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Motion Picture Association (MPA) response to the UK Intellectual Property Office’s call for views on artificial intelligence and intellectual property

The MPA welcomes this opportunity to provide comments in response to the UKIPO’s call for views on artificial intelligence (AI) and intellectual property (IP), which considers the potential implications for AI on IP policy. We will be limiting our comments to the section of the consultation most relevant to our member companies: copyright and related rights.

Introduction

The MPA is a trade association representing the interests of six major international producers and distributors of films, home entertainment and television programmes.¹ The MPA’s members have long supported and invested in innovation, including by fostering the development of new proprietary technologies and by licensing the rights to use cutting-edge technologies developed by third parties. In the process of producing films and television shows, the MPA’s members or their affiliates develop and use a vast array of technological innovations—including innovations that may be categorised under the broad umbrella of AI—to help creators bring their artistic visions to life on-screen.

Such AI technologies include those that bring photorealistic images or other visual effects to the finished audiovisual work; assist artists and animators in the elaborate process of developing computer-generated special effects; streamline filming, post-production and editing processes; and many more. On the distribution side, AI technologies allow consumers to discover and consume more content through more diverse channels than would have been imaginable a generation ago. In short, technological innovation, including AI, has been and will continue to be of central importance to the audiovisual industry and to the ability of the thousands of people involved in creating audiovisual works to bring that content to widespread and diverse public audiences.

The MPA’s members’ use of technology exists against the backdrop of a stable legal regime governing the rights and responsibilities of those who create, distribute and use copyright works. The copyright system in the UK generally functions well and has successfully accommodated decades of technological change. The MPA’s members believe that, based on what is now known about the state of AI technology, English copyright law is fit for purpose and it is appropriate for courts to continue to apply existing principles to address the legal issues that presently appear likely to arise in connection with the use of technologies labeled “AI.”

¹ Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc.

The State of AI Technology, and the need for restraint in considering changes to copyright law

As highlighted in the consultation description² and noted by the House of Lords Select Committee on AI, there is no widely accepted definition of AI.³

While AI has developed rapidly in recent decades, the technology remains in its infancy, and much is unknown about how it will evolve. Because AI may develop in unforeseen directions over time, restraint is warranted when considering whether established copyright doctrine appropriately addresses the various issues presented by AI and whether changes to the law are necessary.

Parliament has a proud history of strong protection of copyright works, starting from the world's first copyright law, the Statute of Anne. In the UK, the justifications for copyright legislation have centred historically on the economic and social arguments. The need to protect the natural rights of authors and to encourage creativity by protecting the fruits of their intellects has always been recognised, as well as the need to ensure rewards for authors and other rightholders for their efforts. At the same time, the copyright system aims to encourage the dissemination of ideas and knowledge to the general public. There is also a concern to balance the interest of authors in protection of their works, on the one hand, with the interest of the public in access to works, on the other. Thus, traditionally, copyright law in the UK has created rights and regularly adapted the law to provide authors and other rightholders with protection with respect to new developments in technology, but at the same time conditions and limitations have been imposed on these rights. Copyright, along with other intellectual property rights, is a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest.⁴

While following the end of the Brexit transition period, the UK will no longer be subject to EU copyright law and the Charter of Fundamental Rights, existing CJEU judgments⁵ will remain binding as retained EU law with only the Supreme Court and Courts of Appeal having the power to depart from these judgments.⁶ In any event, the UK also has a series of obligations to protect copyright and related rights under both specific international IP treaties as well as pursuant to various human rights instruments, including at the international and Council of Europe (see Article 1 of Protocol No. 1 of the European Convention on Human Rights which extends to copyright) levels.

The traditional approach of UK governments to copyright has faced many challenges in recent years, brought about by unprecedented technical developments, including the internet. These have led both to new uses of works protected by copyright and high levels of unauthorised use. Since 1991, the Copyright Designs and Patents Act 1988 (CDPA) has been continually adapted and is under frequent review. In 2014, UK copyright law was changed. The main outcome was to extend the copyright exceptions framework and weaken exclusive rights at the same time. The changes were said by the Government to include safeguards to ensure that a reasonable balance is maintained between the interests of creators, owners, performers, consumers and users of copyright works. However, Copinger is of the view that: “*there is a*

² See <https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views>

³ Paragraph 9, House of Lords Select Committee on Artificial Intelligence, Report of Session 2017-2019, HL Paper 100: *AI in the UK: ready, willing and able?*

⁴ See *Copinger and Skone James on copyright* (17th ed), the leading text in the field, at 2.29

⁵ This includes judgments concerning copyright as a fundamental right, the relationship between copyright exceptions and fundamental rights, and specific exceptions in the 2001 Copyright Directive which may be relevant in the AI space. Concerning the latter see e.g., *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others*, Case C-360/13, ECLI:EU:C:2014:1195 (on-screen copies and the cached copies made by internet users do not infringe the reproduction right as they qualify for the temporary copy exception under Article 5(1) and conform with three-step test (Article 5(5))); and, *Stichting Brein v. Jack Frederick Wullems*, Case C-527/15, ECLI:EU:C:2017:300 (temporary copies from an illegal source will infringe the reproduction as they do not qualify for the temporary copy exception).

