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Consultation Response: Copyright and AI
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A consultation response from the Chartered Institute of Patent Attorneys on Copyright and AI.

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The Chartered Institute welcomes the opportunity to provide comments in the consultation on Copyright and AI. This is an enormously important area which is developer faster than many people imagined, and has the potential to have both significant benefits and real negative impacts in the creative and innovation sectors; and commensurate challenges in providing the environment for a thriving and world competitive environment for these sectors.

The Chartered Institute of Patent Attorneys (CIPA) is the professional body and approved regulator for patent attorneys in the UK. Founded in 1882 and incorporated by Royal Charter in 1891, CIPA is one of the oldest intellectual property organisations in the world. With almost five thousand members, including two thousand nine hundred Fellows (Chartered Patent Attorneys), one thousand student members and seven hundred paralegal members, CIPA is the largest IP membership body in the UK. CIPA's Royal Charter covers IP practitioners with expertise in patents, trade marks, designs, copyright and all other forms of intellectual property. CIPA is governed by its elected Council, in whose name this consultation response is made. CIPA members, both in industry and private practice have real expertise in advising businesses and individuals on the use of intellectual property in support of their activities – whether commercial or not-for-profit, from cradle to success, in the protection they have for their innovations, through seeking protection and developing strategies around protection, to monetisation or other means of exploitation of their rights, and enforcement of those rights.

In that context relevant rights include the full portfolio of different intellectual property rights and key elements of those rights are copyright, database rights and the protection of confidentiality (as well as patents, designs and trade marks).

This consultation is concerned mainly with copyright and rights in databases and collections of data and information; and creating an environment to encourage implementation and development of AI industries in the UK, while protecting the creative sector from the damage arising from the use of AI – for example by use of their creative output without remuneration and/or replacement of their creative work. There are many well qualified commentators who will respond in this area.

Having regard to its membership and the areas in which they practice, CIPA will focus in this response primarily on the extent it is relevant to IP in the 'industrial' sector (what used to be called 'industrial property'), where CIPA members have more direct experience.

Key observations

The development of AI is moving very rapidly and different jurisdictions are seeking to provide an environment where innovation in AI will thrive, but, at the same time creativity will be protected. The latter is an important area in the UK with a very significant creative artistic sector, but also in the design sector; and at the same time substantial, in many cases world leading skills and talent in AI.

Harmonisation: A key requirement of any approach to copyright in the AI field is that it is, where appropriate harmonised so that developments in the UK work in an international environment – and as such substantial harmonisation with the EU is likely to be highly desirable, and at least as much freedom for AI developers as they will have in the EU.

Certainty: Copyright protection for the protection of many areas of industry is somewhat idiosyncratic – it has been made to fit, but often not originally designed for that purpose. That means that the scope of protection is often idiosyncratic and uncertain and there is a corresponding cost both in terms of enforcement and reliance on copyright rights – clarification and simplification where possible are important considerations in making the law more effective for businesses.

Differing viewpoints: CIPA has members and their clients who have a wide range of objectives – and accordingly different views on the topics of the consultation. We have attempted to ensure that where there are different views these are represented here.

Interaction with other rights: Copyright and database protection has become an important right in the industrial field – while registered designs, patents and trade marks are often seen as the key forms of protection designed for a specific purpose in industry, copyright is relied on to a very significant extent in all those areas. This means that approaches to copyright protection or database protection will have an impact in areas where patents, designs and trade marks are also relevant. We have commented on this at the end of this response (under '**Interaction with other intellectual property rights**'), and in particular the scope for using AI to take advantage of making close imitations which take advantage of the investment businesses developing and bringing products and services to market. One example of this is the field of digital replicas, but there are other potential impacts which deserve attention.

Responses

B.4 Which option

Question 1. Do you agree that option 3 [TDM w opt out] is most likely to meet the objectives set out above?

Question 2. Which option do you prefer and why?

