DACS®

Response to the UK Intellectual Property Office consultation on Artificial Intelligence and Intellectual Property

January 2022

Executive Summary

DACS is grateful for the opportunity to partake in this important consultation on the future of intellectual property law in light of a growth in AI industries in the UK. DACS represents the rights of visual artists and is pleased to share evidence from artists themselves on both the opportunities and concerns surrounding AI, appended to this consultation response.

Visual artists can be quick adopters of technology, intrepidly exploring the utility of AI tools at their disposal. However artists also believe that copyright is a vital way for them to be remunerated and involved in the decision making process over uses of their work. Artists have displayed a strong preference that AI developers and users should license the use of their works, rather than expanding the text and data mining exception in copyright law any further.

DACS has a long track record of acting as a trusted broker to over 180,000 artists worldwide, providing a suite of services that remunerate artists for the use of their works. Royalty payments are immensely beneficial to artists, allowing them to sustain their practice and meet the costs involved in making their work available for display. Copyright licensing also gives artists the autonomy to decide how their work is used and in what context. In the context of AI, this means being able to collaborate with AI developers and users rather than being left out of the equation.

Expanding the copyright exception for text and data mining would remove a potential revenue stream to artists at a time, post-pandemic, when they need it the most. As technology evolves, government must ensure that all players in the marketplace are able to benefit. Licensing the use of works to AI technology companies and AI users achieves this by enabling companies to innovate whilst remunerating the creators whose works are used. It also keeps a level playing field between businesses who have adopted AI technology and those who have not, and who license the manual use of copyright-protected works.

AI industries operating in the UK can grow innovation and skills. However, providing carve-outs in copyright law causes serious problems and potentially damages the foundation of the UK's sizeable creative industries, worth over £111 billion to the economy pre-pandemic[1]. AI developers and users are often making commercial products with the intention of financial gain, whilst using copyright-protected works. Licensing these works is a flexible, agile way to bring economic benefit to creators and copyright holders, which does not hamper the development of AI products. For government to keep the creative industries thriving creators must be supported in commercial opportunities like AI.

DACS makes the following recommendations to government to:
- Make no legislative change to the text and data mining exception. Expanding the exception would mean the UK misses out on economic incentives to license works and have revenue flowing back to those who create them;
- Work with existing licensing bodies to improve the licensing framework for AI. DACS has already started working with AI developers and is in a strong position to develop further licensing opportunities for visual creators;
- Play a role in facilitating educational initiatives and bring creators into the fold;
- Work cross-departmentally to consider other ways of aiding AI industries in the UK, e.g. through tax relief;
- Consider ethical issues in AI when making policy decisions.

---

[1] https://www.gov.uk/government/news/uks-creative-industries-contributes-almost-13-million-to-the-uk-economy-every-hour

About DACS

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 180,000 artists worldwide.

Founded in 1984, DACS is a flagship organisation that campaigns for artists' rights, championing their sustained and vital contribution to the creative economy. DACS collects and distributes royalties to visual artists and their estates through Payback, Artist's Resale Right, Copyright Licensing and Artimage. In 2020, we paid £15.2 million in royalties to 72,000 artists and estates.

Responding to this consultation

In preparation for this consultation response, DACS sourced evidence from artists who participated in a 'town hall' style stakeholder session held on 2 December 2021. Participants heard a keynote presentation from AI expert Andrew Burgess, were briefed on copyright and the current consultation, and invited into breakout rooms to provide insight and testimony. The report of this event is appended to this response, and will be referred to regularly throughout with page numbers in brackets.

DACS is a member of the British Copyright Council and the Alliance for Intellectual Property and supports their submissions. DACS is also one of four members of the Copyright Licensing Agency and supports their submission to this consultation. DACS is responding in relation to questions on copyright, and does not comment on questions relating to patents.

Copyright – text and data mining (TDM)

Note: page numbers in brackets refer to the appended report, Stakeholder session on AI and copyright

Examples of AI in the art world

Artists have been quick adopters of AI, as they have with other types of technology. Artists participating in the stakeholder session explained how AI presents them with new opportunities and tools to explore in their practice (p.17). Keynote speaker Andrew Burgess covered some well-known uses of AI artworks, including the portrait of 'Edmond de Belamy': a painting created by Paris-based collective Obvious in 2018. This work sold at auction house Christie's for $432,500 – the first portrait using AI technology to be sold at auction[2].

The AI that created Edmond de Belamy is an example of a Generative Adversarial Network (GAN) where two algorithms work in tandem – a generator and discriminator. As explained in the stakeholder session (p.8) a discriminator is trained on data to make a judgement on whether the generator's output fits the intended task. In the case of Edmond de Belamy, the discriminator was trained on 15,000 images of works by real artists, some of which were still in copyright.

