

Responses to “Policy Questionnaire on the Relationship Between Generative Artificial Intelligence and Copyright and Related Rights” (Council of the European Union 11575/24) from University of Galway

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?

- Copyright exception Art 3 Digital Single Market Directive (DSM directive) provides a copyright exception for text and data mining for research organisations and cultural heritage institutions for the purposes of scientific research, text and data mining for works for which they lawful access. Art 4 DSM provides a copyright exception for text and data mining for commercial purposes. Art 53 AI Act clarifies that the copyright exception in Arts 3 & 4 of the DSM directive applies to AI training.
- In the wake of the *Robert Kneschke v. LAION e.V.* case, in which the activity of the LAION was held to fall under Art 3 and thus the rights of Kneschke had not been infringed, it is unclear exactly what type of organisations/entities and what activities will fall under Art 3 DSM rather than Art 4 DSM. This will impact how and whether rights holders can opt out of training – as Art 3 has no opt-out provisions for rights holders. Further clarity is needed to define a “research organization or cultural heritage institution,” and what types of activities are encompassed by “scientific research.”
- Further, in regards to Art 4 DSM, AI training includes two steps. The first step is data collection and establishing a training dataset. The second step is training through machine learning based on the training dataset. There is dispute about whether the copyright exceptions in Arts 3 & 4 of the DSM directive applies to both of these steps. Therefore, there may need to be clarification of the AI Act, particularly whether the copyright exception applies to both steps or only the first one.
- “An Appropriate Manner”: According to Art 4 DSM, to reserve the use of the work by the rights holder, the reservation has to be in “an appropriate manner” such as in machine-readable form. However, if a person with little technical background may not know to rdo this. They may just comment beside their uploaded works along the lines of “my works can not be collected for text-and-data mining without permission.” Can such text reservation be considered “an appropriate manner”? There may need to be further clarification on what meets the requirements of Art 4 DSM
- Clarification on legal outcome: AI training is different from other data and text mining. If a creator does not reserve their rights, AI developers can legally re-use that work for training . However, this means AI companies can generate outputs that are highly similar to existing works. This raises the question of whether a creator who does not reserve their

rights can be held to have understood and accepted that there would be potential infringing outputs coming from the AI system. If there are infringing outputs is the original creator eligible for an infringement compensation claim when they did not choose to reserve their right? Guidance on the legal consequences of not choosing to reserve rights is needed.

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?

- Building an EU-wide database of reserved works may be helpful but it is not sufficient, in part because large volumes of data needed are coming from non-traditional authors who would not think of themselves as needed to register their work with a database. It would need to be exceptionally broad based and recognize the contributions of bloggers, volunteer travel guides, social media users and others operating on the internet. Such a data base would be difficult to maintain as it would need to be constantly updated.
- There is a perception amongst creatives that a set of tools and a platform which enables the monitoring of consensual/non-consensual data used for training AI models and offering digital content provenance might be useful. An example of the type of tools envisioned include Spawning's 'Have I been Trained?' (<https://spawning.ai/have-i-been-trained>) and Content Authenticity Initiative (<https://contentauthenticity.org/>)
- If there is an EU-wide database of works that artists have opted-in to training, artists could choose to submit their works for AI training and perhaps get some revenue in return. If artists choose to reverse their rights, they can choose not to submit their works to the database. However, this may lead to other difficulties. First, building an EU-wide database does not prevent other companies from building their own databases, absent some regulation limiting their ability to train on data outside the database. Disputes about copyright infringement in AI training may still occur.
- Second, an EU-wide opt-in database is established, It would require significant investment to operate in the long term. Creators will continue to create new works, which will need to be included along with appropriate meta-data., The database should be able to collect new works continuously in a sustainable way. The database operator may even need to think about how to make profits to be able to reimburse artists.
- A possible way to bring more certainty is through agreements between AI companies, online platforms, and their users. Normally, users will upload their works on certain online platforms such as X, LinkedIn, and Google. If AI companies want to collect work for training, they need to start collection from online platforms. Online platforms can communicate directly with their users. They can ask whether users want works to be

collected for training through “terms of use”. Therefore, when AI companies collect works from online platforms, they can pay online platforms a certain amount of money. Then, online platforms can distribute a certain portion of the money to the users willing to let works collected for AI training.

- Further, it is worth considering whether such a database whether opt-out or opt-in could run afoul of the abolition of formalities contained in Art 5 Berne Convention and incorporated by reference into the TRIPS Agreement, regarding the level of protection granted to rights holders.

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?

- Article 21 (f) of Copyright and Related Rights Act: Copyright of computer-generated works belongs to the persons who made necessary arrangements. There is a lack of clarity what this provision means in the light of the development of generative AI and no relevant case law.

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?