Option 3:

Generally, we agree on that Option 3 (TDM exception with a reservation of rights, provided that it is implemented in a manner that enables compliance and does not depart from the EU approach which does not override existing exceptions is the preferred option to seek to implement. However, to some extent the components of it are the holy grail, in particular:

- Reservation of rights
- Transparency

Of course if they can be achieved it is a good solution, but those components are very challenging to achieve in a way which meets everyone's requirements or aims.

Option 3, while permitting ingestion of protected material (subject to a reservation) should not mean that an output which reproduces the whole or a substantial part of an existing work is freely licensed. Challenges would need to be addressed.

There are some views (likely particularly for universities and research organisations) that the non-commercial data mining exception should be retained regardless of reservation; but also the requirement for reservation should not apply to databases for which access is already subject to a licence.

There is also some support for Option 2: that is unrestricted right in relation to data mining and assessment of infringement at the point of use; and securing protection at the point of output rather than input. So some advocate for maximum flexibility/freedom in relation eg to data mining (including commercial data mining)

C.1 Exception with rights reservation

Question 3. Do you support the introduction of an exception along the lines outlined above?
[Exception with rights reservation]

Question 4. If so, what aspects do you consider to be the most important? If not, what other approach do you propose and how would that achieve the intended balance of objectives?

Question 5. What influence, positive or negative, would the introduction of an exception along these lines have on you or your organisation? Please provide quantitative information where possible.

On reservation of rights there are real concerns about how this can be implemented, particularly:

- 'Machine readability'
 - ensuring that it is harmonised, with international standards
 - there is choice,
 - there are at least some low/no cost solutions, particularly bearing in mind not to create an undue burden on small/over busy creators or that service providers impose a significant tariff (preferably have 'machine readability' include a simple text reservation)
 - how this can be applied to material that it is wide circulation and/or ingested from non-digital sources (eg physical products, logos and brands) – watermarking will work for some but not all
- Granularity:
 - There are already concerns about groups of works/material and according group treatment or individual treatment to them
 - A 'must licence/free to use' reservation is potentially too granular and may practically mean that available material is not used for valuable purposes because of the cost of investigating individual licence terms or creators feel the only real option is not to reserve rights. e.g.:
 - Universities and other not-for profit researchers may be very willing to allow TDM for non-commercial purposes; but not for commercial purposes; or to exclude use for offensive purposes
 - Current content controllers/publishers already licence for a limited term but that may not be practical/possible to express in a reservation
 - Creators may be happy for their material to be used on a non-reserved basis until they are well known and then wish to prevent further unlicensed use

- 1) The TDM exception should be exactly that and so the opt-out should not create an independent right divorced from copyright law.

Broadly we support the approach of an exception with rights reservations. It clearly has the components which, in principle, can form a balanced approach. However, this clearly

depends critically on whether the individual components can be effectively designed and created in a manner which supports the intended purpose. There are elements which we would consider important when supporting this option. Some of these are general and other specifically relevant in the context of Industrial IP protection:

As a general issue, a substantial degree of harmonisation with other jurisdictions such as the EU and USA is likely to be very important. In practice the World IP system has shown the value of substantial harmonisation in creating an environment where there is a broadly accurate expectation of IP protection, with variability in relation to special categories of subject matter such as computer implemented inventions and biotechnology (which can be seen to have some adverse effect on innovation in those countries) and in relation to enforcement (which has also had an impact on developments of innovation in some countries);

In relation to either an express licence being required or a reservation of rights being possible, we have some significant questions about whether that will actually work as an effective remuneration system for those whose rights are being exploited, especially in the context of uses of billions of data points and licensing revenue being spread equally across so many points. Even in the creative works world, there are many artists or writers who do not make a living from their works, and the prospect of that being the case with even more widespread digestion of protected works seems even more likely.

It is also far from clear (and likely lacks any real transparency for creators) whether they should reserve their rights and aim to licence them, or permit open use of their rights in the hope that success arising from their open availability will then allow them to licence further works. So while use of their works may be transparent, whether they are obtaining a reasonable return will be far from transparent. This is an area where more information and reporting will be needed to encourage creators to have confidence in the reservation approach providing an appropriate return.

