BRITISH COPYRIGHT COUNCIL

DRAFT: BCC response to IPO call for views: Artificial Intelligence and Intellectual Property – Copyright and related rights

1. The British Copyright Council (BCC) welcomes the IPO's consultation and its support for a copyright system that encourages creativity, investment in the creative industries and promotes economic growth. In our view, the IPO's over-arching approach to AI and copyright set out in this call for views will support innovation that embraces AI technologies and protects human-centered creativity. It will be important that the Government ensure that the interests of rightsholders and users are balanced, as enshrined in international copyright conventions that the UK is party to, against the drive to make the UK the global centre for data-driven innovation.

2. The call for views on the role of Artificial Intelligence and Intellectual Property has invited comments separately for patents, copyright and related rights, designs, trademarks and trade secret law. The BCC's submission covers only copyright rather than the application of other forms of intellectual property linked to the use of AI applications.

3. In expressing views about the role of copyright, the BCC believes that the status of copyright works in providing the source materials (whether in the form of computer programs, databases or other literary works) created and used for the development of AI applications must not be forgotten. These works of human-centred creativity inform and establish value within the AI applications in which they are used. Licensing structures for such source materials are part of existing market structures. BCC comments will therefore focus upon the vital licensing and ownership structures for the use of copyright works of all kinds that are already recognised and protected by International Copyright Treaties.

4. Subject to these general points the call for views on copyright can be interpreted as having two goals – to identify obstacles potentially posed by copyright to the achievement of the goal, and establish whether copyright protection offers a suitable incentive for AI investment in the UK. Rightsholders and users must not be forgotten in striving to achieve these goals as they are at the heart of content creation which fuels AI.

5. It is our view that licensing supporting the use of copyright works within AI applications, rather than exceptions, which allow developers to commercially benefit from the use of the works of others in presenting such works in "new" ways, must remain the focal point of the IPO's work on copyright & AI. As the representative voice for over 500,000 rightsholders, and those who represent them, the BCC has already seen many examples of licensing models which are evolving with technology. Therefore, rather than introducing new exceptions, the BCC's view is that there should be increased support for licensing.

6. The scope of the existing exception for text and data mining is important here. The BCC has previously argued the importance of the "non-commercial research" requirement for application of the text and data analysis exception under s 29A CDPA. AI and investment in new AI systems is a commercial concept that helps and supports better analysis of markets, consumer demands and behaviour. This enables companies to develop and present their goods and services in new and innovative ways for commercial exploitation. When commercial deliverables emerge from application of text and data mining involving the use of existing copyright works it is contrary to the principles of the three-step test.

7. Such an approach could have negative unintended consequences for the UK's reputation as a hub of innovation and creativity. It could lead to increased litigation to deal with any subsequent ambiguity or lack of clarity over the commercial boundaries being crossed in reliance upon exceptions. Whereas industry led licensing, supported by a robust copyright framework, is able to support new innovation far more rapidly and effectively.

8. Fundamentally, copyright does not create any unreasonable obstacles to the development of AI and should not be labelled as such. It ensures that the creators whose works are used by AI are appropriately remunerated and means they are able to continue creating and contributing to the UK's culture and society. Therefore, to protect grassroots creativity, it is important to understand 'ownership' in the context of AI applications. Copyright should be recognised and applied both to the computer programs and databases and other literary works used to support new AI applications whilst recognising that development of the application may then involve licensing the use of existing copyright works which are then adapted (under license of the existing restricted act) as the AI application evolves. This is beneficial to every link in the creative value chain.

9. The creative industries also use and invest in AI – and have done for many years. We recommend that the IPO conducts a mapping exercise of the existing licensing framework and ownership for the use of copyright materials by AI, and for AI-generated content, to ensure that we understand what gaps any policy developments will need to address and whether any new rights are necessary, or whether any gaps can be resolved through updating definitions within the current framework. The Government and industry should continue to have an open dialogue about technological advances and future legislative changes as they arise.

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?

5. Yes. Together, the current licensing framework and the 2014 exception for Text and Data Mining (TDM) permit the use of copyright works and databases by AI. They provide researchers with access to these materials under specified conditions. The BCC would be extremely concerned if the IPO considered broadening these exceptions to include the training of AI. If copyright materials are used to train AI it is in our view only reasonable that the rightsholders should be fairly remunerated and the licensing framework is the most effective way to achieve this. This would also create additional considerations about the AI-generated content – the complexity of this is outlined in our response to question 5.

