**Artificial intelligence call for views:**

**Copyright and related rights**

**The use of copyright works and data by AI systems**

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?**

   We agree with the analysis that whilst the temporary copying and text and data mining exceptions could potentially apply to the use of copyright works and databases by AI in certain circumstances, these exceptions would not apply to all copies made by AI.

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

   Greater clarity is desirable to us from the perspective of both a rightsholder whose archive may be used by third parties to train AI and/or whose rights may be infringed by a work generated by AI and also from the perspective of a potential user/developer of AI ourselves: https://www.bbc.co.uk/rd/topics/artificial-intelligence-machine-learning?Type=Projects.

   We accept that there needs to be a certain amount of flexibility in order to accommodate the many different possible factual scenarios across different sectors. We note that AI is dynamic ie one iteration can lead to another set of circumstances involving different actors as the AI learns and develops. However, any further guidance as to who has "control" over the infringement for these purposes would be welcome.

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.**

   Exceptions

   Exceptions to infringement are extremely useful tools in relation to discrete uses of copyright works. However, in the absence of a substantive body of case law providing guidance on their interpretation, the ambit of exceptions can be unclear such that reliance on exceptions is unlikely to provide sufficient certainty in order to form a sound business model for the use of vast quantities of copyright works in a single project. We therefore do not believe that reliance alone on exceptions provides a long term solution to this issue. However, in the short term, further guidance on the application of the existing exceptions would be helpful.

   Existing exceptions

   We would welcome further clarification as to why the UKIPO considers that the temporary copying exception covers some copies made by AI systems, including confirmation that copies made by AI would be considered to be for the sole purpose of enabling a lawful use of the work.

   We would also welcome further clarification of the requirement of the text and data mining exception that the computational analysis has to be "for the sole purpose of research for a non-commercial purpose":

- The government guidance suggests that as long as the original purpose for carrying out text and data mining is solely non-commercial, then subsequent commercialisations of the outputs are not restricted. We would welcome clarification as to whether this is the case even where some form of commercialisation is foreseeable, although the immediate purpose is non-commercial and the exact form of commercialisation is not known at the time the research takes place. We would also be interested to understand whether it would have any bearing if any commercialisation would be carried out by a different legal entity.
- We would welcome clarification as to whether the relevant commercialisation should be commercialisation of the outputs of the research rather than the use of the outputs in a commercial environment. Though at base a not-for-profit public service organisation, we engage in various scenarios which involve elements which are potentially commercial and therefore call into question compliance with the "non-commercial" requirement. For example, would the exception cover use of copyright works by AI systems for content on the BBC World Service website, which is not sold for profit or distributed commercially as such, but does have limited advertising outside the UK.

We also note the limitations of the text and data mining exception in circumstances where a non-commercial entity wishes to outsource text and data mining research to a third party. The first hurdle is that the entity doing the data mining also needs to have lawful access to the original works. Secondly, as above, it is unclear whether the commercial purpose of the third party carrying out the text and data mining would be the relevant "purpose" rather than the non-commercial purpose of the entity commissioning the research. Thirdly, we would welcome clarification as to the application of s29A(2)(a) (copyright in the work is infringed if it is transferred to another person) where the entity commissioning the research (or indeed a third party) collects the data.

New exceptions

At this stage, and subject to the clarifications of the existing exceptions that we have outlined above, we do not believe that the introduction of a new exception allowing AI free use of copyright works in any circumstances would strike an appropriate balance between supporting the development of AI technology and the legitimate interests of rightsholders. Sometimes copyright works form a fundamental part of the development of the AI, for example the use of archive news articles to train AI to spot fake news. The AI would not be able to function effectively without those works. Furthermore, sometimes the aim of the AI is to create output that can be substituted for such works and is indistinguishable from such works. The law should continue to incentivise works created by humans. This, coupled with the need for certainty, leads us to the view that licensing should form part of the solution alongside the existing exceptions.

Licensing

We believe that a licensing solution for commercial uses may be able to provide the requisite balance between rewarding rightsholders for the use of their works by AI, providing sufficient legal certainty around the mass use of such works and supporting the development of AI technology. However, as noted above sometimes copyright works form a fundamental part in developing the AI's algorithm. Any value exchange for this improvement in the algorithm can be difficult to negotiate as there isn't always an IP right in the algorithm to base this on. We also recognise that if licensing is left purely to market forces then this may provide a significant advantage to those established entities with greater financial resources at their disposal.

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.**

   At this stage, we do not believe that there is any need to provide additional rights to copyright or database owners whose works are used by AI systems.

**Protecting works generated by AI**

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

   Viewed through the lens of the UK's traditional rationale for copyright - that it is an economic tool that incentivises and rewards the creation of works - we are of the opinion that human investment in works generated by AI should similarly be rewarded with some form of protection. For many organisations, the commercial exploitation of their copyright protected works and the ability to prevent others from copying them supports the creation of further works and this should apply equally to AI produced works.

