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**SUBMISSION OF BPI (BRITISH RECORDED MUSIC INDUSTRY) LTD  
TO THE IPO CONSULTATION ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY**

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**INTRODUCTION**

Recorded music provides the soundtrack to the most important moments of our lives. It shapes our culture and sense of national identity. BPI (British Recorded Music Industry) Limited (“BPI”) is the voice of UK record companies – representing hundreds of small and medium sized ‘independents’ up and down the country, alongside the ‘majors’ namely Sony Music Entertainment, Universal Music Group and Warner Music Group. These companies invest in the creators of music, produce and market sound recordings, nurture and support artistic talent, and help bring artists’ creative visions to life and connect them to their fans.

Music has always been an artistic melting pot of human creativity and technological innovation. The musical artistry of composers, songwriters, musicians, performers and producers is expressed through different voices, instruments, technologies and devices. It is enhanced through the creative and technical expertise of the producers, sound engineers and recording studios, and is fixed into a distributable form through innovative technology and tools – from Thomas Edison’s earliest recording cylinders (that gave birth to the recorded music industry in the 1890s), through radio, vinyl, cassettes and CDs, to the vast digitisation of music today.

Artificial intelligence (“AI”) plays a part in technological innovation, ranging from pure machine learning to AI as a tool to assist human creativity. Some examples of the different types of AI at work in the music industry include the following:

- In streaming services, employing AI to analyse data and personalise a user’s experience by creating playlists or recommendations;
- As a tool in the creative process, eg David Bowie famously using an AI style ‘verbasizer’ app to help inspire lyrics; and new artists continuing to experiment and use technology to help with their creativity;
- In mastering and remixing recordings, where AI can be employed automatically using algorithms derived from data on previous recordings, or to find suitable samples for use in recordings;

- In supporting artist development and marketing decisions, eg record companies large and small using AI to analyse music streaming and social media data, or recordings themselves, to help identify potentially successful artists, or to assist in the planning of marketing campaigns or tours; and
- In helping to tackle copyright infringement, using technologies such as audio fingerprint-based content recognition.

### **BPI's OVERVIEW REGARDING AI AND INTELLECTUAL PROPERTY LAW**

**As a matter of good policy making, legislation should only be changed where there is evidence of failure or harm, or where clear benefits can be achieved. In this context, we see no such evidence (nor reason) for change at this stage, and consider the existing statutory framework fit for purpose. We therefore endorse Option 0 in both Section A (copyright) and Section B (text and data mining) of the consultation. We have no substantive comment on Section C relating to patents. Accordingly, we urge the UK Government to continue the discussions concerning AI, but not to take any current legislative steps that could have serious unforeseen consequences as this field develops.**

Copyright is designed to protect the unique value of human intellectual creativity – more specifically to help incentivise and reward the output of human skill, labour and judgment. This essential requirement for human creativity goes back to the creation of copyright law in the UK with the Statute of Anne 1709. It sits at the heart of the leading international copyright treaty (the Berne Convention 1886) and is the core principle of the European copyright framework. As to patents, history goes back to the fourteenth century, when protections were given to tradesmen to protect their unique human craftsmanship.

Unlike human creation, AI operates according to pre-determined parameters, and the quality of the output is highly dependent upon the quality of the input. Accordingly, the notion that AI should be treated the same way as a human brain misrepresents and overstates the current status of technological developments.

What might take a human weeks or months of skill, labour and judgment to create, might take a computer program a fraction of a second. But it is not the jurisprudential purpose of copyright to measure speed. If a computer program itself has been created by sufficient human skill, labour and judgment, then that program can be protected by copyright as a literary work under s.3(1)(b) of the Copyright, Designs and Patents Act 1988 (“CDPA”) reflecting the human expression embodied within it. But the law should not ‘double-dip’ by also giving full copyright work status to the solely artificially generated output.

BPI therefore sounds a note a caution of the unintended consequences of acting too quickly by introducing legislative changes which could upend whole industries and centuries of jurisprudence and which, in any event, may simply not be needed. Perhaps in time, and depending on the circumstances as AI develops, it might be appropriate to even consider a new category of related right. But we do not currently see a problem that needs fixing.