6. The Publisher's Association, a member of the BCC, has reported that TDM of copyright protected materials was ranked as the most relevant policy issue for publishers' AI investment decisions. A key issue is to ensure a stable legal framework in respect of new technologies and products in this area, and the resultant impact this has on investment decisions. We understand that publishers are ready to work with the UK IPO in developing this line of policy thinking.[1]

7. Our collective priority regarding TDM is greater clarity over the parameters of the TDM and temporary copying exceptions in the specific context of AI. At the very least, in addition to the existing caveats contained within these exceptions, it would be helpful if a fair dealing test applied. Another helpful clarification would be for explicit acknowledgement that data crawled from websites does not constitute "lawful access" under Section 29A(1) of the TDM exception, especially if the website includes user T&Cs that prohibit such data mining or extraction.

[1] https://publishers-association.shorthandstories.com/people-plus-machines/index.html

8. Other legal aspects to be considered are: (i) the Séjourné report on "Intellectual property rights for the development of artificial intelligence technologies" (2020/2015 (INI)), which was approved in the JURI Committee in the European Parliament on 28th Sept 2020; and (ii) to the extent not covered by other parts of the IPO consultation, the privacy implications of biometric data of individuals depicted in photos and other copyright works being used by AI systems.

9. It is worth the IPO considering two pieces of EU legislation in its considerations (despite the end of the transition period being imminent):
    a. The Directive on Copyright in the Digital Single Market as this contains two mandatory TDM exceptions
        i. research organisations[2] (e.g., universities, research institutes) and cultural heritage organisations to use copyrighted material to train their AI for the purposes of scientific research; and
        ii. anyone else to use copyrighted material to train their AI, provided that rights holders have not opted out. In considering this second point UK should ensure there is much better recourse for opt-out (if opt-in is not considered viable). It should not be for rightsholders to have sole responsibility to police this, especially when they are unlikely to have any way of knowing their material has been used until far after the event unless some responsibility is placed on the user. Licensing solutions should be able to address a great deal of this area to everyone's mutual benefit rather than a blanket exception.
    b. The Digital Services Act (which is still under consultation) as this seeks to ensure the use of high quality, non-discriminatory and unbiased underlying datasets, as well as to help individuals acquire access to diverse content. Therefore, its provisions relate to transparency, understandable explanations of algorithms, and liability. These are not addressed in existing legislation, nor is redress for any damage related to the use of automated decision-making systems. Transparency around algorithms is essential in terms of cultural diversity, fair market access and consumer choice. This is an area the DCMS Select Committee has explicitly asked about in relation to music streaming in its current enquiry into the economics of music streaming.[3]

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

10. Section 16(2) of the Copyright, Designs and Patents Act 1988 (CDPA) suggests that AI cannot of its own volition infringe the copyright in a work, as copyright can only be infringed by a "person" who does, or authorises another to do, one of the acts restricted by copyright. Case law under this provision has made it clear that the person or legal entity exploiting the infringing AI-generated work would be liable. AI technologies depend on an ecosystem of enterprises including data scraping companies, software developers, AI trainers and analysts and companies utilising AI software. The liability for copyright infringement should extend to all involved in the process.

11. Determining infringement of a specific work by AI given the amount of works used to train AI is a residual practical issue. This has arisen as determining infringement of a specific work after the event is challenging. Licensing solutions for the purposes of training AI resolve it and

---

[2] Definition in Article 2 of the DSM - 'research organisation' means a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research: (a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or (b) pursuant to a public interest mission recognised by a Member State; in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organisation.

[3] https://committees.parliament.uk/work/646/economics-of-music-streaming/

provide certainty for those investing in AI as it enables developers to control the risk of infringement by embedding the recognition of intellectual property rights within the AI's code itself. Developers of AI will need to teach their software to respect the rights of third parties, particularly if the AI is so advanced that the process by which tasks are completed is out of the control of the operator.

