BPI SUBMISSION TO THE IPO ARTIFICIAL INTELLIGENCE CALL FOR VIEWS: COPYRIGHT AND RELATED RIGHTS

INTRODUCTION

About the BPI

The BPI is the representative voice of UK record labels. It promotes British music and champions the UK's recorded music industry – the world's third largest and the second biggest exporter of recorded music after the US. The BPI's membership consists of over 450 independent music companies and the UK's three 'major' record companies, which together account for up to 85 per cent of legitimate domestic music consumption.

The BPI works with labels and artists to promote British music overseas. This includes support through numerous trade missions as well as through the Music Export Growth Scheme, which since 2014 has awarded over £4 million in government funding to over 250 music projects benefitting mainly independently-signed artists. The BPI provides valuable insights, training and networking with its free masterclasses and presentations and through a variety of programmes and events, including strands on technology and diversity.

The BPI owns and organises the biggest night in the music calendar, the annual *BRIT Awards with Mastercard*, and the *Mercury Music Prize*. It also co-owns the *Official Charts* and runs the *The BRIT Certified Awards* programme, recognising artist achievement with the iconic Platinum, Gold and Silver Awards. The BPI established and funds *The BRIT School* in Croydon (the UK's leading Performing and Creative Arts School, which is free to attend) through *The BRIT Trust* charity, which has donated over £26m to music education and wellbeing charities, including *Nordoff Robbins* (the UK's largest independent music therapy charity).

Artificial intelligence and music

The BPI welcomes the opportunity to respond to the IPO's call for views on Artificial Intelligence (AI), and makes this submission in relation to the questions on Copyright and Related Rights. Our detailed responses the questions posed by the IPO are below. By way of introduction, the BPI would make the following brief overarching observations.

As a sector, music was one of the first to be affected by and to embrace the opportunities of digital technology, including exploring the opportunities of AI. Music companies have begun to use AI in a number of ways, including its potential to tackle copyright infringement and in more creative contexts, including as a tool in the creative process and in enhancing the listening experience of fans. Examples of this include:

- Streaming music services employing AI to analyse data and personalise a user's experience of their service by creating playlists or recommendations;
- Artists using tools based on AI in their creative processes (for example, tools that can "master" or remix a recording automatically using algorithms derived from data on previous recordings; or to find suitable samples for use in a piece of music;
- Labels or start-ups using AI to analyse streaming and social data, or recordings themselves, to identify potentially successful artists (A&R), or to plan marketing campaigns or tours;

- Music production companies attempting to use AI to generate music that can used as background music online, or in advertisements.

These emerging innovations in music underline that copyright and related rights and AI should not be seen as binary or in conflict. There can be a tendency in discussions such as these, to consider copyright as an impediment to technological advances. However, that fact that the UK enjoys both world class creative industries *and* a highly innovative and successful tech sector demonstrates that copyright is an important part of the UK's economic and cultural success. Indeed, with many creative sectors working at the vanguard of digital technology, copyright protection can be seen to support such innovation by providing protection for those involved in content creation such as music companies, as well as those developing computer software.

Importantly, the IP framework has also been shown historically to be flexible and adaptable to change, and we believe it will remain so. We note also that discussions about the relationship between AI and Copyright and Related Rights are taking place not only through the IPO's work but in other fora around the world, including WIPO. Given the relative infancy of AI uses in creative contexts, and these ongoing parallel discussions, we welcome the opportunity to contribute to this call for information, whilst urging caution about moving fast to decision on any future policy direction in this emerging field of development.

We reflect further on these points in responding to the IPO's questions in more detail below.

RESPONSES TO CONSULTATION QUESTIONS

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?**

The description of how AI may use copyright works

The following high-level description from the Consultation Paper of how AI may use copyright works is accurate in that the use of a copyright work in an AI process is infringing, unless the use is licensed, the work is out-of-copyright, or a specific exception applies:

> "*Each work used by an AI may be protected by copyright. This means that the copyright owner's permission is needed to use the work unless a copyright exception applies. This permission may be granted using a licence, which will set out who can use the work, how and why.*
>
> *It is possible to avoid infringing copyright by using licensed or out-of-copyright works. For example, an AI could be trained using the works of Shakespeare, which are no longer protected by copyright. But unless a work is licensed, out of copyright, or used under a specific exception, an AI will infringe by making copies of it.*"

Although, we note that the description that the "*AI will infringe*" provides uncertainty in its implication that the AI itself infringes copyright. We provide further comments on this in our response to Question 2.

We reject the view referred to that "*the risk of infringing copyright or other rights stops people making full use of AI*" as being without an evidential basis. Copyright has not inhibited the rapid development of AI. The music industry, for example, has developed a broad range of licensing solutions in the last decade and works

continually with technology companies to facilitate licensed innovation. Accordingly, the markets can and already do address uses of creative works in AI processes, and a strong copyright framework will only serve to encourage innovative partnerships between the creative and tech sectors that will allow both to flourish.