Litigation is a good, and independent, indicator of problems that need fixing. But we are not aware of any recent AI litigation in the copyright sphere that would suggest any such problems. The only copyright related AI litigation in the UK is one, unremarkable, case over 15 years ago (*Nova Production Ltd v Mazooma Games Ltd* [2006] EWHC 24) regarding the issue of authorship under s.9(3) of the CDPA. This would suggest that the market for AI generated content is still in its infancy, and that those engaged in it are successfully using the existing laws. We also note the current patent law litigation (*Thaler v Comptroller General of Patents* [2020] EWCA Civ 1374) which, although not directly relevant to the recorded music industry, has also adjudicated on the position with which we are aligned – namely that intellectual property (“IP”) law protects human creativity.

In terms of possible changes to the text and data mining exception in the CDPA, the existing copyright framework gives rights holders the ability to grant permission for usage on agreed terms to those who wish to use their work to feed AI systems, with a limited exception permitting text and data mining for non-commercial research. In this respect too, the law is fit for purpose in allowing AI innovation to occur. But it should not be extended at the expense of incentives and rewards for human creativity, without which AI innovation would have no input from which to work.

The IPO’s options 2-4 in the text and data mining exception section, in particular, could be seen to suggest that AI generated ‘innovation’ can be fuelled by chipping away at incentives and rewards for human creativity. This would be wrong and self-defeating. It undermines the very human creativity that AI systems cannot operate without. We are strongly opposed to these options.

Additionally, we wish to stress one important point. This relates to data input transparency and record keeping. It is crucial to the development of AI that society is able to trust the law and to hold the creators of AI systems accountable for harm or damage caused by those systems (be it personal injury, property damage, financial harm or copyright infringement). Liability cannot be assessed unless there is transparency around data inputs. Accordingly, there needs to be a clear and unequivocal obligation on AI system owners/programmers to keep clear and comprehensive records of what is inputted into an AI system – with sanctions and an assumption of liability of infringement if they fail to do so.



A2. The recorded music industry does not currently rely on s.9(3) of the CDPA.

**Q3. If we introduce a related right for computer-generated works, as per option 2, what scope and term of protection do you think it should have? Please explain how you think this scope and term is justified in terms of encouraging investment in AI-generated works and technology.**

A3. As explained above, we believe it is premature in these formative years of AI development to introduce new laws or new rights. However, if (and 'if' being the operative word) subsequent developments justify further insight and exploration of legal changes, then we believe that it might (depending on all the circumstances) be appropriate to consider a new category of related right. It is too early to tell what the appropriate scope of any such right might be. It is clear, however, that it would need to fit the practical reality of how AI was being used at the time, how it had been used to date, and how it would likely develop in the future. Introducing a new law to simply meet the then present situation would risk creating a myopic law which would be of more hindrance than help to encouraging investment.

As to any term of protection, there is already in existence a wide variety applicable to different IP rights – ranging from 15 years for database rights to life plus 70 years for musical works – so there is plenty of scope. As to what the term might be for a new related right, again, it is premature to determine, as the position would need to be assessed once any such new right was more fully particularised. However, as a matter of principle, given that copyright protects human creativity, any such new sui generis right would need to have a significantly lesser term than copyright.

**Q4. What are your views of the implications the policy options and of AI technology for the designs system?**

A4. Given the nature of the recorded music industry, we have no definitive view as to AI and designs, save to repeat the key point that IP law exists to protect human creativity and invention.

**Q5. For each option, what are your views on the risk that AI generated works may be falsely attributed to a person?**

A5. We have concerns over false attribution risks, irrespective of the option. It may be necessary to protect artists against unfair uses of their names or likenesses, eg regarding 'deep fakes' and 'in the style of' products created using AI.

Precedent for this already exists in international IP treaties. For example, Article 23 of the Trade Related Aspects of Intellectual Property Rights regarding geographical indications (“GI”) for wines and spirits prohibits the use of a protected GI unless the product was produced in the place indicated by that GI “... even where the true origin of the goods is indicated or ... accompanied by expressions such as “kind”, “type”, “style, “imitation” or the like ...”.

An artist’s likeness, voice and other attributes may not be GI, but they are unique to that individual artist and must be protected from unauthorised imitation or copying by an AI process.

