

EC Consultation on White Paper on Artificial Intelligence A European Approach

(19.02.2020-14.06.2020)

EUROKINEMA's contribution

Transparency register n° 4324569685479

The impact of Artificial intelligence on the audiovisual sector

EUROKINEMA represents cinema and audiovisual producers in Europe.

Artificial intelligence, was not, up to now, seemingly at the core of our concerns. However, with the development of technologies and the growing influence of data in our field of activity, we understand that a strong and balanced regulation must be thought and debated.

As far as the copyright is concerned, the World Intellectual Property Organization (WIPO) has launched in December 2019¹ a public consultation aimed to gather the position from the widest-possible global audience on the topic of AI and copyright.

With its White paper on Artificial Intelligence and this new consultation, the European Commission introduces a new major step aimed at enhancing the research in AI and suggesting an EU regulatory framework.

Of course, these two official consultations (WIPO and EC) have been preceded by many reports and analysis from academics and institutions². Reports have been also ordered by the IMCO committee of the European parliament³

As in all the other fields of activities, the audiovisual sector is very much concerned by the data and consequently the AI.

1. The involvement of the AI in our eco-system:

Our sector is facing the AI technologies in different areas (production, broadcasting, marketing etc..). Among these, we wish to shed the light on the following:

¹ WIPO consultation: Impact of Artificial Intelligence on IP Policy: Call for Comments.

https://www.wipo.int/pressroom/en/articles/2019/article_0017.html Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence prepared by the WIPO Secretariat (13.12.2019)

² Among them :

- Commission Report on safety and liability implications of AI, the Internet of Things and Robotics, COM(2020) 64 final – 19.02.2020. https://ec.europa.eu/info/sites/info/files/report-safety-liability-artificial-intelligence-feb2020_en_1.pdf
- The CNIL's report in France dated December 2017 : « Comment permettre à l'homme de garder la main ? Les enjeux éthiques des algorithmes et de l'intelligence artificielle » <https://www.cnil.fr/fr/comment-permettre-lhomme-de-garder-la-main-rapport-sur-les-enjeux-ethiques-des-algorithmes-et-de>

³ "Artificial Intelligence: new developments and innovations applied to e-commerce" of Dino Pedreschi and Ioanna Miliou dated May 2020. EP report by the Policy Department for Economic, Scientific and Quality of Life Policies

Directorate-General for Internal Policies (IPOL) PE 648.791 (May 2020)

"New aspects and challenges in consumer protection - Digital services and artificial intelligence" PE 648.790 (15-04-2020)

"Artificial Intelligence: Opportunities and Challenges for the Internal Market and Consumer Protection " PE 648.777 (16.03.2020)

- a. **Production of fake images:** deep fakes are the first illustration of the possibility of AI to create artificial images. This phenomenon is nascent and is above-all used in the movie production for special effects. We can imagine that in the future (when?), a whole story will be able to be told only with data.
- b. **Script writing:** the access to consumers' worldwide data already helps some major production companies (mostly US) to build story corresponding to the public expectations.
- c. **Distribution of films on the internet:** in order to have access to the public (either to convince them to watch a film or to suggest them to consume goods or services, or to sell this access to other companies), the broadcasters (TV or VOD platforms) use their data. With the help of extremely sophisticated research engines, recommendation programs or social network algorithms⁴, the platforms recommend/target the needs and tastes of their consumers or the one of the internet users that could be interested by the programs they sell.
- d. **Fight against piracy:** it has been more than 15 years that the movie sector is struggling to fight against illegal up-loads or pirated streamings. The AI is a possibility to enhance the efficiency of the recognition tools used⁵.

2. All these new prospects represent innovation but also a risk for diversity and a threat to ethic principles. A balance must be struck:

AI has innovation prospects. It encompasses huge interesting challenges for our sector. Among them, some are already being examined and even implemented.

For instance, the chain of titles is essential to secure the financing process. When a film is produced, the right to exploit and broadcast it, stems from the securing of the proper assignment of the authors' rights to the producer and the communication right to distributors/broadcasters.

To make sure that these rights are exclusively assigned to the benefit of the financiers and that no other third party can claim them, the **block chain technology** is currently one major tool being currently considered to secure the transactions⁶.

