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GESAC's contribution to the European Commission's consultation on the White Paper on Artificial Intelligence: a European approach to excellence and trust

GESAC represents more than one million creators from all sectors, such as music, audiovisual and visual arts, through its 33 authors' society members – collective management organisations. Please see www.authorsocieties.eu for more information.

GESAC welcomes the Commission White Paper on '*Artificial Intelligence - A European approach to excellence and trust*' (White Paper) and the European Data Strategy and considers that they provide comprehensive initial background for deployment of the potential of human-centred AI in the EU. AI indeed has wide spectrum of applications across different sectors and is a critically important technology that enables what has previously not been possible in many fields.

GESAC acknowledges that AI comprises many types of technologies and applications, already existing or to be developed in the near future. As regards the relation of AI with copyright/authors' right, GESAC considers that any policy initiative should have a very clear scope and focus only on the issues that are necessary to address. In this respect the Commission White Paper refers to a risk-based approach that is important to help ensure that the regulatory intervention is proportionate: *"However, it requires clear criteria to differentiate between the different AI applications, in particular in relation to the question whether or not they are 'high-risk'. The determination of what is a high-risk AI application should be clear and easily understandable and applicable for all parties concerned. Nevertheless even if an AI application is not qualified as high-risk, it remains entirely subject to already existing EU-rules."*

GESAC agrees that the short to mid-term policy perspective can remain focused on regulating where necessary so-called immediate "high-risk" areas mentioned in the White Paper. The AI aspects of copyright/authors' right would not fall under the definition of such immediate high-risk sectors that require urgent regulatory action, although authors' rights are indeed crucial for the development of cultural and creative sectors, that are significant contributors to the EU economy, as well as to the sense of unity and development of common values in society. Furthermore, copyright/authors' rights are also fundamental rights, hence failing to give them the necessary attention and careful considerations in this respect might lead in future to an economic and social 'high-risk'.

We would therefore like to use this opportunity to express several important principles to be considered as regards AI and copyright, since substantial part of the existing AI applications shall and can remain subject to already existing EU-rules, whose application still needs to be safeguarded by

the Commission as part of current EU law. Moreover long term policy considerations on AI would eventually need to deal with parts of the so-called “no-high-risk” or not immediate high-risk areas, including intellectual property and copyright, as well, in which case the below views might contribute to the considerations of the Commission.

Input to AI and training of AI:

As far as the copyright/authors’ rights are concerned, GESAC notes that the copyright protected works used as input to train AI process/software do not require any new policy consideration and should remain under the current copyright framework, which is fit for purpose.

Article 3 of the newly adopted Copyright in the Digital Single Market Directive provides an exception for “text and data mining”, which can be used for functioning of AI technologies, for non-commercial purposes of research institutions and universities. Article 4 provides that in the case of text and data mining of the protected works that are lawfully made available to the public, rightholders can reserve their right to provide licences for such uses or let them be subject to an exception. In this respect, it is crucial to ensure a sustainable and future-proof transposition of this Article 4 in to national laws of the Member States to make sure that creators have clear revenue streams for the use of their works for such commercial text and data mining that would allow functioning of AI, in form of licensing or a remuneration scheme. And all other copyright protected acts, e.g. where protected works are reproduced or otherwise used to feed AI, existing copyright rules based on exclusive rights shall continue to apply.

Therefore, there is no need to provide for a new exception or to enlarge the existing exceptions for the use of protected works since creators and rightholders are and shall remain able to give voluntary licences to allow the use of their works to feed AI technologies or to refuse that usage. Moreover, going further with a new exception or an enlarged exception would severely undermine the protection of authors right without justification, and be contrary to the objective of the Copyright Directive.

GESAC would be interested to remain in contact with the Commission as regards the use of copyright protected works for feeding AI software/technology and how such uses can be licensed in practice, which will certainly be one of the growing areas of the market in the near future.

Output of AI

- *AI-assisted creative works:*

GESAC underlines that creators and creative sectors are typically one of the main users of new technologies and AI is already used widely by creators as a supporting tool to complete and enrich their works. Copyright/authors’ right protection should therefore be provided each and every time there is a creation, whatever its form, however it is achieved, and the use of new technologies, such as AI, to assist creation should not question or prevent in any ways copyright/authors’ right protection of individual (human) creators using them.

