HM Intellectual Property Office Call for Views on copyright and related rights in relation to Artificial Intelligence (A.I.)

Written evidence submitted by the Association of Photographers (AOP) Limited

1. The AOP is a not-for-profit professional trade association, founded in 1968. Its aims are to champion and protect the value, professionalism and standing of its members and the creative image-making industry. We vigorously defend and lobby for the interests and rights of all photographers and image-making professionals.

2. Our members include professional photographers, assistants, agents, suppliers, students and education establishments as well as many others working professionally in the creative industries.

3. Professional members have a wide client base of large- and small-scale businesses ranging from individual clients in the corporate sector to design groups, publishing houses, music publishers and advertising agencies. Their work is published worldwide in magazines, newspapers, books and advertising campaigns and many sell their images as fine-art through galleries, both in traditional spaces and online.

4. The AOP is a member of the British Copyright Council (BCC), the Creative Industries Federation (CIF), the British Photographic Council (BPC) and Pyramide Europe (EEIG) and we fully support the 'Fair Terms for Creators' campaign: https://www.fairtermsforcreators.org/ co-ordinated by the Creators' Rights Alliance (CRA).

5. The AOP welcomes the IPO's Call for Views and we endorse the view that copyright should protect human creative endeavour. We note that the Call for Views has been divided into types of IP and that our submission covers only copyright-related matters. We also note the IPO's definition of 'Artificial Intelligence' in regard to this consultation and express our view that currently there is no consensus on what the definition of A.I. should be.

6. It is of primary importance that the status of original creative works, protected by copyright, should not be compromised in regard to the provision and use of those works in any regard to the development or 'training' of A.I. platforms. We firmly believe that there should be no extension of exceptions to copyright and that licensing use of copyright-protected works is a flexible and adaptive solution that supports creators and their ability to build sustainable businesses, which rewards their creative endeavour.

7. Any current exceptions to copyright which could be extended to support the development of A.I. in any commercial aspect should be resisted as this is contrary to the principles embodied in the Berne Three-Step test.

8. We firmly believe that copyright does not create any legitimate obstacles to the continued development of A.I. and should not be seen as a barrier to that growth and that all creators whose works are used in the development and advancement of A.I. should be properly compensated for that use.

Q1: 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?

9. We agree with the current description but would add that as there is no consensus on the definition of A.I. it would be prudent to keep this as part of an iterative process. The current licensing framework already permits limited use of copyright-protected works and we oppose any broadening of these exceptions to include the development and 'training' of A.I. platforms and technologies. Use of copyright-protected works should result in fair remuneration for rights-holders. Additionally, we would not wish to see any sort of mandatory licensing or restrictions on a rights-holder's ability to opt out of any potential solution.

Q2. Is there a need for greater clarity about who is liable when an AI infringes copyright?

10. Current provision in the Copyright, Designs & Patents Act 1988 (as amended) ('CDPA 1988') allows for the liability of a 'person' to include natural and legal persons and the liability for any infringement should extend to all 'persons' involved. Because of the volume of work likely to be used in the development or 'training' of an A.I. platform, it would be incredibly difficult to determine the infringement of a specific work, which clearly places the rights-holders of those works at a disadvantage. The rights of third parties must be respected by those that need to use original creative works in the process of A.I. We recommend that auditable records of any data used are retained to facilitate the building of trust in A.I. platforms and systems. It should not be possible for an infringer to shelter behind the development of an A.I. platform or process.

Q3. 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.

11. As we have mentioned, the licensing framework already in existence is flexible and adaptive and will continue to evolve. We fully support the strengthening of licensing solutions and do not support or endorse the broadening of exceptions.
    In our sector, images, combined with the metadata that exists within the digital file, provide a unique and powerful source of data from which to 'train' and develop A.I. platforms and systems. The creators of those images deserve to be remunerated for their use so it is fundamental that appropriate licensing occurs at the outset. Image libraries already use A.I. to improve their users' experience in terms of search and find functionality, and image-use tracking platforms use A.I. to identify uses of an image across the internet.

Q4. 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.

12. The rights of database owners are already protected in the CDPA 1988 and in the Copyright & Rights in Databases Regulations 1997. However, it is very important that the exclusive rights of copyright owners are supported through any practical implementation of any legislative provision. No presumptions should be made about mandatory licensing or opaque 'opt-out' provisions as to do so would favour the developers of A.I. platforms and systems.

Q5. Should content generated by AI be eligible for protection by copyright or related rights?

13. We believe that copyright protects the intellectual and creative output of human beings. If A.I.-generated content is to be protected, it should be through a different right. The development of A.I. is still at a comparatively very early stage and we believe that the IPO should use this Call for Views as a starting point for the assessment of its impact. It is clear that any gaps in policy and

legislation will be need to be addressed as the landscape unfolds, and as a result, we hope the IPO will maintain a watching brief on the matter and continue to consult. We believe that copyright protection for works of human endeavour, creativity and spirit is integral to the development of A.I. platforms and systems. There are fundamental problems with affording machine-generated or A.I.-generated output the same or similar levels of import to that of human creation, not just on an economic or legislative level, but philosophically too. It is already clear in the EU and in the United States of America, that original works are protected by copyright if they are the author's own intellectual creation reflecting their personality (*Infopaq v Danske*, C-5/08, [2009] EUECJ C-5/08, [2012] Bus LR 102, [2009] ECR I-6569, [2010] FSR 20, [2009] ECDR 16 and many other cases subsequently, plus the *Naruto v Slater* case in the USA reconfirmed the exclusive nature of copyright protection for human beings).

Q7. Do other issues need to be considered in relation to content produced by AI systems?

14. Whilst content can be produced solely by A.I. platforms and systems, content creation can also be *assisted* by A.I. and this should aspect should form part of the overall consideration. This is already the case with many software packages designed for image creation and manipulation and in these instances our view is that the creator is the author of the work and therefore copyright resides with them for the usual term of life plus seventy years, along with any moral rights.

15. Another issue which is worthy of consideration is that of the identification of A.I.-generated works. 2020 has seen a sharp rise in the creation of 'deep fakes' (and indeed, much manifesting in 'fake news') and without wishing to open a philosophical Pandora's Box, it is clear that the creation and dissemination of 'fakes', without any means to identify them as such, is deeply damaging to our society on all levels. It is entirely in the consumer's and regulatory authorities' interests to be able to label and therefore identify such content as stemming from A.I. platforms or systems. Our views concur with the National Union of Journalists (NUJ) in this, in that the easiest way to address the matter is to strengthen the attribution right for human creators and to add a requirement for the same to those 'authors' that are non-human.

Q9. Does copyright or copyright licensing create any unreasonable obstacles to the use of AI software?

16. Copyright and the licensing thereof ensure that creative endeavour is rewarded and the protections enjoyed by creators and authors allow them to create sustainable businesses, thereby generating economic activity. These protections are not obstacles, neither are they unreasonable. We have said already that the licensing model is flexible and adaptive and we would hope that as the scope of A.I. continues to evolve that the IPO will continue to do likewise and continue to consult and engage with us as stakeholders and representative bodies of the very creators, without whom there would be no works to enjoy.

The Association of Photographers (AOP) Limited, November 2020.
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