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Artificial Intelligence and Intellectual Property: copyright and patents

techUK's response to the Intellectual Property Office consultation

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[redacted]

About techUK

techUK is a membership organisation launched in 2013 to champion the technology sector and prepare and empower the UK for what comes next, delivering a better future for people, society, the economy and the planet.

It is the UK's leading technology membership organisation, with more than 850 members spread across the UK. We are a network that enables our members to learn from each other and grow in a way which contributes to the country both socially and economically.

By working collaboratively with government and others, we provide expert guidance and insight for our members and stakeholders about how to prepare for the future, anticipate change and realise the positive potential of technology in a fast-moving world.

Our response:

techUK has provided responses to the relevant questions raised in this consultation below given the focus for our members. However, we would welcome an opportunity to discuss further and in more depth the issues that this consultation and our response raises.

Copyright

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

Members' preference would be for 'Option 0: Make no legal changes'. It is felt that the existing legal framework is sufficient and well equipped to address potential copyright issues at this stage. There is no evidence to suggest that the current framework is creating any problems. Also, UK case law to date remains focused on issues related to simple computer generation of content (such as Nova vs Mazooma[1]) and not more advanced AI issues. Given that AI technology is still not that far advanced changing the law at this time is seen as premature.

'Option 2: Replace the current protection with a new right of reduced scope/duration' currently lacks detail, risks creating legal confusion and therefore is difficult to support. There may be differences between copyright and this other right that are substantive and so this option opens up several questions such as, what is eligible? How would this right be asserted? And what remedies could be available for it? Also, Option 2 suggests the duration of protection of works would be chosen to reflect the effort or investment put into their creation. This creates difficult questions such as how much investment needs to be made to warrant protection? And how much of this effort needs to be generated by a human vs. computer? Given the many questions and issues that are raised by Option 2 (as was seen in the responses to the first IPO consultation in this area), and the lack of evidence to support the introduction of a new right, maintaining the existing legal framework (Option 0) is therefore favored. There is also some concern about the impact on organisations of the introduction of a new UK only right, particularly SMEs in the growth area of AI, that operate not just in the UK but internationally, including that such a new right would not fall under the

[1] http://www.musiclawupdates.com/?p=3075#:~:text=In%20Nova%20Productions%20Limited%20v,players%20could%20win%20cash%20prizes.

principle of national treatment of any reciprocal copyright arrangements under the Berne Convention on Copyright or under any other international treaties.

'Option 1: Remove protection for computer-generated works' is unpalatable and should be avoided. It is also not clear or outlined in the consultation what impact the removal of protection could have. For example, it could introduce confusion in UK copyright law where there is currently clarity and could lead to unintended consequences such as disincentivising company investment in this area. Also, removal of the protection for computer-generated works runs the risk of people trying to re-allocate protection into the only other remaining category, which is AI used as a tool.

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?

Given techUK's role as a trade association we are unable to provide details on individual company's activities.

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.**

There is currently limited detail on option 2 and so therefore it's difficult to support. In addition, there is a general concern here that the possible introduction of different terms and protections for computer-generated works and computer-assisted works could lead to additional complexity and confusion in the UK copyright regime.

If option 2 was to be selected ideally the provisions applying to the new right under this option would be very similar to current copyright provisions, therefore maintaining the current status quo. There should also be guidance alongside any change made that make it clear that provisions for computer generated works should not be used as a way to circumvent other copyright protections.

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

No comment

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

This potential risk is not perceived as a current issue by our members. Further clarity is needed on what exactly is meant by 'falsely' attributing a person.

Option 0: provides some level of legal stability. Any of the other options creates more legal uncertainty, at least within the UK. There is also a concern that introducing a different approach and protections for computer-generated, and computer assisted works could actually lead to the incentivisation of false attribution.

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, 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.**

Given that the details, including costs, of TDM licence agreements between parties are commercially sensitive information it is not possible to share such information.

