The Association of Photographers Limited (AOP) response to the IPO Consultation – Artificial Intelligence and IP: copyright and patents.

Written evidence submitted by the AOP

Background

1. The AOP is a not-for-profit trade association for professional image-makers, founded in 1968. Its aims are to champion and protect the value, professionalism and standing of its members and the creative image-making industry. We vigorously defend and lobby for the interests and rights of all photographers and image-making professionals.

2. Our members include professional photographers, assistants, agents, suppliers, students and education establishments as well as many others working professionally in the creative industries.

3. Our professional members have a broad client base of large- and small-scale businesses ranging from individual clients in the corporate sector to design groups, publishing houses, music publishers and advertising agencies. Our members' work is published worldwide in magazines, newspapers, books and advertising campaigns and many sell their images as fine art through galleries, both in traditional spaces and online.

4. The AOP is a member of the British Copyright Council (BCC), Creative UK (ex-Creative Industries Federation), the British Photographic Council (BPC) and Pyramide Europe (EEIG) and we fully support the 'Fair Terms for Creators' campaign: https://www.fairtermsforcreators.org/ co-ordinated by the Creators' Rights Alliance (CRA).

Key Summary

5. The AOP welcomes the IPO's Consultation and we endorse the widely-held view that copyright should protect human creative endeavour. We also wish to make clear that any review of the relationship between 'artificial intelligence' (howsoever defined) and copyright must be carried out on a 'no harm' basis, which is to say that copyright holders must not be disadvantaged from their current position. We would urge further consultation and detailed research to map out the extensive landscape that AI permeates, rather than relying solely on the information that this consultation will generate.

6. The AOP supports the position of the British Copyright Council, of which it is a member, which also advocates extreme caution in considering any changes to current legislation and the effects that might have on the existing (and functioning) licensing regime.

7. The AOP wish to point out that the approach taken in this consultation, that of ranking a number of options from most, to least, favourable, misconstrues the selection process and outcome as some options may not be desirable at all, yet giving those options a ranked position implies some degree of favourability. We believe this will present a skewed set of results. Where appropriate we have set out whether we disagree with or oppose any of the possible options presented.

Section A questions

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 do not, broadly-speaking, rely solely on any CGW provision in the pursuit of their economic activities and we note the lack of case law to clarify the use of the provision and the lack of clarity in the term 'computer generated work'. It is important to separate the notion and understanding of AI-*assisted* work, AI-*generated* work and *computer*-generated work. Currently some of these phrases are used interchangeably which is less than helpful.

   Clear definitions of each should be agreed upon before any further discussion about broadening the scope of exceptions to copyright should be embarked upon. We note too that there is a difference between what is termed 'machine learning' and 'artificial intelligence' and it is of utmost importance that all parties to any exploration of a change in legislation are agreed upon or at the very least, aware of the distinctions between the phrases used to describe the various technologies and methodologies currently available.

   Our members frequently use computer software to assist in the creation of copyright-protected work and some of this software uses AI as a tool within the software itself. The software licensing arrangements in place between software supplier/licensor and creator/licensee are enough to handle this aspect of AI-assisted input incorporated into new copyright-protected work.

   We believe that existing copyright legislation, guidance and case law provides enough of a yardstick to determine if the requisite bar for originality under the UK's legal system has been met in order for a work to qualify for copyright protection. This is not necessarily the situation for database rights which as yet has little case law to clearly demonstrate that the legislation gives ample protection to databases in relation to AI processes and data extraction.

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

AOP rank 1	Option 0	Make no legal change.
AOP rank 2	Option 1	Remove protection for computer-generated works
AOP rank 3	Option 2	Replace the current protection with a new right of reduced scope/duration.

   The landscape of artificial intelligence is evolving fast but, importantly, is *still* evolving. Initiating any changes to legislation at a time when the full picture is unclear and the implications of any changes may well not be known for some time is a dangerous activity to undertake which risks upsetting and undermining the current copyright and licensing framework and we urge the utmost caution in this regard. As a result, we urge the IPO to select Option 0 at this time.

   We would select *only* Option 0 on the basis that firstly there remains a significant gap in knowledge and understanding of the extent to which copyright legislation (CDPA S.9.3) for computer-generated works is relied upon by AI developers for machine learning (ML) data sets, applications, and AI-created output without a human author.