Legal effects of the rights reservation

Question 6. What action should a developer take when a reservation has been applied to a copy of a work?

Question 7. What should be the legal consequences if a reservation is ignored?

Question 8. Do you agree that rights should be reserved in machine-readable formats? Where possible, please indicate what you anticipate the cost of introducing and/or complying with a rights reservation in machine-readable format would be.

Legal consequences:

A range of consequences should be available ranging from expunging the use, and/or compensation, to exemplary compensation. However, there needs to be a very low cost enforcement mechanism in addition in view of the fact that a single instance of infringement is likely to be worthless + a mechanism for addressing repeated or flagrant infringement. If a reservation system is introduced, it should be made as accessible as possible and preferably free at the point of use. Without that there is a risk that the main earners of revenue will be the service providers in the sector rather than the users. Consideration should be given to whether a free form reservation (without prejudice to developing standardised reservations) would be practical. After all the users are using AI and it is not unreasonable to contemplate that their systems can detect and interpret a reservation statement without it complying with a specific standard stopping use, damages, or enhanced damages depending on the circumstances

'Machine readability'

- ensuring that it is harmonised, with international standards
- there is choice,
- there are at least some low/no cost solutions, particularly bearing in mind not to create an undue burden on small/over busy creators or that service providers impose a significant tariff (preferably have 'machine readability' include a simple text reservation)
- how this can be applied to material that it is wide circulation and/or ingested from non-digital sources (e.g. physical products, logos and brands) – watermarking will work for some but not all

One relevant issue in relation to rights reservations is whether there can be meaningful granularity – and if not will developers be simply inhibited by having to determine what licence terms apply:

- There are already concerns about groups of works/material and according group treatment or individual treatment to them
- A 'must licence/free to use' reservation is potentially insufficiently granular and may practically mean that available material is not used for valuable purposes because of the cost of investigating individual licence terms or creators feel the only real option is not to reserve rights. e.g.:
 - Universities and other not-for profit researchers may be very willing to allow TDM for non-commercial purposes; but not for commercial purposes; or to exclude use for offensive purposes
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 - Creators may be happy for their material to be used on a non-reserved basis until they are well known and then wish to prevent further unlicensed use

C.2 Technical standards

Question 9. Is there a need for greater standardisation of rights reservation protocols?

Question 10. How can compliance with standards be encouraged?

Question 11. Should the government have a role in ensuring this and, if so, what should that be?

See above. If possible, free form reservation should be available.

C.3 Contracts and licensing: Contractual relationships

Question 12. Does current practice relating to the licensing of copyright works for AI training meet the needs of creators and performers?

Question 13. Where possible, please indicate the revenue/cost that you or your organisation receives/pays per year for this licensing under current practice.

Question 14. Should measures be introduced to support good licensing practice?

We would like to see this based on evidence to provide confidence to creators – in view of the amount of material ingested in AI models there would seem to be a risk that any return for creators would be very little if it is assessed at the point the material is ingested – and would not reflect the difference between a successful creator and one inspiring no interest or value from third parties

Collective licensing and data aggregation

Question 15. Should the government have a role in encouraging collective licensing and/or data aggregation services? If so, what role should it play?

Potentially – ideally rules need to be in place to enable cost effective licensing on a level playing field. The corresponding position with standards essential patent demonstrates how expensive and unsatisfactory a system without guidance/rules can be; it inhibits some innovation, and often disadvantages the smaller enterprises which have no negotiating power.

Use of AI in education

Question 16. Are you aware of any individuals or bodies with specific licensing needs that should be taken into account? [re Use of AI in education]

Not strictly education, but not for profit research institutions will have specific requirements

C.4 Transparency

Question 17. Do you agree that AI developers should disclose the sources of their training material?

