INDEPENDENT MUSIC PUBLISHERS INTERNATIONAL FORUM

Av. Marnix 28, 1000 Bruxelles, Belgium
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IMPF Comments to U.S. Copyright Office Artificial Intelligence and Copyright

<u>AI US on Generative AI</u>

IMPF (Independent Music Publishers International Forum) represents 200 of the world's leading independent music publishing companies. We are engaged in international AI related policy discussions, with the European Union ("AI Act"), the United Kingdom and Australia. In October 2023, we published <u>ethical guidelines</u> on generative Artificial Intelligence welcoming technological developments in as far as they improve our business and the capacity to assist the writers we represent. These guidelines are aimed at enhancing the relationship between the creative side, in our case writers and music publishers, and tech companies providing AI applications. This should ultimately enable transparent collaboration for the benefit of all stakeholders including users of AI applications. Given the rights we represent our comments concern musical and literary works only.

I.   Rights (Questions 6 and 7 of the consultation specifically)

Tech companies providing AI applications (run by various, sometimes third-party entities selling datasets, ultimately for commercial purposes) scrape the internet to collect data for machine learning. This involves many rights which require express permission by the rightsholders including copyright for the reproductions. In our view such a requirement is not superseded by any of the available exceptions (e.g., text and data mining, temporary copying, fair use depending on the jurisdiction). In the absence of relevant Court decisions (ministerial statements on the interpretation of the law are not sufficient) copyright exceptions do not apply. In any case, an exception would only apply to copyright but not to other rights such as data protection. Additionally, data scraping is often expressly prohibited in the Terms and Conditions of the scraped websites.

<u>Recommendations</u>

1. Government/US Copyright Office should provide relevant guidance stressing the requirement of an express permission under existing laws including copyright. Such guidance should also alert tech companies and users to the contractual terms and conditions regulating the use of the musical and literary works by users of AI platforms. We note here the many useful ethical guidelines put forward by rightsholders' organisations in various creative sectors such as photo <u>libraries</u> or the <u>Human Artistry Campaign</u>.

2. The requirement for such express permission should not be circumvented by "offshoring" the machine learning process to countries setting themselves up as copyright havens. Government/US Copyright Office should analyse the existing provisions on contributory or vicarious infringement and, if required, suggest guidance to ensure that tech companies do not manipulate jurisdictional rules to flout domestic copyright requirements.

Both proposals ensure compliance with obligations resulting from international copyright treaties as well as a level playing field on a competitive market for creators and AI tech companies operating within the law. Given the global nature of AI applications, cooperation amongst governments is important. These proposals are intended as answers to question 6 of the notice of inquiry; furthermore, we note that in the absence of specific

licensing requests from AI providers (**question 6.2.**), it is impossible to consider the terms of any such licence; e.g., any license depends on what happens to the datasets once used for machine learning (**question 6.4**). A one size fits all licence is entirely inappropriate given the different value of individual datasets, the different types of copyrighted works and the freedom to contract; equally, such licence seems highly problematic from an anticompetitive aspect. Any guidance has to also recognise that a rightsholder can choose not to license at all; copyright in the US is based on an opt in approach (based on international copyright obligations).

II. Further obligations on AI providers (question 28 specifically)

In order to ensure the smooth functioning of the permission-based process, and in particular to uphold the authors' legal right to reject the use of their creative musical works, it is necessary that both the AI provider and any party they used to collect data keeps records about the data used in the machine learning process.

Recommendations

1. US Government should render record keeping a condition for the operation of an AI application, perhaps under FCC or even FTC rules. The responsibility for record keeping should be bestowed upon all parties collecting data, be it a third-party entity or an AI provider.

Similarly, AI generated musical works should be labelled as such in the metadata of the work to protect the consumer from disinformation about the nature/ origin of the product or service they acquire (**question 28**).

2. Government/ US Copyright Office should render labelling or metadata tagging a condition for the operation of an AI application, perhaps under FCC or even FTC rules.

III. Infringement by AI generated musical works (question 24 specifically)

AI applications provide statistical inferences based on the computational analysis of existing datasets. Thus, unless the output replicates a portion of the training data, in many circumstances it will be difficult for rightsholders to determine whether an AI developer has used their works.

Recommendations

1. This further highlights the importance of implementing robust transparency and record keeping at every stage and by every party involved during the data collection and ingestion/machine learning process (**question 24**).

2. Infringement by the output of AI applications presumably follow "normal" copyright enforcement rules when identifying infringement of previous works or derivative works. In response to **question 25,** we note that a variety of natural or legal persons can be solely or jointly liable including the developer of a generative AI model, the developer of the system incorporating that model, end users of the system but also third parties providing the datasets; and more generally, the person/ entity ultimately benefiting from the AI generated output.

IV. Personality rights (question 30 specifically)

Personality or publicity rights are available at state and federal level, although they may not be sufficient to account for all situations where AI is used to imitate a person's likeness, voice, or image.

When a distinctive voice of a professional singer is widely known and is deliberately used in order to sell a product, this constitutes misappropriation. It is important to note that the resulting damages can be economic or otherwise (such as damage to their reputation or goodwill or causing distress).

Recommendation

In addition to the rights already in existence protecting the personality or image against false endorsement and misappropriation applying to AI we suggest in response to **question 30** the introduction of a specific federal right of publicity. This not only clarifies the situation for all parties; it also harmonises the protection of the personality/ image rights at federal level. We broadly welcome the *Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act 2023* protecting against the production of digital replica defined as a newly-created, computer generated, electronic representation of the image, voice, or visual likeness of an individual.

V.   Copyright status of purely AI generated musical works (question 18 specifically)

The protection of musical and literary works is deeply ingrained with human creativity. Consequently, we strongly urge differentiating between human creation and technical generation, in particular by clearly labelling AI generated musical works as such.

Recommendation

We welcome the clear statements of the US Copyright Office in this context. Nevertheless, we would like to mention the practical challenges in establishing whether a work is created by a human with the assistance of an AI application or generated without any human involvement. In any case, because of the requirement in the US that a work must be registered before the rightsholder can bring an enforcement action, there is a strong need for the Copyright Office's guidance with regard to registration to be clear and workable in practice. AI generated works should not dilute the exploitation and management of human created works at the expense of our creative writers.

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