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IPLA **INTELLECTUAL PROPERTY LAWYERS' ASSOCIATION**

RESPONSE BY THE INTELLECTUAL PROPERTY LAWYERS' ASSOCIATION (IPLA)

A. Introduction to IPLA

1. This is the response of the Intellectual Property Lawyers' Association (IPLA) to the consultation of the UKIPO on Copyright and Artificial Intelligence (AI).

2. The IPLA represents law firms in the United Kingdom (UK) which have substantial practices in the field of intellectual property (IP). Around 65 law firms are members of the IPLA, and members have a deep understanding of AI in the context of copyright law, as well as image rights issues.

3. Our members advise individuals, SMEs and large global businesses on copyright, other IP rights and digital compliance. Accordingly, we consider that we are well placed to make constructive comments in relation to the issues raised in Questions 1 to 2 (policy options), 3 to 8 (Exceptions with rights reservation), 9 to 11 (technical standards), 12 (contractual relationships) 15 (collective licensing), 17, 22 and 23 (transparency), 25 (treatment of models trained in other jurisdictions), 26 to 27 (temporary copies exception), 28 to 29 (encouraging research and innovation), 30, 31, 32, 33 and 35 (computer generated works protection and AI output protection), 38 to 39 (infringements and liability relating to AI generated content), 40 and 42 (AI output labelling), 43 to 44 (digital replicas).

B. Approach and understanding of IPLA to the consultation.

4. The government consultation opens in this way:

   "*Two major strengths of the UK economy are its creative industries and AI sector. Both are essential to drive economic growth and deliver the government's Plan for Change.*"

5. IPLA agrees, and we consider the challenge for the government is how to enable and foster the potential of both so as to strike a fair balance between reward for the creation of intellectual property rights (such as works which have been, are being or will be used to train large generative AI models) and the work of the AI developers and providers in creating innovative new technology.

6. The Ministerial foreword reinforces this:

   "*This consultation sets out our plan to deliver a copyright and AI framework that rewards human creativity, incentivises innovation and provides the legal certainty required for long term growth in both sectors.*"

7. This is again supported in the three stated objectives in the consultation, namely:

   7.1 supporting right holders' control of their content and ability to be remunerated for its use;

   7.2 supporting the development of world-leading AI models in the UK by ensuring wide and lawful access to high-quality data; and

   7.3 promoting greater trust and transparency between the sectors.

8. As noted in the consultation, the purpose of copyright law has, since its inception, been to reward human creativity and that purpose must be borne in mind when considering any changes to copyright law. We consider the law, as currently drafted, to be relatively clear and capable of interpretation by the Courts.

9. We are not aware of evidence that the current law is holding back AI development or adoption. We are aware of several legal disputes by copyright and related rights owners alleging that their rights have been infringed because their copyright works may have been reproduced without permission during the training of AI models albeit there is only one such case in the UK at present, Getty Images v Stability AI. These claims are challenging for copyright owners, in part due to lack of transparency on the part of AI developers as to the exact technical methods used to train their models and the nature and exact use of datasets used to train those models. The ongoing litigation may well provide some clarity on these issues.

9. We make the following preliminary observations:

9.1 The creative industries are an important part of the UK economy. The value in these industries is underpinned, in part, by copyright.

9.2 At law, the copying in the UK of a copyright work for the purposes of training an AI model without licence or the consent of the copyright owner is likely to be copyright infringement (pursuant to s16 of the Copyright, Designs and Patents Act 1988). It follows that any individual or corporation undertaking data mining in the UK for the purposes of training an AI model may have infringed third party copyright. As a result, a copyright owner is likely to be entitled to relief from the data miner, including an injunction, damages or an account of profits, delivery-up or destruction and costs.