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

   We would welcome further guidance as to what types of human input in AI would be sufficient to satisfy the author's intellectual creation test under the current law, such that content generated by AI would qualify for full copyright protection.

   The current regime for computer generated works under the provisions of the Copyright Designs and Patents Act 1988 ("CDPA") should be reconsidered in a number of respects:

   Computer generated works
   Under the current provisions of the CDPA, copyright protection is granted to literary, dramatic, musical and artistic ("LDMA") works which are generated by computer in circumstances where there is no human author of the work in the normal copyright sense (s178). "Generated by computer" has not been further defined, however there are advantages to this level of generality. We note that there is currently no universally accepted definition of AI and that any definition needs to be sufficiently flexible to avoid being rendered obsolete by rapidly advancing technology.

   Author
   We believe that the test for authorship as it currently stands under s9(3) ("the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken") is reasonable and provides a degree of certainty given it is an existing concept employed in relation to films and sound recordings; though further clarification in the context of AI use would be welcome.

   Originality
   It is not clear whether the normal originality requirement for a LDMA work contained within s1(1)(a) and as subsequently developed by case law, still applies to computer generated LDMA works as defined in s178. There is certainly no express provision which removes this requirement.

   It is difficult to foresee in what circumstances the requirement that a work express the intellectual creation of its author could be met where there is no human author. This requirement is therefore not appropriate for computer generated works which by definition have no human author. One possibility would be the test applied to "entrepreneurial works" at sections 5A, 5B and 6 CDPA,

namely that such works should not be a copy taken from another work. This would allow protection regardless of creative input. We understand the arguments in favour of imposing a higher bar given the capabilities of AI to generate vast quantities of works with relative ease (in terms of speed and investment required), however it may be better to address these concerns by restricting the duration of the right, instead of focusing on the rather human centric concept of originality.

Duration

The duration of protection for computer generated works pursuant to s12(7) CDPA is 50 years from the date the work is made. However this provision only applies to literary, dramatic, musical and artistic works. There are no separate provisions for computer generated films, sound recordings or broadcasts which presumably remain protected for the same period of time as works created in the normal way. This means that computer generated films and sound recordings that have been published obtain a longer period of protection than computer generated LDMA works. Consideration should be given as to whether there is any justification for this difference between different types of work. It is certainly arguable that a distinction should be made between films which have a human author and films which do not (and therefore by definition are unlikely to involve human creativity in the copyright sense). As noted by Copinger[1], "the Term Directive appears to provide for two distinct sets of rights in films, one in films as cinematographic or audiovisual works, to be treated as authors' works, the other in films as the recording of the work, to be treated as a work protected by related rights" with the latter afforded a shorter period of protection.

The BBC believes that analysis of data in relation to the exploitation of content by rightsholders over time could be used to inform policy as to the appropriate duration of protection. Consideration should also be given to precedents such as design right (15/10 year term) and the sui generis database right (15 year term). We are open to the possibility that such analysis could support a much shorter term. Once again a balance needs to be drawn between incentivising development in this area whilst continuing to support (and not disincentivise) human creativity, bearing in mind AI's ability to create vast quantities of works relatively quickly and at relatively low cost. For AI-produced content to continue to evolve, it seems conceivable that it will continue to need human-created works to use as training data for some time to come.

Copyright vs sui generis right

There appear to be good arguments in favour of replacing s9(3) with a sui generis right rather than attempting to stretch the current copyright regime:

- International harmonisation - this is desirable in order to facilitate any kind of global market for such content, digital or otherwise, and it currently seems more likely that other jurisdictions will take this approach.
- If we want to lead the market in this area, having a standalone right with clear rules would make it easier for other countries to replicate than if the rules are intertwined with existing copyright rules.
- It would allow more flexibility to create a bespoke regime rather than stretching existing copyright concepts, for example if analysis of the exploitation of works over time (as suggested above) suggests that different works should have different terms of protection.
- Amending existing provisions to accommodate AI-produced works may result in uncertainty, as we have seen with the interplay between the existing provisions relating to computer-generated works and concepts which apply to other types of copyright work.

[1] Copinger and Skone James on Copyright 17th Ed, 6-76

We weigh this against potential negative aspects, such as uncertainty while law develops around a sui generis right and novel concepts or terms therein (as observed with the sui generis database right) and risk of rapid technology evolution rendering legislation unsuitable or ineffective.

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

Whilst we do not think this should be viewed as prohibitive, the fact that AI is still developing and it is therefore still relatively early to form any position warrants that the development of the law in this area should proceed with caution and with sufficient flexibility to allow for future development.

We would reiterate the desirability of international harmonisation in this area, in order to facilitate a global market and international partnerships.