Secondly, as AI extensively covers such a broad range of applications and as such is yet to be clearly defined as a single technology, it seems hasty and incomplete to attempt to define an AI-generated work distinctly from other parts of a copyright protected work, within the guise of computer-generated works. The use of AI is not only multi-faceted across the creative industries (such as the use of AI-assisted tools within the photo-industry and photographic works) but also across many other industries and sectors.

We would highly recommend greater stakeholder dialogue involving the creative industries, particularly representatives from the photo-industry such as photographers who already utilise many AI-assisted tools in the creative development of their photographic works (images and metadata) within the current legislative framework, and may well look to expand to AI-developed works or AI-generated works in the future.

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.*

Copyright exists to protect the output of human endeavour and to start down a path which awards machines a degree of the same protection is a path fraught with peril leading to a downward spiral in which human endeavour is disincentivised against a background of billions of AI-generated works.

There have already been legal tests of this human element to be a requirement in copyright protection in the past, which have confirmed the sanctity of the human being in the creative process [ref. US cases: *Naruto v Slater* and *Cetacean v Bush*] and noting that the European Union (CDSM 2019) also excludes machine-developed works from the scope of copyright protection.

We refer again to the lack of clarity in the language used ("computer-generated works") and the danger of conflating this with 'AI-assisted' or 'AI-developed' works.

Of greater concern to us, is whether the generation of AI-assisted or AI-developed works infringes the existing copyright of works upon which those AI platforms may have been developed.

We believe the current CDPA provisions works well without the need to introduce a related right for CGW. As stated above the range, variety and use associated with AI suggests that it would be better to do nothing (Option 0). Human creators already utilise AI-assisted tools for still and moving images (such as adding in elements or editing to enhance images, which can range from small enhancements to significant changes, using AI-assisted software programmes like Adobe Photoshop CC, Luminar AI, Coral Paintshop Pro, etc) within the current framework, we strongly believe this would or should be no different for further AI-generated outputs.

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

It is unclear what is meant by the "designs system", and whether this is referring to website development and design systems powered by AI - whereby site modules and other interaction patterns design themselves, without the need of a designer. But to reiterate – we

do not believe that any new provisions or extension to current exceptions to copyright protection are desirable. The implications of anything other than Option 0 (make no legal change) are that the framework that currently exists to support creative endeavour would be undermined. We oppose options 1 and 2.

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

We strongly believe that AI-generated works should be identifiable as such, and that appropriate audit trails should be in place to safeguard against the conflation of fantasy with reality (a good example to demonstrate this issue photographically is the recently published work - The Book of Veles: How Jonas Bendiksen Hoodwinked the Photography Industry - https://www.magnumphotos.com/newsroom/society/book-veles-jonas-bendiksen-hoodwinked-photography-industry/). This is no different to much industry best practice which already seeks to make obvious when a piece of completed work has its origin in truth or reality (such as the recent implementation of a new law in Norway, requiring retouched imagery to be identified as such by content creators when posting to social media platforms) or whether some amount of computer-generated input has been involved and to what extent (retouching in advertising imagery being one example). There is already a problem with fakery (aka 'deep fakes') across a whole range of copyright-protected output and it seems that any issue with false attribution is independent of the options presented. Far better in our opinion to attend to the shortcomings in the current moral rights provision and enforceability in the Copyright, Designs and Patents Act 1988.

Attribution is important particularly for creators of copyright-protected works and as such there should be an open industry standard approach to logging the input to exclusively AI-generated works which includes attributions to copyright holders to ensure transparency and traceability. Even with AI-generated works there is human-creative input that make up or use data-sets which are component parts of an AI-generated output. Within the image-making industry, the adoption of an open industry standard approach is already gaining interest and credibility, encouraging transparent record keeping, to ensure the authenticity and provenance of photographic works. The Content Authenticity Initiative (https://contentauthenticity.org/faq) addresses misinformation through digital content provenance end-to-end, ensuring both image manipulation and metadata changes are recorded, without the need for blockchain. Therefore, the question of a suggested risk is negligible if a standard code of practice is adopted from the outset.

