

# 2023 Intellectual Property Owners Association (IPO) Annual Meeting September 11, 2023



## Generative AI & Copyrights

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# Conflicts and Jurisdictional Issues

- Substantive differences in laws e.g. subsistence of copyright, neighboring rights ownership, tests for infringements, defenses to infringement (e.g., no fair use), differences in remedies, notwithstanding Berne, TRIPS, WCT, WPPT, Rome. Copyright is not purely territorial, especially online e.g. reproductions, public performances (also displays), communication to the public, MAR, distribution, with different principles
- Personal jurisdiction
  - EU/UK: Targeting: *Tunein Inc v Warner Music UK Ltd & Anor* [2021] EWCA Civ 441 (26 March 2021)
  - Canada: *Real and Substantial Connection test SOCAN v. Canadian Assn of Internet Providers, 2004 SCC 45*

# Moral Rights Infringement

Article 6b is of the Berne Convention

“Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation...”

# Moral Rights Infringement (cont'd.)

## WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO

“BC-6b is .5. At the 1948 Brussels revision conference, it was clarified that the protection of honor and reputation should extend not only to the honor and reputation of the author as an author (in close relationship with the quality of his work as such) but also to his honor and reputation as a human being (which may concern also such aspects as the context – for example, a politically charged context – in which the work is used). It was emphasized that one of the reasons for the inclusion of the new phrase at that conference was to underline this element. The statement adopted by the conference about this read as follows: “The author will have the right to bring action against any acts prejudicial to his honor and reputation, and the discussion revealed that the author has to be protected not only in his capacity as a writer, but also in the role he plays on the literary stage: it is for that reason that you have added that he could object to any derogatory action, that being understood to mean any action that would be liable to harm the person through distortion of his work.”

# Temporary Reproductions

- Temporary Reproductions [EU 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.
- Art.5.1 Temporary acts of reproduction...which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable...a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.
- *Infopaq International A/S v. Danske Dagblades Forening*, [2010] FSR 20; *Football Association Premier League Ltd v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, [2012] 1 CMLR 29, *Infopaq International A/S v. Danske Dagblades Forening*, [2012] EUECJ C-302/10, *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Ors* [2013] UKSC 18 (17 April 2013).

# Text and Data Mining Exceptions

— Matthew Stratton, Deputy General Counsel, Association of American Publishers, April 14, 2023 “Copyright Framework for TDM: A Jurisdictional Approach”

## Overview of Selected TDM Exceptions

AAP | ASSOCIATION OF AMERICAN PUBLISHERS

	Lawfully-accessed content	Purpose Limitations	Limitations on Users	Permitted to share training data	Rightsholder Opt-Out	Other
<a href="#">EU Art. 3</a>	Yes	Scientific research	Research orgs and cultural heritage insts	No	No	Note 1
<a href="#">EU Art. 4</a>	Yes	No	No	No	Yes/Note 2	
<a href="#">Japan</a>	No	Note 3	No	Yes	No	Note 4
<a href="#">Singapore</a>	Note 5	No	No	Limited/Note 6	No	
<a href="#">Switzerland</a>	Yes	Scientific research	Note 7	No	No	
<a href="#">UK</a>	Yes	Research for non-comm. purpose	Note 7	No	No	

### NOTES

1 Content must be stored securely. Rightsholders may take necessary measures to ensure security and integrity of their networks and databases.

2 The exception does not apply if rightsholders expressly reserve their rights in an appropriate manner, such as machine-readable means in the case of content made publicly available online. W3C has issued a final community [report](#) (non-normative) proposing a web protocol for reservation of rights.

3 Applies to TDM and other cases where the exploitation is “not for enjoying . . . the ideas or emotions expressed in the work.”

4 Exception “does not apply if the exploitation unreasonably prejudice the interests of the copyright owner in light of the natures and purposes of the work, as well as the circumstances of such exploitation.”

5 Requires lawful access but may use infringing copies if unaware

6 User cannot share copies with others, except for verifying the results of the computational data analysis or for collaborative research or study relating to the purpose of such analysis.

7 The purpose limitation implies that non-commercial users in particular are beneficiaries

# Copyright Protection for GenAI Works and Other Related Matter

*Sookman Computer Internet e-Commerce Law*

“The determination as to whether a person is an author of a work created using a computer program will be a factual one. If the person controlling the program can be seen as directing or fashioning the material form of ~~the~~ work, it will likely be protected as a computer-assisted work. **But, if the person does not contribute sufficient independent intellectual effort to satisfy the Act’s requirement for originality, the individual using the program would likely not be considered its author.**”

—*Telstra Corporation Limited v. Phone Directories Company Pty Ltd.*, [2010] FCAFC 149 (15 December 2010)

—*Acohs Pty Ltd v. Ucorp Pty Ltd.*, [2010] FCA 577 (10 June 2010)

—*IceTV Pty Ltd. v. Nine Network Australia Pty Ltd.*, [2009] HCA 14.

—*Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] SGCA 37

—*Camlin Pvt. Ltd. vs National Pencil Industries* on 7 November, 1985, AIR 1986 Delhi 444

# Neighboring Rights Protection

## — *WIPO, Guide to the Copyright and Related Rights Treaties Administered by WIPO*

“The broadest and most up-to-date definition of “producer of a phonogram” is offered in Article 2(d) of the WPPT, under which it “means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.”

“The Rome Convention (Article 3(c)) defines the term as “the person who, or the legal entity which, first fixes the sounds of a performance or other sounds.” (Under Article 3(b) of the Rome Convention, however, “phonograms” are exclusively aural fixations of sounds.)”



# Neighboring Rights Protection for GenAI Works

—U.K. [Copyright, Designs and Patents Act, 1988](#)

—CDPA, s 178 “computer generated”, in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work.

—9(3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

—See, *Nova Productions Limited v. Mazooma Games Ltd.*, [2006] E.W.H.C. (Ch) (20 January 2006), affirmed [2007] EWCA Civ 219.

—Also, Hong Kong, India, Ireland, New Zealand, South Africa.

# Rights Management Information

- TPMs and Rights Management
  - WIPO Copyright Treaty (See also WPPT, USMCA)
  - Article 12 Obligations concerning Rights Management Information
- (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
- (i) to remove or alter any electronic rights management information without authority;
  - (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

# Transparency obligations

## ➤ *EU AI Act (AIA)* Art. 28(b)

“4. Providers of foundation models used in AI systems specifically intended to generate, with varying levels of autonomy, content such as complex text, images, audio, or video (“generative AI”) and providers who specialise a foundation model into a generative AI system, shall in addition:...

c) without prejudice to national or Union legislation on copyright, document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law.

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