Question 18. If so, what level of granularity is sufficient and necessary for AI firms when providing transparency over the inputs to generative models?

Question 19. What transparency should be required in relation to web crawlers?

Question 20. What is a proportionate approach to ensuring appropriate transparency?

Question 21. Where possible, please indicate what you anticipate the costs of introducing transparency measures on AI developers would be.

Question 22. How can compliance with transparency requirements be encouraged, and does this require regulatory underpinning?

Question 23. What are your views on the EU's approach to transparency?

- Granularity: Yes – but designing a level of granularity which is meaningful for users but not burdensome competitively unattractive or prohibitive (because of the disclosure of confidential information) for AI operators or providers is a significant challenge
- On transparency:
 - , this should include measures that are balanced and proportionate and do not require the disclosure of confidential information, trade secrets, or information that would compromise privacy or security
 - we not convinced that this alone allows for traceability (and especially that the EU position) or that any practical real life transparency really addresses the issues that 'transparency' is offered to address
 - consider whether mandatory provision of more detail on request (but subject to confidential disclosure) of transparency information would assist

C.5 Wider clarification of copyright law

Question 24. What steps can the government take to encourage AI developers to train their models in the UK and in accordance with UK law to ensure that the rights of right holders are respected?

Question 25. To what extent does the copyright status of AI models trained outside the UK require clarification to ensure fairness for AI developers and right holders?

- The present law in the UK depends to a significant extent on what specific steps are undertaken by the AI developer – some may amount to a copyright infringement and some may not. This makes challenges to the use of works in AI development hard, unpredictable certainly at an early stage, and often continuing, and very costly. If the use of works in development of AI engines/models or outputs is used the legal framework should be addressed to make it simpler and less idiosyncratic.

- As proposed above, consideration should be given to focussing more on the ability to discover and challenge outputs rather than or in addition to inputs. The UK should **NOT** introduce a long arm approach to infringement: it infringes when in the UK, if the acts carried out in creating it would have infringed if done in the UK

The 'temporary copies' exception.

Question 26. Does the temporary copies exception require clarification in relation to AI training?

Question 27. If so, how could this be done in a way that does not undermine the intended purpose of this exception?

C.6 Encouraging research and innovation

Question 28. Does the existing data mining exception for non-commercial research remain fit for purpose?

Question 29. Should copyright rules relating to AI consider factors such as the purpose of an AI model, or the size of an AI firm?

Non-commercial research: this should be retained

Purpose: Yes; size of AI firm: probably not

D.1 Computer-generated works: protection for the outputs of generative AI

Question 30. Are you in favour of maintaining current protection for computer-generated works? If yes, please explain whether and how you currently rely on this provision.

Question 31. Do you have views on how the provision should be interpreted?

- Computer generated works still require investment. The borderline between computer generated works and ones which have some human input inevitably be very difficult to determine, and almost impossible for a third party to determine. This will nevertheless be a difficult area to address and needs more specific consideration if it is to be modified/clarified.

Subject to such consideration, a work generated by a computer should have the same protection as other commercial works – there should not be a requirement for originality, other than that it is not a copy of an existing work.

In practice, we believe that in most cases whether a work is computer generated or has an author is ignored, and it will be far from transparent to any user. It is preferable to avoid the legal uncertainty rather than adopt a creators intellectual input

Option 1: Computer Generated Works: Reform the current protection to clarify its scope

Question 32. Would computer-generated works legislation benefit from greater legal clarity, for example to clarify the originality requirement? If so, how should it be clarified?

Question 33. Should other changes be made to the scope of computer-generated protection?

Question 34. Would reforming the computer-generated works provision have an impact on you or your organisation? If so, how? Please provide quantitative information where possible.

Option 2: Computer Generated Works: Remove specific protection for computer-generated works

Question 35. Are you in favour of removing copyright protection for computer-generated works without a human author?

Question 36. What would be the economic impact of doing this? Please provide quantitative information where possible.

Question 37. Would the removal of the current CGW provision affect you or your organisation? Please provide quantitative information where possible.

