



## ARTIFICIAL INTELLIGENCE

### Legal issues and challenges from a GDPR and IP perspective

Artificial Intelligence is nowadays rapidly spreading in the public and private sector throughout the world, including but not limited to, in the fields of education, healthcare system, transport (e.g. autonomous cars), scientific research and agriculture. Some countries, such as the United States are committed to introducing the use of Artificial Intelligence or otherwise called machine intelligence by law enforcement authorities and courts in order to address criminal justice challenges, promote public safety and reduce crime. In February 2019, the Council of the EU adopted conclusions on the Coordinated Plan on the development and use of Artificial Intelligence Made in Europe, underlining the crucial importance of fostering the development and use of Artificial Intelligence in Europe by increasing investment, reinforcing excellence in such technologies and applications, while strengthening research and innovation

collaboration between industry and academia in this field.

Although no formal and specific definition of Artificial Intelligence (AI) exists, it can be described as *“intelligence demonstrated by machines, in contrast to the natural intelligence displayed by humans and other animals”, “any device that perceives its environment and takes actions that maximize its chance of successfully achieving its goals”, “a system’s ability to correctly interpret external data, to learn from such data, and to use those learnings to achieve specific goals and tasks through flexible adaptation”* or as, stated in the UK Information Commissioner’s Office (ICO) paper on “Big Data, AI, machine learning and data protection” issued in 2017 and which should be mentioned as a point of reference *“... giving computers behaviors which would be thought intelligent in human beings”*.

## Artificial Intelligence and the GDPR

AI, in order to function, collects voluminous amounts of different types of data produced from various types of sources, such as people, machines or sensors (called Big Data), personal data included. When the General Data Protection Regulation EU 2016/679 (GDPR) came into force in all EU Member States in May 2018, many questions arose as regards the interaction between AI and the GDPR requirements. In particular several fields of the data privacy obligations might present issues regarding the compliance of AI operation with the GDPR.

In particular:

- According to **Art. 5** of the GDPR, personal data must be always processed lawfully, fairly and in a transparent manner in relation to the data subject. Companies, organizations and AI developers may face problems in ensuring transparency for the users, since they might not want to disclose detailed information on the data processing methods and similar tools, as well as the logic involved due to trade secrecy. Companies, organizations and AI developers might also not be willing to disclose details on data processing due to the complexity of the developed algorithms on which AI technologies are based. Furthermore, the purpose of data processing cannot be always identified and determined from the beginning and it can possibly change during the processing.
- The determination of the lawful basis, on which personal data are processed according to **Art. 6 or 9** of the GDPR (e.g. consent, legal obligation, legitimate interest pursued by the controller, performance of a contract etc.) might be problematic. As mentioned above, companies, organizations and AI developers may not be in a position to provide data subjects with clear and meaningful information about the logic involved in the data processing, details on the rationale behind same, which may consequently prevent data subjects from granting their informed consent.
- Another hurdle, data controllers and data processors involved in AI technologies have to overcome, is the right of data subjects “not to be subject to a decision based solely on automated processing, including profiling” (**Art. 22** as well as Recital 71 of the GDPR), i.e. that individuals can object to an automated decision. AI technologies are broadly used in order to discover individual preferences, predict behaviors, and/or make decisions that may impact individuals’ rights and interests (e.g. recruitment, granting of mortgage, medical disease diagnosis etc.). In any case, such processing should be subject to suitable safeguards, including specific information to the data subject and the right to obtain human intervention, to express its opinion, as well as to obtain a justification of the decision reached after such assessment.
- Finally, due to the complexity of AI technologies, data controllers and data processors may face difficulties in fulfilling the obligation to notify a data breach to the competent supervisory authority without undue delay and

inform data subjects accordingly (**Art. 33 and 34** of the GDPR).