9.3 A copyright owner's ability to enforce its rights may be curtailed by a number of legal, procedural and practical issues including:

9.3.1 a jurisdictional question as to whether the data miner's alleged copying (giving rise to copyright infringement) has occurred in the UK;

9.3.2 whether an organisation can bring a claim on behalf of multiple copyright owners (a representative action) against a data miner (see *Getty Images, Inc v Stability AI Ltd* [2025] EWHC 38 (Ch));

9.3.3 that it may not be economically viable for an individual copyright owner to enforce his/her/its rights; and

9.3.4 absent transparency obligations, a copyright owner may not be able to identify whether the data miner has copied the work when mining the data.

9.4 On the other hand, at law, for copyright to subsist it must be deemed 'original'. Thus, not all data used to train AI models will necessarily consist of copyright works. In addition, AI companies contribute to innovation and growth by undertaking research and development into new and improved AI models for many different applications. As such, the AI sector could play an important role in the growth of the UK economy. However, the value in at least part of this sector is underpinned, by exploiting third party copyright through the mining of data and training of AI models.

9.5 In contrast to the EU which implemented Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (the "**Digital Single Market Directive**"), the issue of copying in the context of data mining has not been addressed in the UK beyond an exception for non-commercial research (set out at s29A of the Copyright, Designs and Patents Act 1988). More than six years have since elapsed since the government's decision not to implement the Digital

Single Market Directive in the UK, such that anyone undertaking data mining in the UK may be potentially accruing significant liability for copyright infringement.

9.6 Given the UK's current copyright law regime in respect of use of third party copyright works to train its models, the data miner has a choice of engaging in a licensing regime (which is likely to be expensive and protracted), continuing to accrue potential liability and/or not operating in the UK.

9.7 The government may choose to assign different conditions to different categories of work and/or AI model when determining any exceptions to data mining to reflect the risks associated with each category, for example different approaches may be taken to news generation than to other categories.

9.8 The introduction of an exemption may assist with this. However, where this exemption is not retrospective but is coupled with a transparency obligation (whereby a data miner is required to publish the works it has used to train any model), the effect may be to crystalise (at least in part) the past liability for copyright infringement (it being noted that not all works which are used by a data miner are actually protected by copyright).

9.9 Additionally, thought must be given to the status of models trained outside the UK. If the exemption is introduced and it is not coupled with a clarification that trained models will need to comply with the UK regime if being imported into or accessed and used in the UK, then the new exemption regime and any licensing will be significantly undermined.

9.10 In addition to copyright infringement, data mining also gives rise to potential causes of action for database right infringement and breach of terms of service of a website. Consideration should be given to the application of any exemption to these.

Responses on behalf of IPLA

Question 1: Do you agree that option 3 - a data mining exception which allows right holders to reserve their rights, supported by transparency measures - is most likely to meet the objectives set out above?

10. The creative industries have already rejected a broad data mining exception (Option 2). We do not consider that copyright laws require strengthening to ensure licensing given that this represents the current law (Option 1). In our view, therefore, the pertinent options presented by the government are leaving the copyright and related laws as they are (Option 0) and the data mining exception plus reservation of rights and transparency measures (Option 3).

11. In our view Option 3 presents the following issues:

11.1 It is an accepted principle that, if the scope of a right is to be changed, it should be changed prospectively only. To change its scope retrospectively is to impinge on the right owner’s reasonable expectation of quiet enjoyment of that right.

11.2 If this principle were to be upheld, the qualified exemption would only apply to copyright created on or after the introduction of the qualified exemption. This would have the following effect: a) It would significantly reduce the pool of data to be mined, undermining the practical benefit of the qualified exemption (at least in the short to medium term); b) It would be difficult for a data miner to identify which copyright was created before or after the introduction of the qualified exemption; and c) It would mean that the data miner continues to be liable for infringement of the copyright up to the introduction of the qualified exemption.

11.3 Further, it is an accepted principle that a party should not be retrospectively deprived of a chose in action. To do so would be to deprive the owner of his/her/its ability to recover relief afforded to him/her/it under statute or common law.

