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AI GUIDES

AI & COPYRIGHT INFRINGEMENT

Artificial intelligence (**AI**) systems can create music, paintings, poetry and books. Such systems have created works based on Dutch masters' paintings, Kanye West rap lyrics and research texts about lithium-ion batteries.

Training AI systems using third party works may infringe the third party's copyright. Both the inputs and outputs of an AI system have the potential to infringe.

TRAINING AN AI SYSTEM

In order to train an AI system to create a work, the AI system must be provided with data (e.g. 6,000 Kanye West lyrics). The data is fed into the system and the system creates rules based on the input data to produce its own work (e.g. a new rap song).

Sometimes the input data will not be capable of being a copyright work. For example, copyright will not subsist in raw data or values, such as weather or tidal data (provided these have not been compiled in a database).

Infringement issues won't arise where the input data is old if the copyright in the input data has expired. For example, the "Next Rembrandt" project fed numerous Rembrandt paintings into an AI system and the AI system produced a new work based on those paintings. There was no copyright infringement as Rembrandt died in 1669 (copyright expires 70 years after the author's death).

Things get more complicated where the copyright has not expired in the input data.

Varying approaches have emerged around the world. A 2019 European Union (EU) directive introduced a narrow exception to copyright infringement, known as the "text and data mining (TDM) exception" for researchers only. The directive also introduced a broader TDM exemption for any entity, but on an "opt-out" basis (i.e., copyright holders can opt-out of making their works available for TDM). The UK plans to introduce a new copyright and database right exception which allows TDM for any purpose. However, rights holders will have safeguards to protect their content, such as the requirement for lawful access.

There is no specific exception for TDM in the *Australian Copyright Act 1968* (Cth).

In the United States, the fair use defence to copyright infringement could permit the use of copyright works to train AI systems. This has been tested in the US Courts. Google used material from Oracle's APIs to build its Android smartphone platform. The US Supreme Court found Google did not infringe Oracle's copyright.¹ It was held that Google's copying of Sun Java API was fair use of the material, as they took only what was needed to allow users to work in a new and transformative program. This has implications for AI creators, particularly those who wish to content train algorithms at lower cost.²

THE AI SYSTEM'S OUTPUTS

Will the AI system's outputs infringe the copyright in an earlier work?

If the AI system has created the work independently of the earlier work, there will be no copyright infringement even if the AI system has generated a work that resembles the earlier work. This will be a harder argument to make where the claimant's work was part of the input data.

There may be an infringement if the AI system produces a work that is a direct or indirect copy of an earlier copyright work (or if the works are substantially similar). For example, if an AI system is trained exclusively on Lady Gaga songs and creates a song that sounds just like an existing Lady Gaga song.

It has been suggested that the use of an AI system to create new works based on existing works is a form of "appropriation", a well-known concept in the art world. This practice involves the intentional borrowing, copying and altering of existing works. Jeff Koons and Damien Hirst are current examples of artists who practice appropriation. The validity of appropriation art under copyright law has been the subject of a number of cases (think Andy Warhol and his soup cans). These (predominantly US) cases suggest that appropriation may be protected by fair use if the resulting work is sufficiently transformative from the original work.

The outputs of an AI system may also receive copyright protection in some jurisdictions. For example, the UK provides copyright protection to computer-generated works. This means computer-generated works without a human author currently have protection in the UK. In a recent consultation paper, the UK confirmed there was no evidence that protection of such works was harmful.³ Such protection does not yet exist in Australia. If a party claiming copyright cannot establish that the computer-generated work originates from a human author, or that a human author exercised skill, judgment or intellectual effort in the creation or production of the work, copyright protection cannot be granted in Australia. Similarly, the US does not recognise copyright protection for computer-generated works or allow for AI authorship.

¹ Google LLC v. Oracle Am., Inc., No. 18-956, 2021 WL 1240906, (U.S. Apr. 5, 2021).

² See https://www.gibsondunn.com/2021-artificial-intelligence-and-automated-systems-annual-legal-review/#_ftn78.

³ UK AI Consultation, Government response on 28 June 2022, available at:

<https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/outcome/artificial-intelligence-and-intellectual-property-copyright-and-patents-government-response-to-consultation>.



LIABILITY FOR COPYRIGHT INFRINGEMENT

Determining liability for infringement of copyright by an AI system will be complicated. An AI system cannot incur liability as it is not a legal person, as discussed in our AI & Liability guide. If you cannot sue the AI, who do you sue?

The World Intellectual Property Organisation (**WIPO**) released an Issues Paper on Intellectual Property (**IP**) Policy and AI identifying a range of potential issues relating to the IP infringement of machine learning and the difficulty in determining accountability for decisions made by AI.⁴

This becomes particularly challenging when AI becomes autonomous and operates largely without human input. A possible solution is holding the individual responsible for an AI system also responsible for copyright infringement by the AI system.

On the other hand, AI tools can also be used to identify and investigate IP violations. For example, machine learning can analyse video imagery to identify any material that infringes copyright. A 2022 EUIPO study on the impact of AI on the infringement and enforcement of copyright and designs highlighted the ability of different AI to also enforce IP rights.⁵ The study found there are various opportunities for AI, including the use of machine learning for the enforcement of copyright and design, by analysing large amounts of information to detect threats, identify social engineering bots, and provide insights to find infringement patterns. However, limitations still exist, and the study highlights the need for a better understanding of AI on behalf of policymakers, IP protection entities, companies and law enforcement.

⁴ WIPO 'AI and IP Policy: The WIPO Conversation', available at: https://www.wipo.int/about-ip/en/frontier_technologies/ai_and_ip_policy.html.

⁵ EUIPO 'Study on the Impact of Artificial Intelligence on the Infringement and Enforcement of Copyright and Designs', 2 March 2022 available at: https://euipe.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2022_Impact_AI_on_the_Infringement_and_Enforcement_CR_Designs/2022_Impact_AI_on_the_Infringement_and_Enforcement_CR_Designs_FullR_en.pdf.

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