

AI [IPO consultation](#) questions MPA response 30 November 2020

The Music Publishers Association (MPA) Membership organisation represents over 200 UK music publishing companies, ranging from iconic independents to the global Major Publishers. The MPA Group also includes the MCPS mechanical rights organisation (representing over 22 thousand direct composer and songwriter members) and PMLL, providing licensed sheet music of original compositions to schools and choirs.

The MPA plays an integral role within the UK's music industry and creative sector. The composers, song-writers and publishers they represent, contributed over £712m in exports, part of the 5.8bn GVA of the music sector, in 2019. Classical composers, film/TV score writers, orchestras and performers underpin our cultural value on stage, online and on screen.

Background summary.

Songwriters and composers have been embracing artificial intelligence (AI) technology assisting in their creative process for a significant time. Similarly, music publishers have been using AI tools to assist in business processes such as administering repertoires individually or collectively by their collective management organisations, PRS for Music and MCPS. The UK's copyright system encourages creativity and investment whilst enabling the development of technologies such as AI. We are not aware of any tensions between copyright and technology / data driven innovation in practice.

To contribute to this Call for Views, we would like to address the relationship between copyright-protected musical works and artificially-generated content creation in two parts:

- (1) Copyright-protected musical works involved as ingestion material for the machine learning (the "training" or "source" material) and
- (2) The artificial music content 'output' of the computer. Human interaction with AI content creation may be of different levels of involvement and the resulting content can therefore be differentiated into being described as "AI-assisted" and "AI-generated".

In both aspects, it is the reproduction right (mechanical right) of a musical work which is involved in or affected by, the creation of AI music content.

- (1) **Training.** General copyright rules apply; the training usually involves the ingestion of musical works requiring a copy of them to be made through the technical process.¹ If these works are protected, i.e. within the 70 years pma protection period, this constitutes a reproduction under UK and European Union copyright law.

¹ Our comments also apply to AI-generated literary works; which are considerably less common; in fact, the main examples of AI-generated musical works are accompanied by manmade lyrics (e.g. Daddy's car: music by flow machines and lyrics by Benoit Carre).



Music Publishers Association

The reproduction falls outside the scope of two potential exceptions, for temporary copies or for text and data mining. An express permission for such use is therefore required.

- (2) **Output.** Currently, purely AI-generated output is not protected by copyright law, which requires a human author.

AI-assisted output is integrated within the copyright of the human author creating the musical works with the assistance of AI. As a tool of human creativity, AI does not acquire copyright in itself.

Given the nature of the rights of music publishers in musical works and mechanical rights in particular, we do not comment on the potentially different situation regarding sound recordings.

Part 1. The use of copyright works and data by AI systems

Questions

1. Do you agree with the above description of how AI may use copyright works and databases, when infringement takes place and which exceptions apply? Are there other technical and legal aspects that need to be considered?

We generally agree with the description provided in the consultation document. Current AI applications typically come in two basic forms:

1. Tools assisting composers creating musical works, for instance by providing:
 - access to relevant computer-generated samples (in all formats such as MIDI or MP3),
 - variations on melodies or musical styles
 - added instrumentation such as drum sequences
 - mixing and mastering services
 - orchestration facilities
2. Autonomously generating musical works, composing music based on training by:
 - teaching the computer the rules of composition (“unsupervised” machine learning)
 - ingesting existing musical works (“supervised” machine learning), or
 - a hybrid of the two

The consultation identifies the pertinent issues.

1. **Activities.** There is a reproduction under UK law (Section 17 CDPA) and EU law (Article 2 Information Society Directive)² by an AI system which is trained by using existing musical works. We note that some AI systems might be trained without using existing musical or literary works: similar to a human composer, they are taught the range of instruments, the operation of harmonies and rhythm, etc. Depending on the actual AI output there might be a further reproduction and/or communication to the public by the AI-generated work, if there is a recognisable “substantial taking” from an existing work.
2. **Exceptions.** None of the current exceptions apply.

Temporary copying

- UK: Making temporary copies (Section 28A CDPA) has strict cumulative conditions which are not likely to be met.

² We include references to European Union copyright provisions because, even after the end of the transition period, existing decisions by the Court of Justice of the European Union interpreting the relevant legislation will apply under the European Union (Withdrawal) [Act](#) 2018

- The works ingested are unlikely to be a transient/incidental reproduction in the first place because they are needed to remain part of the repertoire of the trained computer.
 - Without licence, the use of the musical work is not lawful.
 - Furthermore, these source works are the basis for the successful operation of the machine learning process and thus have independent economic significance.
- EU: Under the scope of Article 5 (1) Information Society Directive the same conditions apply under European law.

Text and Data mining

- UK: Text and data mining (Section 29A CDPA) is primarily limited to the reproduction of works for research for a non-commercial purpose.
- EU: Text and data mining (Articles 3 and 4 Digital Single Market Directive which the United Kingdom will not implement); the conditions are not met. Article 3 is limited to text and data mining for the purposes of scientific research; Article 4 requires lawful access for the exception to apply.

