The IPKat

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[Guest post] Artificial Intelligence and (hopefully) the death of copyright

Eleonora Rosati Sunday, September 24, 2023 - Artificial Intelligence, authorship, copyright, Guest post, Jakub Wyczik, originality, work

*The IPKat has received and is pleased to host the following guest contribution by Katfriend **Jakub Wyczik** (University of Silesia in Katowice) on Artificial Intelligence (AI) and the application of copyright subsistence criteria. Here's what Jakub writes:*

Artificial Intelligence and (hopefully) the death of copyright

*by Jakub Wyczik**

Last year, I wrote an article about how copyright law relates to creations generated by AI. **Now, after the ruling in the Thaler's case** and subsequent USCO decisions, including **the Théâtre D'opéra Spatial case**, I think it is clear that there is no copyright for entirely AI creations in the US. In my opinion, there has never been any talk of such works, because that would be the same as talking about non-distinctive trademarks.

Human author

It is well known that copyright protects products of the human mind (see **Feist v. Rural, 499 U.S. 340 (1991)**, **Case C-5/08, Infopaq (2009)**, **Eastern Book v. Modak (2008) 1 SCC 1**). Therefore, things made without human input are not eligible for protection. However, humans are the users of various tools that rely on AI. Thus, proponents of copyrightability of such creations argue that they are created in a process
similar to photography. **As the CJEU explained, even a portrait photo can be protected** if the author has expressed in it the creative choices made in the fixation of the work, such as the choice of framing or the angle of the shot.

The problem is not human, but the work

In fact, the whole issue is not about a person, but about a work. In EU law, a work has an autonomous meaning and its existence depends only on the fulfillment of two conditions (see **Case C-833/18, Brompton Bicycle (2020)** and references therein):

1. Original subject matter - in the sense that it reflects the personality of the author as an expression of his free and creative choices;
2. Sufficiently fixed - so that the subject matter exists to the extent that it can be objectively identified.

There seems to be little doubt about the second condition. A sheet of paper printed with text, a digital file that stores information about the combination of colored pixels, grooves carved into a vinyl record that correspond to each sound wave.

Expression - of the author's creative choices

Far more problematic, however, is the first condition. Free and creative choice is already well understood, and over the years many doctrines, such as merger or scènes à faire, have been developed to narrow this issue.

But works are only the expression of such choices. It doesn't matter how creative the process was. All that matters is whether what was created is expressed in a creative manner. Note that the Berne Convention speaks of writings, lectures, paintings or sculptures (Article 2(1)). Plot, fictional characters, or style are not mentioned once. While the latter is obvious, for many years we have been chasing abstraction, protecting things like a set of attributes describing a character in a movie. We have forgotten what copyright is all about.

This is perfectly described in the **Berne Convention Guide** (p. 13). Literary works are expressed by words. "The writer conceives the plan of his work and then makes it known; it is this expression which gives rise to copyright." A sketch can be protected because "the idea finds concrete form in lines and colours." "The painter makes his own brush marks," while in music "sounds replace the lines and colour." So, there is no literal and non-literal copying of a work. A work is always just a creative combination of elements such as words, sounds, shapes or colors. Therefore, this is not about the content of the work, only how it was expressed. Just as when two painters, setting up their easels in the same place and painting the same landscape, create two independent works (p. 17)

However, even the drafters of the Convention were not able to fully reflect this. They also recognized the need to protect against various other acts of exploitation of others' creativity. They therefore introduced additional rights for derivative works, such as translations, film adaptations or musical arrangements (pp. 19-20). This is pure fiction. A film adaptation cannot take over the elements of a book other than statements. Similarly, a translation would have to include the meaning of certain words. The judge would have to reconstruct in his mind the intention of both authors and then try to compare the semantic level of the two texts. Such an exercise makes absolutely no sense and completely ignores the principle that copyright does not exist to protect against the use by others of the content embodied in the work (**Baker v. Selden, 101 U.S. 99 (1879)**).

That is why I wrote in the title that I hope for the death of copyright. The current regulation is based on several internal contradictions and a number of subjective criteria that lead nowhere. Since only the form of expression is protected, it doesn't matter how creative the prompt for AI is, because it is the **statistical model of the joint probability distribution P(X, Y)** that will be responsible for the final form of expression. Therefore, there is no such thing as "computer-generated works," because they would still have to be works. But if they are not expressions of human creativity, they are not works.

One to rule them all

So how do we solve the problem of protecting the value created by technological innovation? It's simple. Forget the legal fiction and focus on the reality. The whole world is data. Data is any representation of information that can be processed. Information, on the other hand, is an understanding of specific objects (**see more**). I believe that we should not monopolize information, as various IP rights do today. Information is the main fuel for technological development, which, according to the basic objectives of the treaties, IP should stimulate, not stifle (**TRIPS, Article 7**).

Therefore, we should follow a simple rule - if you can do something better, do it. In this way, you will contribute to global development instead of fostering stagnation and the monopolization of knowledge. What will you get in return? *The right to protect the data you create*. Regardless of obscure subjective criteria such as originality, value, or content.

No one will discriminate against you for creating an image instead of a phonogram. Describing the same phenomenon in a different way. The only thing that matters is what you have created, and we will protect you if others copy your creation. Remember, however, that you won't get a monopoly on information, so (1) elements whose form of expression merges with information, (2) those dictated by external factors, or (3) those for which the rights have already expired - won't be protected.

Does it mean someone can benefit from your ideas? Yes and no. They can only benefit from the general thoughts that underlie your creation. But the world does not end with "creator's rights." If someone competes unfairly with you, there is unfair competition law. If someone causes you other harm, there is tort law. If someone invades your privacy, you can enforce your personality rights.

The world does not end with the original products of the human mind. Everything that is distinct from the person and serves the use of people can be protected (**ABGB § 285**). However, this does not have to be an exclusivity on information, at least not in the form we know today under the term "copyright."

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