The writer is not in favour of removing protection. At one extreme it would result in widespread copying of works believed to be computer generated; at the other it would not be a benefit because potential users would not know whether the work was computer generated or not; and in practice it would likely be a muddled middle ground with some users ignoring any potential third party rights, and other 'playing by the book'.

[D.3 Computer: generated works interaction with designs]

This is an important area and we would wish to comment on any proposals

There is an obvious overlap between designs and the creative sector, and design protection and copyright. The overlap has varied over time with shifts between industrial designs and industrially applied designs being excluded from copyright protection or benefitting from copyright protection or something in between. That, and lack of clarity of the law and often a lack of information to determine whether a relevant right subsists or has been infringed mean that the area would benefit substantially from the proposed fuller designs review. Any action taken in relation to the design protection and the use of AI needs to take possible developments of formal design protection into account as well as addressing issues before any such developments emerge.

One view is that this area is extremely messy, as it is often difficult to determine whether any copyright protection actually extends to a three dimensional design, both factually and as a matter of law, making litigation uncertain and costly and deterring both parties from action beyond early skirmishing to see whose nerve will break first? But in the absence of other protection which provides a fair return to the original creator, there is a risk that innovation in that market will not thrive; and correspondingly, if too much protection is provided then there is a risk that that further innovation will be inhibited. Is this a case for a remedy for 'unfair competition' which extends beyond the UK law of passing off

D.4 Infringement and liability relating to AI-generated content

Question 38. Does the current approach to liability in AI-generated outputs allow effective enforcement of copyright?

Question 39. What steps should AI providers take to avoid copyright infringing outputs?

It is difficult, expensive and with uncertain results because it depends in part on idiosyncratic factors (e.g. copying, proof of title to copied material, assessment of substantial part at any stage in the process etc.) often unrelated to the nature of the subject matter or the intention of the users.

A key question is whether there has been access, ie whether a potential infringer is likely to have encountered the original work. If so, then there may be a finding of copyright infringement even if the potential infringer has no clear recollection of ever hearing the relevant work. In other words, if the copyright holder can show probable access (+ a suitable level of similarity between the original work and the new work). then the onus is no longer on the claimant to show that

copying occurred, rather the onus is on the potential infringer to show that there was no copying.

This reversal of the onus of proof should be considered in relation to the AI copyright world.

D.5 AI output labelling

Question 40. Do you agree that generative AI outputs should be labelled as AI generated? If so, what is a proportionate approach, and is regulation required?

Question 41. How can government support development of emerging tools and standards, reflecting the technical challenges associated with labelling tools?

Question 42. What are your views on the EU's approach to AI output labelling?

Not in relation to products which are not intended to communicate, or to process data or information using AI or rules developed using AI. However, we also doubt that any labelling will provide real protection for consumers (who will not understand from mere labelling what the implications are and will likely come inured to labelling and ignore it unless it is more informative). There are however specific instances where labelling (as in news transparency or other information provision) may be desirable. This should likely be addressed in the product context rather than in the AI generation context (e.g. health and safety regulators for health and safety issues)

D.6 Digital replicas and other issues

Question 43. To what extent would the approach(es) outlined in the first part of this consultation, in relation to transparency and text and data mining, provide individuals with sufficient control over the use of their image and voice in AI outputs?

Question 44. Could you share your experience or evidence of AI and digital replicas to date?

The protection is again idiosyncratic – it depends on rights not designed for the purpose or adventitious infringement of copyright. It requires to be looked at in more detail (possibly in the context of a different approach to infringement).

Interaction with other intellectual property rights:

Designs and AI

The use of AI has the considerable potential in the design field, an area in which the UK has a well established reputation. For example it could have application in making both new functional designs and creative designs and a mixture of both, and do so autonomously or with prompts of varying degrees of detail; and it can do so based on models with a similar range of source materials. These may range from databases of functional attributes or requirements, through existing designs in graphic or three dimensional form (which may or may not have copyright protection), to various other sources subject to copyright such as creative art, technical descriptions etc.

