# IPO Consultation: Artificial Intelligence and Copyrights

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**Consultation response from the**

## Centre for Competition Policy

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This consultation response has been drafted by named academic members of the Centre, who retain responsibility for its content.

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# Introduction

The government is seeking consultation on balancing copyright protection with Text and Data Mining exceptions. The consultation has been presented with a proposal aimed at fulfilling three objectives:

1. **control:** Right holders should have control over and be able to license and seek remuneration for the use of their content by AI models.
2. **access:** AI developers should be able to access and use large volumes of online content to train their models easily, lawfully and without infringing copyright.
3. **transparency:** The copyright framework should be clear and make sense to its users, with greater transparency about works used to train AI models and their outputs.

The proposal outlined four scenarios and a framework to balance these three objectives in Option Three. In this response, we have critically examined the options, suggested necessary clarifications, and highlighted some impacts of policy changes.

# Critical Analysis of the proposed options:

**Option 0: Do nothing: Copyright and related laws remain unchanged.**

This option appears inadequate in addressing the evolving challenges posed by artificial intelligence for numerous reasons, ranging from the substantial uncertainty faced by both parties involved in this presumed *quid pro quo* to the increasing frequency of litigation worldwide.[1] Furthermore, the growing utilisation of artificial intelligence tools within creative industries necessitates a reconsideration of the fundamental concepts and tests for copyright protection as established in the Copyright, Designs and Patents Act 1988. Consequently, it can be argued that the status quo fails to fully meet copyright law's traditional objectives.

The legal response addresses a longstanding issue that has been approached by creative communities through various means. For instance, there are adversarial strategies employed at the digital architecture level,[2] such as implementing data poisoning technologies designed to degrade, deny, deceive, or manipulate artificial intelligence systems or the continued application of an opt-out option,[3] at least when this alternative is available.

Furthermore, there is a state of insufficiency regarding the clarity and transparency provided by artificial intelligence developers concerning their data utilisation. Consequently, we agree with the proposal advocating for enhanced transparency. Nevertheless, we emphasise that transparency must function as a reciprocal process. This entails the establishment of a clearly defined and elevated standard of transparency requirements from AI developers, not only regarding data usage but also concerning the objectives of their training processes. It is essential

[1] Emily Cox, 'UK Copyright Reform "Could Expose AI Developers to Mass Claims"' (Pinsent Masons15 January 2025) <www.pinsentmasons.com/out-law/news/uk-copyright-reform-could-expose-ai-developers--mass-claims> accessed 22 February 2025.
[2] Jing Lin and others, 'ML Attack Models: Adversarial Attacks and Data Poisoning Attacks' <https://arxiv.org/pdf/2112.02797>.
[3] Tatum Hunter, 'Artists Are Fleeing Instagram to Keep Their Work out of Meta's AI' (Washington Post, 6 June 2024) <www.washingtonpost.com/technology/2024/06/06/instagram-meta-ai-training-cara/> accessed 22 February 2025.

for the creative industry to have a thorough understanding of what they are effectively opting out of and what their copyrighted work is being used for. Furthermore, the increased use of AI tools necessitates greater transparency from copyright holders to outline the parameters surrounding human and artificial intelligence contributions. Such developments may prompt additional inquiries that fall outside the existing legal framework yet remain related, such as reassessing the originality criteria and the copyright valuation. Interestingly, this further investigation may arise from reassessing digital forms of copyright material but could also include non-digital copyright materials; this area requires further clarification as addressing the TDM exception might change other fundamental areas of the system.

**Option 1: Strengthen copyright by requiring licensing in all cases.**

The proposition to strengthen copyright through mandatory licensing presents a framework that fundamentally aligns with established Intellectual Property principles. This approach reinforces the foundational purpose of copyright law: enabling the creative industry to monetise and leverage their work effectively. The current legal and practical framework already demonstrates the viability of this approach, providing explicit mechanisms for commercial entities, including AI developers, to legally obtain and utilise copyrighted materials for training Large Language Models (LLMs). These mechanisms are supported by well-established licensing frameworks administered through reliable institutions and communities.

