Music Publishers Association

Music Publishers Association AI open consultation questions

Question 1. Copyright protection for computer-generated works without a human author. These are currently protected in the UK for 50 years. But should they be protected at all and if so, how should they be protected?

Options

- 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

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

MPA: Option 0, at this stage, is the only option available to us.
The consultation describes computer-generated and artificial intelligence software creation relating to music copyright as 'AI' and AI created 'music' content as 'AI work'. Note that the MPA herein addresses AI works as being 'musical works' and does not refer to recorded or software rights.

The market for AI works is still developing. Technological developments will exponentially evolve the possibilities for the content output of AI applications. (e.g. *Sounddraw.io, Musenet, Melobytes.com*). Consumer demand for AI content services and AI musical works has yet to become established and will likely develop according to regional differences in consumption cultures and accessibility to different content services. Until markets and models crystalise, stakeholders and rightsholders can only begin to assess any impacts and opportunities for their related assets.

Given this fledgling stage of development for the creation and use of AI works, it would be premature for the UK Government to intervene in this immature market that has not yet provided sufficient evidentiary data and practical experience of engagement with AI works by all stakeholders. Below, we outline, in particular, the uncertainties created by (a) varied definitions and characterisations and (b) differing legal interpretations in relation to works created by AI applications (AI works).

(a) **Variance in definitions**: Inconsistent uses of language around AI leads to misunderstanding, starting with the definition of artificial intelligence as well as its possibilities. Understandings of specific AI software models and of General AI will not necessarily be relevant or applicable to AI applications within the creative sector. Relying on re-interpreting legal terms originating in the 1977 Whitford Committee report to describe artificial intelligence is unhelpful. Therefore, we strongly recommend first agreeing more specific language for AI products which relate specifically to creative content (such as music) when discussing these issues. The definition of computer generated works in the CDPA (Section 178, CDPA 1988) excludes any works involving a human author, save for cases in which AI applications are used as a mere tool for the creative process (such as LANDR). Variance also arises when comparing UK to non-UK case law, such as the (controversial) "Suryast" case, where the decision gave joint (or co-)authorship to an AI author and a human author (c.f. Registration A-135120/2020 dated 2 Nov 2020 – "Suryast" in India).
We need to establish a new, cohesive and universal language surrounding AI works to enable discussions on artificial intelligence between all stakeholders, lawyers, policy makers, software developers and rightsholders.

We note the recent Court of Appeals decision assessing amongst others whether AI would qualify as an inventor under the Patents Act. All three judges agreed that the law requires a person as an inventor and that a machine could not be an inventor, even if it created the invention. *(*Thaler v Comptroller-General). In the case at hand, the owner of the patent (a

human) was not in dispute. Furthermore, any conclusions on an industrial property (patent) case are not transferable to intellectual property (copyright) questions, given the ample philosophical and legal differences between the two rights.

(b) **Variance in Legal interpretations**. Some preliminary observations:
There are no legal precedents concerning AI applications in relation to copyright, despite artificial intelligence having been used in the content-making process for decades. This implies that in practice, legal interpretation has rarely been required.

- Question 1 only refers to works generated by artificial intelligence with reference to computer generated works in Section 178 of the CDPA, consequently excluding works created with the assistance of, or jointly with, humans (Sections 10 and 10A, CDPA) and other subject matters benefitting from protection by copyright such as sound recordings, broadcasts, films (c.f. Section 1 CDPA).

- Although Section 9(3), CDPA concerns the authorship of computer-generated works without involvement of a human author (Section 178, CDPA), this provision does not apply to works created by a human author using AI applications in the creative process (which would be subject to Section 9(1) CDPA).

Section 9 (3) CDPA does not address the question of whether an AI work is protected by copyright, which seems to be the main issue of the academic discussions on the copyright status of AI generated works. Under current law such literary, musical, dramatic and artistic works have to be original (based on human creativity), to qualify for protection. As it stands, purely AI works do not fulfil the requirement of originality. Furthermore, it should be noted that any legal interference in this framework would be limited to the UK, given the clear position on this subject in the European Union and the United States which exclude non-human productions from the scope of copyright protection.