⁶ See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926811/departure-eu-case-law-uk-courts-tribunals-consultation-response.pdf.

danger that the expansion of exceptions allowing third parties to use copyright works without permission from right owners combined with the practical difficulties right owners face in a digital world in keeping control over the markets for their works may result in tilting the balance too far in favour of consumers and users.”⁷

In addition, the High Court has also intervened when an imbalance was found and overturned new copyright legislation that would have allowed users to create personal copies of copyright-protected materials without permission from rightholders⁸. The UK government sought to implement art 5(2)(b) of the InfoSoc Directive by introducing regulations (the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations) in August 2014, which inserted a new provision (s 28B) into the Copyright, Designs and Patents Act 1988. However, the absence of a balance to all parties affected - particularly rightholders - led to judicial review proceedings being successfully brought to challenge the legality of the implementing regulations. As a result, the Personal Copies for Private Use Regulations were quashed with prospective effect.

The MPA urges the UK Government to take a measured approach with respect to potential developments in AI. The UK Government should reaffirm core copyright principles, which have balanced the rights and responsibilities of copyright owners and users through decades of technological change during which the British content sector has flourished to become the leader in Europe. The Government needs to be careful to ensure that copyright exceptions are not further extended, thereby tilting the balance against the creation, production and protection of new copyright works. The MPA focuses its comments in three particular areas: (1) the rules governing copyright authorship and ownership; (2) the allocation of liability for copyright infringement; and (3) exceptions to copyright.

MPA’s Responses to Specific Questions

Copyright Authorship and Ownership Rules (Responding to Question 1)

The MPA’s members recognise the importance of ensuring that original works receive copyright recognition and protection. Questions of copyright ownership, however, also affect the rights of assignees, licensees, and others who utilise works generated with the use of AI in creating their own original works.

Whatever recommendations emerge regarding the authorship and ownership of works created with the use of AI, a key goal must be to ensure clarity of ownership, so that prospective assignees, licensees, other rightholders or users can be confident that all of the rights necessary for the intended use have been appropriately obtained.

Systems referred to as AI generally include the inputs of many human beings and/or business entities and AI-generated works may result from the contributions of those responsible for programming the AI system, and others who supply data, “train” the system and give it particular tasks, or provide it with feedback; and, still others who own or operate the system to produce a particular work.⁹ As a result, multiple service providers may play a role in influencing the outputs of an AI system that creates a single work.

⁷ Copinger, 2-29

⁸ See [Case No: CO/5444/2014 R \(on the application of British Academy of Songwriters Composers and Authors and others\) v Secretary of State for Business Innovation and Skills \(The Incorporated Society of Musicians intervening\) \[2015\]](#)

⁹ See e.g., Bond, T and Blair, S, *Artificial intelligence and copyright: section 9(3) or authorship without an author*, *Journal of Intellectual Property Law & Practice*, Volume 14, Issue 6, June 2019, Page 423.

The complexity of AI ecosystems therefore creates the potential for multiple different individuals or entities to claim an ownership interest in some or all of the rights in a single work produced through the use of AI technology. As with other works that have multiple ownership interests, it is important to the creative industries utilising and incorporating such works in their own original creative works that there are clear rules which apply to the assignment and licensing of those works.

The challenge of delineating clear rules for assignment and licensing where multiple ownership interests are at stake is neither unique to AI nor new to copyright.¹⁰ Copyright law has several existing mechanisms for providing certainty to users of copyright works in similar situations. For example, the CDPA provides that the employer is the first owner of copyright in works, including films, created in the course of employment.¹¹ In addition, the copyright framework permits pragmatic solutions ensuring certainty for all parties. In brief, in the audiovisual sector the position is that the producer (along with the principal director) is designated the ‘author’ of the film work.¹² Thus, for films made after 1 July 1994, copyright vests jointly in the producer and the principal director¹³. Where the latter is employed by the producer and the audiovisual work is made in the course of employment, the copyright vests in the producer subject to an agreement to the contrary. In practice, however, the principal director is usually an independent contractor and the rights will be secured by contract – the same holds for other creative contributors including script writers and performers. Finally, the important principle of contractual freedom plays a crucial role in ensuring the necessary clarity.