Whilst the sale of the Edmond de Belamy portrait brought significant income to its creators, the authors of the copyright-protected work would receive no income without licensing. It is clear there is a significant financial incentive for individuals and companies to use and develop AI: Snowpixel is an example of an application that charges users to utilise its AI tool. The sale of Edmond de Belamy at auction also demonstrated a proper economic market for AI art works, but it is imperative that those whose intellectual creations form part of the process of developing AI and its outputs also receive fair remuneration and recognition.

In the stakeholder session, artists who used AI in their work demonstrated an understanding of shifts in AI development, and an enthusiasm to acquire skills to utilise AI. They noted a large marketplace for AI art work, often work that was sold on the blockchain as non-fungible tokens. The knowledge and curiosity demonstrated by these artists supported the important role licensing can play in AI: to create mutual benefit and collaboration.

Licensing art works for AI

Some artists were sceptical of AI and felt that AI developers advocated for a rights-free environment. Artists questioned why AI developers should receive special treatment compared with traditional users of copyright, such as print and broadcast media, where copyright-protected works are licensed (p.20). Trust was a key theme, as some artists felt that AI and other technologies created a 'wild west' of non-authorised uses. These artists advocated for DACS to provide trust and assurance through licensing (p.22), noting that they had specifically joined DACS for this purpose.

DACS has been approached by artists using AI and AI developers to use images of artists' works for machine learning or other AI related purposes. Whilst there is not a specific text and data mining licence currently offered by DACS, there is evidence that this will be a growing commercial area, and one that artists want to take part in. DACS can act as a broker between artists and AI users and develop relevant licences that serve both parties mutually, as DACS has done for over

---

[2] https://www.christies.com/features/A-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx

thirty years in other industries. Importantly, through licensing, artists are given the opportunity to collaborate in AI projects, and have an involvement in the output. An AI developer who approached DACS considered this to be a benefit to their projects.

A robust licensing environment also means understanding the choices made by rightsholders. Artists who have mandated their copyright to DACS have done so by exercising their choice – a key tenet of the Collective Rights Management Regulations. Establishing mandatory licensing for AI – for example using creative commons or creating a new licensing scheme that does not involve existing licensing bodies – would derail the principles of autonomy, freedom and choice that comes with licensing in a commercial market, including the freedom and choice *not* to license. Artists demonstrated a concern over not just a loss of opportunity to be remunerated for their works used by AI, but also the right to object to the use of their work or a loss of control (p.22).

Role of government

In agreement with other contributors to this consultation (including the CLA and the Alliance for IP), DACS considers government should work together with existing licensing bodies to improve licensing for text and data mining, or indeed any other related AI use. Licensing is a key commercial benefit to artists, providing them with remuneration that they can invest into their work, which underpins the UK's successful creative industries. Furthermore, licensing is flexible, negotiable and a commercial endeavour that many other industries take part in on a regular basis.

Artists were alive to other issues that arose from AI, such as educational, ethical and environmental concerns. Artists discussed how AI should form a part of arts education to equip graduates with the right skillset to enter the marketplace and there was also consensus for established creators to understand more about the nexus of AI and copyright. Government can play a role in creating more educational resources that would aid individual creators and AI developers to navigate both copyright and AI, enabling better mutual understanding and fostering collaboration.

To support AI development in the UK, government can look elsewhere than copyright law. Tax incentives will encourage AI businesses to develop in the UK, as well as other business support for small and medium sized enterprises and educational grants. Some AI developers work closely with higher education and research institutions, therefore educational funding into relevant programmes could also help AI industries flourish. DACS recommends the IPO plays a role in education, facilitating licensing and aiding cross-departmental conversations on how AI can be supported for the benefit of both AI industries and IP rightsholders.

Negative impacts of extending the TDM exception

Allowing AI developers use of copyright-protected works under an extended exception has the effect of creating an industry-related carve out in the law. In the creative industries, businesses already license the use of copyright-protected content for a wide variety of uses, both analogue and digital. Although AI industries are emerging in the art world, other creative industries have a track record of licensing for AI uses, demonstrating value in the AI licensing marketplace. In some ways, copyright licensing is akin to supplying services or selling goods – demand for a certain product leads to a negotiation for that product and a transfer of value. Extending the TDM exception will disrupt an important value chain, and would also create an imbalance where AI industries get free access to value that others pay for.

AI algorithms require data for training. The better the data, the better the outcome. In the stakeholder session there were two examples of AI outputs that had responded to the data used, but with flawed results. Botto, an art collective, used a discriminator algorithm trained on all of the internet, which meant its output reflected more negative aspects of information available online, from simple inaccuracies to demonstrating bias including racism (p.11). Equally, a database of real human faces used for training discriminators did not represent society more widely (p.24) giving rise to concerns that this incomplete data will impact how the AI discriminator makes decisions on real world scenarios.