It is important to remember that licensing for TDM already exists today and is an everyday reality for many organisations in our data driven economy. For example, there will be situations where organisations that license their own works for TDM may also have separate licences in place with other organisations for TDM of others' content. This may in fact be across different areas or business units of the same organisation. In these situations, licence agreements can provide an effective way of securing access to copyright protected content for the purposes of TDM and flexibility and legal clarity and certainty for organisations, particularly in development markets such as data and AI, and can also help to encourage investment in new innovative data services and development of high-quality content.

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

Discussed in answer to question 8.

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

As mentioned above techUK is a trade association with a broad membership. We have many members with different business models that are working hard to drive forward the UK's data economy. As a result, we have diverse views on the different options outlined in question 8. We are therefore unable to provide a preferred order for the options and can only provide specific views and points on each of the options provided. Input and views on each of the options (in the order outlined in the consultation) are below:

Option 0 : Make no legal change

There is a view that the current position (Option 0) could do more to encourage legitimate collaboration between non-commercial research institutes and commercial research institutes. Currently there is a limited exception which applies to non-commercial research which is not clearly defined and may prevent a non-commercial research institute collaborating with a commercial research institute.

Option 1: Improve licensing environment for the purposes of TDM

For many of our members licensing is viewed as preferable to exceptions which are seen by some as a blunt tool that can create uncertainty around what exactly is allowed within the exception and may lead to increased litigation to determine the parameters of a new exception. Meanwhile a licensing contract is seen as a very clear tool that sets out in precise legal terms what you can and can't do with content and the ownership of both inputs and outputs. In addition, however, improving the licensing environment should be looked at. For

example, it is suggested that one option the IPO may wish to consider with regards to licencing is the creation of model licences which could be particularly useful for SMEs.

Some members hold the view that TDM is an automated way for organisations to read content they already have access to and therefore should not be subject to additional licenses. There is a view that where TDM users have legal access to copyright-protected work, for example through a license or where it is publicly accessible, additional license to mine that content for the purpose of TDM should not be needed. This view is heavily contested by some other members given the two use cases for the content are different, and believe it is right that commercial organisations enter into commercial negotiations when seeking to benefit from the value created by one parties' investment.

Option 2: Extend the existing TDM exemption to cover commercial research and databases

There are concerns that the parameters under 'Option 2' are not clear which could lead to more disputes and possible copyright infringements which would be difficult to monitor and take enforcement action against. For example, if both commercial and non-commercial research are permissible under the exception, then the entire weight of the exception would come to rest on the definition of "research". This could create unnecessary problems, confusion and uncertainty.

There are many of our members that are also concerned at the lack of an opt-out under Option 2 and the impact that this could have on their current operations, as well as future investment in the creation of new data services and tools, and what this could mean in terms of their ongoing investment in the UK's data economy. This could also have a broader impact on the UK's wider research landscape and future investment in content and technical access tools that enable TDM and AI.

In addition, there are members with concerns that providing an exemption for commercial research would prevent the ability of copyright holders to exploit their copyright as required under the Berne Convention.

However, there are also members that believe 'Option 2' could help to facilitate collaboration between commercial research institutes and non-commercial research facilities which could help to strengthen the UK's status as a leader in AI research.

Option 3: Adopt a TDM exception for any use, with a rights holder opt-out

While there are members that welcome an approach that would mirror the EU's, there are also concerns about the nature of the opt-out in option 3, and whether the opt-out can be applied retroactively. From techUK's perspective, opt-out must not be retroactive if it's to have the intended benefit of improving AI research. Removing data due to opt-out once the processing and testing an AI/ML model has begun would be difficult administratively and technically. Given the administrative and financial difficulties of removing data due to retrospective opt-out, option 3 could also chill investment in AI research, which would be contrary to the rationale of introducing an exception in the first place. We would welcome further details on questions on how this opt-out would work in practice.