- *Deep fakes, copies, and other similarities with existing works:*

It is important to recognise that imitations, fake versions, deep fakes, copies or other similarities that are created by AI can constitute an infringement of copyright in existing works, if they use part of existing protected works or copy the expressions subject to protection. Especially creators are likely to suffer from more of such potentially infringing cases, where their works and performances are used and regenerated by sophisticated AI with the help of sound recognition, text to speech and machine learning technologies to create deep fakes and imitations. In this respect, liability for infringement needs to be established and the below principles developed by the Expert Group on Liability and New Technologies¹ can be helpful in determining the liability under existing rules, or by adapting them to emerging cases:

- *In situations where a service provider ensuring the necessary technical framework has a higher degree of control than the owner or user of an actual product or service equipped with AI, this should be taken into account in determining who primarily operates the technology.*
- *A person using a technology which has a certain degree of autonomy should not be less accountable for ensuing harm than if said harm had been caused by a human auxiliary.*
- *It is not necessary to give devices or autonomous systems a legal personality, as the harm these may cause can and should be attributable to existing persons or bodies.*

- *AI-generated creative content:*

Autonomous AI creations raise questions on whether there could be any original creation that does not involve human intervention, and whether there is a need to consider such creations within the intellectual property regime. Their emergence and possible wide-spread use can cause challenges for the existing copyright regime in the coming years. While it is premature to construe a definitive position on these important issues especially as there is a need to analyse concrete and tangible examples in different sectors (music, books, movies, graphic arts, etc.), GESAC believes that there is a need to preserve human creations, and for this purpose it is necessary to think about the ways to achieve this.

GESAC notes that several services of the Commission undertake studies on the impact of AI in the current intellectual property framework, copyright infrastructure and cultural diversity and we would like to continue the exchange with the Commission on this important issue at forthcoming occasions after the ongoing studies are completed and a comprehensive assessment is undertaken.

Use of AI and algorithms by digital services and platforms

- *Algorithms and the liability of services*

It is to be noted that AI-based algorithms used by platform services are one of the main assets of such businesses to target their consumers and maximise their revenues. Therefore, where their role lead to organising and promotion of copyright protected content their liability should be triggered.

¹ Report on “Liability for Artificial Intelligence and other emerging technologies”, November 2019, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=63199

The newly adopted Copyright in the Digital Single Market Directive provides a clear and robust legal framework in this respect.

GESAC notes that the current debates regarding a possible Digital Services Act inevitably deals with such issues as well and we would like to use this opportunity to strongly state that Digital Services Act should apply without prejudice to the Copyright in DSM Directive and should not have any negative impact on the latter's application. If anything, DSA should aim at providing a sounder responsibility framework and where necessary legal liability rules for platforms and intermediaries that are currently under Art 14 of the E-Commerce Directive. In this respect, GESAC reiterates that the services defined in Art 2.6 of the Copyright in DSM Directive are now called as "online content sharing service providers" under EU law. They are subject to copyright liability under Art 17 of the same directive and they cannot benefit from any type of non-liability regime provided for hosting services under E-Commerce Directive or the forthcoming Digital Services Act.

- *Cultural diversity:*

GESAC would like to stress the need for transparency and accountability of algorithms used by music and audio-visual streaming companies, as well as content sharing platforms, in order to ensure access to culturally diverse content. Such algorithms are certainly essential to provide a user-friendly experience and well-functioning of the services. Nevertheless, these online media services are becoming increasingly more influential in what people see, read and listen to when using their services to access art, culture, news, etc. Leaving their operations only to their purely commercial choices can lead to challenges and inequalities both in the market and society. Therefore, their algorithms should be designed in such a way that they provide transparency in their operations, consider cultural diversity in their offers, and eventually ensure visibility and discoverability of European works on their services/platforms.

As the Commission White Paper in its introductory remarks rightly puts it: *"To address the opportunities and challenges of AI, the EU must act as one and define its own way, based on European values, to promote the development and deployment of AI. The Commission is committed to enabling scientific breakthrough, to preserving the EU's technological leadership and to ensuring that new technologies are at the service of all Europeans – improving their lives while respecting their rights."* European Commission can usefully take the initiative to protect the interests of the European creators and the creative sector when the digital streaming and platforms services operate in the EU by ensuring promotion and visibility of European and emerging artists. This issue can be dealt with as part of the Digital Services Act or within the forthcoming Media Action Plan of the Commission and would not necessarily need to be under the AI-specific regulation considerations of the Commission that the White Paper deals with.