



CERHA HEMPEL CEE NEWSLETTER *Austria*

Artificial intelligence

Who does the output produced by ChatGPT belong to?

In principle, texts or images generated by artificial intelligence are not protected by copyright in Austria. However, there are a few exceptions – such as in those cases where human input predominates.

AI systems, such as ChatGPT or Stable Diffusion, are now capable of generating output of astonishing quality. However, is the output of these AI systems also protected by copyright? And if so, who holds the rights to the texts and images?

Monkey selfies and works produced by AI systems

Under Austrian copyright law, protection is only afforded to "original intellectual creations". According to the European Court of Justice, texts consisting of just eleven words or the simplest of snapshots can exhibit all the necessary features of originality. Nevertheless, this requirement regarding intellectual creations relates exclusively to humans. Therefore, the output of a largely autonomous AI system is not protected under Austrian law and as such it can be freely used by anyone. Incidentally, the same holds true for works created by animals, as demonstrated by the monkey selfie that became famous as a result of a legal dispute.

It is a logical step to exclude the output produced by AI systems from copyright protection. This is because the algorithms they employ only simulate human intellectual creativity by using statistical models; AI systems do not engage in creative

activity themselves in the same way humans do. This intrinsic difference underlying the creative process means it is irrelevant whether the output of AI systems is indistinguishable from works created by humans. In the case of a dispute, the author will have to demonstrate that the work in question was the result of a human creative process.

Rights of the creative mind behind the idea?

In exceptional cases, it is possible for the output of an AI system to be protected by ancillary copyrights, which do not presuppose the existence of any individual intellectual creations. As a result, AI-generated music can be subject to the ancillary copyright held by the record company in the same way that the recording of mere ambient or natural sounds can be. For linguistic works – as in the case of ChatGPT – only the ancillary copyright for the press can offer protection in rare and exceptional circumstances.

However, AI systems such as Chat GPT often work on the basis of input given to them by a specific human being. At first glance, therefore, it would seem obvious to assign the copyright to the AI output to the person in question. However, a person who merely provides ideas or abstract guidelines does not acquire copyright to the work based on those ideas or guidelines. Therefore, asking ChatGPT to write a poem using rough guidelines does not as a general rule establish a copyright for the user.



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ChatGPT as a tool to aid the creative process

Cases in which the specific nature of the input is directly incorporated into the work created by the AI are to be judged differently. For example, this can be the case if ChatGPT is instructed to rephrase a text composed by the user by following certain guidelines. In this case, the AI system is only being used as a technical tool. In practice, such situations will in future give rise to questions of delimitation that may prove difficult to answer: Is the AI used only as a tool to aid in the human creative process? Or is the output purely an AI creation and thus not protected by copyright?

The creation of content based on other people's works is also subject to similar principles. If ChatGPT merely reworks texts or songs, no use of the output may be made without first obtaining the consent of the original author. It is worth noting that fictional characters in a novel or in a film can also enjoy their own independent copyright protection under certain circumstances. Accordingly, AI-generated sequels or alternative plots could prove to be problematic.

By contrast, works created merely in a certain style are not protected by copyright. So, if an AI system creates an image or produces a text in the style of a particular artist (for example, a painting reminiscent of the style of Picasso) without using parts of previous works in an altered or unaltered form, the output may be reused. However, excessive references to a known artist or even fake works may violate personal rights.

The very uncomplimentary reaction of artist Nick Cave to

song lyrics created in what was purported to be his style with the aid of ChatGPT illustrates the potential conflicts that may arise.

And the programmer?

As a rule, the programmer of AI software is not regarded as the copyright owner of the generated content either. Using an algorithm, the programmer only lays down abstract rules and parameters and is therefore comparable to the creative mind behind an idea, who likewise does not individually shape the work.

If need be, the operator of an AI service could restrict any further use of the output in its terms of use. However, such contractual stipulations are only effective between the service provider and the users, which is why other people cannot be prevented from redistributing the generated content. OpenAI, the operator of ChatGPT, is generous in this respect and grants users all rights to the output of the software.

As a result, this means that the output produced by AI systems in Austria only enjoys protection in exceptional cases. An international comparison shows this is not necessarily the case elsewhere. In the United Kingdom, for instance, the author of a computer-generated work is deemed to be the person who made the necessary arrangements for its creation.



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In most cases, this means that the operator of an AI system acquires the rights to the AI-generated content. The concept of a work is harmonised at the EU level.

Therefore, the Austrian legislator would be precluded from unilaterally redefining the authorship of AI products in this way.

For more information

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