However, this approach presents significant practical challenges. The requirement to negotiate licenses for the vast array of materials needed for AI training could substantially increase development costs in the United Kingdom. The resulting pricing and market dynamics could create pronounced disparities in competitive AI development capabilities. A critical consideration absent from the current framework is the assessment of copyright material quality in terms of both protection and pricing, necessitating further investigation into fair remuneration and licensing mechanisms.

The economic implications are particularly concerning for market competition. Due to licensing costs, smaller companies and new entrants would likely struggle to compete with dominant AI firms. This financial barrier could force less-resourced developers to rely on lower-quality, potentially outdated or biased training data.[4] This scenario risks creating a two-tier AI development ecosystem, potentially exacerbating algorithmic discrimination and market inequality and increase concentration in an already concentrated industry.

**Option 2: A broad data mining exception**.

The consideration of a broad data mining exception emerges partly in response to recent legal developments. The United States' experience with fair use doctrine, particularly highlighted in the *Thomson Reuters v. Ross Intelligence* case (February 2025),[5] demonstrates the limitations of relying solely on fair use principles. Similarly, the United Kingdom's fair dealing doctrine, as outlined in the Copyright, Designs and Patents Act 1988 (Section 30), currently only facilitates

[4] Geoffrey A. Manne & Dirk Auer, From Data Myths to Data Reality: What Generative AI Can Tell Us About Competition Policy (and Vice Versa), International Center for Law & Economics', <https://laweconcenter.org/resources/from-data-myths-to-data-reality-what-generative-ai-can-tell-us-about-competition-policy-and-vice-versa/> accessed 22 February 2025.

[5] Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc, No. 1:20-CV-613-SB (February 11, 2025)

non-commercial applications. These limitations necessitate the exploration of Text and Data Mining (TDM) exceptions as an alternative approach.

However, the current interpretation of this option presents significant shortcomings. The lack of appropriate trade-offs creates potential risks for creative industries. The opt-out provision, as opposed to an opt-in option, while seemingly offering control for rights holders, could lead to a problematic scenario where Collective Opt-out might occur.[6] If all artists choose to opt out, the exception becomes effectively meaningless, reverting to the status quo (Option 0). This leaves AI developers with Selective data for AI training, potentially creating systematic biases and quality issues in AI development. Finally, the lack of an effective remuneration framework to supplant the traditional licensing model exacerbates these challenges, leaving creators without positive incentives to engage in this option.

**Option 3: A data mining exception which allows rights holders to reserve their rights, underpinned by supporting measures on transparency.**

**Question 1. Do you agree that option 3 is most likely to meet the objectives stated above?**

**Question 2. Which option do you prefer and why?**

**Answer:**

**We disagree that Option 3, in its current form, optimally fulfils the proposal's stated aims. Our analysis examines the three core objectives and identifies significant areas requiring further development.**

- **Supporting Rights Holders**

The goal of supporting rights holders' control of their content and ensuring fair remuneration requires a deeper examination of several critical parameters. It is also important to distinguish between control and monetisation. The current proposal leaves important questions unanswered regarding essential definitions of the parameters proposed in this framework, particularly concerning the scope and duration of the opt-out mechanism. Furthermore, the relationship between AI developer transparency framework and rights holder control remains unclear. Indeed, it is unclear how this transparency would enable effective content control and fair compensation.

- **AI Development and Access Support**

The objective of supporting world-leading AI model development in the UK through access to high-quality data raises several technical considerations that must be addressed. These include clarification of which specific AI models and technologies (such as LLMs, RAGs, etc.) would be using right holders' data for training. The proposal must also address how AI developers would manage the inherent challenges of AI model opacity, define the scope of transparency requirements, establish clear liability frameworks for breaches of transparency and accreditation, comply with complementary legal instruments and implement effective data labelling mechanisms.

- **Enhancing Trust and Transparency**

[6] Though a collective agreement to opt out may possibly violate competition law.

While the emphasis on transparency is welcome, we believe it must be reciprocal between all involved parties. Transparency from AI developers alone provides an incomplete picture of AI use and development. The increasing prevalence of AI-generated copyrighted materials, created through prompts and human-AI interaction, introduces new considerations regarding quality assessment and pricing for subsequent use for both digital and non-digital materials.