Another very interesting example is **the use of the public's data and the traffic** to have a better knowledge of its consumptions, desires, habits etc.... Thanks to powerful algorithms, trends can be drawn, very accurate and subtle analysis can be made of the consumers, their time spent on

⁴ An algorithm does not always use the AI's technology. By algorithm we simply mean "the description of ended and non-ambiguous steps (or instructions) allowing to obtain a result from elements supplied at the beginning" (our translation) – Definition provided in page 2 of the above mentioned 2017 CNIL's report.

⁵ **Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward – Jean Philippe Mochon – CSPLA - 29 January 2020** - page 3: "While the developments ahead for recognition tools are still uncertain, artificial intelligence is likely the most promising avenue to date, with the caveat, however, that it should not be considered a replacement for the fingerprinting technique, but a further tool expected to contribute to improving the sharpness of recognition tools".

⁶ On this topic please refer to the WIPO presentation of the challenges of this technology in the protection of copyright : https://www.wipo.int/wipo_magazine/en/2018/01/article_0005.html. Despite the fact that, as per the Berne Convention, no registration is necessary to protect the author's rights (article 5.2), the enforceability of the latter against third parties remains an issue. In France, for a long time, a register has been created for that purpose ("le Registre Public de l'Audiovisuel" a.k.a RCA: https://www.cnc.fr/cinema/registres-du-cinema-et-de-laudiovisuel-rca_777234). It is not aimed at modifying article 5.2 of the Berne Convention (i.e: "The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.") but to provide a security interest for third parties.

A very comprehensive report by Jean Martin and Jean Pierre Dardayrol documenting that subject was released in 2018 by the CSPLA in France (available in English): <https://www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-chaines-de-blocs-blockchains>

internet (social medias, VOD platforms etc...). When we were previously blind, with no vision of the viewers, we have now the tools to get a better knowledge of them and to meet their characteristics.

However, this enthusiasm ought to be shaded and **in the points raised below, a future legislation of the EU is necessary**. Indeed, with an extensive and unregulated use of data, AI could be a threat to privacy, diversity of creation and expression and raise ethic issues.

a) The personal data

The Charter of Fundamental Rights of the European Union⁷, the GPRD directive⁸ provides some answers to the protection of personal data and the fundamental rights of citizens. However, the control of their compliance notably by non-EU companies remains a great concern⁹.

An evaluation of the implementation of the Directive will be done by the end of 2020¹⁰ but we know already that a lot of work must be done before a balanced situation between right of privacy and freedom of commerce and expression is achieved.

Therefore, for the moment, we fear that under the auspices of innovation, abusive use of personal data is done. This is a problem for our fundamental values. But not only. It raises unfair competition issues: the social networks or the subscription VOD platforms – thanks to the films we provide them – have **information on our customers that we don't have**. Thanks to AI and big data, this information is extremely accurate and can lead to aggressive and targeted marketing and recommendation strategies that will compete with ours¹¹.

b) The algorithms shaped with AI methods:

A lot has been written on how the algorithms can confine the public into its own choices and expectations jeopardizing the “offer” that is traditionally intrinsic to the act of creation. But this **is** not the only subject in stake.

⁷ https://www.europarl.europa.eu/charter/pdf/text_en.pdf - please refer to article 8:

“1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.”

⁸ Regulation (EU) 2016/679 of the EP and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) **GPRD directive**: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=FR>

⁹ Despite article 3 of the GPRD directive (see below), please refer to article of Philippe Laloux in Le Soir dated 26 May 2020: « Après deux ans de RGPD, la vie privée reste menacée ».

“Article 3 – GPRD - **Territorial scope**:

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.) a lack of control and therefore implementation of the law is observed. “

¹⁰ See the 24th of July press communicate of the European Commission whereby it is acknowledged that more work ought to be done to achieve the goal initially pursued: https://ec.europa.eu/commission/presscorner/detail/fr/IP_19_4449

¹¹ Netflix and Disney are not only broadcasters of films. They are producers as well: it's a two-sided market on this field of activity as well.