11.4 Again, if this principle were to be upheld, the qualified exemption would apply following its introduction only. Again, this would have the following effect: a) It would significantly reduce the pool of data to be mined, undermining the practical benefit of the qualified exemption (at least in the short to medium term); b) It would be difficult for a data miner to identify whether the chose in action was created before or after the introduction of the qualified exemption; and c) It would mean that the data miner continues to be liable for infringement of the copyright up to the introduction of the qualified exemption.

11.5 In the alternative, if the scope of copyright were to be retrospectively changed and/or the chose in action retrospectively removed, the scope of a copyright owner's rights (which in some instances will have the author's life plus seventy years to run) would be significantly curtailed and he/she/it would be deprived of the relief to which he/she/it was entitled. For example, an author of a successful novel (the copyright of which was infringed by a data miner in the period 2010 to 2025) would cease to have recourse (including the ability to recover damages) from said data miners.

11.6 Such a retrospective curtailment of intellectual property rights could be subject to challenge in accordance with the Human Rights Act 1988. Intellectual property falls within the scope of the "right to property" in Article 1 of the First Protocol, which states: "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*..." Possessions include any tangible and intangible property. The provisions of the Act prevent public authorities interfering with a party's intellectual property without a legitimate legal reason and in the public interest.

11.7 When addressing the legitimate legal reason and public interest of a qualified exemption, the government should give careful consideration to the evidence available to it. In particular, the government has the benefit of two jurisdictions (the European Union (EU) and the UK) one of which (the EU) has implemented a qualified exemption to data mining (through the implementation of the Digital Single Market Directive) and one which has not (the UK). The government is encouraged to source evidence concerning whether the implementation of the exemption in the EU has encouraged data mining for "*the development of world-leading AI models … by ensuring wide and lawful access to high-quality data*" and/or "*promot[ed] greater trust and transparency between the sectors*". The IPLA is not aware of any such evidence.

11.8 There are also practical reasons why caution should be exercised when considering a qualified exemption:

11.8.1 Article 2 of Digital Single Market Directive defines "*text and data mining*" as any "*automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations*". This is a very broad definition which may be construed as going beyond data mining for the purposes of training models for the development of artificial intelligence.

11.8.2 Article 4 of Digital Single Market Directive provides an exception to the qualified exemption, namely "*that the use of works … has not been expressly reserved by [the] rightholder[…] in an appropriate manner, such as machine-readable means in the case of content made publicly available online*." However, no common mechanism has been established for making such an express reservation, making it difficult for data miners to determine whether the exception applies.

11.8.3 The burden shifts to the copyright owner to reserve his/her/its rights. Where said rights owners are small to medium sized enterprises, they may have limited ability to do so. On the other hand, it is not possible for the data miner to assess whether any given work or part of a work does in fact attract copyright protection, as copyright does not subsist in all data or works (see paragraph 9.4).

11.9 It is emphasised that decisions in relation to the above may have a material impact on pending and issued cases, including *Getty Images, Inc v Stability AI Ltd*.

11.10 As mentioned, an exemption will likely not deal with contractual issues faced by AI developers or potential data protection issues. This will leave AI developers with continuing legal issues to resolve before they can train their models in the UK.

11.11 The government could also consider amending the exemption, so it applies only to training in relation to models with certain purposes. An exemption in relation to the training of AI models which are designed to generate creative content which may even compete with original copyright works (such as in the case of *Getty Images, Inc v Stability AI Ltd*) may lead to greater difficulties in balancing the government's objectives.

11.12 If the government takes Option 0 and leaves the law as it is, then there will remain some issues such as a lack of transparency on the part of AI developers, lack of clarity for AI developers over permitted acts and litigation, probably by larger companies (or significant individuals or via class actions), to try to enforce their intellectual property rights against AI developers over AI tools imported into the UK or AI training in the UK.

Question 2: Which option do you prefer and why?

