

—Topics on AI Products—  
Copyright infringement by AI products  
Eligibility of AI products as works

## Introduction

The first section of this article briefly explains Article 30-4, item (ii) of the Copyright Act introduced under the 2018 revision. See References 1 and 2 below for details.

By the 2018 revision of the Copyright Act, the following new types of copyright limitations were introduced: "It is permissible to exploit a work, in any way and to the extent considered necessary," "for use in data analysis," "or in any other case in which it is not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in that work; however, that this does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its exploitation" (Main text and item (ii) of Article 30-4). This revision enabled machine learning of a large quantity of content without authorization of the copyright owner as a general rule, if the purpose of the machine learning is not the enjoyment of thoughts or sentiments expressed in that work, as is the case for information analysis for AI system development. This provision can be considered, also from an international comparative view, as enabling a broad range of use of works for AI learning, as it also applies to commercial activities without limitation on types of use of works, encouraging AI system development activity. Japan is sometimes described as a "paradise for machine learning" as it allows the wide of use of works for AI learning.

Meanwhile, The Japan Newspaper Publishers & Editors Association and other organizations have announced concern about the risks, such as "allowing the creation of a large volume of content with no opportunity for copyright owners to benefit from the use value of AI learning would result in the loss of creative opportunities for creators, who will face economic difficulty in continuing creative activities" and "there is a risk of development and dissemination of infringing content largely relying on or similar to original works." It is also sometimes described as a provision that needs to be revised as it does not contemplate the rapid progress and diffusion of generative AI.

## Copyright infringement by AI products

In June 2023, The Agency for Cultural Affairs, the competent authority for the Copyright Act, held a seminar titled "AI and Copyright," and announced its stance toward copyright infringement by AI products in a seminar material.

The seminar material made available by the Agency indicates that copyright infringement by an AI product is to be "determined in the same way as the case where an individual person draws a picture, for example, without using AI." According to the material, the use of an AI product that is "similar to" or "relies on" an existing work infringes upon copyright, unless: (i) a license is obtained from the copyright owner; or (ii) a copyright limitation is applied and no license is required. Therefore, for such activities as uploading AI products including AI-based writing and pictures on the internet or selling their reproductions (e.g., a collection of illustrations), copyright infringement is assessed according to the same criteria for general copyright infringement.

The term "relies on" is understood to mean "accessing another person's work and using it as part of one's own work" (Reference 3). Then, a difficult question arises with respect to AI products generated by AI system users who have no knowledge of the content learned by the AI system. For such products, it is difficult to determine the "reliance" based on past example cases, so the approach and method for assessment remain challenges.

This issue has been discussed also at the Agency. The Agency's seminar material contains comments and opinions, such as: "An AI product should be considered to rely on an original work if it uses the original work as AI learning data," "An AI product could be presumed to rely on an original work if the product uses similar expressions to those of the original work used for learning (in which case the AI user bears the burden of proof that the original work did not contribute to the creation of the AI product)," "Reliance should be found unless the work is the original creation by the AI user and the AI does not enable the outputting of learned works without any modification (original creation by AI)." The future discussions and development concerning this "reliance" need to be paid attention.

## Eligibility of AI products as works

A work is defined as "a creatively produced expression of thoughts or sentiments that falls within the literary, academic, artistic, or musical domain" (Article 2(1)(i) of the Copyright Act). Citing this provision, the Agency's seminar

material states that any work autonomously generated by AI, including a "work generated by AI only by pressing a 'Create' button with no instructions (or with only simple instructions) by a human, like copying a work by using a copying machine, is considered not to fall under a work as it is not 'a creatively produced expression of thoughts or sentiments.'" This material also mentions: "If an AI user is considered to have used the AI as a 'tool' for the creative expression of thoughts or sentiments, it is eligible as a work and the AI user becomes the author." It also mentions: "whether an individual person has used AI as a 'tool' is determined on the basis of whether the person had 'creative intent' and conducted any activity which is considered as a 'creative contribution,'" and "What kind of activity is eligible as a 'creative contribution' is subject to a case-by-case analysis, and requires the overall assessment of each of the phases of AI use for the generation of work." The Agency has announced its intention to streamline and make public the concept of "creative contribution." The discussions and development concerning the concept of "creative contribution" also need to be paid attention.

## References

1. Innovations-i "Copyright information room for patent attorneys"  
Isn't generative AI learning infringement of copyright? What is the "use that does not have the aim of enjoyment of thoughts or sentiments expressed in the work" for which copyright is limited?  
<https://www.innovations-i.com/copyright-info/?id=111>
2. The Agency for Cultural Affairs, material for FY2023 Copyright Seminar "AI and Copyright"  
<https://www.bunka.go.jp/seisaku/chosakuken/93903601.html>
3. Nobuhiro Nakayama, *Chosakukenhō* (Copyright Act), 3th Ed., (Yuhikaku Publishing, 2020), p.709.

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