload all of our reports on Zenodo, and you'll find some of it on SSRN and on different affiliated blogs. More specifically on rights reversion, there is the reversion rights resource page, where one can find all our mapping and all the reports and all the papers available in one place.

The reCreating Europe project aims at bringing a ground-breaking contribution to the understanding and management of copyright in the DSM, and at advancing the discussion on how IPRS can be best regulated to facilitate access to, consumption of and generation of cultural and creative products. The focus of such an exercise is on, inter alia, users' access to culture, barriers to accessibility, lending practices, content filtering performed by intermediaries, old and new business models in creative industries of different sizes, sectors and locations, experiences, perceptions and income developments of creators and performers, who are the beating heart of the EU cultural and copyright industries, and the emerging role of artificial intelligence (AI) in the creative process.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626