

## BCC response to the 2022 IPO Artificial Intelligence and IP: copyright and patents Open Consultation

### Section A

#### Copyright – computer generated works (CGW)

- 1. 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 computer-generated works?*

Our members have indicated that, in practice, little direct emphasis has been placed on the computer-generated works (CGW) provisions. We therefore note that the CGW provision is limited in practical application. This provision was introduced in the 1988 Act and only tested once in court to establish the ownership of a work. According to the decision in *Nova Productions v Mazooma Games* (2006) Section 9 (3) CDPA deals with the ownership, but Section 1 CDPA outlines whether there is a protectable literary, musical dramatic or artistic work in the first place.

We also urge clarity in terminology regarding works that are developed and adapted with the assistance of computer technologies and works which are based upon the application of computer programmes that are then applied to find or select or use other copyright works and enable the combined result to be presented to end users (for the purposes of this response “AI generated works”). The terms should not be used interchangeably as seems to be the case with question 5 of this consultation. As a general remark it is important to differentiate between AI assisted works where AI is used as a creative tool by a human author and a work which is generated by an AI application. Notably, even in the latter case, a work would need to be established under Section 1 CDPA to benefit from copyright protections. For example, originality tests for data sets that are compiled as a result of the application of an algorithm.

Currently, if we consider works created with the help of a computer, many of our members rely on “computer generation” in the creation process. Furthermore, many creative computer

programmes used by artists already rely on a degree of development of adaptation of a work within the overall creative process without the licensing of the computer programme putting any limits or restrictions on the ownership or authorship of the creative works being developed as a result of the licensed computer programme use. For example, in Adobe Photoshop, one can change visual content (for example the sky) based on the algorithms and neural engines that are already in use within the software yet are humanly activated and directed. As a result, many works have human authorship while containing artistic elements that are entirely generated from the application of the software. If the final work meets the originality threshold, even if its creation was highly dependent on technology, then the work is eligible for copyright protection under general provisions where the “author” denotes the person who used the technology as a tool to express the originality needed to underpin the creative work itself.

This renders Section 9 (3) irrelevant since existing copyright guidance and case law can be relied on to determine when the requisite level of originality has been met to grant copyright protections, as opposed to developing a separate and redundant process for the categorisation of copyright for distinct CGWs. Indeed, AI has also been used in art (see for example the next Rembrandt project) and is already widely used in the music and film industries, as an assisting tool. The use of technology to create these works is already covered by existing software contracts and licensing provisions.<sup>1</sup>

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

<b>Computer generated works</b>	
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

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<sup>1</sup> For example, in the case of the Adobe product suite which is used by many creatives across a range of sectors, care is taken to outline:

- a) Adobe’s own Intellectual Property as: “We (and our licensors) remain the sole owner of all right, title and interest in the Services and Software. Except as stated in the Terms, we do not grant you any rights to patents, copyrights, trade secrets, trademarks, or any other rights in respect to the items in the Services or Software. We reserve all rights not granted under the Terms.
- b) And users may not use the product to “engage in behaviour that violates anyone’s Intellectual Property Rights. “Intellectual Property Rights” means copyright, moral rights, trademark, trade dress, patent, trade secret, unfair competition, right of privacy, right of publicity and any other proprietary rights.”

The UK has been world leading in examining the relationship between copyright and AI, in part due to the recognition that works can be computer generated, but still linked to human authorial endeavour. As evidenced by this call for evidence, the Government has a unique opportunity in the coming months to strengthen the UK's copyright regime in a manner which compliments technological innovation and as a result secure our position as world leaders. But we caution acting too quickly since there is a real risk that the economic and societal benefits derived from the creative sector will be eroded.

Therefore, the British Copyright Council is in favour of adopting Option 0 at the current time since it avoids causing unintended consequences to the strengths of the existing copyright regime which would be difficult to reverse and, through exploring existing and new licensing options (see below), this scenario would not create undue barriers to innovative firms. This is of course with the proviso that we are not convinced that referring to computer generated works is semantically accurate when talking about artificial intelligence. As outlined in our answer to question 1, Section 9 (3) is much more limited and risks conflating issues relevant to AI applications.

