

AI and Copyrighted Works and Protected Designs



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Practice Areas

- Insolvency and Restructuring
- Technology, Media and Telecommunication
- Patents and Life Sciences
- Arbitration and Litigation

Education

- University of Pennsylvania Law School, LL.M. (1989)
- Admitted to the bar in Switzerland and New York (1988/1990)
- University of Zurich, Dr.iur. (1988)
- University of Zurich, lic.iur. (1982)

Memberships

- INGRES, AIPPI, ABA, ASA, LCIA
- Swiss / American Chamber of Commerce
- Various boards memberships

Languages

German, English, French, Italian

Product of AI as Copyrightable Work

CJEU in Infopaq, BSA and Football Association Premier League: the criterion of "the author's own intellectual creation".

- Copyright requires a scope for free, creative decisions in which the personality of the author can express himself or herself.

CJEU in Painer: relevant criteria are whether the work reflects the author's personality and expresses his free and creative choices in the production of the work.

CJEU in Football Dataco: [the author].. expresses .. originality in the selection or arrangement of the data which the database contains.

- The author is the one who intends to fill the available scope by his or her creative decisions. It is irrelevant how and through which tools and aids he or she does so.

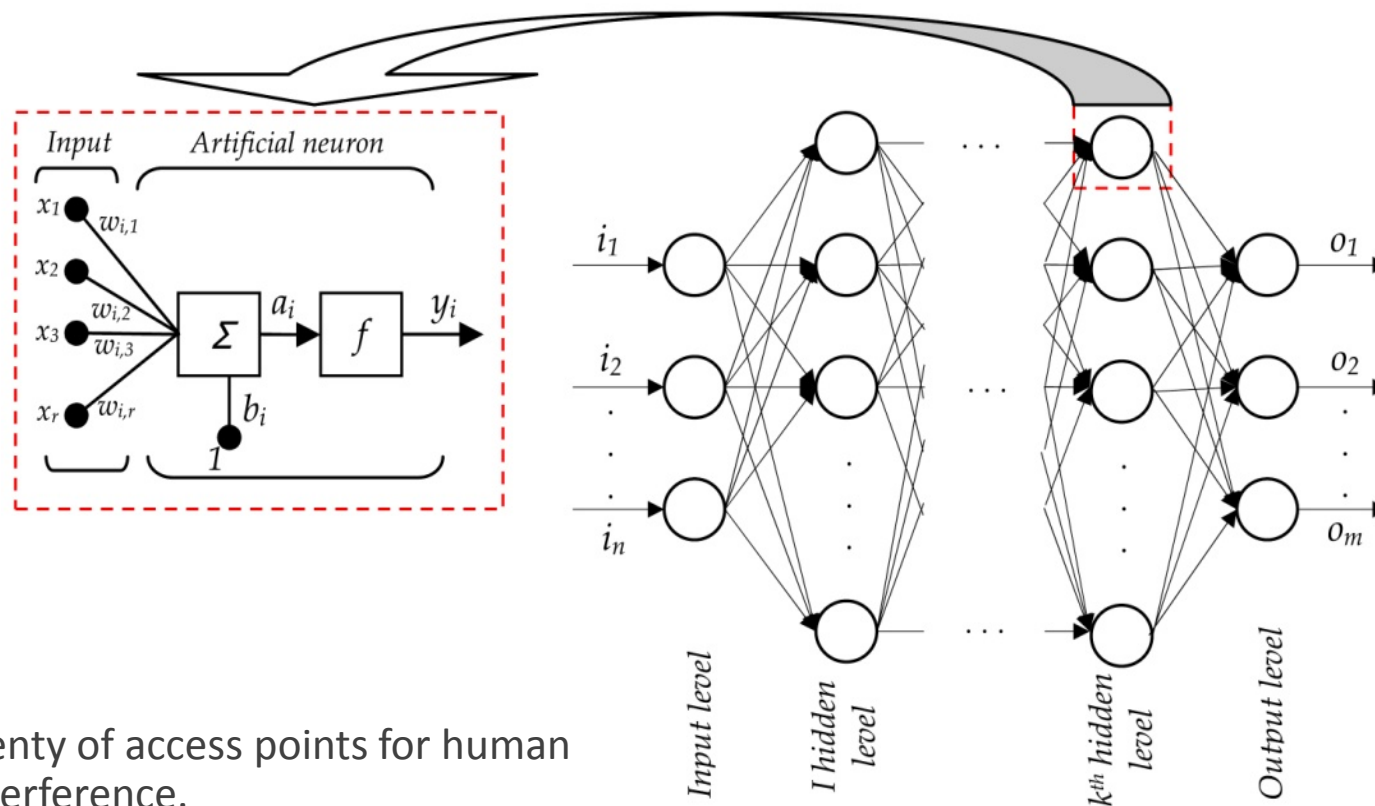
Product of AI as Copyrightable Work