**Maintaining Human-Centric Creativity and Copyrights**

It is crucial to emphasise a human-centric approach to AI that subsidises rather than replaces the human creative sector.[7] Without this focus, we risk shifting from human-centric innovation to Machine Learning-based creativity and IP systems. This concern extends beyond copyright issues, as evidenced by parallel discussions about AI inventors in patent law. The potential automation of creativity through algorithms could fundamentally alter copyright protection mechanisms even beyond the intended changes for TDM purposes.

# Response to Section D on AI outputs

***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?*

**Answer:**

**We do not recommend maintaining the current protection for computer-generated works.**

In the current UK copyright law, section 9(3) of the Copyright, Designs and Patents Act (CDPA) states:

*In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.*

And Section 178 of the CDPA states:

*"computer-generated", in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work;*

The provision allows for authorship to the developer of computer programs where no human contribution is found in the creation of a work. In the 2021 consultation, the UK IPO decided not to change it based on the consideration that "AI is still in its early stages".[8] That has clearly changed given the technological advances over the past 4 years, especially after the launch of ChatGPT in November, 2022, which started an explosion of generative AI applications. Today we are rather familiar with AI-generated works (CGWs) that are results of computer programs working with prompts and parameters entered by human users. In such circumstances there can be ambiguity as to whether the human acts as a co-author or merely a user. And when a CGW is deemed original, how to determine whether the human user has contributed to the originality?

[7] Harrison Lung, 'Why Human-Centric Strategies Are Vital in the AI Era' (World Economic Forum17 January 2025) <https://www.weforum.org/stories/2025/01/leading-with-purpose-why-human-centric-strategies-are-vital-in-the-ai-era/> accessed 23 February 2025

[8] https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents

The technology explosion has certainly made AI accessible to a much wider user base through more interactive interfaces like chatbot in a similar way to the widespread of smartphones. We are marching towards a world where anyone can generate an article, an image, a song or a film by giving just a few prompts or parameters to an AI tool. With the current CGW legislation, we can expect a growing number of disputes over copyright authorship of CGW and an increasing risk of copyright being diluted by a pile of AI-generated content without originality. Firms could be incentivised to use AI to mass-generate content and claim copyright monopolies, resulting in abuse of copyright and worsening the disadvantaged market position of small businesses and individual creators, those in the long tail of the industry. This could harm human creativity.

***Option 1: 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: 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.*

**Answer:**

**We do not support the removal of specific protection for CGW based on two aspects of consideration:**

First, removing the specific legislation doesn't help answer the questions about determining the role of AI in creation. With that ambiguity, there will always be disputes over authorship. If copyright can only be granted to human authors, works created using AI tools may lose copyright protection and be freely copied, modified and exploited without attribution, discouraging creators from using AI.

Consequently, the second aspect is the suppressing effect on businesses and individuals developing generative AI tools. Without copyright, companies may avoid releasing their AI models or move toward restrictive licensing, limiting access to AI-generated creativity. More content might be locked behind platform-controlled ecosystems, reducing open access. This goes against the government's objectives for this area.

We suggest an alternative approach to balance human creator rights with AI innovation. This could be formed as Option 1, a reform to the current legislation. The essential elements of this reform include:

- A solution to determining human authorship in CGWs: set a clear and executable definition of meaningful creative human input.

- A hybrid system consisting of both a licensing scheme and a public domain model.

- It is essential to consider the unique characteristics of different sectors because each form of creation has its own way to define value and originality, and to be distributed and consumed. The media form directly affects whether and how a work can be digitalised and used for AI model training, and eventually monetised.

# Issues for further consideration

There is a lot we do not currently know about how AI may impact the production (quantity and quality as well as supply chains), gate keeping and consumption of creative products. Some of these issues appear relevant to the questions asked in the consultation document without being explicitly mentioned or discussed.

## Are we short of creative outputs?[9]

While it has always been debated what motivates creators, for economic rights to make sense there has to be some belief that to get enough output, money matters. Moreover, it must be the case that the marketplace is the best way to decide who to remunerate and by how much. The proposed remedy is not a response to the question about the best way to identify and remunerate creators. Copyrights as economic as opposed to moral rights are there as an answer to the question: How are we going to get sufficient creative output given the high fixed cost nature of production coupled with an easy or copying, a problem which got much harder with digitalisation?