The MPA’s members, like many other copyright owners, frequently acquire or license works created by third parties in the course of creating their own copyright audiovisual works. Screenplays, music, photographs and other works of visual art, and special effects are just a few examples of the areas in which content creators acquire or license the rights to use works created by other parties. Copyright creators rely on clear rules regarding the ownership, assignment, and licensing of such incorporated works to ensure that their own creations will not give rise to claims of copyright infringement. However ownership principles develop for works produced with the use of AI technology, it is important that the rules regarding assignment and licensing remain clear for those who lawfully acquire the rights to incorporate such material into their own creative content.

In terms of section 9(3) of the CDPA, which provides that ownership of a computer-generated work, i.e. a work which has no human author, belongs to the legal person who undertook the arrangements necessary for its creation,¹⁴ we are aware of the debate as to whether this can cover works generated by AI. Ultimately, our view remains that whatever approach is taken, it must be one that guarantees clarity for copyright owners, licensors and licensees.

Allocating Liability for Copyright Infringement (Responding to Question 2)

The consultation asks if there is a need for greater clarity about who is liable when an AI infringes copyright, i.e. whether current laws for assigning liability for copyright infringement are adequate to address a situation in which an AI process creates a work that infringes another copyright work. We

¹⁰ Regarding complex ownership of copyright works, see e.g., *Robin Ray v Classic FM plc* [1998] FSR 622. The point with respect to sound recordings is discussed e.g., in BAINBRIDGE, D., *Intellectual Property 8th edition* (Longman 2010) – page 102. On the issue of joint authorship in the context of screenplays, see *Kogan v Martin* [2019] and *Shaw, J., Court of Appeal clarifies joint authorship criteria under UK copyright law*, *Journal of Intellectual Property Law & Practice*, Volume 15, Issue 1, January 2020, Pages 7–9.

¹¹ CDPA, section 11(2)

¹² CDPA, section 9(2)(a) and (b)

¹³ The general situation for audiovisual works made before 1 July 1994 is that the copyright vests in its author which is the producer. See KAMINA, P., *Film Copyright in the European Union 2nd ed.*, (Cambridge University Press 2016) at para. 117

¹⁴ CDPA, sections 9(3) and 178

understand this question to ask whether current doctrines for assigning liability in such circumstances should be changed as the result of the involvement of AI in the process.

Existing liability doctrines establish a general, well-accepted framework for analysing claims of primary and secondary copyright infringement in the context of new technologies. Based on what is now known about AI technology, the existing doctrines of direct and secondary liability—when applied consistently with their purpose of holding perpetrators responsible for the infringing acts they commit or cause others to commit—appear adequate to provide a clear and workable baseline for allocating liability in the AI context.

Section 16(1) of the **CDPA** sets out the acts restricted by copyright in a work. These acts include reproducing a copyright work, which – crucially for AI – includes the making of temporary copies by electronic means. While there are some permitted reproductions of copyright works, if AI is used in a commercial context, these are unlikely to apply. Section 16(2) CDPA suggests that AI cannot itself infringe the copyright in a work, as copyright can only be infringed by a natural or legal person who does, or authorises another to do, one of the acts restricted by copyright, most likely the designers, owners, and operators of the AI. While AI is, of course, neither a natural nor a legal person and therefore technically cannot infringe copyright, a person can authorise infringement and thus authorisation seems to be the natural route to liability for infringement by AI (see reference to *Newzbin* below).

We note that the House of Lords Select Committee on AI has recommended that clarity is needed on the applicability of principles of general liability to AI systems: *“Clarity is required. We recommend that the Law Commission consider the adequacy of existing legislation to address the legal liability issues of AI and, where appropriate, recommend to Government appropriate remedies to ensure that the law is clear in this area. At the very least, this work should establish clear principles for accountability and intelligibility. This work should be completed as soon as possible.”*¹⁵ Other than on the specific issue of automated vehicles, we are not aware that the Law Commission has commenced work on this issue.

We agree with the sentiment that clarity is crucial. That said, based on what is now known about AI, there does not appear to be any immediate need to change the current rules as they pertain to copyright to deal with AI systems. We also recall the role of the judiciary to assess the adequacy of current rules before legislative intervention should be contemplated.