12. In addition, or as an alternative, to Option 3, we propose that the government consider a licensing scheme, two examples of which are below:

12.1 A voluntary collective licensing scheme, with copyright owners subscribing to be members of an organisation(s) which would be responsible for collecting a reasonable royalty from data miners for past and future use in relation to works which have been shown to attract copyright. The membership of the organisation would be public, with the data miner free to mine data the copyright of which belongs to a member provided the data miner commits to take a licence and the alleged rights owner has submitted proof of copyright. The rights of non-members would be an issue for that non-member and the data miner. The scheme could be administered by entities regulated by the CRM Regulations.

12.2 A compulsory collective licensing scheme, with copyright owners deemed a member of an organisation which would be responsible for collecting a reasonable royalty from data miners, unless opted out. The data miner would be free to mine data in which copyright subsists and which belongs to a third party, unless that third party has opted out of the scheme. The list of opt-outs would be public. Again, the scheme could be administered by entities regulated by the CRM Regulations.

13. In each instance, a reasonable royalty would need to be determined. It is suggested that it would recognise the volume of copyright protected data licensed by the copyright owner along with the expected or realised return from commercially exploiting the mined data set. Where there are disputes as to the royalty and the terms of any licence, this may be resolved by existing institutions (for example, the Copyright Tribunal) or a new body.

14. We note that the experience of some of our member firms indicates that the licensing that is already taking place in relation to AI model training is international in nature and therefore take up of any national voluntary scheme may be limited. Again, to the extent the UK implements a

scheme which is different to that implemented internationally, care must be taken as to any chilling effect on the growth of the AI economy in the UK.

Question 3: Do you support the introduction of an exception along the lines outlined above?

15. Of the three options advanced in the consultation, we consider Option 3 (the qualified exemption) to be most likely to meet the objectives set out above. We do, however, have concerns that an exception along these lines would disadvantage individuals and SMEs who might struggle to reserve their intellectual property rights effectively (including because of the cost and complexity of machine-readable format reservations). We therefore encourage the government to explore additional or alternative solutions such as collective or compulsory licensing schemes. We also note that serious consideration needs to be given to whether any qualified exemption has retrospective effect and, if so, the implications of this. Serious consideration also needs to be given to the status of models pre-trained outside the UK, as part of any new regulatory framework. Further, to the extent the UK's approach differs to that adopted internationally, serious consideration needs to be given to any chilling effect on the growth of the AI economy in the UK.

Question 4: If so, what aspects to you consider to be the most important? If not, what other approach do you propose and how would that achieve the intended balance of objectives?

16. If a qualified exemption is to be adopted, we consider its component parts (the exemption, rights reservation and transparency) to be of equal importance.

17. In a collective licensing scheme, copyright holders who have proven that their work attracts copyright protection would opt in their work, the society would monitor and work with AI developers to collect a suitable fee, and the society would make a payment to those who have registered their copyright works. This could create large data sets for AI developers, ensure rights holders are remunerated for use of their works and balance all interests. Consideration would need to be given as to the cost of assessing whether copyright does in fact apply to an owner's work that is submitted to any such licensing scheme. Further consideration needs to be given as to any divergence by the UK from international approaches and any impact on the growth of the AI economy in the UK.

Question 5: What influence, positive or negative, would the introduction of an exception along these lines have on you or your organisation? Please provide quantitative information where possible.

18. IPLA is responding on behalf of its member law firms, who are unlikely to be directly impacted significantly, although we note our members are both owners of copyright (for example, in respect of publications and other documents) and users of AI technology in the provision of their own legal services. Each firm represents a variety of clients ranging from individuals to SMEs to universities to large national and also international companies all of whom may be creatives or engaged in AI technologies irrespective of size. Consequently, each of them may be affected by the proposal in different ways.

19. For copyright owners, if the exemption is retrospective, they may forego causes of action and the consequent relief to which they may currently be entitled as a result of the data miner’s past copyright infringement (for example, during the period up to the implementation of the exemption).