3. Infringements. Infringement could potentially occur in two forms:

- Use of source musical works without permission or licence for the machine learning process
- “Substantial taking” recognisable in the AI music content; for example, where the AI application produces music “in the style of” another composer.³

The first example could be practically addressed by licensing for such use of musical works, either on a voluntary blanket basis⁴ (for generalised training using a wide selection of repertoire) or on an individual basis (for specific training on a certain repertoire). Licences would be developed by the industry and negotiated voluntarily; composers need to have the ability to prevent such use if it is against their wishes. The details of such an “AI Exploitation” licence need to be elaborated. This should include a mechanism for identifying the works ingested based on detailed datasets (digital rights management) and reporting capabilities. It is established practice to address any potential issues of copyright controls in pre-use licences, which also serve to avoid subsequent infringement procedures (such as having to establish “substantial taking”).

³ This might also lead to the infringement of a publicity right or a moral right e.g. Section 84 CDPA

⁴ E.g. via collective management organisations

2. Is there a need for greater clarity about who is liable when an AI infringes copyright?

Yes; given the number of people potentially involved in the creation of AI-assisted or AI-generated music works, a clear approach to liability is required. There are many people involved in the process, e.g. the AI investor, the AI producer, the AI developer/programmer, the AI input selector, the AI trainer, or the digital service providing the AI application and/or the AI-produced works. In our view, the ultimate commercial beneficiary will be liable for any licence including that for 'AI Exploitation' (c.f. Section 9 (3) CDPA: the "person by whom the arrangements necessary for the creation of the work are undertaken.").

3. Is there a need to clarify existing exceptions, to create new ones, or to promote licensing, in order to support the use of copyright works by AI systems? Please provide any evidence to justify this.

Licensing addresses both the needs of the AI application in regards to 'source' content and also, in respect of the interests of the composer and music publisher. Any new exception for AI-assisted or AI-generated music works would be in conflict with the Three Step Test (Art 13 TRIPS Agreement 1994).

4. Is there a need to provide additional protection for copyright or database owners whose works are used by AI systems? Please provide any evidence to justify this.

In our view the existing copyright system is sufficiently robust to protect copyright owners such as composers or music publishers.

Part 2 Protecting works generated by AI

5. Should content generated by AI be eligible for protection by copyright or related rights?

As a starting point we refer to the internationally-established approach to only grant copyright for human creations.

In the case of AI-assisted works, i.e. when a composer uses AI applications as a tool for the creative process, the copyright in the musical and/or lyrical work rests with the composer. In such scenario, the AI application is merely an instrument, a pen in the hands of the composer.

In the case of AI-generated works, i.e. when the computer produces musical works without human input, there is currently no copyright protection under UK,⁵ EU⁶, and US⁷ law. This reflects the anthropocentric philosophical justification of copyright as natural law (In Germany: Immanuel Kant, Georg FW Hegel; in France: Issac Rene Le Chapelier) or as natural justice in the UK (John Locke).

Section 9 (3) CDPA only deals with the authorship of the computer-generated work not on the subsistence; whether there is an original work has to be established under general copyright rules (Section 1 CDPA). In the only (first instance) decision⁸ in relation to Section 9 (3) CDPA, Kitchen J applied general copyright rules when establishing whether graphics and video game frames were artistic works and programme and accompanying notes were literary works. He relied on Section 9 (3) of the CDPA only when addressing the authorship of the programmer.

6. If so, what form should this protection take, who should benefit from it, and how long should it last?

At this stage, the appropriate nature or application of any specific protection for purely AI-generated works, or whether protection is appropriate in any form is unclear. Copyright is inappropriate given its anthropocentric fundament.

Notwithstanding the above, we suggest that purely AI-generated content is identified as such to users and rightsholders, in a standardised way, similar to the now ubiquitously recognisable ‘E’ for adult content, with an underlying watermark to avoid misrepresentation.

⁵ Protecting original work (skill, labour and judgement); whether AI applications could be protected depends on the definition of originality addressing the relation between the author and their work. The UK has been applying European Union standards established in various CJEU decisions and still applicable in the United Kingdom after the end of the transition period: only human creations are protected by copyright

⁶ Protecting the author’s own intellectual creation reflecting their personality, and thus only protecting human creations (amongst others Infopaq International A/S v Danske Dagblades Forening Case C 5/08)

⁷ 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".

⁸ Nova Production v Mazooma Game 2006

7. Do other issues need to be considered in relation to content produced by AI systems?

Yes; the nature of the human input into AI generated works will have to be established; i.e. what form of human input suffices to trigger copyright protection or, to what extent is AI generated music work reliant upon human input. Is initiation of the AI process or a proposal of the required output in terms of style, mood and/or genre sufficient to qualify for copyright protection on the basis of human interaction/dependence? This delineation will need to be established in practice.

Part 3 Copyright protection for AI software

8. Does copyright provide adequate protection for software which implements AI?

9. Does copyright or copyright licensing create any unreasonable obstacles to the use of AI software?

These questions are not for the MPA, other than repeating that we have been effectively using artificial intelligence for a considerable time and in our experience there are no unreasonable obstacles. We suggest a voluntary licensing-based approach.