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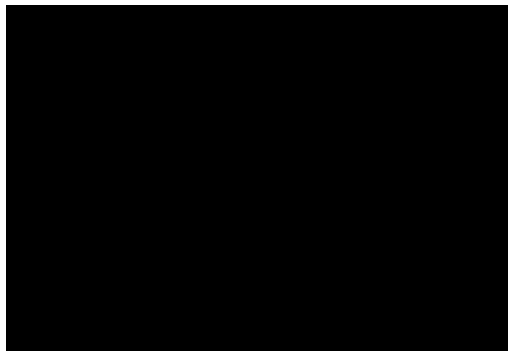
Dear Sir or Madam

Consultation on AI and IP covering: copyright in works made by AI; text and data mining using copyright material; and patents for inventions devised by AI ("Consultation")

We set out below the responses to the Consultation on behalf of the members of BAPLA.

Please do not hesitate to contact me if you would like further information or clarification of any of the statements made in our submission.

Yours faithfully,



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
Option 2	Replace the current protection with a new right of reduced scope/duration

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
Option 4	Adopt a TDM exception for any use, which does not allow rights holders to opt out

Patent Inventorship	
Option 0	Make no legal change
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?***

BAPLA, licensors of copyright in visual works such as photographs, films, graphic works and drawings, as further described in Section B of our response, do not report that they rely on s. 9(3) of the Copyright, Designs and Patents Act 1988 (**CDPA**) in asserting copyright ownership of works that they represent. This is, generally, due to the following reasons:

- a) s. 9(3) has received little to no judicial consideration, creating a risk that if our members' assertion of copyright in a CGW were to be challenged, they would have to rely on the lengthy and expensive court process (as such dispute would be too complex for IPEC) with unclear prospects of success.
- b) Copyright vesting in works of human authors is universally accepted and serves as a strong basis for copyright protection and licensing.

It bears noting in this context that technology companies that offer software, such as Adobe Photoshop which provides visual creators automated tools to create or enhance their works, take an unambiguous position that copyright vests with creators. Adobe does not claim ownership of copyright in modifications of content manipulated with Adobe tools. This is consistent with the role technology has always played in relation to works of human creativity – to assist and not create. It is on this very basis technology companies benefit from protection from copyright liability (under the “mere conduit” provisions of The Electronic Commerce (EC Directive) Regulations 2002) and manufacturers of equipment enabling infringement (photocopiers or, in the past, audio and video recorders) are absolved from liability for unauthorised copying. Technology (digital or otherwise) is and should remain solely a tool for human creators.

- c) A provision equivalent to the UK CGW protection is not present in other jurisdictions. BAPLA members often offer global or multi-territory licences and consider it impractical to rely on a right in a work not recognised elsewhere.
- d) In light of the legal uncertainty noted above, copyright licensors are concerned that licensing CGWs would create uncertainty for their clients/licensees in downstream use, and erode the licensors' business models. In order for BAPLA members to earn revenue on licensing content, they must make every reasonable effort to prevent unauthorised uses. Often, protection against infringers is an express assurance given to clients seeking exclusive (and thus higher value) licences. Enforcement of copyright in a work not recognised in other jurisdictions would be difficult, if not impossible in practice. This would undermine the value of licensed works and may deter clients from seeking licences.

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

Given BAPLA's views on CGW, we would rank the proposed options as 1,0, with option 2 rejected.

- a) Option 1 (remove the CGW provision) would remove the uncertainty discussed in question 1.
- b) Option 0 (do nothing) would retain the status quo. The visual licensing industry has functioned with it, and so in the short term this can continue. Our concern is, however, that technology companies interested in securing copyright for CGW would be motivated to rely on it. The AI sector could assert CGW in works produced by copying existing works. While it is a recognised principle of copyright law that an infringing work may nevertheless be protected by copyright, the potential scale and speed of creation of AI output would leave human creators powerless against the tide of machine infringement. Very few BAPLA members would have the means to pursue AI companies whose very *raison d'être* depends on copying and who are generally better funded. Armed with a property right, technology companies would be even more difficult to challenge than the social media platforms (the IPO will be aware of the calculated and persistent copyright infringement by the latter). Remedying this potential future problem may require legislative intervention similar to Article 17 of the DSM Directive in the EU.

