January 2022

Artificial Intelligence and IP: Copyright and patents
IPO Consultation

1. UK Music is the collective voice of the UK's world-leading music industry. UK Music represents all sectors of the music industry – bringing them together to collaborate, campaign and champion music. UK Music promotes the music industry as a key national asset to all levels of Government and publishes research on the economic and social value of music.

2. UK Music welcomes the opportunity to respond to the Intellectual Property Office consultation on copyright in works made by AI; text and data mining using copyright material; and patents for inventions devised by AI. Given UK Music's knowledge and expertise we limit this response to the first two aspects of the inquiry.

3. Copyright exists to remunerate human creative endeavours; the protection of UK creative talent as an important contributor to the economy and pivotal factor in maintaining the UK's position at the top of the "soft power" tables should be the overriding objective for policy making.

Preliminary remarks.

Before responding to the specific questions, we would like to make some observations about the consultation, intended to clarify some of the concepts set out within.

4. **Original works.** The consultation seemingly only addresses literary, musical, dramatic and artistic works as defined in Section 1 CDPA. It expressly recognises that sound recordings, films, broadcasts or published editions are independent from computer-generated works; the consultation states that these continue to be protected even if the protection of the latter will be removed under Option 1. It is assumed that the differing treatment of these rights is in part due to the application of the originality requirement in respect of authors' rights.

UK Music
Savoy Hill House
7-10 Savoy Hill
London, WC2R 0BU
T. 020 3713 8444
info@ukmusic.org
www.ukmusic.org

UK Music is a company limited by guarantee (registered in England Wales No 3245288)

The originality requirement is a constituting provision for copyright protection of literary, musical, dramatic and artistic works, computer- or human-generated. By their very nature, autonomously AI-generated works do not fulfil the originality criterion and as such, under the well-established case law (cf. amongst many, case C-5/08 Infopaq International A/S v Danske Dagblades Forenin and Eva- Maria Painer v Standard Verlag GmbH Case C 145/10), are not protected as literary, musical, dramatic and artistic works under current UK law.

5. This also follows from the only UK Court decision dealing with Section 9 (3) Nova Production v Mazooma Game 2006. Kitchin J assessed the subsistence of copyright applying the criteria of Section 1 CDPA) when confirming amongst others that the graphics and video game frames were artistic works, and the program and the accompanying notes were literary works. The subject matter of the other pre 1988 Act decision (Express Newspapers plc v Liverpool Daily Post & Echo 1985) concerned the use of a computer as a tool; which is not relevant in the context of this consultation.

6. **AI-generated only**. We consider the consultation does not, nor is it intended to, cover the widespread use of AI as a tool. In this assumption we note that according to Section 178 CDPA, computer-generated works are works created in such circumstances "that there is no human author of the work". However, within the consultation the delineation of the circumstances when an AI-generated work is produced with human involvement, and when not, is at times unclear. A clearer distinction should be made between "AI-assisted" and "AI-generated." The extent and nature of human involvement needs to be specified; e.g. does it suffice if a human instructs an AI application to produce music of a specific genre or specific speed, is that sufficient to make the resulting work fall outside the qualification of AI generated works? These question are very relevant for the authorship and ownership of works. They need to be addressed in the scope of the IPO's future work.

7. **Computer- and AI-generated.** The consultation variously applies both terms which creates some ambiguity as to whether the IPO consider there to be a differentiation. In order to avoid any misunderstanding we suggest that clarifying whether the government consider there to be a difference, and if not to choose a single descriptor. In general, we propose the IPO provide a glossary of terminology for clarity and consistency of use.

Specific questions

i. Question 1.

Copyright protection for computer-generated works without a human author. These are currently protected in the UK for 50 years. But should they be protected at all and if so, how should they be protected?

Options

- Option 0: Make no legal change
- Option 1: Remove protection for computer-generated works
- Option 2: Replace the current protection with a new right of reduced scope/duration

1. **Please rank these options in order of preference (most to least preferred) and explain why**

Only Option 0 is feasible at this stage (options 1 and 2 are both equally premature given the lack of an established evidence base).

The market for AI-generated works is still developing; all stakeholders are trying to assess and understand (1) technological possibilities, (2) the potential legal implications and the (3) most relevant uses in practice.

(1) Reference to the technological possibilities provided by artificial intelligence are Kafkaesque but not based on a clearly defined understanding of the technology involved nor the type of "works" / output created.