As outlined in the explanatory note in the consultation document, there are clear knowledge gaps resulting from the fact that the market for end-users' selection of works generated on the back of AI applications is very new and many market parameters regarding technological innovation and market demand have not been established.<sup>2</sup> As a result, there is a lack of the requisite data which would be needed to support a broad policy intervention at this stage.

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.*

The British Copyright Council understands the argument that computer-generated works should be copyright protected. But we need to stress that that any evolution of current law should be done on a "do no harm" basis and not to the detriment of existing copyright provisions. Clarity is also required to determine whether works developed with the assistance of a computer do or will also fall under this category since such works should not be assessed solely as computer-generated works for CDPA purposes. As noted above, creators relying on AI to assist the creative or technical process to develop an original work are already considered within existing copyright protection, whilst outputs in which, for example, the only

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<sup>2</sup> As outlined in the consultation document, we use the term end-user in this submission to refer to AI developers or individuals that interact with AI programmes to create new works.

copyright element links to copyright ownership of computer programmes, do not fulfil the originality requirements needed to qualify for additional copyright protection.

This is because granting blanket copyright protection to machines devalues the fundamental reason for copyright – to protect human endeavour and spirit. This has already been a matter of legal consideration in the United States, which holds a similar view to the UK that the protection of literary and musical works requires at least a minimum amount of creativity. Based on this premise, section.313.2 of the Compendium of the US Copyright Office explicitly states that: "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." The European Union also excludes fully machine-developed works from the scope of copyright protection.

Given the involvement of a human creator, existing copyright laws already cover most of the activities involved in AI applications. While investment in AI applications and their development encompassing uses of all types of recognised copyright works does deserve to be protected and rewarded, this should not in any way undermine copyright protections for original works.

Nevertheless, if a new related right is established for the output benefiting end users resulting from processes involving AI applications, then clear language and safeguards must be established to avoid any confusion with copyright works which are completed with the assistance of computer software applications. Furthermore, care must also be taken to consider whether any "AI generated work" itself infringes the copyright of ingested works during the training stages- both in the case of supervised and unsupervised training - which would render the creation of a new related right that does not erode or infringe the existing copyright of rightsholders much more difficult.

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

Currently, and in line with our recommendation of Option 0, the British Copyright Council believes introducing new provisions related to CGWs and AI generated works is unnecessary.

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

There is a risk that AI generated works may be falsely attributed to a person; - as in the case of deepfakes. Yet this is no different to having a human created work suffer from false

attribution due to non-AI factors (i.e. forgeries or impersonation). In the interest of expediency and clarity, laws protecting creators against false attribution should be consistently applicable regardless of creator type. There are however methods of best practice to foster ethical and responsible innovation which, while not directly copyright related, we recommend such as mandating that AI generated works be identified as such and the retention of auditable records tracking material used to develop an AI generated work.

On a related note, existing UK laws are not sufficient to protect a person against false attribution. However, the solution to this is not copyright related but rather exploring other avenues for reform such as the 2006 Fraud Act included in the consultation prompt.

In this context the way in which AI applications are developed and the wider legal rules which should be applied to those who are responsible for writing the applications and authorising their use goes beyond the area copyright. Copyright protections provide an important framework for stimulating creativity and innovation. Other areas of law protect consumers against societally damaging application or publication.

### **Copyright – text and data mining (TDM)**

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, price-point, whether additional services are included or available, number and types of works covered by the licence etc.*

The British Copyright Council would refer to submissions made by publishers and other BCC members who currently use a range of licensing systems to permit text and data mining (TDM) of digital catalogues of works.

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

As previously outlined, the British Copyright Council's position is that licensing options reflecting global and technological developments provide new market opportunities. However, the status of copyright works, which provide the source materials to develop AI applications, must not be forgotten since these human-centred creative works inform and establish value within the AI applications themselves. Broadening current exceptions relating to text and data mining without recognising existing and new potential marketplace licensing solutions risks undermining and eroding future creativity and innovation.