It is particularly important that a party’s use of AI technology should not become a means to escape liability rules simply because an AI system is involved. The designers, owners, and operators of AI systems who do one of the acts restricted by copyright may be subject to liability for primary infringement of copyright, depending on the actions of individuals involved and how the systems exercise the copyright owner’s exclusive rights. The same individuals and entities may also be subject to secondary liability when others use their systems to directly infringe copyright.¹⁶ By way of illustration, in *Twentieth Century Fox and others v Newzbin Limited* [2010] EWHC 608, the High Court found that Newzbin, an online indexing and search service, was liable for the infringements of copyright committed by those users, which had used its service to help them download copyright-protected films and other media. The Court found that Newzbin authorised the copying of those films, procured and engaged with its users in a common design to copy those films and communicated those films to the public.¹⁷

¹⁵ Paragraph 318

¹⁶ See *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch)

¹⁷ *Newzbin* is still the leading authority on this matter and has been applied in the following cases: *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch); [2012] E.C.D.R. 14; *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8; *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch); [2014] E.C.D.R. 7.; and *Warner Music UK Ltd & Sony Music Entertainment UK Ltd v TuneIn Inc* [2019] EWHC 2923 (Ch); [2020] E.C.D.R. 8.

Based on what is currently known regarding AI, there is no reason to believe that these existing liability doctrines will be inadequate to deal appropriately with new scenarios engendered by the use of AI technology. The MPA's members believe there is no immediate need for changes to the law governing the assignment of direct and secondary copyright liability in the context of AI technology.

Exceptions for Ingesting Large Volumes of Copyrighted Material in the Use of AI Systems (Responding to Question 3)

The consultation also seeks feedback on whether exceptions, including fair dealing and text and data mining (TDM) for non-commercial research, as they stand today, adequately address the legality of AI systems that ingest large volumes of copyright material for training purposes or to produce output.

The TDM exception is limited and only permits the making of copies for the purpose of TDM for non-commercial research. This should rule out its applicability to a good deal of the AI systems of concern for producers and distributors of content. In addition, the TDM exception requires the person using the AI system to have lawful access to the material in question.

While the UK has indicated that it will not implement the 2019 DSM Copyright Directive (DSMCD) into national law, there is still a question as to whether the narrow TDM exception under UK law will be amended in the future to reflect the broader TDM exceptions introduced at EU level by said Directive. The DSMCD provides for two mandatory TDM exceptions. Article 3 provides an exception for TDM for scientific research purposes for "Research Organisations" and "Cultural Heritage Institutions". Article 4 provides a general TDM exception which is not limited to non-commercial use, although rightholders are permitted to 'opt out' of the exception by reserving their rights through machine-readable or other means. Conversely, one might actually consider this requirement for rightholders as more of an obligation to 'opt-in' to protection. It creates a potential formality that must be complied with as a pre-condition to the enjoyment of copyright protection (the Berne Convention contains a prohibition on the imposition of formalities on the enjoyment (existence/scope) and exercise (enforcement) of copyright).

Our view is that the current UK TDM exception is fit for purpose and provides an appropriate balance between allowing important non-commercial research and development and maintaining adequate copyright protection for rightholders. The Article 4 TDM exception in the DSMCD, which appears to permit TDM for all imaginable purposes for a considerably broader class of potential beneficiaries (than the Article 3 TDM exception), in particular could be damaging to rightholders. The burdensome approach of requiring rightholders to opt out of the exception (or opt-in to protection) is insufficient to cure what is already an overly broad exception which appears contrary to the three-step test under international copyright treaties. Any amendment to reflect the changes recently adopted at EU level, which are now being implemented by EU Member States, should be resisted.

The relevant fair dealing exceptions are also limited to specific situations, including for the purposes of research or private study.¹⁸ Even then, whether the use of a copyright work falls under fair dealing will be a question of fact, degree and interpretation.

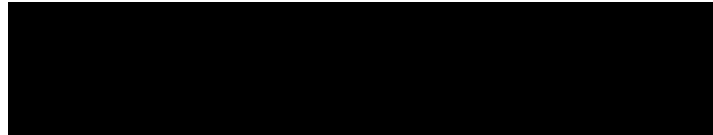
In addition, most commercial copyright content is protected by technological measures and the CDPA provides a number of civil and criminal remedies in respect of acts which circumvent the protection which has been applied to a copyright work other than a computer program by way of "effective technological measures". In particular, there are civil remedies available where effective technological measures have been applied to a copyright work (other than a computer program) and a person circumvents those

¹⁸ Fair dealing is permitted for the purposes of research, private study and text and data analysis for non-commercial research as well as for criticism, review, quotation, news reporting and caricature, parody or pastiche (CDPA, sections 29, 29A, 30 and 30A)

measures. For these purposes, “technological measures” are defined as: “...any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program.”¹⁹

The MPA appreciates this opportunity to provide its views in response to the consultation. The MPA looks forward to providing further input and working with the UK Government as it continues its consideration of these important issues.

For further information regarding this consultation response, please contact Motion Picture Association UK representatives



¹⁹ Section 296ZA and 296ZF(1), CDPA