(2) To our knowledge there are no legal cases concerning the copyright protection of computer-generated works (other than Nova Production v Mazooma Game 2006). This decision applied normal standards to assess the protection of copyright for computer-generated works; no specific rules exist for the subsistence of copyright in computer-generated works. Systematically, the provisions in the CDPA on computer-generated works only refer to authorship and the reduced term of protection (we refer to the exclusions for moral rights at a later stage of this paper). Internationally, there are no legal cases on AI and copyright. Most cases to date concern the inventorship of an AI application in patent cases. Obviously, patent as industrial property is very different to copyright. However, even in these patent cases the ownership of the patent is initially granted to a human. One Indian reference – the registration of an AI application by the Indian Copyright registry ("Suryast") involves AI as joint author with a human author and that is thereby outside the definition of computer-generated works in the UK.

(3) The market is in its infancy; available AI applications are mostly limited to providing assistance (e.g. LANDR) and only a few AI applications generate music; mostly, what would be suitable for use as background music instead of music created by songwriters (classical, rock or pop). These applications (e.g. AIVA) operate on a subscription basis; their use is subject to a software licence. But business models are still developing; at the moment they operate at a quasi-sandbox level testing the possibilities, similar to other creative sectors such as the next Rembrandt project.

It seems negligent to legislate at this state without practical evidence or understanding of the commercial market and the legal framework.

Furthermore we stress that a national or even regional approach to AI generated works is at best useless in the borderless digital world. Rather than proposing precipitant national approaches we urge UK Government to operate as a global thought leader in international fora such as WIPO.

2. **Do you currently rely on the computer-generated works provision? If so, please provide details of the types of works, the value of any rights you license and how the provision benefits your business. What approach do you take in territories that do not offer copyright protection for [cgw]**

No; to our knowledge the music industry has not relied on computer-generated works though we refer you to our members individual responses also. We are also unaware of other creative sectors relying on such works. This explains the lack of jurisprudence.

3. **If we introduce a related right for computer-generated works, as per option 2, what scope and term of protection do you think it should have? Please explain how you think this scope and term is justified in terms of encouraging investment in AI-generated works and technology.**

Given the lack of information about the market, it is premature to discuss scope and duration of a possible new related right. Copyright protecting AI applications' software as literary works might be sufficient to encourage investment in the production of AI generated works. Consequently, monetisation of AI tools is achievable through charging for software licences and return on investment is not reliant on extending copyright protection to computer-generated works that might have detrimental and unintended consequences for the value of musical works created by humans within the licensing ecosystem. This depends on yet to be established business models and purposes of AI tools.

Given the overriding principle to protect human creativity, copyright remains granted solely to humans for their creativity and talent.

The protection of human creators is paramount in particular in the United Kingdom where we have an abundance of musical talent and industry acumen which renders the UK music internationally so successful (UK created music is one of three net exporters of music in the world). Consumers must also have transparency via clear identification of any non-human authored works delivered within music using services.

4. **What are your views of the implications the policy options and of AI technology for the designs system?**

N/A

5. **For each option, what are your views on the risk that AI generated works may be falsely attributed to a person?**

Independent of the options, there is a risk that AI applications enable AI generated works to pass off as the works of a real person. This will be the case in particular if the AI application has been trained on the repertoire of one specific composer in order to produce music in the style of that person. Rightholders might have to rely on a passing off action as a civil remedy (with the associated impact on human and financial resources). Additionally, composers have the option to pursue infringement of moral rights and specifically the moral right protecting against false attribution in section 84 CDPA. But moral rights are very poorly protected in the United Kingdom; they do not provide recompense for damages suffered, nor do they constitute an effective deterrent.

One approach to remedy the situation would be to increase the penalties for infringement of moral rights in general. Further approaches would be to (i) require that computer generated output from any AI tool has to be clearly identified as having been created by AI and (ii) protect the right of the creator to refuse to agree to the ingestion of their works into a tool designed to create output that will interfere with the reputation and legitimate interests of the creator.

ii. Question 2.

Licensing or exceptions to copyright for text and data mining, which is often significant in AI use and development.