Other best practice examples exist within our industry in relation to the metadata (in this case used to record copyright holder attributions and text value assets, often referred to as keywords and captions) such as the IPTC Photo Metadata https://www.iptc.org/standards/photo-metadata/ which sets the industry standard for administrative, descriptive, and copyright information about images.

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.*

Generally-speaking, our members do not as yet licence the use of their works for this purpose, however, it is widely acknowledged that the one thing AI platforms and networks

require is data on which to be trained initially. This is a concern for our members, who rely on licensing to generate income for their businesses. Any TDM that occurs in relation to AI-training should be licensed appropriately.

We are aware of several image libraries that offer TDM licences for ML and anticipate they will respond more fully to this question.

As it is a potential revenue stream for image rights holders as further opportunities are realised, we want to take the opportunity here to confirm the value of images by professional photographers as significantly rich and high-quality sources of data as data input and as such while our preference would be to make no legal change to the current framework, we are equally strong proponents of licensing. Our photographers invest significantly both in the initial setting up of a business, the continuing growth of it (as an example, professional standard kit equipment can start from £33,000) and to the level of investment needed for each professional shoot (which includes, but is not limited to R&D, pitch booking and shoot organisations, software subscriptions, web hosting and image storage/transfer, equipment/studio hire, wardrobe/props retouching/editing, assistants, stylists, etc – Note: we can provide an example of investment costs upon request).

Over many decades licensing has been utilised as a successful facilitator to the use of copyright-protected creative works, for photographers it has enabled them to be recompensed for the value they have created for each work, incentivising them to invest and create new works, adding further value to their creations. It is a method which remains successfully adaptable and utilised across the creative industries and in part has supported the world-beating economic growth of the UK creative industries. Licensing by default is market-led and provides for a competitive environment, both offline and online, and as being demonstrated by others in our industry, is already adapting to market needs for use in ML requiring vast image data sets.

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

We do not wish to see the current exceptions for TDM broadened. This will certainly have a negative economic impact on our members, indeed on all creators of copyright-protected works, as those works add considerable value to the AI platforms and networks themselves, for without access to those works, those platforms would not economically benefit. In particular, digital photographs, complete with metadata, provide a rich source of data for use as a development and training tools by creators of AI technology, platforms and networks. This is without doubt a commercial use of such data and as such, should be properly licensed and paid for.

We are well aware of the Government's desire to make the UK a leader in AI technology and business - as highlighted in statements made variously by IP Minister, George Freeman, IPO Comptroller General and CEO, Tim Moss and DCMS Under Secretary of State, Chris Philp included in the preamble to the Consultation - but would ask that the implications of any changes to the current framework and legislation are properly and fully considered.

The Three-Step Test as established in the Berne Convention should be used as the yardstick when considering any changes to the current framework. We do not wish to see any situation where the data mining of online databases of our members' work (and any other creator with accessible data online) is covered by a broadening of the TDM exception, that commercially transfers economic value away from copyright holders. This activity can and

should be managed through appropriate licensing and we strongly oppose any broadening of the current exception, along with implementations of new related ones.

Should this consultation identify clear gaps in knowledge or information we would strongly support and advise on reducing this gap with guidance and signposts in order to bring stakeholders from both sides together.

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

AOP rank 1	Option 0	Make no legal change.
AOP rank 2	Option 1	Improve licensing environment for the purposes of TDM.
AOP rank 3	Option 2	Extend the existing TDM exception to cover commercial research and databases.
AOP rank 4	Option 3	Adopt a TDM exception for any use, with a rights holder opt-out.
AOP rank 5	Option 4	Adopt a TDM exception for any use, which does not allow rights holders to opt out.

We have not seen any evidence that suggests the current system of licensing, copyright and the exceptions are a barrier to any innovation and/or development in the AI sector. Any commercial use of data should be appropriately licensed from copyright holders. We wish to express our concern that the direction of this consultation looks to be driven by commercial demands of the AI sector at the expense of the current framework of copyright protection and licensing. This concern appears to be borne out by comments included in the preamble to the consultation, which seems biased towards that direction. We would request that in order to dispel such concerns, there is important merit in working with photo industry representatives, to bridge gaps in knowledge and the use of AI from our perspective going forwards.

As we cannot see any clear market failure, we would advocate Option 0 for no change. However, if it is clearly and decisively indicated that as a result of several consultations (including roundtable discussions) which recommends change, Option 1 would be our second preference but also request further clarification on what the government means by "*improving the licensing environment for the purposes of TDM*".