In the one, relevant UK court decision on computer generated works (*Nova Production v Mazooma Game, 2006*) Kitchin J examined whether a specific (computer-generated) work qualifies for copyright protection based on Section 1 CDPA, i.e. whether it constitutes an original literary, dramatic, musical or artistic work. It was determined that authorship is only relevant only if a human authored work is present in the first place.

- It's also important to note that sound recordings, broadcasts and films do not have an originality requirement and will need to be considered differently.

Re: Options 1 and 2:
The potential removal or replacement of Section 9 (3) CDPA – i.e. taking options 1 and 2 - seems irrelevant for the protection of AI-generated works, as outlined above. This leaves option 0 the only option currently available to us.

2. 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?

No. Music publishers do not rely on Section 9 (3) CDPA which deals with the authorship of AI works. Music publishers obtain the rights in literary or musical works through contractual transfer (licence or assignment) from the songwriters and composers who initially create the work.

As the AI works provision (re: authorship of a work) has only been tested in one legal decision to date (*Nova Production vs Mazooma Game*, as above), Section 9(3) isn't relevant to our present work.

At a practical level, composers have been embracing new technologies within the creative process for decades. Music publishers have been using new technologies such as AI applications in their workflows (such as for meta-data management) and have been investing in relevant AI applications.

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 do not think that the introduction of a related right for AI generated works is necessary at this early stage of development. We are not aware of any market-based claims in favour of a new, related right for AI works. Investment in AI works can already be remunerated and incentivised by the protection of the underlying software (as software). We understand that the current use of AI applications is subject to software licenses which could potentially extend to the output, without adding undue complication to copyright frameworks and understandings.

Should any new right be considered, we strongly recommend using new and specific language explicitly addressing AI works (and we would prefer the term '*computer generated'* for rightsholder and consumer clarity).

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

N/A. We have no experience with the designs system.

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

The issues here relate to falsely attributing AI works to the incorrect person. There is a material risk that AI works may be falsely attributed to a person who did not create them, which would falsely attract copyright. This can be seen in another sector of the creative industry, the fine arts. For example, the quality of the output of the *Next Rembrandt* project could lead to AI generated artworks being falsely attributed to the famous human painter. This presents issues for copyright, moral rights, consumer rights and piracy. It is only a matter of time until AI works will sound like they have been created by a human composer, leading to the risk of false attribution (c.f. the current project to finish Ludwig Van Beethoven's 10th symphony – which happens to be out of copyright).

We suggest practical solutions to avoid such false attribution. For instance, requiring AI works created to be soundalikes or added to music services etc, should be explicitly identified as such to both consumers and rightsholders. For example a clear identifier 'flag' as AI work when presented to consumers and service users and an identifier within work data (eg watermarking) to avoid confusion with musical works.

Further, in the UK, existing laws are not sufficient to protect a person against false attribution, the only option is *passing off*. Unlike the US, UK law does not provide for a *personality right* protecting against false attribution.

Current *moral rights* laws in the UK also do not provide sufficient protection. Section 84, CDPA which attempts to protect against false attribution, is limited in scope (e.g. it only applies for 20 years after the death of the author). Additionally, the infringement of moral rights in the UK does not trigger deterrent remedies given the low damages granted for any infringement. Lastly, computer generated works are not protected by the moral rights of paternity and integrity (express exclusions in Section 79(2) and Section 81(2) respectively).

Question 2. Licensing or exceptions to copyright for text and data mining (TDM), which is often significant in AI use and development.

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

Option 0 – with an underlying undertaking of '*do no harm'* to copyrights, where the text/data relates to rights ownership (e.g. musical works meta-data).