And yet, post-digitalisation we have seen an explosion in output such that we are now observing long tails of underused output in all creative sectors.[10] There appears to be a huge amount of material which is untouched by the majority of users. In none of the creative sub-industries is there any evidence for a shortage of new products.

What is less clear is whether there are worthwhile quality outputs among the undiscovered.[11] It may be possible to argue that the effort which goes into producing for the long tail contributes positively to the economy if this eventually leads to output of higher quality. But if this is not the case, then encouraging more production may not be the best use of the money contributed by the consumers of the creative products.

Choice overload is a well-known phenomenon in behavioural psychology which has found its way into competition and consumer policy. Even the most assiduous critic, a traditional gatekeeper for cultural products, would struggle to process more than a fraction of new creative products in their area. The same is true of publishers and agents. The fear that the long tail may

[9] de Rassenfosse, G., Jaffe, A. B. and Waldfogel, J. (2024). Intellectual property and creative machines. NBER Working paper: w32698 offers a recent perspective on this.
[10] See for example: Waldfogel J (2020) Digitization and its consequences for creative-industry product and labor markets. In: The role of innovation and entrepreneurship in economic growth. The University of Chicago Press.
[11] Waldfogel J (2015) Digitization and the quality of new media products: the case of music. In Economic analysis of the digital economy. The University of Chicago Press, pp. 407–442

be full of rough diamonds partly arises from this concern. Being discovered and discovering appears to be the new struggle and how to achieve this the fundamental question in the market for creative products. A lot of our information comes from more casual empirical sources. The value of name recognition in that regard is suggested by the reaction of authors to celebrity publications.[12] The supposed increased concentration of sales among an elite in the creative sectors, see BBC radio 4 programme "The Strange Death of Cultural Originality?" by Ben Chu[13] and blog post by Adam Mastroianni[14] appears a consequence of too much choice. The cost of choosing has increased with the increase in available content. As a result, so some argue, people are more prone to go for the tried and tested, leading to more concentration and less variation in the type of creative goods consumed.[15]

It is at least arguable that the right question is not longer "how do we get enough stuff?" but rather "how can the right stuff be found?". Is it time to have a broader review of IP legislation?

## Too much output may create a problem for the market for data.

The long-tail not only challenges our fundamental question about copyright, it also creates issues for the way AI is used in learning. The long tail is not currently seeing much remuneration going their way. How easy is it to use the tail for learning? How valuable is the tail in the learning process? How much data does the modeller need to construct a financially viable algorithm? As the answer to the last question is almost certainly a fraction of the available data, it is questionable whether, without a monopoly on the licencing side, is it at all realistic to think that the licensors can extract much money? What will be the ability of the AI modeller to make a very modest "take-it-or-leave-it" offer to licence holders if some may end up without an offer for their licenses?

## Distributional effects

Whichever response to the opportunities and challenges created by AI is chosen, it may affect different stakeholders differently. This may be so even within groups such as creators (e.g. established and unknown artists) and consumers (e.g. rich and poor). Should such distributional effects be considered in the assessment of the options? For example, if the chosen option leads to a windfall gain for the sector as a whole, how much, if any, of this gain should be shared with the consumers and how?

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[12] See for example article in the Guardian by Ella Creamer and Lucy Knight published 20/10/2024: "'It's quite galling': children's authors frustrated by rise in celebrity-penned titles" which illustrates the problem with "discoverability".

[13] https://www.bbc.co.uk/sounds/play/m002697q, Released on 29 Dec 2024.

[14] "Pop Culture Has Become an Oligopoly - A cartel of superstars has conquered culture. How did it happen, and what should we do about it?" https://www.experimental-history.com/p/pop-culture-has-become-an-oligopoly?s=r. Adam Mastroianni, May 02, 2022.

[15] In this regard, we note that the potential which digitalisation had for "democratising" the production of creative outputs and breaking the power of the major players appear not to have materialised, see for example Morten Hviid, Sofia Izquierdo-Sanchez & Sabine Jacques (2019) From Publishers to Self-Publishing: Disruptive Effects in the Book Industry, International Journal of the Economics of Business, 26:3, 355-381, and Hviid M, Izquierdo Sanchez S and Jacques S (2018) Digitalisation and intermediaries in the music industry: The rise of the entrepreneur? SCRIPTed 15(2): 242–276.