BRITISH COPYRIGHT COUNCIL

briefing

A world-leading copyright regime

Copyright is fundamental to human creativity. It makes sure that creators are able to keep creating.

The creative industries are major contributors to the UK's economy, societal fabric and its reputation as a hub for culture, creativity and innovation. They contributed £115.9bn to the UK economy in 2019.[1] This is more than the automotive, aerospace, life sciences, and oil and gas industries combined.[2] Between 2010 and 2019, the creative industries grew its GVA by 43.6%, compared to 17.7% across the UK economy. Additionally, Intellectual Property (IP) is in the top five UK service exports, valued at £17.5bn in 2020, 6.5% of UK exports.[3]

The sector is driving growth both nationally and locally. Prior to the Pandemic, creative industry employment in local economies had grown by an average of 11% per annum. This is twice as fast as other industry sectors, and if this pace is regained post-Covid it will mean 1,000 new jobs are created every week and that jobs in the creative industries will increase from 2.1 million to over 3 million by 2030.[4] Copyright is a key component of the UK's IP framework as it supports creators and performers to earning a living from their works, thereby contributing to the economy, as well as being an important tool for those at the business end of the creative and cultural industries.

Yet the rights of creators and those who produce and publish their works are not given sufficient priority in policy developments relating to digital markets or in the Free Trade Agreements (FTA). The Government has a unique opportunity in the coming months to strengthen the UK's copyright regime and secure our position as world leaders. But without action there is a real risk that the economic and societal benefits derived from the creative sector will be eroded.

The BBC urges the government to prioritise these policy recommendations that have been developed with our membership, which collectively represents the voices of over 500,000 creators, spanning the creative industries.

1. **Licensing options reflecting global and technological developments must be permitted to provide new market opportunities. Broadening exceptions without recognising marketplace licensing solutions will erode future creativity and innovation.**

2. **The new IPO Enforcement Strategy must support improved use of the Intellectual Property Enterprise Court's (IPEC) small claims track (SCT) and:**
    - **Reduce costs linked to securing injunctive relief and launch an education initiative to explain the relief available and the grounds on which it can be secured.**
    - **Produce clearer guidance for rightsholders.**
    - **Ensure that there is understanding of the value attributed to creative works and the level of claimable compensation.**

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[1] https://www.thecreativeindustries.co.uk/resources/infographics
[2] Government press release, *UK's Creative Industries contributes almost £13 million to the UK economy every hour* https://www.gov.uk/government/news/uks-creative-industries-contributes-almost-13-million-to-the-uk-economy-every-hour
[3] Department for International Trade (2021) *Trade and Investment Core Statistics Book, April 2021* Core Statistics Book for trade, investment and the economy (publishing.service.gov.uk)
[4] https://www.nesta.org.uk/press-release/creative-industries-are-driving-economic-growth-across-the-uk-on-track-to-create-one-million-new-creative-industries-jobs-between-2013-and-2030/

- **Consult on the introduction of optional statutory damages - though this should not be limited to the SCT.**

3. **The DCMS Ministerial Team must continue to champion the aims of the Creative Industries Council's Intellectual Property Sub-Group. This initiative needs all the major platforms to engage constructively in the roundtable discussions if we're going to make meaningful progress towards Codes of Practice as set out in the Creative Industries Sector Deal.**

4. **The CMA's Digital Markets Strategy update in February this year is positive progress. The new Digital Market Unit must prioritise the enforcement of copyright online and the economic harm caused by infringement. Any regulatory changes resulting from its work, which are related to the power of online platforms with Strategic Market Status, should address economic harms to rightsholders. This Unit must work across government to ensure that any regulatory changes are analogous with the work underway by the IPO. This would support cost effective and practical protection of copyright and related rights, and update the responsibilities for the enforcement of rights, as online markets continue to evolve.**

5. **Licensing to support the use of copyright works within AI applications, must remain the focal point of the IPO's work on copyright & AI, rather than exceptions. Before taking further action, the IPO should complete a mapping exercise of the existing licensing framework and ownership for the use of copyright materials by AI, and for AI-generated content. This will ensure that we understand what gaps any policy developments will need to address, whether any new rights are necessary, or whether any gaps can be resolved through updating definitions within the current framework.**

6. **The IP Chapters in all FTAs must be given the prominence they deserve to appropriately reflect the creative industries' contribution to UK exports and soft power.**
   - **Provisions within FTAs should support bilateral developments for rights protection above minimum levels to support reciprocity for UK right owners.**
   - **The UK should not under any circumstances adopt a 'fair use' approach to limitations and exceptions. The advantages of a 'fair dealing approach' should be promoted, and the internationally recognised three-step-test governing exceptions & limitations should be protected in FTAs and by WIPO.**
   - **The UK's departure from the EU has resulted in an asymmetric exhaustion regime between the UK and the EU. This cannot be a permanent solution and our view is that copyright concerns for the creative industries would be best addressed by returning to the long-standing exclusion of international copyright exhaustion in UK legislation and adoption of a national exhaustion framework.**
   - **International recognition and adoption of the Artist Resale Right should be recognised within FTA provisions.**
   - **We ask government to support movements at WIPO to create an international instrument on PLR and promote this right on a global stage and the benefits of such reciprocal arrangements should be borne in mind during negotiations for future trade agreements.**