The use of the computer as a tool does not stand in the way of human creative activity, if the use of the computer in the creation of a work involves selection and compilation by the composer to a considerable extent.

- Authors using AI systems are those who set the essential basic patterns, the frame and the goal for the functioning of the AI system.
- The smaller the creative contribution of the author, the more limited the scope of protection.
- No copyrightable work only if created by AI system autonomously, based solely on an idea, but without human interference in any level of the creation process.

Product of AI as Copyrightable Work

A system of an artificial neuronal network.

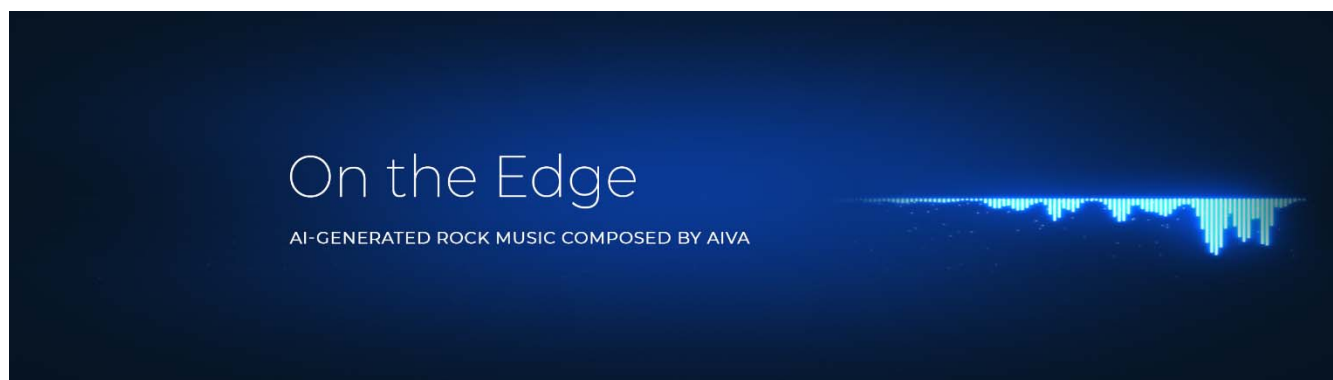


- Plenty of access points for human interference.

Ownership in Product of AI

Machines and apparatus as such cannot be authors of a work in a copyright sense; the author of a work can only be one or several natural persons.

GEMA: No registration of a computer generated work possible.



SACEM: has registered AIVA (Artificial Intelligence Virtual Artist) Music as composer

SUISA: Interesting subject. May have registered AI generated works if the method of creation was not disclosed.

Ownership in Product of AI

- Many authors collaborate in the creation of a work by using an artificial neuronal system: data selection, data modelling, determining weight and presumptions, choice of ideal result and measure of difference, structure of backpopulation.