12. For this to work, the Government could make it a statutory requirement for developers of AI to retain auditable records of what data has been used. Then, where input data contains copyright works, questions about whether a license is required could be determined. A legal requirement to maintain auditable and records will also help instil trust in AI systems, by enabling developers and operators of those systems to demonstrate that they have used "good data" that is less likely to lead to discriminatory or biased outcomes. This could be achieved in partnership with rightsholder, or where appropriate Collective Management Organisations (CMOs), for which there is precedent. For example, we do not have data on exactly what music is listened to in many small businesses such as hairdressers, but CMOs are able to operate on a non-attributable basis. It is worth noting the concerted efforts of CMOs to fill this data gap to support less need for non -attributable distributions in the digital age. Greater support for standards of metadata and protection from stripping would be welcome and mean overtime the system could evolve from non-attributable, to attributable as technologies and capabilities evolve.

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.

13. The licensing framework is responsive, it has already and continues to evolve. The BCC's members strongly support strengthening licensing solutions over the broadening of exceptions. Broadening exceptions for AI would conflict with licensed uses of copyrighted materials and prejudice rightsholders. This includes a specific exception that allows copies to be made within an AI system for training purposes. If the IPO considers introducing any new exceptions or broadening any existing exceptions, which again we strongly feel it should not, then clearly defined parameters will be needed to prevent any output or findings from this training being used commercially.

14. Here are some examples from across the creative industries and the sectors our members represent:
    a. The newspaper publishing sector has already embraced the use of copyright work by AI systems; examples include 'Tracknomics' which allows publishers to consolidate data from multiple affiliate networks & view it all in one dashboard;[4] 'Loyal AI' a suite of editorial assistants, including the use of machine learning to suggest sources to inspire new perspectives and content ideas.[5]
    b. In the EU, the legislative framework permits the use of copyrighted musical works, at least for a period of time, by a computer as part of the training process. The Court of Justice of the European Union (CJEU) defines this as a 'reproduction'. The temporary nature of the reproduction for training purposes means that the mandatory exception for temporary reproduction - Article 5 (1) of the Directive Copyright in the Information Society 2001/29/EU - is considered. This continues to be relevant in the UK within the

[4] https://www.ppa.co.uk/article/hanan-maayan-or-ceo-and-co-founder-or-trackonomics
[5] https://loyal.ai/products/editorial-insights-assistant/

parameters of Section 6 of the European Union (Withdrawal) Act 2018.[6] This is another example of where CMO licensing could support this sort of endeavour.

c. Images together with associated metadata are incredibly rich sources of training data and if the human creators of those images are to share in the value generated by this new technology, it is critical that they are licensed at the outset. Image libraries use a range of AI-based applications to better store and separate images, as well as providing search and discovery functions that drastically improve usability. They use image recognition APIs to provide image tags, auto-generated keywords, and automatic categorisation tools based on visual categories, often across devices. Image library websites use AI image recognition tools to assist both in the upload and appropriately tagging of image content, and giving better support to customers to find images they intend to license.

15. These examples demonstrate that promotion and requirement of the licensing of copyright works used in the development and training of AI systems is of paramount importance.

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.

16. The BCC's view is that additional protections are not necessary as database owners whose works are used by AI systems are appropriately protected by the Copyright and Rights in Databases Regulations 1997 and the CDPA 1988. We also reiterate the role of licensing for works used by AI systems. From a public policy perspective, our view, is that the current framework appropriately balances the need to ensure sufficient access to databases and copyright to maximise their productive use and benefits, drive innovation and enable further innovation; alongside rewarding creators of original works and those who give time and effort (and financial investment) to ensuring data quality and encouraging further investment in innovation.

17. It is however worth noting that when the UK leaves the EU, there will be no obligation for EEA states to recognise UK nationals as eligible to qualify for the database right in the EEA. Provisions have been made by the UK to ensure that EU nationals are still eligible to qualify for the database right in the UK post Brexit. Yet there will remain no obligation on other EEA states to provide database rights to UK nationals, residents or corporations and therefore UK database owners may find their rights in databases created by them in the EEA are unenforceable in the EEA. This means that after Brexit in the EEA it would be necessary for those entities to rely either on any copyright in the relevant database, contractual arrangements to protect that database and/or other forms of protections such as licensing agreements.