Supporting UK creativity

Responding to advances in technology and a global pandemic

A recurring theme is copyright in digital markets. Our members have a long-standing history of investing in and embracing digital technologies to engage new audiences through digital platforms and distribution channels, both nationally and internationally. They are also creating new forms of art, creative and cultural content, and experiences, as well as increasing access to our world-class archives and collections for entertainment and educational purposes.

The Coronavirus Pandemic has accelerated the creation and consumption of online content. The Creative Industries Policy and Evidence Centre, led by NESTA, replicated the IPO's Online Copyright Infringement Tracker (OCI) survey during the first lockdown and found that the consumption of online content increased across music, film, TV, and e-publishing, as well as 'non-traditional' digital activities such as watching filmed performances of theatre, concerts and dance shows and looking at art, paintings and photographs online.[5]

The most recent OCI tracker that was published towards the end of 'lockdown' confirmed these findings with average TV streaming hours increasing between 2019 and 2020 from 93 hours to 122 hours, for film it increased from 57 to 77 hours and for music from 75 to 80 hours. Concerningly, it found that illegally streamed music has more than doubled from 10 hours to 21 hours. Though the OCI found that live sport and digital magazines had the highest levels of infringement.[6]

Licensing

Licensing options reflecting global and technological developments must be permitted to provide new market opportunities. Broadening exceptions without recognising licensing solutions will erode future creativity and innovation.

The UK's copyright framework is flexible and licensing systems can adapt in times of challenge to reflect market needs. The Pandemic has proven that copyright in the UK can ensure access for users, whilst protecting the industry's ability to contribute to the economy and support the livelihoods of creators. Having a range of licensing options also supports a robust marketplace contributing to economic growth for a broad range of stakeholders.

Education

- Online technologies have provided vital support for educational, government and research services since the start of the Coronavirus Pandemic. This has put a spotlight on the importance of copyright works being accessible for users and consumers. The differences

[5] PEC (2020) *Understanding changes to the way that we consume culture at home during COVID-19* https://www.pec.ac.uk/policy-briefings/digital-culture-consumer-panel
[6] IPO (2021) *Online copyright infringement tracker survey (10th Wave)* Online copyright infringement tracker survey (10th Wave) executive summary - GOV.UK (www.gov.uk)

between "commercial" and "non-commercial" uses for copyright works has therefore been tested against the copyright licensing frameworks.

- Members of the BCC license content for educational purposes in schools and universities. Online learning had shown significant growth over the last decade; and since the COVID-19 outbreak, online learning has become central to the education sector. Therefore, the practical application of both direct and collective licensing of copyright works for use within digital delivery systems must not be overlooked as an important part of developing digital markets in the future.

- Licensors of content across these sectors already provide valuable models for access to works. This has been complemented by new actions to support businesses, researchers, educators and providers of cultural content during the crisis. The actions of rightsholders, in conjunction with licensing bodies, have enabled distributors and creators to facilitate access to copyrighted content online. This adaptation to the licensing framework shows how copyright can adapt to changing circumstances.

Research

- Free access has been granted to academic research material (particularly evident in the COVID-19 research field) with full text availability online and data mining access for academic research. In addition, research material on COVID-19 has been fast-tracked for publication. Academic libraries have also put key materials online and shared COVID-19 resources globally, as have research / scientific image libraries by discounting and expanding their licensing agreements.

Enforcement

Improve the Intellectual Property Enterprise Court's (IPEC) small claims track (SCT).

- Copyright infringement and piracy are a serious threat to the creative industries. A 2019 report by the UK's Intellectual Property Office (IPO) and Intellectual Property Crime Group identified that "Intellectual Property Crime is a feature of organised crime and highly profitable, accounting for almost 4% of UK imports (£9.3 billion in value) and more importantly accounts for £4 billion in lost tax revenue and 60,000 UK jobs."[7] In its 2020 Corporate Plan the IPO states that IP crime causes "Economic harm to rights-holders and allied industries supporting legitimate trade, plus unfair competition to legal traders and loss of revenue to Government in terms of tax and duty payments".[8]

- Despite the work of the Intellectual Property Enterprise Court (IPEC), the financial and opportunity costs of pursuing a copyright infringement claim is still prohibitive for many creative SMEs and sole traders, even when infringement is obvious. In particular, the evidential difficulties of establishing clear loss and damages when liability is not realistically in issue remains a barrier for prospective claimants. Collectively, these financial and opportunity costs put redress for individual infringements beyond the reach of too many creators and creative companies as one in three creators are self-employed and the majority of creative companies employ fewer than 10 people.[9] This *de facto* bar to bringing claims has been