Production of fake images: the issue does not only arise from the misuse of personal data but also the collective use that is done with the data related to copyrighted work. We know now that it is possible to produce an image out of data with no filming process through AI technology. This is not new, and this technology is widely widespread for the special effects. What is new is the possibility to build a fake image of a person telling things that he has never said or doing things he has never done. This raises many ethical questions¹² in the information sector (with the fake news phenomena) but will certainly raise some problems in the scripted fiction when the technology will be fully powerful (economic problems of course since the performers would not be necessary anymore, but also moral rights issues, since a performance could be falsely attributed to a person for instance).

Production forecast: the AI is widely used by some producers/online broadcasters (that have also access to public's data) to order stories to scriptwriters that meet the public's tastes. Netflix has been doing that for years now and each film that is put in production must feed the expectations of their worldwide consumers. This technique, as brilliant it may seem, tends to push works that are acceptable, or even expected, by the public when they are put online. But a few years later, the obsolescence of these films aimed at satisfying the immediate needs of the public, is scheduled. Often, there is no long-term viability¹³ and no patrimonial strategy (films put on the shelves of the back catalogue).

Recommendation: the learning machine technology is also used to recommend programs expected by the public. This "filter bubble"¹⁴ can possibly become a trap. Indeed, there is no consciousness by the consumer of the bias that is used for the suggestions made. What is at stake here is the propension of each individual to only associate its choice to opinions, people, cultures in compliance with its own tastes and to reject what is unknown. But more widely, the algorithmic fragmentation entails the individualization of the choices toward a broader collective logic.

3. Legal issues: the author's rights

Another AI challenge is at stake in our field of activity: will the artefacts produced by learning machines¹⁵ be protected by the Berne Convention and the Copyright directive whereas no human creator is attached to them?

While some stakeholders answer positively, we remain firmly attached to this simple principle: a human being should remain the author of a work.

This principle, enshrined in article 1 of the Berne Convention¹⁶, abides by the ethical principles to which we deem necessary to stick to. The act of creation cannot stem from a machine. All the more, it is most unthinkable that a work be created even without a person in charge of the configuration of the machine¹⁷. The intervention of a human being is always behind.

¹² "Le « **pouvoir faire** » risque d'occulter **qui le fait et pour qui on le fait** », Discours du Pape François aux participants à l'Assemblée plénière de l'Académie pontificale pour la vie, 25 février 2019, p.1

¹³ One can, by the way, question the economic viability of these VOD subscription platforms that have entered into a fierce competition.

¹⁴ This expression is making reference to a book of "The filter bubble, what is internet hiding from you?" – by Eli Pariser- 2011

¹⁵ Machine learning (ML) is the study of computer algorithms that improve automatically through experience. "[Machine Learning textbook](#)". www.cs.cmu.edu. Retrieved 2020-05-28.

¹⁶ Berne Convention - Article 1: "The Countries to which this convention applies constitute a Union for the protection of the rights of authors in their literary and artistic work."

¹⁷ See in [Response from the British Copyright Council](#) to the WIPO Public Consultation on AI and IP Policy (December 2019), p.2: "LeChapelier: "La plus sacrée, la plus personnelle de toutes les propriétés, est l'ouvrage fruit de la pensée d'un écrivain ...").

Some researches on these ethical issues have been carried out by many institutions¹⁸ and led to the same conclusions: **a human centric approach**.

If, at the European level, reflections are under way, we remain convinced that this debate **ought to be conducted by the WIPO**, which guarantees the implementation and the evolution of the Berne Convention¹⁹.

Observations and suggestions:

Facing the uncertainties entailed by these new technologies, our democracies must approach any future regulation with ethical principles in mind that will guide the legislator.

The AI implies that we delegate some tasks to automatic systems. The question of the impact of such delegations must be raised since it causes a dilution of who is responsible of what, what legal rule ought to apply²⁰.

A pure algorithmic regulation is not the solution even when we speak about low risk tiny decisions, since, placed end to end, all these tiny decisions are constituent of our day to day lives. The algorithms not only decide for us with no arbitrage, but they also mash the duration and the spatial dimension of the decision delegated to the machine. This mash leads to an impoverishment of the action.