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

18. This question is complex. We recommend the IPO uses this consultation as one-stage of its stakeholder engagement to agree the best way forward. Our members have a range of views and we have tried to highlight them below to demonstrate the range of considerations that need to be worked through. The one thing that received wide support was the need to clarify what is meant by 'content generated by AI' and the need to conduct further evaluation of the current framework before making any changes. As mentioned throughout our response, in the first instance we recommend that the IPO conducts a mapping exercise of the existing

[6] http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted

licensing framework and ownership for the use of copyright materials by AI, and for AI-generated content, to ensure that we understand what gaps any policy developments will need to address and whether any new rights are necessary, or whether any gaps can be resolved through updating definitions within the current framework. For example, does the IPO have evidence that those reliant on copyright protection are not able to obtain it; that copyright is a significant investment consideration for AI; the role of government versus the courts in any changes to the definition of copyright protections; and the impact this could have for other works that are non-AI?

19. Ultimately, the BCC believes that copyright protections for original human rights works are integral to the development of AI-generated works.

20. International, regional, and national laws recognise that a fundamental tenet of copyright is the human creator. Granting copyright protection to machines devalues the fundamental reason for copyright – to protect the human endeavour and spirit. Given the involvement of a human creator existing copyright laws already cover most of the activities involved in AI applications; and their input needs to be at the core of any future initiatives. That is not to say that investment in AI applications does not deserve to be protected and rewarded, but from this perspective it should be distinct from copyright protections for original works. This would mean that content generated exclusively by AI, without any human creative intervention, would not be eligible for protection by copyright or related rights. This is because no economic incentive is required in these circumstances; and crucially the implications for human creative endeavour could be devastating.

21. It is important that whatever the form of the protection, that the right is calibrated appropriately to take account of the fact that the (ever-increasing) processing power of computers means that innumerable examples of artificially-generated works can be produced in little time. Granting such works the benefit of equivalent copyright protection to human-generated works might have uncomfortable implications. First, philosophically, there are problems with rewarding the "brute force" creativity seen in computer-generated works, at least if such works are rewarded on a par with human-created works. While it is true that some such works can be the result of an instant of creativity, it is also the case that many human-generated works are the result of weeks, months or even years of labour. Arguably, it devalues such work by granting blanket equivalent (or near-equivalent) protection to machine-generated works that might – ultimately – involve very little human input or creativity. Therefore, it is important to set an appropriate threshold of creativity, by reference primarily or exclusively to human input leading to the ultimate output.

22. Given the UK's current position on the international stage and its ongoing trade talks with the EU and US it may be useful to consider how AI-generated works are treated in those jurisdictions:
    a. Under European Union law, literary and musical works are protected if they constitute the author's own intellectual creation reflecting their personality (applying standards developed in numerous cases by the Court of Justice of the European Union since Infopaq International A/S v Danske Dagblades Forenin Case C 5/08).[7] The Commission has also recently
    b. Under United States law, the protection of literary and musical works requires at least a minimum amount of creativity, "fruits of intellectual labour based on creative power of the mind".[8] Specifically, section.313.2 of the Compendium of the US Copyright

[7] Also amongst many Eva-Maria Painer v Standard Verlags GmbH Case C-145/10; Cofemel – Sociedade de Vestuário SA v G-Star Raw CV Case C 683/17
[8] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)

Office states: "the office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author".[9] The exclusive protection of copyright for humans has been reaffirmed in the Monkey selfie case.[10]

23. It is also worth noting that not all artistic works are covered by copyright i.e. they must meet certain criteria. Some may argue that a similar approach could be applied to artificially-generated works which meet certain requirements, namely, they could be protected from copying. The Joint Institute for Innovation Policy and University of Amsterdam recently prepared a report for the European Commission on AI. It suggests a 4-step test to establish whether or not an AI-generated work qualifies for copyright protection: *'…four interrelated criteria are to be met for an AI-assisted output to qualify as a protected "work": the output is (1) a "production in the literary, scientific or artistic domain"; (2) the product of human intellectual effort; and (3) the result of creative choices that are (4) "expressed" in the output.' A*ppropriate protection from copying could be provided for all relevant works, whether they be artificially-generated or human-generated. To deny protection for artificially-generated works, which meet certain criteria, could be providing free reign to potential copiers of such works, with no reasonable justification.