Under existing UK law, the deep fake issue could be addressed under the existing laws of, amongst other things, privacy and passing off. Further, as briefly mentioned in the consultation itself, there may be some remedies available under the Fraud Act 2006. Thought could also be given by the IPO to include in the current work on the potential introduction of a statutory damages regime (in which BPI is heavily involved), the availability for a wronged party to take advantage of a statutory damages remedy for false attribution.

In addition, best practices (and the laws relating to moral rights) in the broader entertainment and book publishing industries include maintaining credits and provenance information. For several reasons (eg credit acknowledgement, discovery, consumer choice, etc) creative content made by humans could be labelled as such to identify that the work in question was not merely AI generated. Identifiers could also be considered as a means to distinguish between content produced in different ways, similar to our thoughts on GI above, and protect artists, authors, producers, publishers from practices that may not necessarily contravene IP laws per se, but which seek to freeride off of their creativity and investments. Such identifiers would also support consumers in making informed choices about the content they wish to consume.

## **Section B – Text and Data Mining (“TDM”)**

### **IPO Options**

Option 0	Make no legal change.
Option 1	Improve licensing environment for the purposes of TDM.
Option 2	Extend the existing TDM exception to cover commercial research and databases.
Option 3	Adopt a TDM exception for any use, with a rights holder opt-out.

Option 4	Adopt a TDM exception for any use, which does not allow rights holders to opt out.
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**Q6. If you license works for TDM, or purchase such licences, can you provide information on the costs and benefits of these? For example, availability, price-point, whether additional services are included or available, number and types of works covered by the licence etc.**

A6. The music industry has developed a broad range of licensing solutions and we work continually with technology companies to facilitate licensed innovation. Accordingly, the market can and already does address uses of creative works in AI processes. Maintaining a strong UK copyright framework will only serve to encourage innovative partnerships and allow relationships between the creative and tech sectors to flourish.

BPI cannot share commercially sensitive information relating to our individual members in this response. What we can share is that we have some concerns about the collective phrase ‘text and data mining’ and its further derogation to the acronym ‘TDM’ in the context of music industry copyrights. Indeed, we question whether s.29A of the CDPA relates to music copyright at all.

As set out in the leading textbook Copinger and Skone James on Copyright (18<sup>th</sup> Ed at paragraph 26-65) “the phrase ‘text and data mining’ is a conflation of two processes by which researchers are able to find trends and correlations across academic literature. Text mining converts text designed for human reading into structured data for computer processing (data mining)”. Music is not ‘text’ and it should not be derogated to cold ‘data’. Music is the product of human endeavour and creativity.

The phrase also obscures what we think the consultation is actually getting at in this regard, namely the copying of music copyrights and inputting them into an AI system to enable machine learning to generate ‘new’ outputs. We comment further on this below, the essence being that a licence (freely negotiated) should be required in such circumstances.

**Q7. Is there a specific approach the government should adopt in relation to licensing?**

A7. Licensing of music copyrights for the use in AI should always be required, and the decision as to whether or not to licence should always vest with the copyright holder. There should be no mandatory licensing.

**Q8. Please rank the options [as set out above] in order of preference (most to least preferred) and explain why?**

- A8. Our ranking is as follows:
- (1) Option 0
  - (2) Option 1
  - (3) Option 2
  - (4) Option 3
  - (5) Option 4

The existing law, namely s.29(A) of the CDPA, should not be changed or watered down in any way. Again, we question whether s.29(A) relates to music copyright at all. But in any event, to water it down would give greater ability to those wishing to take unfair advantage of music copyrights. This would harm existing rights holders and we strongly oppose it.

An obvious example is where existing compositions or sound recordings are used by machine learning applications to generate output ‘in the style of’ the input music. It would be entirely inappropriate to undermine the copyright protection in those compositions/sound recordings, and those who have invested creatively and financially in them, if the exploitation of the outputs were allowed to hide behind a non-commercial research exception. As currently drafted, s.29A makes it quite clear that the purpose of any research must be for non-commercial computational analysis, and that if such ‘research’ is used for commercial purposes there is no defence to infringement.