It is vital that any changes proposed are considered against application of the three-step test for permitted exceptions. The effect on the legitimate interests of right holders and the normal exploitation of catalogues of copyright works by right owners must be addressed when considering text and data mining of catalogues by third parties on the grounds of exceptions, rather than licensed consent, and must not be forgotten.

We also note that exceptions can lead to long lasting uncertainties within the market until their parameters are established in court decisions - which would in turn become a barrier to both artistic and technological innovation. Flexible licensing-based market solution must not be eroded by inflexible exceptions.

While we strongly believe a new TDM exception is not necessary to foster innovation, supporting the development of a suitable industry-led licensing system to assist with the use of copyright works within AI applications must be the focal point of the government's work on copyright & AI. Should this consultation identify clear gaps or a market failure within the existing licensing framework and system of ownership for the use of copyright materials by AI to support AI generated content then these should be clearly defined. At this point in time, we do not believe there is any evidence that there is a licensing problem relating to the current use of copyright materials for TDM. Therefore, it is too early to discuss the removal of barriers since it is not clear whether these do in fact currently exist. For a solution to effectively fulfil a need, the scope and impact of the problem it aims to address must be clearly determined in order to determine whether any new provisions are necessary, or if a newly identified problem is best solved through alternate means such as updating definitions within the current framework, encouraging the creation of new market-led licensing solutions or ensuring that available licensing options are fully understood and visible.

Options 2, 3 and 4 as outlined would conflict with licensed uses of copyright materials and prejudice rightsholders. While this consultation notes that "TDM automates and accelerates what would traditionally be done by eye - reading a document, making notes, and understanding relationships and trends," this description fails to recognize that TDM makes copies of the data it relies on - for example for training purposes. Such copying clearly invokes copyright issues, and new exceptions that blur the boundaries between commercial and non-commercial (Option 2) will likely lead to a lack of clarity over commercial boundaries which will subsequently increase the likelihood of expensive legal proceedings. Not least, on a more general note, suitable restrictions must be put in place for text data mining, particularly in cases where paywall (or access) protection is needed or may have to be introduced. This is critical because publishers, and other content rights holders, must be able to ensure that the integrity of their data platforms is not challenged by "crawler" programmes that seek to mine content for the purposes of training machine-learning systems.

In effect, we strongly oppose introducing any new exception or broadening the existing TDM exception since industry led licensing, supported by a robust copyright framework, would be

able to support innovation far more rapidly and effectively. Indeed, many industry-led licensing models have already been evolving effectively in response to technology:

- 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 into one dashboard; ‘Loyal AI’ a suite of editorial assistants, including the use of machine learning to suggest sources to inspire new perspectives and content ideas.
- Images together with associated metadata are incredibly rich sources of development data. 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 currently use a range of AI-based applications to store and separate images as well as to provide search, tagging and discovery functions, as well as offering licensing solutions for ML.
- An example of a successful industry licensing model which is already in use can be seen with the CLA which licenses a number of Media Monitoring Organisations (MMOs) operating in the UK and overseas to undertake TDM. Following extensive consultation, [the CLA MMO Licence](#) was introduced in 2013.<sup>3</sup> The licence repertoire now covers more than 10,500 websites, including many thousands of news and current affairs sources. MMOs pay an annual subscription fee for website monitoring, based on the number of clients receiving web snippet links and a licence fee per licensed cutting.

As the examples demonstrate, rather than introducing new exceptions or broadening existing ones, there should be increased support for licensing-based solutions.

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<sup>3</sup> The license permits licensees to index relevant website content, defined as ‘accessing and copying web pages using so-called “web-crawler”, “spider” or “robot” software or other automated and/or manual review methods, processes or means in order to derive and store searchable index entries’ and ‘store the indexed material for a period not exceeding 30 days in order to search, retrieve and evaluate (by automated and/or manual review methods, processes or means) [the material]’.

