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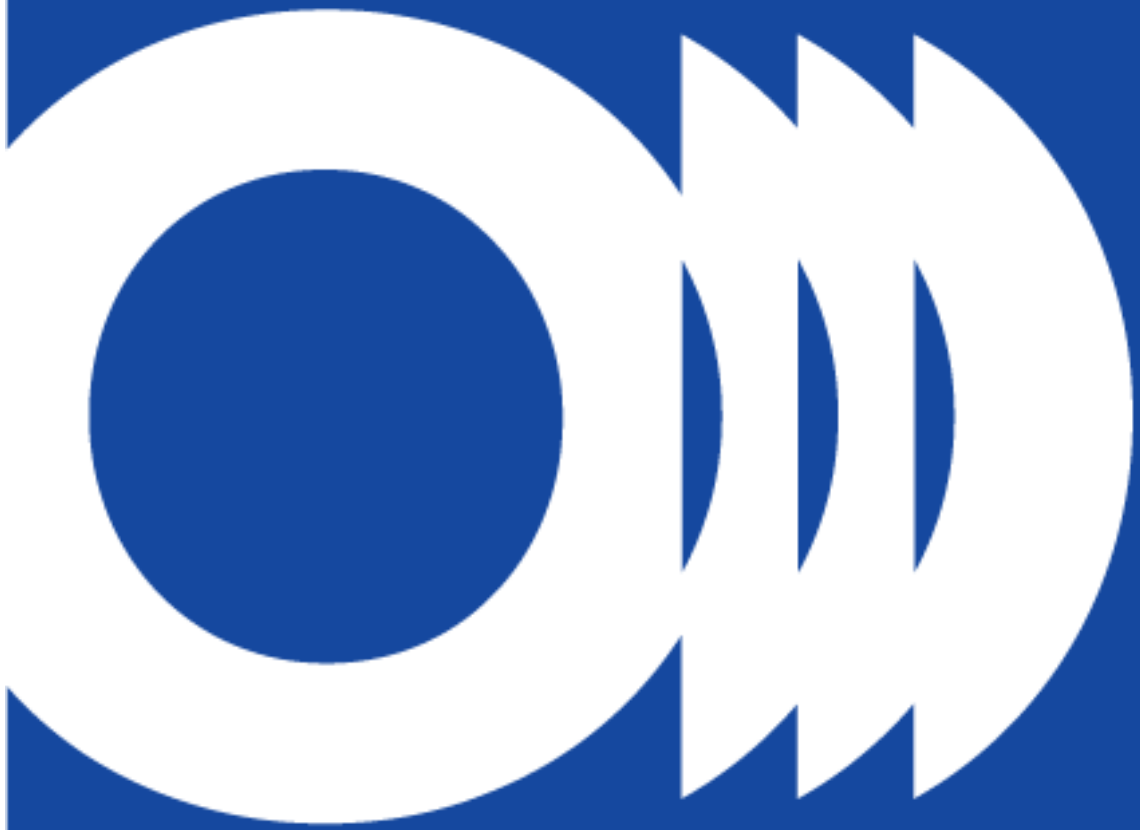
POSITION PAPER

EBU response to the EC-commissioned survey on “Copyright and the Use of Artificial Intelligence”

31 MAY 2021



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European Broadcasting Union's reply to the survey on "Copyright and the Use of Artificial Intelligence"

Please note that the response below is complementary to, and should not be understood as a substitute for, any EBU Member's responses.

The European Broadcasting Union (EBU) welcomes the opportunity to take part in the Consultation on "Copyright and the Use of Artificial Intelligence" commissioned by the European Commission Directorate-General CNECT (the "Consultation").

The EBU is the world's leading alliance of Public Service Media (PSM) organizations.[1] It is a not-for-profit organization that represents 115 member organizations in 56 countries. PSM organizations, which vary significantly from one country to another (*e.g.*, in terms of size, level of funding, regulatory requirements, including public service obligations, etc.), are entrusted with the provision of high-quality content that fulfils the cultural and democratic needs of the society they serve.

To fulfil their remit, PSM organizations may use artificial intelligence (AI) technology to increase their productivity in order to produce content and to convey information to listeners and viewers quickly, accurately, automatically, and autonomously. In the broadcasting industry, PSM organizations are already using specific AI technologies and this use is likely to surge in the near future.

For ease of reference, the present contribution follows the numbering in the Consultation.

Issue 1 – Use of creative works to train AI algorithms

The use of copyright protected works for text and data mining may be covered under specific circumstances by the exception provided for in Articles 3 and 4 of the DSM Copyright Directive[2]. Text and data mining activities seem to be limited to the production of information that can be digitally derived from the analysis of works or other subject matter. The text of the DSM Copyright Directive does not however clarify whether such exception allows the processing of large sets of data to produce creative outputs generated – autonomously or not – by an artificial intelligence.

Whilst the EBU encourages creativity and fosters innovation, it is worth stressing that the use of copyright protected material to train AI algorithms may infringe the copyright of the rightsholders, in particular their right of reproduction (as set forth under Article 2 of the

[1] More information about the EBU can be found on the website: www.ebu.ch.

[2] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

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InfoSoc Directive[3]). In this respect, one needs to consider the value of creative content and how any creative endeavours is monetised, especially when third-parties wish to use copyright protected material for their own benefit and/or for offering new services on the market.

On this basis, the EBU suggests clarifying the scope and application of the text and data mining exception of Articles 3 and 4 of the DSM Copyright Directive, notably:

- In which situations and how the exception of text and data mining applies?
- Does the exception of text and data mining allow all use of lawfully accessible sets of data to train an AI algorithm regardless of its purpose?
- Does the exception of text and data mining cover all use of copyright protected content to train an AI algorithm to produce creative content?