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[7] IPO & IP Crime Group (2019) *IP Crime and Enforcement* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842351/IP-Crime-Report-2019.pdfhttps://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842351/IP-Crime-Report-2019.pdf

[8] IPO (2020) *IP Enforcement 2020: Protecting creativity, supporting innovation* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/571604/IP_Enforcement_Strategy.pdf

[9] https://www.creativeindustriesfederation.com/sites/default/files/2018-12/Creative%20Industries%20Federation%20-%20Growing%20the%20UK's%20Creative%20Industries.pdf

exacerbated during the pandemic as it has become clear that certain aspects of the administrative process for new claims take longer remotely.

- The pandemic has led HM Courts & Tribunals Service (HMCTS) to embrace greater use of technologies, which is hugely welcome. Now is the time to move the issuing and managing of claims in IPEC's small claims track (SCT) online with the adoption of 'CE File'. This would create efficiencies and improve confidence in the SCT by saving costs, improving track and search functionality, and reducing time delays in proceedings. As you will no doubt be aware, this approach is already being used effectively in the IPEC District Registries, Admiralty and Commercial Court and for Business and Companies to ensure that HMCTS's operations are consistent with their world-leading reputation. This would also allow IPEC to continue offering the option of holding interim hearings remotely as both Court staff and litigants would be more readily able to access all the information in each case.

Reduce costs linked to securing injunctive relief and launch an education initiative to explain the relief available and the grounds on which it can be secured.

- Our members have expressed a general concern that the costs of taking action continues to be perceived as disproportionate compared to the remedies available. Costs will of course vary very considerably, depending upon the court in which proceedings are brought. In the High Court, direct actions tend to cost upwards of £1m, with further costs on appeal (500-600k) and potential adverse costs liability if the action is unsuccessful. Interim injunctive relief can cost in the region of 50-100k and may require giving a cross-undertaking in damages (in case it is later decided that the interim injunction was wrongly granted). In site blocking actions rightsholders face costs of around £60k-90k in legal fees and can also face significant time and costs outlay in compiling the factual evidence needed to substantiate such actions and in monitoring the blocks after the order is granted".

Produce clearer guidance for rightsholders.

- Our members have reported that they would value clearer guidance on the process; a coherent understanding of the value attributed to creative works and the level of claimable compensation; and the availability of injunctive relief.

Ensure that there is understanding of the value attributed to creative works and the level of claimable compensation.

- Our members have reported that they would benefit from a coherent understanding of the value attributed to creative works and the level of claimable compensation. The current system can place a significant burden of proof on the rightsholder and there are concerns that this, in some instances, is leading to the loss of revenue from infringements of copyright being undervalued. The proposal to introduce statutory damages goes someway to address this, but it does not sufficiently manage all subjectivity in the system.

Consult on the introduction of optional statutory damages - though this should not be limited to the SCT.

- Our view is that a non-mandatory statutory damages option would be beneficial. In practice, from the perspective of a right owner, court proceedings for infringement of copyright and related rights can be daunting, expensive, time consuming and complex. We believe that the benefits of a statutory damages option would deliver a number of advantages. These include:
    - Clearer evidence of the possible damages may make it less easy for would be infringers to ignore the need to obtain a license.

- It should not be more attractive for would-be infringers to ask forgiveness rather than permission for use of copyright materials.
- Addressing concerns over costs, expenses and time delays for damages inquiries or accounts of profits.
- Provision of support for smaller claimants who currently face challenges in evidencing damages, or understanding what they have to do in order to do so.

- The introduction of statutory damages option should be accompanied by clear parameters and efforts to tackle transparency. For example, the IPO could set a minimum amount, or a range of awards per incident of infringement. This would ensure that rightsholders, no matter how large or small, have clarity and greater flexibility when pursuing infringements of their rights. It will also provide a more affordable alternative option, especially in cases where calculations of the claim value are prohibitive.

- Statutory damages would also be applicable in the High Court, arguably more so. Therefore, they should not be limited to the SCT. For this it will be important that relevant rules establish appropriate minimum and maximum amounts that can be awarded for established infringements. These can then be varied according to the courts in which proceedings are brought; to reflect any non-commercial infringing uses; and to reflect any commercial infringing uses.

- It will be important for the proposals to be presented as an elected option within otherwise available remedies for copyright and related rights infringements, considering the caveats touched on above.