On balance, therefore, BAPLA's preference would be to remove the provision rather than maintain the status quo.

- c) Option 2 (replacement of the current provision with protection of reduced scope/duration) is proposed in the Consultation document as a potential compromise which aims, on the one hand, to incentivise the development of the AI industry, and on the other hand, to draw a distinction between works created by humans, and those produced by a machine. In the Consultation document, such right is compared to certain neighbouring rights in the CDPA.

BAPLA does not favour a new neighbouring right for the following reasons.

- i) It is doubtful that the AI development is incentivised by the creation of a property right in the machine output such as synthetic images. The development is already afoot and fast-paced despite the absence of such protection. The price per work among BAPLA members has generally decreased over the last 20 years. Creation of synthetic output will increase the supply of works and further drive the value down. It is unlikely therefore that copyright in output is a driving force in the development of the AI.
- ii) Copyright is concerned with the protection of works of human authorship. Although neighbouring rights have been extended to composite works (such as film) and the transfer of works in the form of a broadcast, this does not detract from the main preoccupation of copyright: works created by humans with a stamp of their personality, judgment, skill and effort. This test cannot be applied to a machine.
- iii) If the current CGW provision were to be replaced by one of a different scope, it is BAPLA's position that such right should exist outside the copyright regime. A *sui generis* database right is a comparable example. An introduction of such right must be without prejudice to the rights

of authors. If the “sui generis” CGWs were produced by copying existing copyright works, CGW owners should be required to obtain a licence for the use of the underlying works.

It is unclear how any new CGW protection would be treated in other countries. As it would be a legislative outlier, owners of the rights may have difficulties enforcing them in other jurisdictions. For digital technology which, by its nature, is global and borderless, territorial rights are of limited use.

As a final note, the term “computer” does not have a legal definition under copyright law. Any legislative intervention would need to address what machines qualify as producers of protectable content.

- 3. *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.***

We refer to our response in question 2 above.

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

N/A

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

We refer to the response submitted by Getty Images on this question. We support in particular, Getty Images’ position on promoting ethical, legal and responsible innovation, and preventing fraud and misinformation under the guise of technological progress.

We strongly support Getty’s proposal that CGW producers be required to keep records of works used in the production for audit by rightholders. Best practice would need to be agreed, ideally, as part of the IPO’s work on new technologies.

We note that certain emerging technologies, such as the distribution of non-fungible tokens and other blockchain products, are dependent on clear chain of title and audit trail. Muddying the waters by granting a right supporting lack of transparency, could undermine development of technologies other than AI. Non-fungible tokens have enthusiastically embraced visual works as their medium (e.g. <https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million>), creating a new revenue opportunities for the creative industry. It is crucial for the industry that these opportunities are not impaired. It is also key that any legislative change is technology-neutral.



Copyright – text and data mining (TDM)

- 6. *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.***

The agencies represented by BAPLA represent a treasure trove of image and textual data. BAPLA members generate revenue for and manage the interests of over 120,000 image creators and rightholders, encompassing a breadth of experienced and new young image-makers across the UK. Licensing digital content online is the significant driver of the image industry. BAPLA members include various national and regional museums, managing extensive image databases.

To provide just one example, one of our members holds over 460 million assets in its collection (of which over 330 million are digitized).

Customers look to authoritative sources of image content like that of our members, for the variety of content but also for the associated metadata offered – not just loose images, but the full package of image and metadata, arranged in a painstakingly careful manner.

Data licensing deals are still relatively rare. One of our largest members reported that commercial organisations routinely scrape data without permission, hiding behind anonymous IP addresses and VPN connections. Many BAPLA members do not have the resources to track data scraping. However, where data licensing happens, the transaction costs of licensing images for machine learning are typically comparable to licensing images for other purposes, often discounted based on volume use.

Licensing of data for computational analysis would benefit the wider public. At present, the costs of cataloguing, key wording and data management are passed on to clients and customers seeking copyright licence. These costs are significant and, based on feedback from bigger members, can amount to over £100 per image when including overheads, or between £5 – 10 per image on an incremental (maintenance) basis. Such costs could be recouped from licensing of data.