24. However, if this approach is adopted, it could be difficult to identify whether some works are copyright works (with a human author) or a computer-generated copyright work (which, by its very definition, has no human author, but has a deemed author who may or may not be human). The question here is what generates the protectable element of the work: is it a human (e.g. writing a book on a word processor, the computer merely acting as a tool) or is it a computer (e.g. devising and creating a series of moving images in a computer game, where the computer is actually generating the work)? If it is the former, the author is the human (and the current framework deals with this), if it is the computer, it could arguably be the person who made the arrangements necessary for its creation.

25. Another consideration is that given in this scenario AI-generated content could lack a human author we suggest that a 50-year term of protection, from the end of the calendar year in which the work was made, maybe inappropriate (and stifle the innovation the IPO is striving to achieve). Therefore, the IPO may prefer to consider protection by means of a Related Right, sui generis right, or other approaches such as patents for this type of content. There is evidence and case law that would assist the IPO to evaluate any of these options. If this would be helpful, we would gladly help the IPO collate such evidence.

Q6. If so, what form should this protection take, who should benefit from it, and how long should it last?

26. In the light of the purpose of the consultation (establishing obstacles and incentives for the UK to become the global AI centre), we note that any protection for AI works needs to take into accounts other rights which may be more appropriate to provide incentive to investment (e.g. patents). As exciting as AI may appear, overprotecting it may lead to excessive monopolising of the technology and stifling innovation.

27. Therefore, in the first instance the BCC recommends that the IPO maps all existing AI licenses from the programmer to the platform and user to identify where the framework is vague and to gain a better understanding of the dynamics and transparency of licensing. This

[9] https://www.copyright.gov/comp3/
[10] Naruto vs Slater; an ideal playing field for academics in 2016

should include the ownership for the use of copyright materials for the development of AI applications and the use or application of the AI application itself and how users interact with it to ensure that we understand what gaps any policy developments will need to address and whether any new rights are necessary, or whether any gaps can be resolved through updating definitions within the current framework. This would need to be looked at in multiple layers:

(a) within the IP catalogue of a large company (when single ownership may mean that limited "terms of use" are not really considered since it is "all in the family").
(b) between companies responsible for the creation of the copyright computer programs and algorithms which in effect provide the seeds for application by others
    (i) under open rights provisions (when frameworks are effectively made available for commercial use by others) or
    (ii) under commercial licences to third parties.
(c) to define the permitted scope for application of "source" software and application of algorithms under licenses to third parties. I.e. the nature of the source "seeds" defining the use "tree" which will grow from it.
(d) to define the conditions/limitations on use which third parties must pass on down any chain of title to users of their work and any source materials – if order to ensure that "new uses" do not abuse the copyrights of those whose works are picked up, reproduced or adapted as a result of algorithmic applications.

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

28. AI-assisted works may also need to be considered. The BCC's view is that, as far as the creative contribution of the human composer assisted by AI is concerned, normal copyright rules apply i.e. the composer is the author/ owner of copyright for 70 years after their death with all economic and moral rights. The contribution of artificial intelligence does not trigger co- or joint authorship in the literary, dramatic, musical or artistic work given that copyright protection is subject to human endeavour as part of the originality requirement because the AI assistance does not fulfil the requirement of originality to qualify for copyright protection. Even if the contribution to the process is considerable there is still a lack of human input by the AI. This human input requirement also applies in the United States for input under the work for hire doctrine.

Q8. Does copyright provide adequate protection for software which implements AI?

29. Under the Copyrights, Designs and Patents Act 1988 ("CDPA"), the definition of a "literary work" includes computer programs and databases. As such, it is commonly accepted that the primary legal protection for software is copyright. Traditionally, software is developed by a human author through writing source code. Therefore, it is clear that the owner of the copyright in the software is the developer.

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

30. Copyright licensing does not create any unreasonable obstacles; it ensures that creativity and originality are rewarded. From a policy perspective there should be obstacles that keep copyrighted content from being used without authorisation. Any such obstacles are not unreasonable and are in fact necessary to protect human creators from suffering irreparable damage.

31. As previously stated, the creative industries already embrace AI, therefore it is in all links of the value chain's interests that the licensing framework supports the use of AI; but this should not be to the detriment of rightsholders.

As stated in our response, we think more analysis and stakeholder engagement is required before the IPO makes any definitive decisions about this evolving topic. The BCC would be delighted to organise a meeting with our members to flush out the considerations we have raised. To arrange such a meeting or for any further input please do not hesitate to get in touch.

[redacted]