Enforcement online

The DCMS Ministerial Team must champion the aims of the Creative Industries Council's Intellectual Property Sub-Group. This initiative needs all the major platforms to engage constructively in the roundtable discussions if we're going to make meaningful progress towards Codes of Practice as set out in the Creative Industries Sector Deal.[10]

- The welcomed roundtable process on the role of online intermediaries in reducing piracy has stalled. The roundtables were supposed to have led to agreements by the end of 2018. Yet some three years after this deadline some platforms are still not meaningfully engaging in the roundtable discussions set-up to deliver the Creative Industries Sector Deal commitment to putting in place effective Codes of Practice for social media, digital advertising, and online marketplaces. Progress to date has demonstrated without political weight behind this initiative such Codes are unlikely to be agreed and implemented. Ministers could send a clear message to platforms by consulting on a legislative backstop unless all platforms constructively engage on a voluntary basis.

- Helpfully, the IPO's work on enforcement provides a strong basis for the content of the Code of Practice relevant to social media platforms. These include:
  - streamlining procedures and requirements for take down notices, so that rightsholders can easily send notices to a wide range of services.
  - a new "stay-down" obligation to reduce costs and avoid recurring abuse. Rules are needed to support online platforms preventing the re-upload of illegal content and address multiple instances of infringement appearing on their service. This would allow rightsholders to focus their resources on identifying new illegal content, instead

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695097/creative-industries-sector-deal-print.pdf

of preventing infringing copies reappearing, and ultimately reduce the prevalence of illegal content.
  - an obligation on online platform to have and enforce repeat infringer policies that set out the consequences for repeatedly posting illegal content. This could be fulfilled through 'Know your Busines Customer' obligations.

- Progress is crucial to the creative industries as the expansion of digital platforms has made it harder for rightsholders to directly oversee how their content is distributed online and to ensure that is only used by legitimate market-players.

- Our members have seen the level of piracy increase further still across the music, publishing and photography sectors since the beginning of the Pandemic. Of particular concern is a reported increase in the activities of large-scale serial offenders.

- Determining the role of digital platforms in preventing copyright infringement should be a core consideration in the future development of the digital marketplace. Currently, the onus is on individual creators to identify when their rights have been infringed. Our view is that when infringement takes place on an online platform, it is only right that there is shared responsibility. Online platforms derive a commercial advantage from their intermediary role between creators and consumers; and are best placed within the digital environment to take a more active role in efficiently counteracting unauthorised or harmful content that is made available on their platforms. If platforms do not take action to prevent infringement of copyright and related rights, economic support for initial innovation and creativity is at risk. The need to support legitimate markets and boost tax revenue is of paramount importance.

The CMA's Digital Markets Strategy update in February this year is positive progress. [11] **The new Digital Market Unit must prioritse the enforcement of copyright online and the economic harm caused by infringement. Any regulatory changes resulting from its work, which are related to the power of online platforms with Strategic Market Status, should address economic harms to rightsholders. This Unit must work across government to ensure that any regulatory changes are analogous with the work underway by the IPO. This would support cost effective and practical protection of copyright and related rights, and update the responsibilities for the enforcement of rights, as online markets continue to evolve.**

- Annex G of the CMA's Digital Markets Taskforce's report provides context to its recommendation that 'The government should strengthen powers to tackle unlawful or illegal activity or content on digital platforms which could result in economic detriment to consumers and businesses.' [12] The CMA acknowledges that the UK's regulatory regime needs to modernise to be fit for the digital age, harness the full potential of digital markets, and drive greater competition and innovation. [13] The BCC's priorities for the Digital Market Unit are:
  i. recognition of the value of original works, their use and licensing;
  ii. enforcement of rights and access to justice when licensing rules are ignored or overridden in order to prevent economic harm to grassroot creators; and
  iii. redressing the role of online platforms within the marketplace and their responsibility for content on their platforms.

[11] CMA (2021) Policy Paper: The CMA's Digital Markets Strategy: February 2021 refresh - https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh#appendix-examples-of-recent-cma-digital-markets-work
[12] Digital Markets Taskforce Advice (2020) https://www.gov.uk/cma-cases/digital-markets-taskforce#taskforce-advice
[13] CMA (2020) Press release; CMA advises government on new regulatory regime for tech giants https://www.gov.uk/government/news/cma-advises-government-on-new-regulatory-regime-for-tech-giants

These will, in our view, ensure a fair and transparent marketplace that promotes innovation and competition.

- It is however important that the work of the Digital Market Unit is conducted in tandem with work being progressed elsewhere in government such as the Intellectual Property Office's Enforcement Strategy and Ofcom regulatory powers to address unlawful and illegal activity or content hosted on platforms. This will help to ensure that any regulatory changes appropriately reflect the economic harms caused by these unlawful and illegal activities.

Artificial Intelligence

Licensing to support the use of copyright works within AI applications, must remain the focal point of the IPO's work on copyright & AI, rather than exceptions. Before taking further action, the IPO should complete a mapping exercise of the existing licensing framework and ownership for the use of copyright materials by AI, and for AI-generated content. This will ensure that we understand what gaps any policy developments will need to address, whether any new rights are necessary, or whether any gaps can be resolved through updating definitions within the current framework.