Options:

- Option 0: Make no legal change
- Option 1: Improve licensing environment for the purposes of TDM
- Option 2: Extend the existing TDM exception to cover commercial research and databases
- Option 3: Adopt a TDM exception for any use, with a rights holder opt-out
- Option 4: Adopt a TDM exception for any use, which does not allow rights holders to opt out

In order to protect composers and rightholders it is important that any policy decision upholds the supremacy of licensing. The music industry is built on the business of licensing where there is market demand. This licensing system has been established over many years catering for the specific demands of users and rightholders alike based on the flexibility provided by a contractual approach and sustaining the environment for investment in creativity. It is too early to even consider any government involvement in the actual licensing negotiations; we are not aware of any licensing requests for text and data mining of music. This is a consequence of the market not yet being sufficiently developed. It is impossible to offer licences without understanding the demands and requirements of potential licensees. Furthermore, in the absence of any practical evidence of any issue in relation to the licensing of AI generated music, consideration of an exception is premature; we ask government to collect practical evidence rather than ideological views on the introduction of new exceptions.

We stress that any new exception has to comply with the internationally binding Berne Convention three-step test, i.e., it has to be limited to certain specific cases, not conflict with a normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author.

We are generally concerned that the consultation completely focuses on the current text and data mining exception; this exception seems to be entirely inappropriate for the copying of music in the machine learning process.

6. **If you license works for TDM, or purchase such licences, can you provide information on the costs and benefits of these? For example, availability, pricing, whether additional services are included or available, number and types of works covered by the licence. Please also consider the benefits that TDM provide to you and your colleagues.**

We are a business built on licensing reacting to, and innovating to meet, market demand. We are not aware of any licensing requests from AI application providers at this stage.

TDM is ill suited for the music industry – it was introduced in the UK to enable the use of works for research, such as using the text of magazine articles to identify a cure for malaria. Music is not data in this sense and should not be treated as such.

Any form of ingesting for musical works, sound recordings and performances should be conducted only with a licence and robust records must be kept of works ingested. We note that on occasion composers for good reasons object to having their works used in specific ways; it is a fundamental principle of copyright that the creator should have the right to decide what is done with their work.

7. **Is do you there a specific approach the government should adopt in relation to licensing?**

Any Government intervention depends on market demand which is not yet apparent. Government needs to analyse what is happening in practice with AI generated works, involving right holders and users (i.e. tech experts). Any intervention needs to be evidence based, and we need more time to get practical evidence of what is happening. However market demand evolves and whatever evidence base emerges, we are focused on a voluntary licensing model as the best approach to be respectful of the principles of copyright and sustain investment in creativity.

8. **Please rank the options in order of preference (most to least preferred) and explain why?**

0 preferred at this stage.

The rest are unnecessary. Option 1 is the least worst option descending to 4 which is the least justified. Even Option 1 must retain an essential principle of ‘do no harm’ to existing copyrights and to the protections and values afforded to rightsholders, as AI technologies and frameworks develop.

9. **If you have experience of the EU exception with opt out for rights holders, how has this affected you?**

No; given the delayed implementation of the DSM directive in European Union member states but generally, we expect right holders to opt out from the TDM exception in Art 4 schemes; and the exception in Art 3 is limited to scientific research.

Any general UK licence scheme for AI text and data mining must include the ability to opt out although notwithstanding, this caveat would still not justify an exception.

10. How would any of the exception options positively or negatively affect you? Please quantify this if possible.

It will be impossible for anybody to quantify the potential effect of an undefined exception; but we make the following general observations regarding exceptions. Exceptions limiting the rights of composers, publishers and rightholders, and thus generally negative, are justified by reference to a social public domain good. What is justified by public policy may be sector-specific (e.g. more justified in a medical context and sector-specific solutions are more easily found through voluntary licensing models and industry practices). The purpose of exceptions is best exemplified by the exception for visually impaired people who benefit from an exception to use accessible format copies. Such exception is justified balancing the interests of the individual creator in their exclusive rights and societal norms. An exception for text and data mining benefiting the commercial interests of tech companies does not pass this test; it is not justified. Legally, any new exception as to comply with the internationally binding three-step test (e.g. TRIPS Agreement). To allow one industry to grow parasitically at the expense of another - and in this case to contemplate encouraging tech companies to yet again stand on the shoulders of creators - is morally indefensible and economically unjustifiable.

A more notable negative effect of exceptions is that pirates often rely on exceptions in order to avoid paying a licence fee; the costs of arguing the parameters of an exception are prohibitive for rightholders; the costs for legal proceedings are not justified in view of the limited damages available even if they prevail in the case.