CJEU in Luksan: Member states are free to introduce a presumption of transfer, of rights to exploit the work, provided that such a presumption is not an irreputtable one precluding the legal author from agreeing otherwise.

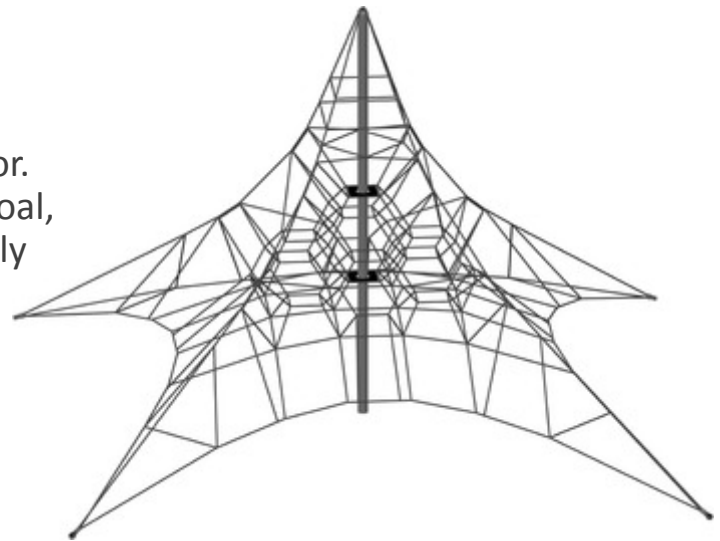
- Presumption in favour of programmer?

AI and Applied Art

German BGH in Seilzirkus (Spacenet)

.... the aesthetic effect of the design can only justify copyright protection to the extent that it is not owed to the purpose of use and technically conditioned, but is based on an artistic achievement.

- The result counts, not the choices made by the author.
Set-up of AI system can be with a purely functional goal, provided the result is not or not exclusively technically conditioned.



AI and Software

5 main tasks of software development:

Software design, Software testing, GUI testing, strategic decision making, and automated code generation

all areas where AI can help.

Existing systems can write code, but require a lot of details to be written down about aim and intent.

AI and Software

bayou

Input to Bayou:

- A “draft program” with variables that are intended to be used in the program.
- A “query” with the intent of the program.

```
out = new  
    BufferedWriter  
(new FileWriter("hello",  
    true));out.write("world");  
catch(IOException e){// ...}  
finally {if (out != null)  
    {out.close();}}
```

Bayou interprets this query by using a neural network on a corpus of program sketches, or abstract models of the program syntax, of existing open source code,

Bayou associates the user’s request to the intent its learned from codes on Github and writes the code for the app it thinks the user wants.

- So the input of the software developer becomes more and more high-level, but remains crucial.

AI and Protected Designs

Community Design Regulation / Community Design Directive: outward appearance of a product or a part of a product which results from the lines, contours, colours, shape, texture, materials and/or its ornamentation; new and having individual character, not for features of appearance of a product which are solely dictated by its technical function (art. 8(1) CDR).

German and Swiss courts: “multiplicity of forms” test, design is not considered as “solely dictated by its function” if alternative designs exist which fulfill the same function.

AI and Protected Designs

EUIPO has (since **Chaff cutters**): “no-aesthetic-consideration” test, a design is solely dictated by its function if every feature of the design was determined by technical considerations, regardless of the existence of design alternatives.

CJEU (**DOCERAM v CeramTec**): modified EUIPO approach.

Excluded from protection are features if:

“the technical function is the only factor which determined those features, regardless of the existence of alternative designs”.

“[A]ll the objective circumstances relevant to each individual case”, including the existence of design alternatives (provided that they are supported by “reliable evidence”) must be taken into account.

AI and Protected Designs

- Protection as registered design for creations of AI poses less problems than copyright protection:
- No human designer required.

But choice between different technical alternatives must be based on esthetic rather than technical considerations.

- Set-up of AI system has to include esthetic considerations when choosing between different functional features.