- Whilst many eyes are on the application of Artificial Intelligence and crypto-assets, and the development of data management systems, consumers will continue to be driven by online access to music, film, tv, art, images, e-books etc., as well as trusted information sources. If the UK wants to drive digital innovation across all of its regions and nations, then the creators and contributors of these cultural assets must be rewarded for their use within the increasingly complex digital delivery chains. It is genuine original variety leads to innovation.
- The BCC believes that the status of copyright works, which provide the source materials to develop AI applications, must not be forgotten (whether in the form of computer programs, databases or other literary works). These human-centred creative works inform and establish value within the AI applications that they are used and licensing structures for these source materials are part of existing market structures.
- It is our view that licensing to support the use of copyright works within AI applications, must remain the focal point of the IPO's work on copyright & AI, rather than exceptions. Broadening exceptions for AI would conflict with licensed uses of copyright materials and prejudice rightsholders. This includes a specific exception that allows copies to be made within an AI system for development 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 development being used commercially. In addition, there are many examples of licensing models that are evolving in response to technology. Here are some examples from across the creative industries and the sectors our members represent:
    - 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;[14] 'Loyal AI' a suite of editorial assistants, including the use of machine learning to suggest sources to inspire new perspectives and content ideas.[15]
    - Images together with associated metadata are incredibly rich sources of development 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

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

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.

These examples demonstrate that rather than introducing new exceptions, there should be increased support for licensing.

- In particular, the scope of the existing exception for text and data mining (TDM) is important and the "non-commercial research" requirement for the exception under s29A 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. Therefore, it does not fall within the TDM exception as defined in the Berne Convention's three-step-test.

- Anything that blurs the boundaries between commercial and non-commercial as set out in the Berne Convention could lead to increased litigation in order to deal with any subsequent ambiguity or lack of clarity over the commercial boundaries. Whereas industry led licensing, supported by a robust copyright framework, is able to support new innovation far more rapidly and effectively.

- Crucially, it is important that policymakers understand that copyright does not create any unreasonable obstacles to the development of AI and should not be labelled as such. Copyright should ensure that the creators whose works are used by AI are appropriately remunerated and mean they are able to continue creating and contributing to the UK's culture and society. We are not aware of any instances where copyright has hindered the development of AI.

- 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. For this to work AI developers will need to retain auditable records of what data has been used. Then, where input data contains copyright works, questions about whether a licence is required could be determined. A legal requirement to maintain auditable records would 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 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. 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.

- The creative industries use and invest in AI – and have done for many years. Therefore, 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, whether any new rights are necessary, or whether any gaps can be resolved through updating definitions within the current framework. This should include:

- the ownership for the use of copyright materials for the development of AI applications;
- the use or application of the AI application itself;
- how users interact with it to ensure that we understand what gaps any policy developments will need to address;
- 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:
  - 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")
  - between companies responsible for the creation of the copyright computer programs and algorithms which in effect provide the seeds for application by others
  - under open rights provisions (when frameworks are effectively made available for commercial use by others) or
  - under commercial licences to third parties.

  Therefore, the government and industry should continue to have an open dialogue about technological advances and future legislative changes as they arise.

- 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.

- 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.

- 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:
  - 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).[16]

- 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".[17] Specifically, section.313.2 of the Compendium of the US Copyright 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".[18] The exclusive protection of copyright for humans has been reaffirmed in the Monkey selfie case.[19]

- Over time the IPO may consider protection by means of a new category of 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 it would be helpful, we could work with the IPO to collate such evidence.

Global Britain

The IP Chapters in all FTAs must be given the prominence they deserve to appropriately reflect the creative industries' contribution to UK exports and soft power.

In 2019, £20.1bn (55.4% of the DCMS sector total goods exports) were in the Creative Industries. This is 49.9% higher than in 2018 and 33.0% higher than 2015. The two most significant markets for UK exports are the EU (£13.9bn, equivalent to 38.4% of total DCMS Sector goods trade exported, by value 38.4%) and the US (£8.4bn, equivalent to 23.1%).[20] Taking each of these markets in turn:

UK-EU trade

Regulatory divergence

Provisions within FTA's should support bilateral developments for rights protection above minimum levels to support reciprocity for UK right owners.

- As the UK will not adopt the EU Directive on Copyright in the Digital Single Market, Digital Services Act or the Digital Markets Act regulatory divergence between the UK and EU will emerge without updates to the UK's regulatory regime. Some of the provisions in these EU initiatives are already contained within UK legislation and so wholesale review of copyright law is not required. However, there is a range of approaches the government could take for those provisions that are not already enshrined in UK legislation - each with upsides and downsides for different links in the creative value chain. Therefore, at this stage dialogue is needed across the creative value chain to make sure that the UK's copyright regime remains world-leading and to find a workable way forward that ensures rights protection above minimum levels to support reciprocity for UK right owners.