¹⁸ Among them, the report of the French CNIL, December 2017 : « Comment permettre à l'homme de garder la main ? Les enjeux éthiques des algorithmes et de l'intelligence artificielle » <https://www.cnil.fr/fr/comment-permettre-lhomme-de-garder-la-main-rapport-sur-les-enjeux-ethiques-des-algorithmes-et-de>

¹⁹ The WIPO published recently a revised issues paper of its first public consultation on AI. This question of the intervention of the human being necessary to be protected by copyright is dealt with as follows:

1. AI applications are increasingly capable of generating literary and artistic works. This capacity raises major policy questions for the copyright system, which has always been intimately associated with the human creative spirit and with respect and reward for, and the encouragement of, the expression of human creativity. The policy positions adopted in relation to the attribution of copyright to AI-generated works will go to the heart of the social purpose for which the copyright system exists. If AI-generated works were excluded from eligibility for copyright protection, the copyright system would be seen as an instrument for encouraging and favoring the dignity of human creativity over machine creativity. If copyright protection were accorded to AI-generated works, the copyright system would tend to be seen as an instrument favoring the availability for the consumer of the largest number of creative works and of placing an equal value on human and machine creativity. Specifically,

(i) Do AI generated-works require copyright or a similar incentive system at all?

(ii) Should copyright be attributed to original AI-generated literary and artistic works or should a human creator be required?

(iii) If copyright can be attributed to AI-generated works, can the AI-generated works be considered original?

(iv) If copyright can be attributed to AI-generated works in whom should the copyright vest? Should consideration be given to according a legal personality to an AI application where it creates original works autonomously, so that the copyright would vest in the personality and the personality could be governed and sold in a manner similar to a corporation? How would this interrelate with moral rights?

(v) If copyright can be attributed to AI-generated works, should related rights extend to sound recordings, broadcasts and performances?

(vi) If a human creator is required, who are the different parties involved in creating an AI-assisted work and how should the creator be determined?

(vii) Should a separate sui generis system of protection (for example, one offering a reduced term of protection and other limitations, or one treating AI-generated works as performances) be envisaged for original AI-generated literary and artistic works?

(viii) In the event copyright cannot be attributed to AI-generated works or that the works are protected by a sui generis system of protection, will this incentivize concealment of the involvement of AI? Should there be a system to prevent such behavior? How could such behavior be detected? Should each work have a log of acts of the creation process leading to a protectable work and transparently identify the acts of each participant?

²⁰ It is interesting to note that article 1 of the French law "Informatique et liberté" notably provides "L'informatique doit être au service de chaque citoyen ».

Therefore, we suggest the following key takeaways:

- **A principle of “loyalty”** of the platforms must be created²¹. The idea is that the platforms should provide for a ranking or an indexing with “good faith” without trying to alter or divert the operation for purposes external to the user’s interests. The loyalty principle would entail:
 - o that the ranking and the indexing suggested by the platforms to the public should be guided by the idea of the “best interest service” given to the public
 - o that the transparency of the criteria used is given by the platform
- **Human centric recommendation**: the configuration of the recommendation algorithms should always be made with the intervention of human beings and not be purely randomized with AI processes.
- **Production of images and cultural recommendation** with AI should be considered as a **high-risk** sector and perhaps, as far as the images are concerned, banned when a reproduction of the image of a human being is done without its consent.
- **Personal data / AI technology**: as stated above, the use of personal data is regulated by the GPRD directive. However, the compliance by companies established in third party countries remains a question. All the more, generally speaking, the control of the implementation of this directive remains insufficient²². Hence, more financial capacities must be allotted to the Member States for this purpose along with a strong coordination and evaluation by the EDPB²³. Alternatively, any attempt to regulate the AI and its widespread use will remain vain.
- **The legal status of the artefacts created** with the help of machine learning automated systems must be carefully analyzed and thought within the framework of the WIPO’s working sessions.

²¹ This has been suggested by the Conseil d’Etat in its 2014 annual study on the digital and the fundamental rights : <https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes-annuelles/etude-annuelle-2014-le-numerique-et-les-droits-fondamentaux>.

²² A recent case illustrates this question: where the Irish regulation agency needs more financial means to have the personal data regulation abide by (<https://www.usine-digitale.fr/article/pourquoi-la-cnll-irlandaise-est-le-centre-nevralgique-de-la-protection-des-donnees-personnelles.N893654>), a German activist Max Schrems has criticized openly the agency in their handling of a complaint against Facebook (<https://www.euractiv.com/section/data-protection/news/irish-data-protection-authority-under-fire-over-facebook-case/>)

²³ EDPB: <https://edpb.europa.eu>