If, and only if, market gaps are identified after further independent analysis, then there may be some benefit in exploring the possibilities of Option 1 as a means to support licensing rights for the purposes of TDM. As a precursor, we would insist that a proper audit trail of accurate data sources is mandated, that the Berne 3-Step Test is applied to data collection processes and that the lawful purposes of TDM are clearly understood by the AI sector and those seeking to benefit from using data in this way.

We strongly oppose Options 2, 3 and 4, despite having to rank them – please see our comments in opening paragraph 7 that voice our concern with this approach – as these three options would undermine the current licensing structures and systems in place. Options 3 and 4 seem to favour no-one, as AI by its very nature requires the broadest and best possible datasets on which to be trained, ergo any compromising of those datasets would be of less interest to those seeking to use them. Additionally, Option 4 breaks the licensing model entirely and strips any value from the creative and economic activity our members are engaged in.

We recognise that the Government has a clear ambition to promote AI development (having observed the Government's National AI Strategy, September 2021), and as image industry professionals already use a range of AI-assisted tools (given the industry's history as early technology adopters) and are likely to expand on this use to create new copyright works, we support this and as a caveat strongly advocate for our involvement in preparing and defining any guidance going forwards.

It may be the case that working in a different sector means you may be less aware of the operations or services available in a separate sector, such as the creative industries, but that should not excuse the need for remuneration for the use or mining of creative content (data) such as still and moving images. Compensation for the value of human-authored works used in AI-generated works must be set at the utmost level of importance in order to ensure we do not reach a point at which there are no new human-authored works because there is simply no incentive left to create.

The AOP holds an annual Awards event, now in its 37th year which showcases the brilliant *human* visual creativity of its members https://www.aopawards.com/ – it is important that we continue to support and not undermine this creativity to the detriment of visual creators.

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

We do not have experience of the EU exception but are aware that transposition of the EU Directive on Copyright in the Digital Single Market (CDSM) which contains some provisions on TDM has been delayed by many EU member states. It also appears that there is no evidence that the current system of licensing is preventing any appropriate TDM from taking place in regard to innovation and development in the AI sector.

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

There are no positive implications in any of the options as presented. As we have already stated, the options range from maintaining the current position (i.e., a 'no harm done' proposition) through to a dramatic undermining of the current system of licensing that supports creators in their economic activity.

Whether for ML or extracting data-sets as input for AI, there is an 'act of copying' in order for a machine to be able to 'read' a training set, it maybe suggested that these are temporary (cached), however to facilitate an ethical approach for transparency and traceability purposes for rights holders, these copies should be retained, much like they are when tracing and identifying image infringements where a fingerprint, IP/URL address (specific web page) and other relevant digital data is kept as verifiable auditable records for legal cases.

Bringing in a broader exception that places unnecessary burden on creative rights holders would undoubtedly stifle human creativity. The extraordinary speed with which developments happen within the tech industry without fully realising the consequences if the legal framework is changed, could have harmful, everlasting and unintended

consequences if not undertaken with extreme care and consideration for human creators affected by it.

Our members earn their living by their creativity alone - they have a uniquely gifted talent for producing some of the most memorable images of the 20th and 21st centuries, which has been honed and skilled over many years along with a plethora of new talent developing their specialist careers - they cannot simply switch to a different career path in another industry sector.

Creative industry rights holders, such as photographers and other image-makers must not be further burdened with the requirement to opt out of any data mining (it is unclear how that would work in any case) nor should they have to initiate or reintroduce Technical Protection Measures (TPMs) to prevent data mining from taking place – i.e. placing an entry/registration wall to prevent unwanted TDM access which would be unfeasible with most in our industry using websites, with image databases, as their commercial shop fronts (examples: renowned photographers Tim Flach (AOP President) https://timflach.com/work/birds/ and Niall McDiarmid https://www.niallmcdiarmid.com/).

We would therefore urge extreme caution and request that further careful and considered research is undertaken to map out the full AI landscape, how AI is used, applied and developed in each sector within each industry distinguishing the different types and uses and how they are applied, in order to demonstrate where there is clear evidence of market failures.

Patents

11. through to 17.