- This is pertinent because digital services increasingly facilitate cross-border trading across the EU and the rest of the world, opening entirely new business opportunities to the creative industries by facilitating their expansion and access to new markets.[21] However, under the current liability regime, certain types of digital services have enjoyed a significant increase in

[16] 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
[17] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)
[18] https://www.copyright.gov/comp3/
[19] Naruto vs Slater; an ideal playing field for academics in 2016
[20] https://www.gov.uk/government/statistics/dcms-economic-estimates-2019-trade-report/dcms-sectors-economic-estimates-2019-trade
[21] In this context, we are referring to digital services as services provided by certain types of platforms that generate advertising revenue indirectly from content shared or streamed on their websites, such as online content sharing service providers

revenue and a dominance of advertising revenues from new markets for creative works, whilst artists' and performers' income has not kept pace.

- Whilst this phenomenon is not limited to musicians, one useful is example is a member survey carried out by The Ivors Academy and the Musicians' Union. 82% of respondents earned less than £200 from streaming, from all of their music across all platforms in 2019. This included members with thousands, hundreds of thousands, and millions of streams. 7% earned more than £200 but less than £500, and 4% earned more than £500 but less than £1,000. The remaining 7% of respondents earned more than £1,000 from streaming in 2019.[22]

- Getting digital services to "pay fair" for the content that enables them to generate large profits, remains at the core of what publishers and creators deserve. As the scale and nature of disruption caused by the pandemic continues to evolve, the creative industries are facing significant challenges meaning that they are more dependent on streaming royalties. Therefore, much more needs to be done to get creators, publishers and producers a better and fairer deal in the digital market.

- This imbalance is caused by:
  - certain digital service providers' relative power in the digital value chain, which means the income generated by digital services is often much greater than the income derived for the original creator; and
  - responsibility for the prevention of piracy and unlicensed use of intellectual property on digital services' platforms falls to individual rightsholders, rather than the platforms having responsibility for preventing illegal content on their platforms.

- Digital services should obtain licences from rightsholders for the creative content they use, regardless of whether the content is uploaded and / or shared directly by the platform or indirectly by users of digital platforms. Such licences are already available. Yet some digital services have avoided obtaining these licences, instead relying on their interpretation of the limitations of their responsibilities and European legislation. This is detrimental to creators and artists, and to those digital services that do the right thing and obtain a licence from rightsholders. The Digital Services Act includes provisions which provide an opportunity to create a level playing field by ensuring that any digital services which do not obtain licences face effective and persuasive sanctions.

- In addition, digital services that provide a platform for exchanging content and services play a pivotal role in preventing the availability of, and dealing with, illegal works. Our view is that within the digital ecology these digital services are best placed to deal with illegal material efficiently by removing illegal content from their platforms and ensuring that it stays down. For example, BAPLA, a member of the BCC which represents commercial organisations that generate revenue for and manage the interests of over 120,000 professional photographers, videographers and illustrators, found that 93% of its members experience copyright infringement online resulting in 25% of licensing revenue each year (on average) being lost to online infringements of images.[23] Digital services that do not play their part in preventing piracy need to face effective and persuasive sanctions to ensure that there is a legitimate marketplace for rightsholders.

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[22] https://committees.parliament.uk/writtenevidence/15416/pdf/

[23] BAPLA Research into Online Copyright Infringement – Assessing the Value Gap https://bapla.org.uk/bapla-releases-its-first-online-copyright-infringement-report/

- Ultimately, consumers are driven online because they want access to music, films, TV, images and books - so if the UK wants to drive digital innovation globally then the creators and contributors of these creative assets must be rewarded.

- The development of digital and communication technologies mean that we are global citizens and consumers. Working across borders to create effective marketplaces and economies across the globe would stand to benefit all concerned.

Exhaustion

The UK's departure from the EU has resulted in an asymmetric exhaustion regime between the UK and the EU. This cannot be a permanent solution and our view is that copyright concerns for the creative industries would be best addressed by returning to the long-standing exclusion of international copyright exhaustion in UK legislation and adoption of a national exhaustion framework.

- The principle of exhaustion dictates that once a product is legitimately put on a market by the rightsholder (or with their consent) it can circulate freely within that market without the need for any authorisation from the rightsholder. Thus, the exclusive right of the rightsholder to authorise the distribution of that product in that market is considered to be "exhausted". In a complex interplay between IP rights and free trade principles, the legal consequence of the exhaustion is essentially an exemption to infringement. It is therefore a crucial issue for rightsholders, as well as for anyone dealing with the import and / or export of IP products. Whilst the basic concept of exhaustion is recognised in most jurisdictions, its application differs considerably. Notably, there are national, regional, and international forms of exhaustion.