Currently the role of copyright protection in relation to source material or its use is to a substantial extent idiosyncratic – it depends on what the material is and how it is used. So is the role of copyright protection in relation to placing of articles made to a particular design on the market. Both registered designs and unregistered design right are the core forms of protection; but experience shows that copyright often plays a subsidiary but nevertheless substantial role, especially in areas where the bespoke design rights do not apply, such as designs dictated by function or one that have become iconic.

Views within trade differ as to the desirability of such protection, from those who have built up a substantial reputation in a design and wish to obtain market protection so that other cannot ride on their coat tails; to those, such as the spare parts industry, who provide valuable competition to the original equipment manufacturers. Both have good reasons for their position and an appropriate a balance needs to be struck.

The key issues in relation to AI and designs still fall into the three categories identified in the consultation: providing a fair return to creators; ensuring that the benefit of AI in the design field can be exploited as effectively as possible; and building trust. However, overlaid on this are the policy issues such as enabling a proper level of competition while providing sufficient return on exploitation of designs to justify the (business) investment in creating them and introducing them to the market place.

The use of AI models will inevitably shift the balance between those factors. Examples are the use used to examine existing designs and other information (for example about consumer sentiment) to create new designs 'optimised' for market entry. That includes being close but not too close to existing successful designs so that they can avoid infringement of existing rights, or being over the line, but the existing rights holder would see too much risk in taking action. That person may still be benefitting substantially from the investment made by the original creator to reduce the risk of market entry.

We would invite consideration to be given to this issue and whether an independent unfair competition right with better defined boundaries than the common law of passing off, especially where a competitor is overtly benefitting from the establishment of a market by the incumbent, and how is this to be balanced with fair competition – for example reaching the balance between 'permitted' look-a-likes (in the interest of promoting competition), and unacceptable look a likes because they take more than reasonable advantage of an incumbent?

Trade marks, brands and digital replicas and AI

The use of AI in the trademark field appears to open up significant opportunities. For example it can be used to examine existing trademark space in order to identify potential new trade marks in a space which is often perceived as overcrowded; and it has the potential to enhance the distinctive potential and attractiveness and Hence value) of new trade marks.

It also has the potential for competitors and potential competitors to identify 'me too' trademarks which sail close to the wind but can still benefit from the investment made by a trademark owner in identifying a valuable trademark or the established reputation of existing trade mark. It might well be difficult or expensive to demonstrate infringement.

In a similar vein, that may be a risk of trademark extortionists generating similar marks, and seeking payment for not exploiting or protecting those marks.

The use of AI in relation to creation of digital replicas has also surfaced as a significant issue recently. Previously the protection of likenesses has depended to a substantial extent on trade mark and other brand protection (such as passing off), or on privacy rights. Neither are altogether well suited to the exploitation of digital replicas because of limitations: the need to show sufficient similarity and risk of confusion or unfair competition in the trade mark field; and the absence of privacy rights after death; and in both cases the challenges faced by close (reminiscent) replication which is not confusing but does benefit from the previous success or investment of the subject and/or infringe on their personal space.

We would invite similar consideration to this areas as in relation to designs.

Patents and inventions

Similar issues are likely to surface in relation to patentable inventions – when an innovation is patented and disclosure is made of its effectiveness, this will inevitably lead to a wider search using AI – as already takes place, but subject to some restrictions in relation to data mining – to find close me too products that fall outside existing protection but are effective, safe or have established markets. This may result in the erosion of the opportunity for creative industries to recoup their investment as competitors more rapidly enter the market. Of course the latter is good for consumers in introducing competition, but only if the innovators have sufficient protection to be incentivised to innovate.

This is an area which justifies examination to ensure that adequate protection is provided for innovative inventions, while promoting both creativity and fair competition.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Lee Davies', with a horizontal line extending to the right.

Lee Davies
Chief Executive