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

BAPLA supports innovation in AI and believes that a well-balanced and clear regulation of content licensing is needed for the benefit of both our members (content licensors) and of businesses using AI. The lack of regulation risks rampant and indiscriminate copying, creation of synthetic content, and destruction of much of the vibrant world-leading image industry.

BAPLA members have invested significantly (time, effort, financial and human resources) in curating their visual and metadata databases. There is a widespread concern that the commercial interests of data users will prevail over the interests of data creators. The reality is that the former cannot exist without the latter and data creators must be treated accordingly – they deserve remuneration for creating the rich repositories of data.

BAPLA would welcome the publication of guidance on training AI on copyright works, emphasizing the non-commercial scope of the TDM exception. Codes of practice and model licences would also be helpful in shaping industry practices. Collective licensing could play a role, with collective management organisations (**CMOs**) developing AI licensing schemes on behalf of the rightsholder CMOs represent.

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

0 and 1 in parallel, rejecting options 2,3,4.

BAPLA believes that the current TDM exception is well-balanced and should remain unchanged. The exception offers access to data for non-commercial purposes, thus reserving commercial uses of content for computational analysis to the market, i.e. the commercial negotiation between data creators and data users.

This is consistent with the goal of creating a data-driven economy underpinning the National AI Strategy. One of the mantras of AI developers is “Garbage in – garbage out” meaning that the better the data on which AI is trained, the better the output, and vice versa. Industries which have been investing in the creation of structured, organised and keyworded data – the raw material fuelling AI – should continue to be entitled to offer access to the raw material for a price. The IPO’s guidance and the facilitation of the creation of codes of practice or model licences would be extremely useful in supporting data markets.

The Consultation document states that “updated guidance on the definition of non-commercial research and what might constitute fair dealing could be produced. This would give both researchers and rightholders greater clarity about what can and cannot be done under the exception.” Depending on how clear and helpful the guidance, option ‘0’ together with licensing assistance as set out above would be the most equitable combination.

‘2’ = Extend the existing TDM exception to cover commercial research and databases

‘3’ = Adopt a TDM exception for any use, with a rights holder opt-out

‘4’ = Adopt a TDM exception for any use, which does not allow rights holders to opt out

Options 2, 3 and 4 would be grossly unfair to content providers. Content providers have invested significantly (time, effort, financial and human resources) in curating their visual and metadata databases. There is a widespread concern that the commercial interests of data users will prevail over the interests of data creators. The reality is that the former cannot exist without the latter. And if data is of such value to AI innovators then data creators must be treated accordingly – they deserve remuneration for creating the rich repositories of data.

In respect of rights holder opt-out (option 3), we note that there has, so far, been no successful UK copyright scheme adopting an opt out mechanism. BAPLA members represent a global portfolio of visual works and thousands of foreign contributors. Their content is publicly available on members’ websites. How should opt out work for foreign authors? What notices would be served? BAPLA members are likely to pre-emptively opt out all of its content thus removing any benefit of option 3.

We note the legislative exception for use of copyright works for computational analysis adopted by Singapore in November 2021. In case this were to be a precedent which the IPO were minded to follow, we stress that the Singaporean creative sector is a small fraction of the British creative industry. The latter has produced a vast number of copyright works of great value, including for computational analysis. Depriving the creative sector of the opportunity to benefit from the fruits of their labour could further depress its revenues already suffering as a result of the pandemic.