- Whilst the UK has left the EU, the UK's treatment of imports from the EU27 remains different than from the rest of the world. This has resulted in an asymmetric exhaustion regime. This must not become a permanent solution. Our view is that copyright concerns would be best addressed by returning to the long-standing exclusion of international copyright exhaustion in UK legislation. Any radical move towards an "international exhaustion regime" would significantly weaken copyright protection for the distribution of goods globally. This is a significant concern to all sectors who export physical IP products around the world, for example in book publishing where authors and publishers rely heavily on global exports under a territorial rights system. Export sales are worth £3.5bn per annum and account for 60% of UK publisher sales of books alone. A functioning exhaustion regime underpins the viability of the publishing industry and supports the thousands of UK authors who rely on global sales.

Data protection

- The exchange of data is key both to permit copyright uses and to ensure accurate payment to the right artist or creator for the use of their works or performances and will need specific consideration. In particular for transfers of EU personal data to non-EEA territories, even in the event that the UK is granted an adequacy decision by the EU for transfers of personal data to the United Kingdom under the General Data Protection Regulation. We urge the Government to maintain a data protection framework that complies with the EU GDPR [and press the Commission for conclusion of an adequacy decision before 30 June 2021].

Copyright enforcement

- As a third country outside of the EU, it remains important to establish a collaborative future relationship with various European institutions to ensure a useful exchange of news and information. This includes institutions such as the EUIPO that heads the EU IP Enforcement Portal, agorateka (the European online content portal) and Orphan Works Database (which will

likely become a repository for Out of Commerce Works) through the Observatory, to enable creative industry rightsholders to maintain connections in order to communicate with these institutions over the use of copyright protected works.

UK-CPTPP trade

- The Government's urgency to join the CPTPP may result in IP standards that are significantly weaker than those present in UK law. Accepting region-wide standards that are far weaker than UK law will threaten the very existence of high-value UK exports such as e-books, music, games, image, art and audiovisual works in these markets as:
    - Without sufficient copyright protections, these UK exports become infinitely reproducible, thereby losing their economic value.
    - The CPTPP contains a provision on exceptions and limitations that encourages the introduction of new exceptions – this is unhelpful given the UK's own thorough review of its exceptions regime, which concluded it strikes the right balance in the Hargreaves Review.
    - The term of copyright could be shortened, thereby reducing the commercial lifespan of copyrighted works.
    - The safe harbour provisions are suspended. The UK must ensure that they are not progressed via the CPTPP even if the suspension is lifted at a later date.
    - The Artist's Resale Right is notably missing from the CPTPP – this is an important component of the UK's Intellectual Property framework.
    - There are also discrepancies between the UK and CPTPP members' approach to public performances and broadcast rights, communication to the public and collective management.

- This Agreement provides a once in a lifetime chance to use the UK's world-leading copyright framework to facilitate the strengthening of copyright globally. Ensuring UK-analogous protection for copyrights in high-growth markets such as Vietnam and Malaysia in particular is vital to ensuring that the UK benefits from the CPTPP bargain. Once we have granted broad market access for tangible goods exports through CPTPP, our leverage to obtain IP improvements will have largely vanished. An IP exporting nation such as the UK must ensure that raising IP standards to UK-analogous levels is part of the benefit of the bargain in any comprehensive trade agreement, including CPTPP. This is fundamental to our export potential.

UK-US trade

Fair dealing

The UK should not under any circumstances adopt the 'fair use' approach to limitations and exceptions. The advantages of a 'fair dealing approach' should be promoted, and the internationally recognised three-step-test governing exceptions & limitations should be protected in FTA's and by WIPO.

- The BCC is concerned that any requirement to adopt the fair use doctrine, instead of maintaining the UK's principle of fair dealing, would not be in the public interest and would ultimately have a negative economic impact.

- The UK and US' approach to the Berne three-step test clause that is included in several international treaties for intellectual property differs. The UK's interpretation of this clause is a fundamental strength of our framework, namely the principle of 'fair dealing'. The list of fair dealing exceptions is set out in UK law and this provides a substantive framework for establishing whether use of copyright material is lawful or not. The UK's legislation already has exceptions for a range of circumstances including teaching, research and private study,

quotation, critique and review, parody, caricature or pastiche, text and data mining and reporting of current news events.

- The US has adopted a more general approach to exceptions - 'fair use'. Fair use is more subjective than fair dealing, therefore claims of copyright infringement in the US are open to interpretation more so than in the UK. This makes decisions about whether someone's copyrights have been infringed, or not, more complex.[24] This complexity means that claims are more likely to be considered on a case-by-case basis and through litigation. This is problematic because the cost of litigation reduces access to justice for rightsholders, many of whom operate as sole traders and SMEs.

- It also means that there is less certainty for creators about what is fair use or not. A recent high-profile example of this is the early April ruling by a US Second Circuit court that a series of Andy Warhol silkscreen portraits of the artist Prince reversed a lower court judgement that has declared the series transformative and therefore fair use. This ruling follows a controversial ruling expanding the fair use doctrine and its protection of transformative works in 2013.[25] As fair dealing is more specific, litigation is more likely to be avoidable. This is borne out in the relative volume and magnitude of fair use cases versus fair dealing cases. New York University has prepared a study of the 435 fair use cases in the US between 1978 and 2019.[26] Our UK analysis suggests that there have been just 9 fair dealing cases during this same timeframe and that the last case was in 2007.