In order for companies, organizations and AI developers to meet their GDPR requirements, they need to plan the implementation of new AI technologies carefully, focusing on protecting individual rights and freedoms, especially the right to privacy. The main pillars of such implementation are the following(s):

- Enhancing transparency on processing of personal data by using a combination of innovative approaches in order to provide meaningful privacy notices at appropriate stages and ensuring that such notices are easily accessible by the data subjects concerned. The satisfaction of the data subjects' right to "explainability" is crucial and so affected companies should organize AI systems in such a way that their methods and procedures can be easily explained.
- Conducting a Data Protection Impact Assessment, as per the GDPR obligation required in case the processing, in particular using new technologies, is likely to result in a high risk for the rights and freedoms of data subjects.
- Adopting and developing privacy by design and by default approach and techniques, by implementing appropriate technical and organizational measures, ensuring integrity, confidentiality and security and by conducting internal and external audits in order to identify *"the rationale behind algorithmic decisions and*

*checking for bias, discrimination and errors"*.

- Ensuring fair and transparent processing in respect of the data subjects, taking into account the specific circumstances and context in which the personal data are processed, by using appropriate mathematical or statistical procedures for the profiling, by implementing technical and organizational measures to ensure that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimized, secure personal data in a manner that takes account of the potential risks involved for the interests and rights of the data subject preventing, inter alia, discriminatory effects on natural persons.
- Developing ethical principles to help reinforce key data protection principles, drafting Codes of Ethics and Conduct based on the protection of fundamental human rights and rule of law safeguards.

### **Artificial Intelligence and Intellectual Property**

So far, intellectual property (IP) protection has been identified with the protection of intangible assets conferred to individuals enabling them in that way to exercise their moral and economic exploitation rights on their creations. However, taking into account the significant growth of AI that has managed to imitate human reactions and methods of problem solving eventually resulting in the generation of works that would normally qualify for IP protection, serious concerns have been raised as to whether the results emanating from the use

of AI should be covered by IP protection and moreover, what consequences might said equation of AI works with human works have. Taking into account the surprisingly expeditious development of AI which permits the creation and composition of works, such as music or artwork, which would normally require for a human intervention, legislators are nowadays facing a major challenge as to the ownership of AI results and in particular, if said justify their protection under the IP legislative scheme.

The discussion on the protection of AI works has been proved quite controversial with a significant part of the scientific community insisting on the traditional interoperation of the works that need to be protected by IP provisions while another part, a more innovative one, suggesting that the aforementioned interpretation of the law is outdated and therefore, a reform of the law both at European and national level is required in order to bring into alignment technological development with legislative protection. While this theoretical and more philosophical approach continues, other issues and concerns emanating from the matter at hand have been raised, which remain unanswered; for example, who would be the beneficiary of economic exploitation in the event that IP protection is granted to AI works? Or who would be liable in certain cases if a claim of infringement of a "traditional IP work" is brought before the courts? On the other hand, if the first scenario prevails and AI creations are not eventually protected under IP, why would someone invest money and effort to develop AI, which, lacking protection would constitute public domain? It goes without saying that, by depriving AI works of their protection under IP law, this would most probably undermine technological evolution and innovation and would be clearly contrary to public interest and humans' welfare that have seen a

significant improvement in their quality of life by enjoying the benefits of AI. The problematic that has been left unsolved refers mainly to the ownership of AI works. Should the user that "feeds" AI with data, resulting in the creation of AI, be considered as the owner of said works? And if not, who would be held liable for damages in case of infringement? Should this depend on the degree of independency of the generated AI works? And if so, would it be possible to claim for compensation against AI? It is apparent that the solution is not straightforward; a middle ground that would compromise all questions and concerns raised by all parties arguing either in favour or against the protection of AI results under IP law must be found. Perhaps a blanket solution is utopic; however, leaving this area unregulated would be detrimental and would constitute an obvious failure of the legislator to cope with the technological progress that necessitates the corresponding appropriate legislative framework to function.

To this end, European Union is currently reconsidering the status of IP rights and the new IPR Directive "On copyright in the Digital Single Market" has now entered into the final phase before being voted on. One of the most worth-mentioning provisions of said Directive refers to text and data mining which provides for a mandatory exception to copyright allowing to carry out text and data mining of protected works without running the risk to be held liable for copyright infringement. This exception, besides being valuable in triggering innovation, would also be helpful to bridge the gap between EU legislation and other jurisdictions which have already tackled the call for a balance between IP protection and technological development. However, it remains to be seen how the EU legislator shall eventually address this challenge and if the right equilibrium shall be met to counterbalance all opposing views.

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