In light of the above, we agree with the views in the following paragraph of the Consultation Paper:

> "*copyright and related rights are not an obstacle to the development of AI… licensing models evolve with technology and there are increasing opportunities for AI developers to license copyright works. Rather than taking steps to limit copyright protection… the focus should be on ensuring that rightholders are remunerated when their works are used by AI*".

We do, however, consider that the "focus" should be on ensuring that right holders retain control of their exclusive rights and a high-level of protection, in keeping with international law.

The description of when infringement takes place

We believe that the law is clear in this area and broadly agree with the way this is set out in this section of the Consultation Paper.

The description of which exceptions apply

We believe that the law is clear in this area and broadly agree with the way this is set out in this section of the Consultation Paper.

Other technical and legal aspects that need to be considered

The Introduction of the Consultation Paper states that "*[m]achine learning systems learn from data which may be protected by copyright or other rights*". This description obscures what is actually meant, which is that machine learning systems reproduce and use copyright works to generate the outputs. The terminology must be clear so as to avoid inadvertently misrepresenting the situation by minimising the role of copyright works as mere "*data*".

"*Artificial intelligence*" and "*machine learning*" are very broad terms which may encompass a very wide range of activities. We suggest that the activities which are intended to be covered by these terms are clarified.

The suggestion that an AI "*brain*" should be treated in a similar way to a human one (and thereby act as some form of negation of the fact an infringement is occurring) misrepresents and overstates the current status of technological developments. An AI process operates according to pre-determined parameters (the algorithm). AI is no-where near replicating the intricacies and independent thought of the human brain. To that end, an AI process is incapable of independent creativity, and in the field of creative content, unlike in human creativity where humans can autonomously create, the quality of the output of AI is highly dependent upon the quality of the input.

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

Where an AI process infringes copyright, it is possible that the AI process owner, developer, trainer and/or AI process user could be liable for the infringement. These determinations will be fact dependent and will require assessment on a case-by-case basis.

The current UK copyright liability rules – including regarding contributory / secondary liability – are fully applicable also to infringements carried out in the course of AI processes. It should, however, be clear at all times that the use of an AI process should not be allowed to serve as a shield for infringers to hide behind to avoid liability. That an infringement occurs during the course of an automated process does not preclude the liability of the person or entity that initiated or otherwise has control over that process. As is, AI is and remains a tool, not an actual independent agent. Having a record of training and input material will be important in determining liability and should be a requirement.

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.

Misconception that AI innovation requires a weakening of copyright protection

There is a danger when talking about new technologies and the use of creative works that there is an assumption that existing principles around copyright will not be able to cope with emerging uses of works. In the first instance, the promotion of AI innovation and the protection of copyright are not mutually exclusive. On the contrary, in many cases AI processes depend upon the "input" of creative works or recordings and derive their purpose and value from the creativity and investment of the authors and producers that created those works or recordings. The most obvious example of this is when existing compositions or sound recordings are used by machine learning applications to generate output "in the style of" the music used as input.

Ensuring strong incentives for the creation and production of new works is therefore essential for the sustainable development of AI. When the quality of the output of AI processes depends on the quality of the input material, it would be counterproductive to undermine copyright protection and thereby reduce incentives in the creation of and investment in new works.

No evidence that the copyright framework needs to be changed

There is no evidence that the copyright framework needs to be changed further to "*make it easier for AI to use protected content*".

As is described in the Consultation Paper, the UK has already introduced exceptions that "*allows copying in certain cases to enable technology to work more effectively*", e.g. relating to temporary copies and text and data mining in certain situations.

Further, as referred to in our response to Question 1, the rapid development of AI under current copyright rules demonstrates that copyright has not been an obstacle. The music industry, for example, has developed a broad range of licensing solutions in the last decade and works continually with technology companies to facilitate licensed innovation, including in relation to AI. Accordingly, the markets can and already do address uses of creative works in AI processes. Examples of current applications include streaming music services employing AI to analyse data and personalise a user's experience of their service by creating playlists or recommendations, and artists using tools based on AI in their creative processes (for example, tools that can "master" a recording).

Weakening copyright protection on the other hand, for instance by introducing new exceptions, would however harm creators and reduce the quality of the output of different AI applications -- and thereby their general relevance. The market has demonstrated that enabling the development of AI does not require or justify new exceptions to copyright.

An AI developer wishing, for example, to use protected contemporary recordings to generate new "sound alike" recordings does not *need* access to the recordings to develop the AI. Rather, it *wants* access in order to produce commercially attractive recordings that can be monetised. Introducing exceptions to allow for such uses in the name of "innovation" would be seriously misguided. It must be for the right holders of the existing works to determine whether to license such uses.