20. In any event, absent reserving their rights, copyright owners will see the scope of their copyright significantly narrowed as a result of the exemption. This will deprive them of certain relief and/or revenue streams in the future.

21. Further, it is questionable whether the burden for reserving their rights should be shifted to the copyright owner. Our international obligations including under Article 5(2) of the Berne Convention should be considered (namely that copyright protection shall not be subject to formalities). This is especially so where the mechanism for reserving said rights is unclear.

22. Save as aforesaid, where a copyright owner has reserved its rights, it will benefit from the transparency obligations. In particular, disclosure of the use of the copyright work to train a model by a data miner will remove one of the obstacles from enforcement and/or procuring a licence.

23. For data miners, if the exemption is not retrospective, they may remain liable for past copyright infringement (namely, the period up to the implementation of the exemption). This liability may be crystalised by the transparency obligation, with publication of the copyright works exposing the data miners to considerable damages.

24. Further, if the exemption is not retrospective, there are also practical difficulties in identifying whether a work was created before or after the implementation of the exemption. The practical utility of the exemption would also be questionable, with the data set available for mining being limited (at least in the short to medium term).

25. The data miner also has the burden of determining whether the copyright owner has reserved his/her/its rights and indeed whether the work is in fact protected by copyright. Again, this is exacerbated where the mechanism for reserving rights is unclear.

26. Save as aforesaid, if the exemption is applied, a data miner is likely to benefit from not infringing copyright and/or seeking a licence and having to share any revenue stream by way of royalties.

Question 6: What action should a developer take when a reservation has been applied to a copy of a work?

27. If the government pursues Option 3, then the legal position should be that where there is a reservation and proof of copyright subsisting in such work and ownership of such work by the entity making the reservation, then any use of the work which meets the legal tests for copyright infringement by AI developers and providers would require a licence, in the usual way or the usual legal remedies of intellectual property rights infringement would apply. This could be done via a collective licensing scheme approach.

Question 7: What should be the legal consequences if a reservation is ignored?

28. It is proposed that, in those circumstances, the copyright owner should be entitled to enforce his/her/its rights in the normal way, assisted by:

28.1 The transparency obligation (to determine infringement); and

28.2 The possibility of recovering additional damages for flagrant copyright infringement (pursuant to s. 97(2) of the Copyright, Designs and Patents Act 1988).

29. Additional alternative approaches available to the government are to impose a statutory strict liability, a presumption of copyright infringement if a reservation is ignored and automatic fines for copyright infringement and/or lack of compliance with transparency measures. However, it is noted that such an approach may trigger conflict with the principles of natural justice which require any defendant to a claim to be able to challenge the claimant's case across its breadth.

30. It is also proposed that the claims for enforcement of copyright infringement are monitored following any implementation of the qualified exemption, with a view to legislating to address any legal, procedural or practical issues copyright owners may have in enforcing their rights

and data miners may have in defending spurious claims to copyright ownership and thus financial redress. .

Question 8: Do you agree that rights should be reserved in machine-readable formats? Where possible, please indicate what you anticipate the cost of introducing and/or complying with a rights reservation in machine-readable format would be.

31. If there is any ambiguity and/or practical implementation issue regarding “machine-readable formats” it is proposed that an express reservation using an adopted standard (for example, the robots.txt standard) or third party database is adopted (although any such database would require financial and regulatory investment and an open issue would be who should fund and administer that database. Noting again that any chilling effect on the AI economy should be borne in mind).

Question 9: Is there a need for greater standardisation of rights reservation protocols?

32. Where there is ambiguity over implied reservations and “machine-readable formats”, it is suggested that there is a need for greater standardisation of rights reservation protocols – ideally that should be administered at an international level in a manner akin to other standardised technologies. This could be achieved by the express reservation using an adopted standard (for example, the robots.txt standard) or adopting a third-party database (but please see the comments above regarding funding and administration).

Question 10: How can compliance with standards be encouraged?

