AI, Music and Copyright – IMPF position paper

As Artificial Intelligence (AI) develops and becomes more capable, its applications across all industries, and not least the music sector, become increasingly apparent. AI is being used at practically all levels of the music value chain, from AI-assisted musical creation and stem separation,[1] [2] to playlist curation and A&R.[3]

While the opportunities presented by such applications of AI are encouraging, there are key issues that also arise, particularly as concerns the field of copyright and AI-generated music. The EU Commission noted in an April 2018 Communication that "Reflection will be needed on interactions between AI and intellectual property rights, from the perspective of both intellectual property offices and users, with a view to fostering innovation and legal certainty in a balanced way." These issues are currently under consultation at both the UK IPO and WIPO.

One of the fundamental questions is about who owns, and thus manages the intellectual property rights for, works generated by AI programmes. In the USA, a work must be created by a human being for it to be able to benefit from copyright protection. This position was confirmed once again in February 2022, when the US Copyright Office once again refused to register a copyright for a piece of 2D artwork known as 'A Recent Entrance to Paradise', which was generated by a computer algorithm running on a machine known as 'Creativity Machine'.

In most EU Member States and in the EU *acquis*, there is a human-centred focus to the question of 'originality' in copyright law. Several EU directives link originality to natural persons or human attributes.[4] As such, most legal scholars conclude that under present law, AI-generated works might not be eligible for copyright protection. However, it should be noted that France's SACEM was the first collection society which registered AIVA, a so-called 'AI composer', as a composer, with several tracks registered under its name.[5]

Further economic and legal research is needed before it can be clearly stated whether or not further rights are needed for AI-generated/AI-assisted works in the EU sphere. Granting protection to these works may lead to the concentration of copyright in a handful of companies and might damage the human incentive for creation. However, a lack of protection may erode incentive and stifle innovation in the field of AI, which should ultimately be encouraged as a useful tool, rather than totally side-lined by potential legislation. In the UK, the Copyright, Designs and Patents Act of 1988 provides protection for 'computer-generated works', with the author being taken to be "the person by whom the arrangements necessary for the creation of the work is undertaken." In terms of potential options for the protection of AI works, the UK law might provide some solutions. **However, it was raised during the UK IPO consultation that these 'computer-generated works' must be original to receive protection, and 'originality' is generally evaluated with reference to human characteristics, which seems contradictory.** Moreover, it can be argued that computers do not need to be rewarded to produce new content in the same way that human creators do; an opinion echoed during the WIPO consultations.[6] Lastly, the UK law on computer-generated works does not address the issue of **creations created jointly by humans and computers**.[7]

This need to differ between 'computer-generated' works and 'AI-assisted' works is a key factor in the second fundamental question regarding AI and music: **if copyrighted works are part of the input data for an AI system which then produces a work, does this entail infringement?** It could be argued that there is no such thing as a 'computer-generated work', as phrased in the UK law, since all AI systems which generate

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[1] E.g., https://openai.com/blog/jukebox/ ; https://magenta.tensorflow.org/ ; https://www.aiva.ai/

[2] https://musically.com/2022/02/17/startup-files-audioshake/

[3] https://www.musicbusinessworldwide.com/abbas-agnetha-faltskog-joins-6m-funding-round-for-ai-powered-record-label-snafu-records/

[4] 'Intellectual Property and Artificial Intelligence: A literature review', 2021, Joint Research Centre (European Commission) https://op.europa.eu/en/publication-detail/-/publication/912bc3f8-7d67-11eb-9ac9-01aa75ed71a1

[5] https://aibusiness.com/document.asp?doc_id=760181

[6] https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_3_ge_20/wipo_ip_ai_3_ge_20_inf_5.docx

[7] As things stand, the UK Intellectual Property Office (UKIPO) recently engaged in a consultation with interested stakeholders about the current UK provisions in this area, and gauging responses for potential change.

'new' works are based on vast amounts of previous **human-created works**, sometimes from the public domain and sometimes copyright-protected works.

With this in mind, if music produced by an AI system is exploited commercially via some kind of IPR (e.g., that provided by the UK CDPA), **it is absolutely essential that music authors and composers whose works formed the input data for the AI system be remunerated.**[8] Complications arise at this juncture, because the AI systems involved are generally 'fed' massive amounts of data, and so tracking specific copyright-protected works which have been used to create the new works will prove challenging. This is especially relevant in the case of potential copyright infringement, because in order to demonstrate infringement, one has to posit a specific copyright-protected work that the new work is infringing (i.e., taking a 'substantial part of', or the original parts of, a specific work). Remunerating the human authors and composers whose works are used by AI systems would require a licensing system of some kind, along with a great deal of transparency and accountability on a general level, in order to ensure that all rightsholders are aware of the use of their works in AI systems.

The 'feeding' of AI systems is sometimes known as 'text and data mining'. Article 4 of the 2019 DSM Directive allows for copyright exceptions for 'text and data mining' of those protected works which are lawfully made available to the public, while providing an opt-out for rightsholders, who can reserve their right to provide licences for such uses. ECSA holds that such rules "provide an adequate balance to favour the development of AI while making sure that creators' works are not used at their expense for commercial purposes by commercial operators."

It is also worth exploring the use of AI in other aspects of the music industry – and most notably, in music recommendation algorithms. The predominant streaming services and platforms, such as Spotify and Netflix, use AI algorithms to suggest recommendations to users. These algorithms raise a number of issues. Firstly, in November 2020, Spotify introduced its Discovery mode, through which artists and labels can choose tracks to be promoted in Spotify's algorithms in return for a lower royalty rate. **This feature has faced a series of complaints, particularly in light of the fact that streaming services such as Spotify have already significantly driven down royalty rates received by rightsholders. IMPALA has called for an end to the practice.**[9]

Furthermore, ECSA has pointed out that these streaming services tend to favour content on which they can make more profit, as well as the domination of Anglo-American music from the major labels.

It is essential that transparency and accountability are introduced with regard to these algorithms, and that rules are introduced to encourage greater diversity.

[8] See p2, 'ECSA View on AI and IP'

[9] https://impalamusic.org/wp-content/uploads/2021/03/IMPALA-streaming-ten-point-plan-March-2021.pdf