Ethical issues arise often from bad quality data. This can be minimised through the licensing process because there is more certainty and transparency around the constituent data which is used to form works. As an example, DACS' image bank Artimage is an example of works of art that contains accurate metadata and descriptions. Licensing works via Artimage is a way of ensuring good quality data, and licensing revenues can also be reinvested to maintain the cleanliness and quality of the data.

Preference of options for the text and data mining (TDM) exception

DACS strongly believes that there is no need to widen the scope of the TDM exception and that doing so would have a negative economic impact on creators and the creative industries. Artists attending the stakeholder session demonstrated a strong preference for licensing the use of their works in AI, with 66% choosing the government option 1 when polled.

DACS suggests the following order of preference:

- Options 0 and 1: DACS does not believe these options to be mutually exclusive, as no changes to the law are needed to improve licensing for AI. DACS has licensed artistic works to a variety of industries for over thirty years, and takes part in collective licensing schemes operated by the Copyright Licensing Agency (CLA). Artists have made clear that licensing can build trust between creators and AI industries, enable artists to participate in AI developments and most importantly provide them with remuneration. AI should be treated no differently to other industries that also license copyright-protected works.
- Options 2 and 3: Some artists were concerned that their work is already being used by AI without their permission, and that simply by having their work available online means it can be used in ways they had not anticipated when it was first published. The notion of an 'opt-out' was attractive to some artists, with 13% of artists choosing option 3 when polled (p.28). These artists considered opt-outs to be a safeguard around their work, however we support the positions of the Alliance for IP and the CLA in this regard. DACS considers an 'opt out' provision in this context prejudices the interests of the rightsholder and risks subverting the position of copyright law by effectively requiring artists to 'opt in' to copyright protection. This is especially the case due to how AI machine learning works in using large quantities of data at once. It is hard to envisage how a mechanism for opt outs will work efficiently in practice, as it would require an accurate database showing up to date records of every rightsholder and every work they are opting out.
- Option 4: When polled, no artists supported option 4 (p.28). DACS supports the views of the Alliance for IP, the British Copyright Council and the CLA in this respect. DACS is not aware of any deficiencies in access to copyright-protected works that licensing cannot resolve. Broadening exceptions without recognising the available solutions, or investing in improving these solutions, undermines the licensing infrastructure and risks destroying revenue streams to creators and the creative industries. Option 4 would, in effect, give creativity away for free – creativity which is the output of UK workers as part of the UK creative industries, and for which they deserve to be recognised and remunerated.

DACS

Copyright – computer generated works (CGW)

DACS considers that the current copyright framework allows sufficient protection for AI developed works within s. 9(3) of the Copyright Designs and Patents Act (CDPA) 1988, and therefore that no legislative change is required (option 0).

Artists considered the notion of whether a work, created independently by AI, should benefit from copyright protection itself, however responses were varied. When polled (stakeholder report, p.27), 47% agreed there should be copyright protection for work created independently by AI, whereas the remaining 53% were either unsure, or did not think AI should benefit from separate copyright protection (24%). In discussions, some artists posed more philosophical questions on what we consider to be 'art', the process or the product, and ideas around human and AI engagement. These questions, whilst pertinent, cannot necessarily be answered by a change in copyright legislation for computer generated works.

Authorship in copyright is also subject to provisions under s.11 CDPA, where copyright in a work can be owned by an employer as first owner if the work was created under employment. DACS considers this provision to be relevant to copyright ownership in AI works, and should be considered in tandem with s.9(3) CDPA on computer generated works.

Other considerations

In discussions during the stakeholder session, artists raised concerns about education, the environment and ethics. Artists considered that AI should form part of arts education to enable a new generation of artists to explore technological changes. Artists were also concerned about ethical issues in AI, from bias to deception. Popular examples of mimicry, such as @deeptomcruise (p. 25) and AI that imitates politicians, create unease and mistrust in society. Furthermore, there are potential copyright and moral rights issues that could arise from unethical uses of AI to create art works falsely attributed to a human artist. When polled, all artists considered ethical issues should be taken into account when the government consults on AI and copyright. It is clear that the lines of distinction between copyright and social, ethical and educational issues are not drawn as clearly by creators.

DACS recommends that the Intellectual Property Office plays a role in aiding copyright education in AI industries and facilitating learning across the AI industry and creator sector. The IPO can also work cross-departmentally to offer insight into the position of copyright holders and supporting other policy levers such as tax relief, educational grants and business support to foster AI industries in the UK.

For further information please contact:

Reema Selhi
Head of Policy and International
DACS
reema.selhi@dacs.org.uk