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

<b>Text and Data Mining (TDM)</b>	
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

We believe that no immediate legal change is necessary since the current TDM exception grants AI innovators access to the data that cannot be obtained through direct licensing-making Option 0 the most preferable. Furthermore, as noted in our answer to Question 2 above, given the absence of data regarding need, technological advancements, and existing gaps in the market, implementing new policy levers and legislation at this stage risks leading to unintended negative consequences.

Nevertheless, the BCC recognises the benefits of increasing transparency and creating educational materials to improve understanding of available licensing options that can support text and data mining. Responses from a number of BCC members have acknowledged the benefits of Option 1 and highlighted existing industry-led licensing models. The BCC recognises that steps can be taken to improve the licensing environment for the purposes of TDM and would be keen to engage and support any relevant stakeholder dialogue for the development of such educational materials.

Furthermore, should clear market gaps be identified in the current licensing landscape, we would also support the establishment of new guidance and obligations which follow best practice in order to support licensing rights for TDM – for example mandating the auditable retention of accurate data sources; verifying that the Berne 3-Step Test is fully considered throughout the data collection stages; and ensuring that "lawful access" for the purposes of TDM is clearly understood by industry. However, the need for clarity and ongoing stakeholder engagement cannot be understated and we recognise the important role the IPO has to play in regard to gathering the much-needed evidence required for this conversation to take place.

We strongly oppose Options 2, 3 and 4 given the harm this would result for rights holders and the consequential undermining of licensing approaches. Given that the market value of a commercial AI tool would be reliant on the protected content used to develop it, this use



must be fairly ascertained, valued, and compensated. There are already many market-based solutions to do so. Indeed, in many current industry cases, licensing agreements have been put in place to support commercial innovation where rights holders receive royalties in exchange for permitting their content to be used to develop TDM applications.

We expect many rightsholders will exercise their right to “opt-out” when rules are applied in the context of any national laws addressing Option 3 thereby resulting in a two-tier system of access to many useful data sources from the market, which would be a detriment to innovation that relies on good quality data. Option 2 still requires lawful access which is best secured through industry-led licensing solutions that are either already in use or are best developed through the deployment of Option 0. Option 4 undermines the very foundation of copyright by creating a “free-for-all” system which would cause irrevocable financial harm to rightsholders and to the licensing framework and should not be considered in any scenario.

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

Transposition of the EU DSM Copyright Directive provisions on text and data mining has been delayed for many EU Member States (with some transpositions not now expected until 2023).

There do not appear to have been any challenges to the licensing structures already applied by publishers and other rights holders to permit and license agreed text and data mining.

In the absence of significant evidence that the current licensing arrangements are really preventing desired text and data mining from taking place, where is the evidence that expanding text and data mining copyright exceptions would improve, rather than damage, the innovation marketplaces?

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

See answer 8.

## **Section B: Respondent information**

**A:** Please give your name (name of individual, business, or organisation).

Saskia Perriard-Abdoh

**B:** Are you responding as an individual, business or on behalf of an organisation?

- 1) Organisation – British Copyright Council

**C:** If you are responding on behalf of an organisation, please give a summary of who you represent.

The British Copyright Council (BCC) is a not-for-profit organisation that provides a forum for discussion on copyright law and related issues within the creative industries. We have 31 member organisations that span the creative industries from creators of literature, music, television and film, photography, illustrations and other visual art - to publishers and producers. Our members represent over 500,000 individual creators and those who manage their rights.

**D:** If you are an individual, are you?

**N/A**

**E:** If you are responding on behalf of an organisation, are you?

- 1) An industry body

**F:** If you are responding on behalf of a business or organisation, in which sector(s) do you operate? (Choose all that apply)

- 1) Information and communication – Publishing, audio-visual and broadcasting
- 2) Information and communication – Telecommunication
- 3) Legal activities
- 4) Education
- 5) Arts, entertainment, and recreation