UK MUSIC

November 2020

Artificial intelligence - IPO call for views (Copyright & Related Rights)

UK Music submission

UK Music welcomes the opportunity to input to the IPO's Call for Views on artificial intelligence. As the umbrella body representing the collective interests of the UK's commercial music industry, we have focused on the Copyright & Related Rights section of the Call for Views.

There is already a range of uses and applications of AI technology in the music industry and we welcome the potential related creative and commercial opportunities. For example, composers and performers have been using AI applications in their creative and production process for some considerable time, supported by music publishers and record companies. Collective management organisations also successfully use AI applications to drive efficiencies and enhance data in the course of administering the rights entrusted to them by right holders.

Before answering the specific questions posed by the IPO, we put forward two key observations on artificial intelligence which are highly relevant to the appropriate treatment of both existing works and "AI-generated" works in the music context:

- We recognise the importance and value of human creativity (and investment in that creativity), Human creativity is fundamental to copyright. We agree with the IPO statements that *"copyright is centred on human creativity"* granting a *"natural right to creators, protecting their works as expressions of their personalities"*.
- The use of existing copyright works in the AI machine learning process requires the express permission of right holders; existing exceptions do not apply and the introduction of a new specific AI exception is neither warranted nor justified. A voluntary licensing model can and should be the preferred solution, facilitating access to existing works by the AI sector but ensuring right holders are fairly protected and remunerated.

<u>The use of copyright works and data by AI systems</u>

1. ***"Do you agree with the above description of how AI may use copyright works and databases, when infringement takes place and which exceptions apply? Are there other technical and legal aspects that need to be considered?"***

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We agree with the approach set out in the Call for Views, dividing the activities of AI applications into two distinctive elements, machine learning and AI output. In particular, we agree with the following IPO statements:

- *"Machine learning systems learn from data which may be protected by copyright or other rights. For example, a system which generates music may be trained using multiple musical works, each protected by layers of copyright which may be infringed."*
- *"Some AI systems … are capable of creating copies of existing protected works. When they do this without permission copyright will be infringed."*

We do not believe any of the current copyright exceptions would (or should) apply to the use of existing copyright works in the AI machine learning process, and instead such use requires the express permission of right holders (who should be entitled to determine whether to license, and to set appropriate terms). A voluntary licensing model can and should therefore be the preferred solution to facilitate such permission. See further our answer to Q3 below.

One important practical issue is that, where machine learning involves the ingestion of multiple existing works, once the AI application has generated a "new" work it will potentially be next to impossible to identify which existing works were used (and, in the absence of a licence, infringed). It is therefore vital to deal with the licensing of existing works for machine learning prior to ingestion, with appropriate identification at that stage of the works being used (any of which may then potentially have some bearing on the AI output works); this is relevant for the scope of the licence as well as the distribution of licence fees to the relevant right holders.

We would welcome IPO investigation into feasible options for technical measures to support this process of identifying existing works being ingested, alongside e.g. general requirements for record keeping in this regard.

Similarly, we would call for appropriate measures to ensure the clear identification of AI "output" works as having been generated in that way – for example, through a digital watermark included in the AI output.

2. *"Is there a need for greater clarity about who is liable when an AI infringes copyright?"*

Even under a voluntary licensing model, there are likely to be instances where this use of existing works takes place without obtaining such a licence. It is therefore very important for right holders to have clarity regarding who is liable for those infringements (on the basis that the AI application itself is not a legal person capable of being the infringer), particularly in view of the range of parties likely to be involved in the production of AI generated works, including (but not limited to) the AI developer, the AI "trainer" and the person "instructing" the AI application to generate a particular work.

On a practical level, another issue in relation to infringement by an AI application will be the identification of the works infringed. Hence, the importance of the early identification of the works proposed to be used in the machine learning process. This will enable more efficient and comprehensive licensing of the relevant works (or clarification that the relevant rightsholder does not wish to make those works available for ingestion) and consequently reduce infringement.

3. *"Is there a need to clarify existing exceptions, to create new ones, or to promote licensing, in order to support the use of copyright works by AI systems? Please provide any evidence to justify this."*

We believe there is already clarity that existing exceptions would not apply. Specifically, in the context of music (Emphasis added):

- Section 29A CDPA provides an exception for text and data mining in the UK:

  "*The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that— (a)the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work* ***for the sole purpose of research for a non-commercial purpose,…"***

  This does not apply for the reproduction of works during the machine learning process since it is not for the sole purpose of research for a non-commercial purpose.

- Section 28A CDPA provides an exception for temporary copying:

  "*Copyright in a literary work, …, or in a dramatic, musical or artistic work, … a sound recording or a film, is not infringed by the making of a temporary copy which is* ***transient or incidental,*** *which is an integral and essential part of a technological process and the sole purpose of which is to enable—…*

  (b)a ***lawful use*** *of the work;*
  and which has no ***independent economic significance.***

  This does not apply for the reproduction of works during the machine learning process: it might not be transient, if the computer constantly has to refer to its "repertoire" during the process; the use is only lawful if licensed; and given the importance of the ingested works for the AI application it has independent economic significance.

The IPO goes on to pose the question: *"Is there evidence and support for new exceptions, or should we explore other approaches such as increased support for licensing?"* A new exception (presumably for the reproduction of existing works as part of the machine learning process) would be misplaced and legally erroneous:

- Misplaced because it would not benefit the public good (in contrast to text and data mining for non-commercial research) but is instead likely to relate to commercial activities.
- Legally erroneous because it infringes the three-step test; in particular, it conflicts with normal exploitation and unreasonably prejudices the legitimate interests of rightholders.

