CAN ARTIFICIAL INTELLIGENCE BE THE AUTHOR OF MUSICAL WORKS?

MusicLM is Google's new generative artificial intelligence (AI), capable of composing complex music pieces from a textual description.

An artificial intelligence is a computer system capable of reproducing behaviour typical of the human intellect, such as, for example, the creation of music tracks autonomously. Underlying the functioning of such a computer system there is the "*machine learning*". The latter refers to machine learning models, *i.e.* systems that allow the machines that use them to recognise specific patterns within the data provided and learn from them without being specifically programmed to do so. A particular subgroup of machine learning systems, called "*deep learning"*, uses deep neural networks to process large amounts of data in a manner similar to the human mind. Thanks to these systems, MusicLM is able to rework the songs at its disposal, creating new musical compositions according to the instructions given.

Although innovative compared to its forerunners, MusicLM has not yet been launched on the market because its activity could infringe the intellectual property rights of third parties. This AI, in fact, uses copyrighted tracks without the consent of the copyright holders, precisely because the system "draws" from already existing tracks to create new ones, thereby creating derivative works or elaborations of already existing works.

Several lawsuits have already been filed against AI image generation systems for allegedly infringing the copyrights of the images included in their databases. For example, in the United States, a collective of three artists sued Midjourney, StabilityAI and DreamUp, companies that own artificial intelligence systems, claiming that these companies would exploit their works without having obtained a licence and without payment for their use. Stability AI was also sued by the Getty Images not only for having used, without permission and without the recognition of remuneration, the images included in its catalogue of photographs for the training of the AI Stable Diffusion created by that company, but also for infringement of its trademark. The images processed by this AI, in fact, bore a watermark reminiscent of that affixed to Getty Images' photographs.

For what concerns the Italian legal system, the training of AI on protected works, if carried out within certain limits established by the legislation, would not constitute an infringement of copyright even if not authorised by the relevant owners. In fact, following the transposition of Directive 2019/790/EU, Articles 70-*ter* and 70-*quater* were introduced into Law No. 633/1941, which added certain exceptions to the exclusive right to reproduce the work, provided for by Article 13 of the same law.

Article 70-*ter* defines the activity of data extraction performed by IA as "*any automated technique aimed at analysing large amounts of text, sound, images, data or metadata in digital format with the purpose of generating information,*

including patterns, trends and correlations". Such an activity could infringe the exclusive reproduction right as it would itself presuppose a temporary reproduction of protected works. However, thanks to the introduction of these articles, this activity is essentially always permitted, and thus both if carried out for the purpose of scientific research and if carried out for profit. In the latter case, for the exception to operate it is necessary that the data and content to be extracted have been obtained legitimately and that the rightholders have not expressly reserved the use of such works.

Works created by artificial intelligences, however, do not only raise the issue of the possible infringement of the rights of third parties, but also give rise to several fundamental legal questions: the question arises as to whether or not works created in this way can be independently protected and who should be identified as their author.

In its judgment No. 1107/2023, the Italian Supreme Court expressed its opinion on this issue.

In the case decided by the Court, the television company RAI had been sued for having unlawfully used as a set design for the 66th edition of the San Remo Festival the image of a flower whose authorship had been attributed to an architect both at first and second instance. Although the ground of appeal raised by RAI was held to be inadmissible, since it was aimed at introducing a new issue for the first time in the court of legitimacy, the Italian Supreme Court nevertheless ruled on the allegedly erroneous qualification by the Court of Appeal of that image as a work of art. RAI, in fact, argued that the work, being generated by a software, could not be attributable to a creative idea of the author.

The Italian Supreme Court first of all recalled that an original work within the meaning of Article 1 of Law No. 633/1941 can be protected only if it is creative and, on this assumption, reaffirmed that this requirement consists "*not in the idea underlying its creation, but in the form of its expression, i.e. its subjectivity, assuming that the work reflects the personality of its author, manifesting his free and creative choices* [...]".

Entering into the merits of the question, the Court underlined that the use of a software to generate an image is not incompatible with the production of an original work of a creative nature and that in order to establish the possibility of protection of the latter, it is only necessary to scrutinise "*with greater rigour*" the "*level of creativity"*.

Consequently, in the case where an artist uses a software to create a work, "*an assessment of fact to ascertain whether and to what extent the use of the tool (has absorbed) the artist's creative elaboration*" becomes essential. The Italian Supreme Court therefore identified human intervention as the determining factor to be considered in order to establish whether or not a work created by an artificial intelligence can be considered a creative work.

These considerations are perfectly in line with the approach that the Court has traditionally adopted so far to interpret Art. 1 of Law No. 633/1941. Indeed, if an original work is protectable only if it has a creative character, understood as the reflection of the author's personality within the work, an IA, insofar as it lacks a personality in the strict sense, can never be the author of an original work.

On closer inspection, it is also necessary to consider that computer systems lack legal subjectivity and, consequently, cannot enjoy either moral or patrimonial rights.

This orientation of the Court would, however, seem to assume that works generated by artificial intelligence for which there is not sufficient human input to warrant protection would fall into the public domain.

However, the application of the public domain to these creations could be a strong disincentive to investment in the sector, since both programmers and users would be completely deprived of protection due to the free usability by the community of the works thus created, thus preventing monetisation of the content.

The solutions to this legal vacuum proposed by the doctrine are diverse, but only a timely intervention by the legislator will be able to bring clarity and adequate protection to the various parties involved in the creation of works through AI.

As was the case with audio cassettes, auto-tune and streaming, the introduction of artificial intelligence in the music industry marks a moment of profound change and potentially great crisis for the entire industry, also due to the lack of legislation.

Artificial intelligence is already widely used by specialist players, *i.e.* record labels and *digital service providers* (DSPs), but also by novice artists and social media users. Indeed, some AI, such as MusicLM among others, facilitate song writing, allowing anyone to create songs through simple written input. This type of AI allows everyone to have a tool through which they can express themselves even without having artistic skills or specific musical competences; but, on the other hand, it risks favouring the populating of the already crowded distribution platforms by songs without quality, which prevent listeners from discovering content resulting from the work of professionals and which, consequently, take away percentages of earnings from the "real" operators in the sector, who deserve to receive an economic benefit.

The implication could be an increase in investments by record companies in tools to help create music content "for all", such as AI, and a consequent decrease in investments in artists' careers and the purchase of related intellectual property rights.

While the legislator will have to try to build a system suitable for the protection of AI-generated works, the music industry will have to strike a balance between democratising content production and selecting quality content.

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