We have no comments to make in regard to patents.

General

18. *What role does the IP system play in the decision of firms to invest in AI?*

Intellectual property has value, of that there is no doubt, and it allows creators to benefit economically from the activities they are involved in, which in turn benefits our wider economy and culture as a whole.

AI platforms require authorised and validated high quality large data sets, copied at neural speeds in order for them to 'learn' and become the platforms their inventors designed them to be and any businesses involved in the development of AI systems will undoubtedly want to see a return on their investment. Any costs incurred in licensing data for the training period of an AI platform are simply the costs of doing business, and licensing, from our experience, is flexible and adaptable. It should not be the role of government to undermine existing marketplaces and licensing models in one sector in order to create attractive environments for those working in another. As already stated we firmly advocate the need for government to fully research and understand the AI landscape, and how it impacts the creative industries, hence our request for further consultation.

19. *Does the first mover advantage and winner-take-all effect prevail in industries adopting AI? How would this affect the impact of the policy options proposed on innovation and competition?*

We know that the first players in a technology-driven and orientated market benefit hugely from being 'the first through the door' – that has been well-evidenced in Silicon Valley, in FinTec and in the crypto-industries. We know that business will want to take advantage of the best deals on offer, when considering where to set up and we know that policy-makers like to be able offer advantages to those businesses to secure economic growth – all of which should not be undertaken at the expense of existing markets and economic security. As an industry we are still navigating the online marketplace, which continues to have its perils – as evidenced by the significant level of copyright infringement that continues to take place despite our members' best efforts, the introduction of the IPEC Small Claims Track (which we applaud) and recent government reviews.

20. *How does AI adoption by firms affect the economy? Does the use of AI in R&D lead to a higher productivity?*

We have no data to support our views on this, but anecdotal evidence would suggest that whilst AI might be able to increase productivity, it may conversely have a detrimental effect on the economy by shrinking the labour market in other areas, in addition to the transfer of economic value from one sector to another.

21. *Do the proposed policy options have an impact on civil society organisations? If so, what types of impacts?*

As AI becomes a greater presence in our lives, it is imperative that the broader, philosophical questions about its role and the impact on human existence are properly debated and considered. The implementation of AI platforms and systems have the potential for great benefit as much as they do for great harm and making the distinctions clear between our lived, human reality and that afforded by AI is crucial. Any civil society organisation relies on a distinction between truth and falsehood and AI should support and enhance the former.

One aspect which has had little reference in this consultation is the issue of data privacy in relation to TDM and data mining huge data sets for commercial purposes without authorisation or permission. A significant number of images contain metadata which includes personal data which may or may not be subject to data privacy laws, therefore our recommendation of a robust and transparent traceable audit record would mitigate this risk.

12. Section B: Respondent Information

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

B: *Are you responding as an individual, business or on behalf of an organisation?*
Responding on behalf of an organisation, the Association of Photographers Limited.

C: *If you are a responding on behalf of an organisation, please give a summary of who you represent.*
The AOP is a not-for-profit trade association for professional image-makers, founded in 1968. Its aims are to champion and protect the value, professionalism and standing of its members and the creative image-making industry. We vigorously defend and lobby for the

interests and rights of all photographers and image-making professionals. We represent around 3000 image-making professionals in the sector.

D: *If you are an individual, are you?*
Not applicable

E: *If you are responding on behalf of an organisation, are you?*
We are an industry body (2).

F: *If you are responding on behalf of a business or organisation, in which sector(s) do you operate? (choose all that apply)*
We (and our members) operate in the following sectors;
Information and communication – Publishing, audio-visual and broadcasting (11)
Legal activities (17)
Administrative and support service activities (18)
Education (20)
Arts, entertainment and recreation (22)
Other activities – advertising (23)

G: *How many people work for your business or organisation across the UK as a whole? Please estimate if you are unsure.*
Fewer than 10 people work in the organisation (1).

H: *The Intellectual Property Office may wish to contact you to discuss your response. Would you be happy to be contacted to discuss your response?*
We are happy to be contacted by the IPO about our response.

I: *If you are happy to be contacted by the Intellectual Property Office, please provide a contact email address.*
nickdunmur@the-aop.org

J: *Would you like an acknowledgement of receipt of your response? Yes/No*
Yes, please