

Annex - Response form

After you have read the consultation document, please consider the questions below. There is no expectation or requirement that all questions are completed. You are welcome to only answer the questions that are relevant to you, your business or organisation.

A copy of this response form is available to download from GOV.uk.

There are two sections on this form:

A. Questions arising from this consultation

B. Information about you, your business or organisation

When you are ready to submit your response, please email this form and any other supporting documentation to Alcallforviews@ipo.gov.uk.

The closing date for responses is at 23:45 on 7 January 2022.

The options for computer generated works, text and data mining and patent inventorship are summarised in the following tables.

Computer generated works	
Option 0	Make no legal change
Option 1	Remove protection for computer-generated works
<u>Option 2</u>	<u>Replace the current protection with a new right of reduced scope/duration</u>

Text and Data Mining (TDM)	
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
<u>Option 4</u>	<u>Adopt a TDM exception for any use, which does not allow rights holders to opt out</u>

Patent Inventorship	
<u>Option 0</u>	<u>Make no legal change</u>
Option 1	"Inventor" expanded to include humans responsible for an AI system which devises inventions
Option 2	Allow patent applications to identify AI as inventor
Option 3	Protect AI-devised inventions through a new type of protection

Section A

Copyright – computer generated works (CGW)

1. *Do you currently rely on the computer-generated works provision? If so, please provide details of the types of works, the value of any rights you license and how the provision benefits your business. What approach do you take in territories that do not offer copyright protection for computer-generated works?*

As a legal academic, I engage and reflect on the provisions on computer-generated works [REDACTED]¹ but I cannot say that I 'rely' on them. When I practiced law in Italy, the lack of protection for computer-generated works was never perceived as a problem as when computer generate valuable works contracts and technological measures can be used to protect them.

Please rank these options in order of preference (most to least preferred) and explain why.

Option 2

Option 1

Option 0

My preferred option is **No 2**. In theory, no protection for computer-generated works would be more consistent with the justifications of copyright and would benefit both the general public interested in accessing works and human creators who would not need to suffer from the unfair competition of machines. However, in practice there is the risk that owners of computer systems, developers, etc. would exploit the legal vacuum and effectively monopolise the relevant creations by technological, factual, and contractual means [REDACTED]² This was well illustrated in *Ryanair v PR Aviation*.³ Accordingly, a legal framework that ensures **minimal protection to computer-generated works whilst setting forth binding non-circumventable user rights** would strike a fair balance between the competing interests of the relevant stakeholders.

Option 1 would have the benefit to bring UK copyright law in line with the requirement of originality, that is the author's own intellectual creation. It would however create the risk that the user rights and freedoms implied in the copyright defences could be nullified through contracts, technological measures, and the manifold manifestations of private power.

Option 0 would have the benefit to wait for further evidence before changing the law. There is however the risk that human creativity be harmed by the increasing use of AI in the creative industries.

¹ [REDACTED] 'Machine rules. Of drones, robots and the info-capitalist society' (2016) 2 Italian Law Journal 367-404.

² [REDACTED] 'Artificial Intelligence and Databases in the Age of Big Machine Data' (2019) 25 AIDA 2018 93-149.

³ [2015] 2 All E.R. (Comm) 455.

2. *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.*

Considering the speed that AI can generate ‘creative’ works and the risk that this poses to human creators, this related right should be as short as possible. I would suggest a **3-year** term of protection similar to the unregistered community design right. I would recommend that this new right should not be an Intellectual Property Right, strictly speaking. A **tort law-approach**, similar to the one instantiated by trade secrets, would be preferable. The law should clearly define the circumstances under which the unlawful use of a computer-generated work should lead to tortious liability but the computer-generated work itself should not be someone’s ‘property’, strictly speaking. This solution would encourage investments by providing an unregistered quick-to-obtain form of protection while making sure that human creators and the public are not harmed.

Copyright – text and data mining (TDM)

Please rank the options in order of preference (most to least preferred) and explain why.

Option 4

Option 3

Option 2

Option 1

Option 0

My preferred option is **No 4**. The UK was the first country in Europe to introduce the TDM exception in 2014; it has been reported that ‘research libraries (...) acknowledge that their researchers benefit from performing computational analysis on large amounts of information’ (Stannard 2015, 235). In March 2021, UK Government recognized the importance of “Improved copyright exceptions to support innovation and research”. Section 29A (‘text and data analysis’) stipulates that the person making the copy must have **lawful access** to the work (e.g. a library user) and it is unclear whether research organisations and cultural heritage institutions will always qualify as lawful users. Another shortcoming of the provision is that it applies only to the **reproduction right**, whereas many of the activities required by AI-powered data mining and research involve other restricted acts e.g. communication to the public. Most concerningly, under the current regime if the **copy is transferred to any other person** other than the initial lawful user the former would expose themselves to copyright infringement. As the transfer of copies and secondary uses can be authorised by the rightsholder, data licensing can lead to curatorial bias. Finally, as the TDM exception is limited to the sole purpose of **non-commercial research**. This engenders a grey area regarding public private partnerships, commercial research conducted by universities, and non-commercial research conducted by private companies. I would agree with the large coalition of colleagues

who argue that the TDM exception should be reconceptualised as a right to research (Academic Network on the Right to Research in International Copyright) and that “there should be no need for a TDM exception for the act of extracting informational value from protected works” (Margoni & Kretschmer 2021). Finally, I would urge the UK to take a leadership role on a global scale and push for an International Instrument on Permitted Uses, as envisaged by the Max Planck Institute for Innovation and Competition (Hilty et al. 2021).

Patents

3. *Please rank these options in order of preference (most to least preferred) and explain why?*

Only option **No 0** would be acceptable. **Inventors must be human beings** and opening up to AI inventors would undermine human ingenuity, would be contrary to the international standard of inventorship, and would run counter the justifications of the UK patent system. The main risk is that AI-generated inventions would supplant human inventions and decrease incentives for human inventors, to the detriment of UK innovators and society at large. It must be recognised that companies increasingly use AI often as an aid to invent (AI-assisted inventions) and, to a lesser extent, to generate inventions (AI-generated inventions). For AI-assisted inventions, the inventive step requirement should be adjusted to reflect the use of AI e.g. by replacing the person skilled in the art with a team equipped with AI. For AI-generated inventions, the IPO should be equipped with tools to detect AI-generated inventions falsely presented as human-generated. A criminal offense should ban the attempts to make-up human authors in AI-generated inventions.

Section B: Respondent information

A: Please give your name (name of individual, business or organisation).

[REDACTED]

B: Are you responding as an individual, business or on behalf of an organisation?

- 1) Individual – please provide your name

[REDACTED]

C: If you are a responding on behalf of an organisation, please give a summary of who you represent.

D: If you are an individual, are you?

- 1) An academic
2) A law professional (non-practising)

H: The Intellectual Property Office may wish to contact you to discuss your response. Would you be happy to be contacted to discuss your response?

Yes, I would.

I: If you are happy to be contacted by the Intellectual Property Office, please provide a contact email address.

[REDACTED]

J: Would you like an acknowledgement of receipt of your response? Yes