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

N/A

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

As mentioned above, content providers have invested significantly (time, effort, financial and human resources) in curating their visual and metadata databases. The transition from analogue to digital is just one example of the labour involved in the work of content creators, not to mention keyword hierarchies, thesauri, translations, third party rights management, continued assessment and improvement of photographic specifications, including professional lighting as well as scientific methods of data capture, enhanced navigation, enhanced viewing (such as IIF). In the case of museums and cultural collections, they are not just a filing cabinet of curiosities but behind each image is an object, continuously studied, interpreted and researched, so the records are continuously updated – the work is never finished. Accordingly, creative content is not 2-dimensional or straightforward. As mentioned already, behind each image may be an object, potentially of great significance, even sacred, belonging to a particular culture that may not appreciate being datamined! BAPLA's history is full of transition, adaptation and the price per image constantly decreasing, while creation costs do not decrease at the same rate. Exceptions that avoid the need to seek a licence will expose the creative industry to a legislative disadvantage not only depriving it of a revenue stream but potentially, through the creation of synthetic content, reducing the need for human generated content. In the world overloaded with information, quality images with authoritative metadata are more important than ever to help cut through the noise, and deserve rigorous legislative support.

Section B: Respondent information

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

BAPLA, the British Trade Association for Picture Libraries and Agencies

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

1) Business – please provide the name of your business

2) Organisation – please provide the name of the organisation

BAPLA is the British trade association for picture libraries and agencies

3) Individual – please provide your name



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

This submission is on behalf of BAPLA, the British trade association for picture libraries and agencies, representing over 110 members of a unique area of the creative industry. We have a broad and diverse membership of image rightholders and purveyors, from sole traders to major news, stock and production agencies, as well as many SMEs, archives and cultural heritage institutions. The majority of BAPLA's membership consists of small and medium enterprises (SMEs) accounting for approx. 72% of the membership, with 28% as sole traders.

Our members are the main source of licensed images you see every day in print and digital media, and as such have contributed to the UK economy for over 40 years. BAPLA members generate revenue for and manage the interests of over 120,000 image creators and rights holders, encompassing a breadth of experienced and new young image-makers across the UK. Licensing digital content online is the significant driver of the image industry.

BAPLA members have invested heavily over many years in technological innovation allowing them to move from analogue to digital, digitising millions of images of great historical and artistic value in order to offer access to digital copies through an extensive and adaptable range of licensing solutions. Significant investment is made on an ongoing basis to accurately keyword and add metadata to almost 1 billion images available to licence in the UK, allowing for seamless customer experiences on the one hand, and full remuneration of creators on the other.

D. If you are an individual, are you?

- 1) **General public**
- 2) **An academic**
- 3) **A law professional**
- 4) **A professional in another sector – please specify**
- 5) **Other – please specify**

n/a

E. If you are responding on behalf of an organisation, are you?

- 1) **An academic institution**
- 2) **An industry body**
- 3) **A licensing body**
- 4) **A rights holder organisation**
- 5) **Any other type of organisation - please specify**

An industry body



British Association of Picture Libraries & Agencies

F. If you are responding on behalf of a business or organisation, in which sector(s) do you operate? (choose all that apply)

- 1) *Agriculture, forestry and fishing*
- 2) *Mining and quarrying*
- 3) *Manufacturing – Pharmaceutical products*
- 4) *Manufacturing – Computer, electronic and optical products*
- 5) *Manufacturing – Electrical equipment*
- 6) *Manufacturing – Transport equipment*
- 7) *Other manufacturing*
- 8) *Construction*
- 9) *Wholesale and retail trade; repair of motor vehicles and motorcycles*
- 10) *Transportation and storage*
- 11) *Information and communication – Publishing, audio-visual and broadcasting*
- 12) *Information and communication – Telecommunication*
- 13) *Information and communication – IT and another Information Services*
- 14) *Financial and insurance activities*
- 15) *Real estate activities*
- 16) *Scientific and technical activities*
- 17) *Legal activities*
- 18) *Administrative and support service activities*
- 19) *Public administration and defence*
- 20) *Education*
- 21) *Human health and social work activities*
- 22) *Arts, entertainment and recreation*
- 23) *Other activities – please specify*

Creation and licensing of content

G. How many people work for your business or organisation across the UK as a whole? Please estimate if you are unsure.

- 1) *Fewer than 10 people*
- 2) *10–49*
- 3) *50–249*
- 4) *250–999*
- 5) *1,000 or more*

BAPLA employs fewer than 10 people, but represents over 100 members who, in turn, represent interests of over 120,000 image creators.



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

Would you like an acknowledgement of receipt of your response? Yes/No

Yes please.