AI Art and Copyright

LL.D, SENIOR LECTURER JOHAN AXHAMN

AI Art and Copyright

1. Copyright

2. Copyright and artificial intelligence

Copyright

Copyright

- **Subject matter**: Literary and artistic works

- **Requirement for protection**: <u>Originality</u> – "author's own intellectual creation", "free and creative choices", "reflects the author's personality"

General justifications for copyright

- **Natural rights** (personhood)

- **Reward** ("desert" – protection against unjust enrichment)

- **Incentive** (public interest, instrumentalism, incentive)

Requirement of Originality

- CJEU case C-145/10, Painer (paras. 88-92)

- 90   As regards a portrait photograph, **the photographer can make free and creative choices in several ways and at various points in its production**.

- 91   In the **preparation phase**, the photographer can choose the background, the subject's pose and the lighting. When **taking a portrait photograph**, he can choose the framing, the angle of view and the atmosphere created. Finally, **when selecting the snapshot**, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.

- 92   By making those various choices, the author of a portrait photograph can **stamp the work created with his 'personal touch'**.

Copyright – some basics

Who is protected /who can be an author?

- **Natural persons**: Individual human beings or individuals who have collaborated

Copyright – some basics

Rights of authorising and prohibiting **reproductions** and **disseminating the work** to a public

The rights are to some extent subject to exceptions/limitations

Presumtion of authorship

- Article 15(1) Berne Convention

- "(1) In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, **be regarded as such**, and consequently be entitled to institute infringement proceedings in the countries of the Union, **it shall be sufficient for his name to appear on the work in the usual manner**. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity."

Rights related to copyright – some basics

- **What** is protected as neighbouring rights?
  - Performances, recordings, broadcasts, photographies

- **Who** is protected /who can be a holder of a neighbouring right?
  - Performances and photographies: Natural persons
  - Recordings, broadcasts and databases: Legal persons/entities

- **How** is a neightbouring right protected?
  - Rights of **reproduction** and **disseminating** to a public
  - The rights are to some extent subject to exceptions/limitations

Artificial intelligence

Artificial intelligence

- No generally accepted definition

Artificial intelligence

- **<u>High-level expert group on artificial intelligence</u>** set up by the European Commission (2019)
  - *"**Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal**. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions.*

  - *As a scientific discipline, **AI includes several approaches and techniques, such as machine learning** (of which deep learning and reinforcement learning are specific examples), **machine reasoning** (whi ch includes planning, scheduling, knowledge representation and reasoning, search, and optimization), **and robotics** (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems)."*

Artificial intelligence?

- OECD

  - *"An AI system is a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of **autonomy**."*

- https://www.oecd.org/digital/artificial-intelligence/

Artificial intelligence

- **Proposal by the European Commission** for a Regulation laying down harmonised rules on artificial intelligence (**Artificial Intelligence Act**)

- Article 3(1)'**artificial intelligence system**' (AI system) means *software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with*;

Copyright and artificial intelligence

Artificial intelligence within the fields of literary and artistic creativity

- Computer-based /algorithmic creativity, neural networks, etc.

1. Input
2. Learning AI
3. Trained AI
4. Output

Artificiell intelligence within the artistic fields

- **The Next Rembrandt**

- https://www.nextrembrandt.com/

DALL·E

- https://openai.com/product/dall-e-2

- Cf. Midjourney, Stable diffusion..

Artificial intelligence?

Is the AI **autonomous** or more aking to a **tool** for human creativity?

AI-**supporte**d or AI-**generated**?

Creative input/feedback by programmer and/or user?

Théâtre D'opéra Spatial

- Jason Allen (?)

The New York Times

An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy.

"I won, and I didn't break any rules," the artwork's creator says.

US Copyright Office

- Zarya of the Dawn (Registration # VAu001480196)

- https://www.copyright.gov/docs/zarya-of-the-dawn.pdf

US Copyright Office

- Copyright protection depends on whether AI's contributions are "the result of mechanical reproduction" such as in response to text prompts, or if they reflect the author's "own mental conception."

- "**The answer will depend on the circumstances**, particularly how the AI tool operates and how it was used to create the final work."

- **Copyright Registration Guidance**: Works Containing Material Generated by Artificial Intelligence

- https://www.copyright.gov/ai/ai_policy_guidance.pdf

Copyright-related questions related to AI output

May the **output** infringe copyright in existing (protected) works?

Similarity with an/one existing work, or rather with "style"?

May the **output** in itself constitute a work?

Authorship?

The rule on presumtion of authorship?

Getty Images lawsuit says Stability AI misused photos to train AI

AI Art Generators Hit With Copyright Suit Over Artists' Images

Copyright-related questions related to AI input

Existing works as training data

Exceptions/limitations for the purposes of text and data mining

Summing up – and suggestions for the future

- **Disruptive technology, paradigm shift, game changer, apocalyps?**

1. Do **nothing**?
2. New legal **personhood**?
3. Solution "within" **copyright** (authors' rights) protection?
4. Solution within **neighbouring** rights protection?

- **Relevance of the purpose(s) of copyright?**

Contact

- johan.axhamn(a)har.lu.se

- Axhamn, *Copyright and Artificial Intelligence – with a focus on the area of music* (2021)