The implications of new exceptions or limitations

As has been established in relation to the music industry, the reproduction (or any other uses) of sound recordings either for the purpose of analytics or for the purpose of creating new sound recordings are activities already licensed by record companies (i.e. a normal exploitation) or are activities which record companies would have a legitimate interest in licensing or controlling. As such, any limitations to record producers' right of reproduction in the context of uses of recordings in AI processes would not be justified by a market failure or any weighing societal reason and would therefore be incompatible with the three-step-test. There is no basis to force the creative industries to subsidise AI developers through exceptions.

In a worst-case practical scenario, exceptions or limitations benefitting the operators of AI applications would enable them to use existing commercial recordings to generate competing products without seeking permission or payment of royalties to right holders, which would be an unfair and unreasonable outcome.

It is too early to consider any changes in the law

The real-life application of AI is still in relative infancy and the nature, extent and future impact of the uses of AI remain unclear. It would be imprudent, in our view, to consider imposing new rules until these developments are better understood, particularly before it has been demonstrated by clear evidence that the existing copyright framework and existing or potential market solutions are not sufficient.

Transparency of AI processes

It is very difficult, if not impossible in many cases, for right holders to determine whether their works have been used in an AI process. Recordkeeping obligations would facilitate the settlement of infringement disputes, and also ensure transparency of AI processes more generally. We would also encourage consideration of the possibility of the absence of record-keeping giving rise to a presumption of infringement.

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.

No further response to the points raised above.

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

Over recent decades numerous technological developments have given rise to policy discussions surrounding intellectual property. At present, this question is being considered in different fora around the world, including as part of the ongoing Conversation on AI and IP at WIPO. For the most part, existing laws have be found to be adequate to address any emerging issues. One point is clear - which we consider should sit at the heart of the question of the status of content generated by AI.

Copyright is designed to protect the unique value of human intellectual creativity – more specifically to help incentivise and reward the output of human skill, labour and judgment. This essential requirement in copyright for human creativity goes back to the very creation of copyright law in the UK with the Statute of Anne 1709. It sits at the heart on the leading international copyright treaty (the Berne Convention 1886) and is the core principle of the European copyright framework.

Indeed, what might take a human author weeks or months of skill and labour to create, might take a computer program a fraction of a second. It cannot be the purpose of copyright to measure the labour involved in the artificially generated output of a computer programme. That said, if a computer program itself has been created by sufficient human skill, labour and judgment, then the program itself can be protected by copyright as a literary work. This is provided for under s.3(1)(b) of the CDPA 1988 and reflects the human expression embodied in the computer code. But the law should not 'double-dip' by also giving full copyright work status to the solely artificially generated output by itself.

Perhaps in time and as the situation continues to develop, it might (depending on all of the circumstances) be appropriate to even consider a new category of related right. Accordingly, we urge the UK Government to continue the discussion concerning protection, but not to take any steps now that could have serious unforeseen consequences as this field develops.

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

We refer to our response to Question 5.

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

Yes.

1. To determine whether (a) content generated by an AI process might be protected (where, as explained above, the author has exercised their skill, labour and judgment in the creation of the output such that it is original) or (b) existing works have been infringed in the course of the AI process, it is necessary to understand the process that generated the AI "output" material. Being able to determine what has happened "under the bonnet" of the AI process is particularly important to enable right holders to protect their rights, noting that infringements may not be immediately apparent from looking only at the AI output itself. As stated in response to Question 3, it may therefore be appropriate to introduce record-keeping obligations (i.e. of training material, input material to trained AIs, and output material), the failure to comply with which could result in rebuttable presumptions of infringement.

2. Legal issues other than those relating to intellectual property can also arise in relation to AI processes and their output. For example, "deep fakes" (where, for example, a person's likeness is replicated) require consideration of privacy, "passing off" and other such issues.

3. Best practices (and some laws, such as moral rights) in content industries (music, movies, books, etc.) include maintaining credits and provenance information. For a number of reasons (credit acknowledgement, discovery, consumer choice, etc.) creative content made by humans could be labelled as such to indicate that the work in question was not merely AI generated. Identifiers could be considered as a means to distinguish between content produced in different ways, and thereby to protect artists, authors, producers, publishers from practices that may not necessarily contravene intellectual property laws but nonetheless seek to freeride off their creativity and investments. Such

identifiers would also support consumers in making informed choices about the content they wish to consume.

4. Furthermore, it may be necessary to protect artists against unfair uses of their names or likenesses, for example in "in the style of" products created using AI. Precedent for this already exists in international IPR treaties. For example, TRIPS Article 23 regarding Geographical Indications (GI) for wines and spirits prohibits the use of a protected GI unless the product was produced in the place indicated by the GI, "*… even where the true origin of the goods is indicated or … accompanied by expressions such as "kind", "type", "style", "imitation" or the like."* Similarly, an artist's likeness, voice and other attributes are unique and should be protected from unauthorized imitation or copying by an AI process.

The BPI does not have any further views in respect of the questions relating to software in questions 8 and 9 that have not been addressed in our responses above.

The BPI trusts this contribution to the IPO's Call for Information is helpful. We look forward to engaging further as the IPO considers these matters further.

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