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

Some members are against Option 4 as the ability to maintain an opt-out is seen as vital to retaining a functioning data economy in the UK - particularly those members that have

invested in the creation, development and availability of data and databases in the UK. There is a concern that without an opt-out, and with an unlimited scope, the time and investment made to create high-quality content and possible competitive advantage developed in the fast-moving areas of data and AI, and emerging business models based on data monetisation, could be lost. This could undermine the investment that leads to the high-quality content that is useful for AI. It is also important to remember that the data held by an organisation could be commercially sensitive or may be sensitive when used in specific situations or use cases. There is concern that without an 'opt-out' organisations working in nascent areas of data and AI would be disincentivised from sharing data in the UK and also possibly discouraged from investing and supporting the UK's data economy into the future. There is also a concern that a broad exemption could lead to increased infringements and the creation of derivative works which could be difficult to control and enforce against.

However, there are other members that do support Option 4 as they believe it would enable and accelerate access to training data which is a key factor in creating high-quality, and enhanced AI models. Also there are members that would welcome alignment by the UK with the license-free approach taken by Singapore which is seen as a less restrictive, and pro-innovation approach, when compared with the EU's (in particular the EU Directive on Copyright in the Digital Single Market (Directive 2019/790)[2]. A similar approach to Singapore is also being taken by Japan which should also be considered. However, it should be noted that as the content industries in both Japan and Singapore are smaller as a proportion of their overall economies compared with the UK this is a factor that should be taken into consideration when considering the possible impact of this option.

There are members that also hold the view that where copyright owners' works are lawfully acquired by users, rights holders are able to use non-copyright- measures to restrict access, such as paywalls or using access-credentials and therefore see an opt-out as not necessary. However, there are other members that see these as separate issues that should not be conflated. This is a complicated area where differences in views need to be recognised and considered further.

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

Within the EU there is work underway to develop machine readable opt-outs, so that where data is publicly available it doesn't require manual checking for the existence of an opt-out. This approach is being increasingly adopted across the EU however given implementation by EU Member States is not yet complete it is too early to assess the impact of its implementation.

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

If you cannot get access to data for TDM purposes without going through contractual or licencing process then the negative effect is that an organisation may be constrained in their ability to do TDM, which is essential to AI development in the UK. However, this is an area

[2] European Alliance for Research Excellence, Singapore's new text and data mining exception will support innovation in the digital economy, 20 July 2021, https://eare.eu/singapores-new-text-and-data-mining-exception-will-support-innovation-in-the-digital-economy

where there is a lack of evidence of a problem given other solutions, such as licensing, do exist and where further information gathering may still be needed.

Further clarity is needed on how broad the exception, under Option 2 and Option 4, might be. It is likely to chill innovation if parties cannot reasonably restrict the use of data which may be sensitive and if use in a particular application may result in an unfair advantage from the investment made by another party.

Inventorship

Based on input from our members and our preference for no legal changes at this time, techUK will be responding to question 11, in this section only.

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

The initial views on the options outlined in the consultation provided below are based solely on the limited details provided in the consultation document. This is an area where we believe further information and level of detail is needed, including on the potential impact and possible consequences of the changes proposed in this area such as reduction of legal clarity and misalignment with other jurisdictions, before a more developed opinion can be provided. This is an area where we would welcome an opportunity to discuss these options in more detail following the consultation. However, at this time our views on the options are below.

- Option 0 'make no legal change' is techUK's preference so that the status quo is maintained. Given the stage of development AI systems, and AI's status as a tool for humans (rather than an inventor) it is premature to consider a change to the law in this area.
- Option 1 expanding the term "inventor" to include humans responsible for an AI system which devises inventions is undesirable and restrictive as the UK would have created a new right that isn't recognised in other countries. Businesses want legal certainty when they move between different jurisdictions and this approach creates a divergence.
- Option 2 ' Allow patent applications to identify AI as inventor' creates many legal complications that would require clarification. One such area that would need clarification would be overall ownership of patent protected inventions by organisations.