- The US Senate is already showing concern about the US approach - the US Senate Judiciary Committee's Intellectual Property Subcommittee is reviewing the DMCA. It recently asked creatives, academics and internet service providers 'How does the DMCA contemplate limitations and exceptions, like fair use, and how should a reform bill consider it?'. During the proceedings, Subcommittee Member, Senator Chris Coons, stated that fair use is "a contentious and challenging subject" because there needs to be a balance between safeguarding free speech and ensuring creators are fairly compensated, and importantly as part of this, be able to combat online piracy when their rights are infringed. If rightsholders are less able to pursue online infringement of their rights, then there is less of a deterrent. This not only means creators are less able to earn an income from their existing works, but it also reduces market demand for original works.

- Adopting a similar 'fair use' doctrine to the US would inject uncertainty into UK legislation. This would undermine a key objective of the copyright system i.e., to provide clarity, as well as reducing incentives for licensing and thereby reducing investment confidence in the UK cultural and creative sectors. Ultimately, this means the UK would likely see a sizeable increase in (costly) litigation around copyright infringement claims, potentially leading to a 'chilling effect' on the commercialisation of creative content. The UK's regime is world-leading

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[24] §107 · Limitations on exclusive rights: Fair use41
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
[25] https://www.natlawreview.com/article/purple-pain-warhol-s-prince-series-isn-t-fair-use-photographer-s-image
[26] Beebe, B. (2020) An Empirical Study of US Copyright Fair Use Opinions Updated, 1978-2019. NYU Journal of IP and Entertainment Law. Vol 10. Fall 2020. No1.

because it balances the rights of creators alongside society's access to information and content.

Safe harbours

- Digital technologies and the digital marketplace have changed dramatically since the US Digital Millennium Copyright Act (DCMA) was devised in the late 1990's. The US Copyright Office has concluded itself that the operation of the section 512 'safe harbor' system today is unbalanced. A report it published earlier this year highlights areas where current implementation of section 512 is out of sync with Congress' original intent, including repeat infringer policies, specificity within takedown notices, and injunctions.[27] The Office did not recommend wholesale changes to section 512, but did identify areas for fine-tuning to better balance the rights and responsibilities of online service providers and rightsholders in the creative industries. It would therefore seem counter-productive for the trade agreement to include provisions on safe harbours, given the US's work to review and fine-tune its system is ongoing - though there is precedent for doing so, the recently negotiated US-Mexico-Canada Agreement, or USMCA.[28]

- Our view is that at this time efforts to harmonise this aspect of the UK and US' respective frameworks could impair any domestic legislative efforts to review and clarify the nature and scope of copyright safe harbours in each country. This is as true in the UK as the US, given the UK's consideration of introducing greater obligations on digital platforms within the context of discussions around online harms.

Artist's Resale Right (ARR)

International recognition and adoption of the Artist Resale Right should be recognised within FTA provisions.

- In the UK, artists benefit from legislation that provides artists with a royalty when their copyright protected works resell through art market professionals, like galleries, auction houses and dealers. There is no ARR or equivalent law in the USA. This means that when British artists' works are bought in US auctions these sales do not result in a payment for the artist and no royalties flow back into the UK economy. ARR exists in 80 countries worldwide, therefore the absence of a US version not only affects American artists but artists of many nationalities whose works are sold on the US art market – which is the largest in the world. Again, this is an area where there have been successive attempts to update US legislation that would bring it in line with globally recognised standards.[29]

Public Lending Right

We ask government to support movements at WIPO to create an international instrument on PLR and promote this right on a global stage and the benefits of such reciprocal arrangements should be borne in mind during negotiations for future trade agreements.

- This right makes a small payment to authors of books, including photographers and illustrators, whenever their work is borrowed from a library - to compensate for the reduced sales expected. The recent extension of Public Lending Right (PLR) in the UK to cover lending of e-books is extremely welcome. This will be vital to book authors retaining the possibility of professional independence in the digital age - though, to be truly effective in

[27] US Copyright Office report, s.512 of Title 17, May 2020: https://www.copyright.gov/policy/section512/section-512-full-report.pdf
[28] US-Canada-Mexico free trade agreement, Chapter 20:58: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual Property-Rights.pdf
[29] https://www.legislation.gov.uk/uksi/2006/346/contents/made

these times it needs to be applied worldwide. We ask government to support movements at WIPO to create an international instrument on PLR and promote this right on a global stage.

- The Government's decision to retain the rights of EEA authors to benefit from the UK PLR scheme, post Brexit, preserves and supports the significant payments made to UK authors from similar schemes in Europe. The benefits of such reciprocal arrangements should be borne in mind during negotiations for future trade agreements.