A new exception would shift the balance unfairly against rightsholders and, whilst we note the government's stated objective to support the AI sector that should not be at the expense of creative industries such as music.

Instead, we strongly support a solution based on a voluntary licensing model (whether for collective blanket licensing of works or more specific licensing of particular repertoire), which can be a "win-win" which ensures right holders can be fairly protected and remunerated whilst facilitating access to existing works by the AI sector.

4. *"Is there a need to provide additional protection for copyright or database owners whose works are used by AI systems? Please provide any evidence to justify this."*

Generally, the existing copyright framework is sufficiently robust; however, as noted in response to Q1 above, we would welcome IPO support regarding the introduction of measures to ensure identification of the works used in the machine learning process and to identify AI output e.g. through watermarking and/or by introducing a general requirement of keeping records.

Protecting works generated by AI

5. *"Should content generated by AI be eligible for protection by copyright or related rights?"*

It is very important here to distinguish between different meanings of "generated by AI" and to draw the key distinction between AI as a tool assisting the human creative process and full AI generation of new works without any human input.

For example, in the music context, cases where AI applications assist writers and artists with their creative process should follow the usual copyright rules for works and performances regarding the subsistence of copyright, with the result that the writer or artist is still the author/owner of the work (subject of course to whatever contractual arrangements may be in place with e.g. a record label or a music publisher). It is important that the law and its interpretation does not wrongly designate authorship/ownership to AI applications or their developers etc in such cases; just as when a human creates a musical work using a piano, neither the piano nor the piano manufacturer have copyright in that work.

As stated as a key principle at the start of our submission, copyright fundamentally exists to protect and reward creative human endeavours. Given the philosophical and legal basis of copyright, we find it difficult to envisage fully AI-generated content being protected by copyright in the same way as a human-created work is protected (leaving aside the debate as to whether fully AI-generated works with no human input are currently possible in any meaningful form).

That is not to say that a related form of IP protection for fully AI generated content might ultimately be appropriate if proven necessary to encourage and protect investment in these technologies. However, the reality is that it is currently too early to define precisely what if any form this should take (and certainly it should not unduly distract from grappling with current and very real consideration such as the treatment of existing works for machine learning purposes) and we would caution against rushing to legislate at such a pace that it runs the risk of unintended consequences.

6. *"If so, what form should this protection take, who should benefit from it, and how long should it last?"*

As commented above, these are not necessarily straightforward questions to answer and the Call for Views acknowledges that stakeholders are expressing a range of views.

Respectfully we would suggest that these topics require further consideration, discussion and development before it would be appropriate to try and specify exactly how fully AI-generated works might be protected – especially at a time when the rapid development of AI technology potentially represents a "moving target".

7. *"Do other issues need to be considered in relation to content produced by AI systems?"*

The delineation between AI as a tool and fully AI-generated works might be difficult in practice and deserves further consideration. Currently available AI applications "generating" works are still subject to human input e.g. by providing detailed upfront instructions and sample material to use, and also subsequent editing (as was the case both in a recent article "written" by AI for the Guardian newspaper – the "GPT3" application – or music "composed" by AI and performed by the London Symphony Orchestra - "the IAMUS" application).

<u>Copyright protection for AI software</u>

8. *"Does copyright provide adequate protection for software which implements AI?"*
9. *"Does copyright or copyright licensing create any unreasonable obstacles to the use of AI software?"*

UK Music is not best placed to comment on these questions but we note the IPO's statement in the Call for Views that there is no obvious reason to anticipate any material issues arising from a copyright perspective with the protection or licensing of AI software.

For more information please contact [redacted]

Annex

UK Music's membership comprises:-

• AIM – The Association of Independent Music – the trade body for the independent music community, representing 1000+ independent record labels and associated businesses, from globally recognised brands to the next generation of British music entrepreneurs.

• BPI - the trade body of the recorded music industry representing 3 major record labels and over 400 independent record labels.

• FAC – The Featured Artists Coalition is the UK trade body representing the specific rights and interests of music artists. A not-for-profit organisation, they represent a diverse, global membership of creators at all stages of their careers and provide a strong, collective voice for artists.

• The Ivors Academy - The Ivors Academy is an independent association representing professional songwriters and composers. As champions of music creators for over 70 years, the organisation works to support, protect and celebrate music creators including its internationally respected Ivors Awards.

• MMF – Music Managers Forum - representing over 1000 UK managers of artists, songwriters and producers across the music industry with global businesses.

• MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including music studios, producers, engineers, mixers, remixers, programmers and mastering engineers.

• MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.

• Musicians' Union - Representing over 32,000 musicians from all genres, both featured and non-featured.

• PPL is the music licensing company which works on behalf of over 110,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK. PPL also collects royalties for members when their recorded music is played around the world through a network of international agreements with other collective management organisations (CMOs).

• PRS for Music is responsible for the collective licensing of rights in the musical works of 150,000 composers, songwriters and publishers and an international repertoire of 28 million songs.

• UK Live Music Group, representing of the live music sector with a membership consisting of: Agents' Association (AA), Association for Electronic Music (AFEM), Association of Festival Organisers (AFO), Association of Independent Festivals (AIF), Concert Promoters Association (CPA), International Live Music Conference (ILMC), National Arenas Association (NAA), Production Services Association (PSA), Music Venue Trust (MVT), with contributions from PRS Foundation, MU, MMF and FAC.