In the event that the results of the study would recommend the implementation of a licensing scheme to use copyright protected content for the purpose of text and data mining, the EBU suggest clarifying first what types of use would require a licence and how the proposed licensing scheme would operate.

Issue 3 – Communication of the opt-out decision

Article 4(3) of the DSM Copyright Directive allows rightsholders to oppose pre-emptively the use of their works for text and data mining activities. If so, the decision to 'opt-out' must be communicated in an 'appropriate' manner. The text of the DSM Copyright Directive does not clarify however how the rightsholder must exercise his or her right in practice.

To allow the exercise of the opt-out right, it is of prime importance that the solution to put in place is practical and widely accessible for rightsholders and rights users. For example, this could be done by implementing a system encompassing both a licensing scheme and/or contractual arrangements together with machine-readable technology. In this respect, clarifying how the opt-out mechanism unfolds is needed for any 'opt-out' reason, not only in relation to the use of AI.

Moreover, there is a consensus amongst EBU Members that the setup of a centralised EU/national register of works with opt-out decisions would be difficult to implement and may have detrimental consequences, in particular by increasing the administrative burden and the associated costs to update and operate such register.

Finally, the EBU would like to highlight that implementing opt-out mechanisms for use related to commercial purposes only would broaden the initial scope of the text and data mining exception.

On this basis, the EBU suggests clarifying what measures would qualify as 'appropriate' in order to assess how the opt-out mechanisms should be implemented in a practical manner for both rightsholders and right users.

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[3] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Issue 4 – Moral rights and the opposition of the use of creations as input for AI

Moral rights are not harmonised at EU level and differ from one Member State to another. For this reason, invoking moral rights to oppose the use of creations as input for AI should only be possible within the scope of the applicable and existing national regulation. In other words, even though the relevant rightsholders should be in a position to invoke their moral rights to oppose the use of their works, not every use of creative content may qualify as copyright infringement. This would have particular importance in situations where copyright protected works would be used to train AI algorithms without any creative AI-outputs; the contrary is likely to prevent innovation.

The legal framework applicable to moral rights, which relies on cultural practices and tradition, should remain a national matter. On this basis, the EBU is of the opinion that no policy action is required at this stage and it would therefore favour the *status quo*.

Issue 5 – Absence of protection for AI autonomous output without human artistic decisions

Since copyright law is author-centred and relies on human authorship, AI-outputs generated without human intervention should not be protected by copyright. As a matter of principle, the current legal framework should remain the same; amending copyright law may blur the lines between copyright, related rights, and *sui generis* rights and create legal uncertainty.

On this premise, it seems important to analyse whether the creation of a *sui generis* right would be an option. The contemplated *sui generis* right should protect the investment and efforts made to produce AI-outputs rather than the outputs themselves and should be of a short duration. That said, AI technology is still at an early development stage and, as such, it is worth gathering the necessary experience and trying the suitability of the current legal framework, as well as assessing the amount of works that would benefit from protection, before introducing new rights.

In view of the above, it seems premature to conclude that the current legal framework requires any adaptation to cover autonomously AI-generated outputs. Should it be the case, the creation of a *sui generis* right based on economic evidence may be considered in the future, subject to prior study.

On this basis, the EBU is of the opinion that no policy action is required at this stage and it would therefore favour the *status quo*.

Issue 6 – Authorship presumption and false authorship

The legal framework applicable to authorship presumption is clear and the issue of false authorship seems to be an ancillary matter. On this basis, the EBU is of the opinion that no policy action is required at this stage and it would therefore favour the *status quo*.

Issues 7 and 8 – Related rights & the protection of AI autonomous output

Related rights cover the artistic endeavours of performers, phonogram producers or broadcasting organizations. Since these activities require a financial investment or hold sufficient technical or organisational skills to justify a 'copyright-like' property right, they benefit from protection under related rights. In these cases, the protection is granted without an act of human authorship or any requirement of originality to qualify as a work in a copyright sense. The simple performance by a performer of a creation, or the recording of sounds by a music producer or – in the case of broadcasting organizations – an act of broadcasting of a piece of audio or audiovisual content, suffices to trigger the protection conferred by related rights.

The condition of 'investment' is not required *per se* in most enterprises covered by related rights (except for the *sui generis* right of databases). Adding such a requirement to benefit from related rights protection would result in uncertainty and create an unbalanced system relying on different thresholds depending on the beneficiary of the protection. It is therefore preferable that no additional condition is required to enjoy related rights.

On this basis, the EBU is of the opinion that no policy action is required at this stage and it would therefore favour the *status quo*.

Issue 9 – Performers right & absence of protection

The EBU understands that the Consultation relies on the definition of 'performance' as set forth in Article 3(a) of the Rome Convention[4], which protects performances of literary and artistic works only; implying that the underlying creation must qualify as a 'work' in the copyright sense. The definition of 'performance' under Article 2(a) of the WIPO Performances and Phonograms Treaty[5] was later extended to include 'expressions of folklore'. It is worth noting that those two international instruments grant a protection *a minima*, which can be extended under national law to award performer's protection to artists performing other types of performances (Art. 9 of the Rome Convention).

Moreover, the performance itself may be covered by copyright protection if it meets the requirements to qualify as a work, granting therefore copyright to its author for the act of creating the performance and related rights protection to its performer for his or her performance. As a result, the performance by an artist of an AI-generated creation could be covered by both copyright and related rights under certain circumstances.

On this basis, the EBU is of the opinion that no policy action is required at this stage and it would therefore favour the *status quo*.

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4 Rome Convention, 1961, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

5 WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20, 1996.

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