- Development of human arts: Generative AI discovers the patterns in data. It can only generate art similar to the art in its training dataset, which is like the reappearance of existing human art. However, many works are built on previous works. The reappearance of existing human art is not a problem. The key point is to make human arts more divergent, we need to find ways to encourage re-creation based on AI-generated outputs.
- Development of AI technology: General-purpose AI has been an important tool to assist in daily work. It has a wide application from generating a simple poem to auto-driving software. So, when thinking about the copyright protection of AI-generated outputs, we might need to think about its direct or indirect influence on AI technology development.
- The meaning of originality: Originality is the key requirement of copyright. If a creation has originality, it can largely have copyright protection. In the EU, the originality standard is “author’s intellectual creation”. In AI-generated outputs, the common human intellectual contribution is “prompts input”, “iteration after the first generation” and “post-generation editing”. It is necessary to evaluate whether these contributions can satisfy the originality standard.
- “Is AI-generated outputs expression of AI-user”: Copyright protects only expressions.. The prompt largely reflects the creative activity of the AI user. However, the extent to which AI-generated outputs reflect the content of the prompt is a case-by-case question. When the connection between AI-generated outputs and the content of prompts is loose, the AI-

generated outputs can not be considered the expression of the user. So, “Are AI-generated outputs the expression of AI-user?” is an aspect to consider.

- Human rights aspect: Traditionally mainland Europe treats works as an extension of their personhood, which makes copyright potentially a human right. Under this philosophy, works are made with the “blood and energy” of their creator. If works receive no protection, it will be a detriment to the author’s dignity. However, many AI-generated outputs are only generated with a few prompts. Does such a generation with so much unpredictability really reflect AI users’ personhood? Therefore, we need to consider whether AI-generated outputs can reflect the dignity of AI-generated outputs.
- Locus of protection: It is yet to be settled where the copyright would vest along the chain of AI creations. Would it vest with the code developer? The owner of the system? The user of the system? Each carries different implications, and raise different issues. Clarity over what level of creativity is needed and where the rights would vest is essentialy.
- Copyright monopoly: In the future, there might be only a few giant companies providing the service of high-quality generative AI. If AI-generated outputs are copyrightable, they may hold control of all the possible AI-generated outputs. This can be detrimental to the innovative use of AI-generated outputs. So, one must think about the possible copyright monopoly problem.
- AI as an inseparable part of work creation: Nowadays, more and more people are starting to use AI in their daily work. When the use of AI is so common, AI may be used in art creation more and more frequently than before. Expecting less frequent use of AI may be unrealistic. More and more art is going to be created with the help of AI. So, we might need to reconsider copyright when AI is becoming an inseparable part of art creation.

3.3. In your opinion, is the rationale behind incentivizing 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?

- The rationale is still relevant. However, it is only relevant in certain cases of AI-assisted works.
- As discussed above, the level of creativity required for copyright to vest is relevant to this question as well. If one inputs a basic prompt, there is no need to incentivize, it does not reflect creativity, nor does it even reflect labour.
- When one contributes a lot of intellectual and creative effort, the rationale will be more relevant. If one carefully designs complex prompts and keeps modifying them based on the results generated, until one generates a satisfactory image or text, that image or text shows at least some degree of imagination and judgment. In this circumstance, the final

AI-generated pictures may satisfy the classical UK “skill, labor and judgment” originality standard and may even receive copyright in some jurisdictions (eg. China). If the pictures can receive copyright, One is more likely to be more willing to create new pictures with AI. The potential AI will be exploited. More high-quality AI-generated pictures will be available to the public.

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?

- Yes, new rules may be needed, though such rules may add to a general confusion over the number of copyright, and copyright related rights legislation at the European level.
- Depending on how AI-generated outputs are created, we may categorize AI-generated outputs into three types.
- The first type is that the outputs are generated only with simple prompts. The outputs reflect only a little labour and it should receive no protection.
- The second type is that the outputs are generated with complex prompts and iterations. The outputs reflect my substantial labor but may not reach the level of “creativity”. So, the output may receive sui generis rights and the duration of this sui generis right should be short.
- The third type is that the AI-generated outputs are just “raw materials” of a new work. Namely, certain components of a new work are generated by AI. If the new work meets the originality requirement and other requirements, it should have copyright protection. With regard to its AI-generated components, whether it should receive no rights or receive sui generis right depends on how it was generated.

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

- It is important to distinguish between different types of rightholders. Some authors rely on their works for income (traditional authors), while others create works casually (non-traditional authors) without depending on income from their creations. The EU must consider the intellectual creations of non-traditional authors, whose copyright protected writings and creations have been scraped and used. Further, the EU should consider

whether the compensation provided to them should be of the same amount.

- The EU should also consider whether to provide the same compensation for works of differing quality. For example, should a carefully crafted photograph by a professional photographer and a casual snapshot taken by an ordinary person receive the same level of compensation?
- There is also a distinction to be made between AI companies. The EU will have to consider whether it wants to give smaller AI companies a subsidy for obtaining licenses to prevent monopolies by larger companies.
- Collective management organizations can negotiate licenses with AI companies, but the EU should take measures to ensure that the revenue collected by these organizations is properly distributed to the authors. Further, there are not collective rights management companies for every creative industry or creative person.
- The EU could consider encouraging online platforms to create databases that include works from both traditional and non-traditional authors, facilitating collaboration with AI companies. Perhaps all internet users should receive a standard payment managed by the EU – a collective rights management platform for the ordinary user.
- It is important for the EU to pay attention to licensing fee rates to prevent them from being excessively high or too low.