Text and data mining generally describes the automated computational analysis of information in digital form, such as text, sounds, images or data to gain new knowledge. It is far beyond the intention of this exception to it to the (unpermitted) copying of compositions and composition data, for mainly commercial purposes. Moreover, most musical works cannot be reduced linguistically to mere data. The threat of new exceptions will increase the threat of piracy, not least given that rightsholders will initially establish the parameters of the new exception, which will require an unworkable burden of proof on them.

If you license works for TDM, or purchase such licences, can you provide information on the costs and benefits of these? For example, availability, pricing, whether additional services are included or available, number and types of works covered by the licence. Please also consider the benefits that TDM provide to you and your colleagues.

We are not able to provide information on the costs and benefits of the licences by individual companies because of competition laws (for a trade association) and confidential business practices about the scope, availability, and the pricing of licences (for individual companies).

Individual music publishers are licensing their repertoire as far as is commercially viable and allowed by the underlying contract with the composer. Often composers have a prior approval clause in their contract for specific uses such as synch or adaptation, which necessitates express permission by the individual composer for the use of their works in the AI (ML) process. Some composers might not want their works to be used in a certain way which might include their use as part of an AI works process (creating content to compete with their own). It is their prerogative as a fundamental principle of copyright law.

Given that the existing text and data mining provision, Section 30A CDPA, does not apply to the commercial music industry, no information is available on its benefits. Any information we would provide will only be estimated on a presumed wording of a hypothetical, new exception and would therefore be of little evidentiary value.

We consider that option 4 would potentially be the costliest for music publishers, particularly given the expected and costly legal proceedings necessary to establish the actual parameters of such exception.

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

No. Licensing enables flexible contractual arrangements between all interested parties, according to their requirements. Government has no role in (and the market presents no failure to warrant) interfering with such licensing arrangements. We repeat our general observation that the market is still developing and contractual arrangements including licensing are still developing. For example, it is not clear whether business models for AI works will be based on subscription to a software licence or a transfer of rights. We are not aware of the practical demand for such licenses at this time.

Government might have a positive role to play in promoting the need for these voluntary commercial licences for any ingestion of copyright-protected material, to ensure that the original creator has sanctioned and benefits from the authorised use of their works and in encouraging robust record keeping of all works ingested. It is also important that output from tools producing AI generated works is distinguishable from human created works to provide the consumer with information they may value when making choices around consumption. As above, an obligation to apply watermarking or other identifier technology at the point of creation will support options available for providing greater transparency to the market.

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

Option 0 is preferred. At this stage, with no data on technological progress and future market developments, nor a common understanding of the technology and the law applied, the only logical option is not to do anything. Legislation would be based on uneducated guesses which would be at best, negligent. For this reason, the other options are all ranked beneath option 0 with option 4 being the least preferred.

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

N/A. This question seemingly refers to the opt-out provided under Article 4(3) of the Directive Copyright in the Digital Single Market 790/2019/EU, which we have no experience with.

However, given that we operate in a connected global environment, we suggest that a UK-only approach would be irrelevant. Users as well as rightsholders are able to operate from any location in the world and consequently, applying an exception that is too broad might lead to the off-shoring of the UK music (software) industry.

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

Any current exception option removes rights from composers and music publishers. Regardless, the impact of a new exception for the use of works to train the AI application as part of the machine-learning process depends on its actual wording. An exception which benefits commercial operators by removing the need for permission from the creator or rightsholder does not fulfil the public-policy purpose of an exception nor does it uphold the current protections afforded by copyright. Instead, the composer and music publisher would be subsidising the development of the tech sector instead of being duly remunerated for human originality and creativity.

It is not possible to quantify the actual impact of the various options for an exception. However, we submit that Option 4 would be the costliest for rightsholders. We expect that under Option 3, rightsholders will naturally opt out and Option 2 will still require lawful access. Option 1 refers to a licensing environment for TDM. Music publishers are exploring available options but as stated, licensing often requires the composer's approval which cannot be coerced or circumvented.

At this point in time, option 0 seems to be the only practical approach, given that any developments and/or reconsiderations should maintain an underlying obligation to do no harm to existing copyright protections or understandings.