Moreover, an AI developer wishing to create new ‘sound alike’ recordings does not *need* access to the original copyright recordings. Rather, they *want* access in order to produce commercially attractive recordings that can be monetised. Introducing exceptions to allow for such uses in the name of innovation would be seriously misguided. It must be for the right holders of the existing works to determine whether to license such uses.

The music industry has developed a broad range of licensing solutions in the last decade and works continually with technology companies to facilitate licensed innovation, including in relation to AI. The reproduction (or any other uses) of sound recordings, either for the purpose of analytics or for the purpose of creating new, competing, sound recordings, are activities which record companies have a legitimate interest in deciding whether or not to license. As such, any limitations to record producers’ rights of reproduction in the context of uses of recordings in AI processes would not be justified by arguing a market failure, or any other societal benefit reason. It would also be incompatible with the Berne three-step-test.



Overall, our view is that there is currently no evidence to support a change to the copyright exceptions framework. The UK has already introduced exceptions that allow for copying in certain cases to enable technology to work more effectively. Further, the rapid development of AI under current copyright rules demonstrates that copyright has not been an obstacle.

Weakening copyright protection by introducing new exceptions would harm creators and reduce the quality of the output of different AI applications – and thereby their general relevance. The market has demonstrated that enabling the development of AI does not require or justify new exceptions to copyright.

As we have stated above, the real-life application of AI is still in relative infancy and the nature, extent and future impact and development of the uses of AI remain unclear. It would be imprudent, in our view, to consider broader exceptions, particularly before it has been demonstrated by clear evidence that the existing copyright framework and existing or potential market solutions are not sufficient.

There is simply no basis to force the creative industries to subsidise AI developers through exceptions.

**Q9. If you have experience of the EU exception with opt out for rights holders, how has this affected you?**

A9. We do not have any experience that licensing is preventing text and data mining from taking place. The UK is not subject to the new EU Copyright Directive and, in any event, transposition of its provisions on text and data mining has been delayed for many EU Member States, so there is little evidence at present.

**Q10. How would any of the exception options positively or negatively affect you? Please quantify this if possible.**

A10. We refer to our answer to question 8 above.

### **Section C – Patents**

We do not intend to respond to questions 11-17 given that patent law is not an area of IP law with which BPI and record labels have significant interaction.

However, as stated above, we note the recent AI related litigation concerning patent law (which unlike copyright creates a monopoly) and which has been the subject of three

decisions, one from the IPO, one from the High Court and the most recent from the Court of Appeal (namely *Thaler v Comptroller General of Patents* [2020] EWCA Civ 1374). In each case the applicant, Dr Thaler, sought to have AI software registered as the inventor of two inventions. But in all three cases, Dr Thaler failed because patent law requires a human inventor. There is no such thing as legal neutrality between AI and humans.

## **ABOUT THE BPI**

BPI promotes and safeguards British music and champions the UK's innovative recorded music industry, the world's third largest and the second biggest exporter of recorded music (after the US).

BPI's membership consists of nearly 500 independent music companies and the UK's three 'major' record companies, which together account for up to 85 per cent of legitimate domestic music consumption and 1-in-10 music streams around the world.

BPI works with labels and artists to promote British music on the international stage. This includes support through numerous trade missions as well as through the Music Export Growth Scheme, which since 2014 has awarded over £4 million in government funding to nearly 300 music projects, with a focus on independently signed artists.

BPI provides valuable insights, training and networking with its free masterclasses and presentations and through a variety of programmes and events, including strands on technology and diversity.

BPI owns and organises the biggest night in the music calendar, the annual BRIT Awards with Mastercard, and the Mercury Music Prize. It also co-owns the Official Charts Company and runs the BRIT Certified Awards programme, recognising artist achievement with the iconic Platinum, Gold and Silver Awards.

BPI established and funds The BRIT School in Croydon (the UK's leading Performing and Creative Arts School, which is free to attend) through The BRIT Trust charity, which has donated over £26m to music education and wellbeing charities, including Nordoff Robbins (the UK's largest independent music therapy charity).

BPI is happy to be contacted by the Intellectual Property Office regarding any elements of this response and of the consultation more generally. In that regard, our point of contact is [REDACTED]