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?

- AI trained on human authors' works can generate outputs similar to those created by humans, and these AI-generated works may compete with human authors in the market. Therefore, it may be necessary to compensate human authors accordingly.
- AI can quickly generate a large number of works at a low cost, while human authors create works more slowly and may charge higher fees. There are competition questions that are raised by introducing machine generated works and tools in competition with creatives at a lower price point, and there are concerns that working creatives like graphic designers and commercial artists will be disproportionately impacted by the adoption of AI tools.
- By providing compensation, authors may be more willing to submit their works for collection and training, giving AI companies access to a richer pool of training materials.
- By offering compensation, authors will be more willing to create new works for training purposes.

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 ?

- AI can generate text, images, videos, and music. As a result, the industries related to writing, art, photography, and music, which are affected by these AI-generated outputs, could establish compensation mechanisms.

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?

- The EU could provide subsidies to small AI companies to help them obtain licenses, and make them more competitive with larger models trained before regulations were adopted mandating that training data be compliant with EU copyright law.
- The EU could fund the creation of a database with low-cost access for small and medium-sized AI companies.

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?

- The EU also needs to consider how compensation will be paid and the criteria for determining the amount.
- The EU must also consider a contradiction. AI models require vast amounts of data to identify patterns, meaning the quality of any single work in the dataset might not be significant. If the quality of individual works isn't crucial, authors may not deserve substantial compensation. However, once an AI model is successfully trained, it may compete with human creators and significantly reduce their income. Thus, the EU must carefully balance the relative insignificance of individual works in training with the potential major impact AI could have on human creators' livelihoods when determining compensation amounts.
- The EU may also need to consider a scenario where I use images generated by a free AI system to train my own AI or for other commercial uses. In this case, should I provide compensation to the provider of the free AI system? Therefore, the EU might consider providing guidelines on compensation for the reuse of AI-generated outputs.

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?

- The EU has 13 Directives and two Regulations related to copyright law, and an important first step may be consolidating copyright law for easier reference and clarity. Simply adding another cross-referenced Directive or Regulation may further muddy the waters. In the context of the relationship between copyright and AI, there are issues such as potential copyright infringement during AI training, the copyrightability of AI-generated works, and infringement issues related to AI-generated outputs. A new, integrated EU copyright law could systematically address these three issues.

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?

- Yes, it will be helpful if there are international agreements on certain issues – many of which have been discussed in previous questions. As AI models are global in their scraping of data and data usage, agreed global norms may be necessary.
- The copyright right of foreign authors will be better protected if we can have international agreements on copyright exception of AI training, and copyrightability of AI-generated works. For example, without an international agreement on copyright exceptions, AI companies in other jurisdictions may exploit the EU author's works. For AI-generated works, if such works are protected in one country but not in another, it could potentially harm the creator's interests.
- However, it might be very difficult to reach international agreements on certain issues. This is because different jurisdictions may take different attitudes towards AI and copyright. We can take China as an example.
 1. The European Union prioritizes safety over development when it comes to artificial intelligence. However, China seems to have adopted the opposite approach, prioritizing development over safety.
 2. There is no Chinese AI Act in effect yet. However, there is a *Artificial Intelligence Law of the People's Republic of China (Draft for Suggestions from Scholars)*. The draft emphasizes AI technology innovation and development. Although the draft also includes provisions regarding the potential risks posed by artificial intelligence, its

- regulations are far less comprehensive than those in the EU AI Act.
3. For example, to promote the development of AI, AI-generated works may be more likely to receive copyright protection in China. However, the European Union may take into account the different copyright philosophies of various countries, making it difficult to issue a unified decision on whether AI-generated works can receive copyright protection.
- Despite the differing attitudes towards artificial intelligence across various jurisdictions, the European Union can still play a leading role in promoting consensus on AI-related issues. This is because the EU has been the first globally to legislate on AI risk, providing a model for other countries' AI risk legislation. The EU's regulation of AI risks reflects a strong commitment to human rights, which can serve as a valuable reference for other countries. The EU AI Act also stipulates that any AI system imported into the EU must comply with its requirements, meaning that AI developers from other countries may be indirectly bound by the EU's regulations. Given the EU's global influence, many AI system providers from other countries are likely to comply with the AI Act in order to access the EU market.
 - It is still worth noting that, since the EU's policy on AI focuses on risk regulation, future EU legislation may also incorporate provisions from other countries that are designed to encourage the development of AI technology.
 - It is necessary to determine which issues can be the basis for consensus. For certain highly specific matters, each country can establish its own rules based on its national circumstances. For example, China's *Basic Safety Requirements for Generative Artificial Intelligence Services* stipulates that before collecting data from a specific source, AI providers should conduct a safety assessment of the data source. If more than 5% of the content contains illegal or harmful information, the data source should not be collected. EU countries can formulate different detailed regulations according to their own national conditions.

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