33. For large copyright owners, where they are economically motivated to reserve their rights (absent which they will forego any relief and/or licence revenue), it is anticipated that they will seek to comply with any standards of their own volition.

34. For smaller copyright owners, it is anticipated that a government publicity and education campaign would be beneficial but again, there is a cost to this.

35. In any event, a grace period should be allowed for copyright owners to reserve their rights and provide proof of the same and for data miners to consider their future business plans in light of the same.

Question 11: Should the government have a role in ensuring this and, if so, what should that be?

36. The government should be involved in mandating any standard and/or third-party database and engaging in a publicity and education campaign. The government will, if it chooses this route, also need to take on responsibility for funding and administration.

Question 12: Does current practice relating to the licensing of copyright works for AI training meet the needs of creators and performers?

37. The question is directed towards the licensing practices of third-party owners of copyright (who are not the authors). This situation typically arises where an author has assigned his/her rights to a third party, for example a publisher. In particular, the question addresses the concern by authors that the third-party owner may license his/her copyright work to a data miner without his/her consent. It is noted that if an author has assigned their rights, then they no longer have any rights, and as such whilst they may have concerns, they have no legal position to take.

38. It is suggested that the authors are already adequately protected in two ways: a) they are free to contract with the third party as they choose, that is they can licence or assign some or all of their rights for any or only some purposes; and b) they can reserve their moral rights, which

affords a modicum of control over the use of the work. In any event, where an author has assigned his/her rights, he/she is likely to have been compensated for said assignment. We do not consider that further action is required.

Question 15: Should the government have a role in encouraging collective licensing and/or data aggregation services? If so, what role should it play?

39. It is suggested that the government consider collective licensing schemes in addition to or as an alternative to the qualified exemption. Clarifying the status of pre-trained models in the UK will also need to be considered at the same time.

Question 17: Do you agree that AI developers should disclose the sources of their training material?

40. If there is to be an exemption or collective licensing scheme, it is agreed that AI developers should disclose the sources of their training data otherwise the operation of the scheme will be frustrated. However, great care should be taken if the UK is to require AI developers to perform actions that are not required elsewhere as the consequence may be a chilling effect on the AI economy in the UK.

Question 22: How can compliance with transparency requirements be encouraged, and does this require regulatory underpinning?

41. It is noted that the EU's approach is part of a wider regulatory framework, which is supported by an enforcement regime (absent in the UK). To that end, the government should consider:

41.1 Who is responsible for making the disclosure (the data miner, the AI developer or any user of the content which has knowledge that it is AI generated)?

41.2 Who is responsible for enforcing said disclosure (an existing or new regulator and/or a civil remedy)?

41.3 What are the sanctions for non-disclosure?

Question 23: What are your views on the EU's approach to transparency?

42. The transparency provisions in the EU relate to concerns over risks relating to the use of AI, as opposed to disclosure obligations for the purposes of enabling copyright owners to determine whether their copyright has been copied without licence or authorisation. A proportionality approach to transparency obligations seems sensible so long as it does not create legal uncertainty.

Question 25: To what extent does the copyright status of AI models trained outside the UK require clarification to ensure fairness for AI developers and rights holders?

43. In order to ensure a level playing field for rights holders in Europe, this will need clarifying should the government pursue Option 3.

44. We note that one of the defences asserted by Stability AI in *Getty Images v Stability AI* ongoing proceedings is that Stability AI copied the data and trained the model outside of the UK. Stability AI argues that the subsequent use of that model inside the UK is not copyright infringement, whereas Getty Images argues that the model is an infringing work pursuant to section 22 of the Copyright, Designs and Patents Act 1988. The matter is to be heard by the High Court in the summer term following consideration of the evidence from the parties (though we would not expect a final answer to this issue to be determined at first instance as we would expect the case to progress to appeal given the novel nature of the legal arguments).

Question 26: Does the temporary copies exception require clarification in relation to AI training?

45. The section was drafted to cover internet browsing and caching activities. We do not consider that the temporary copies exception applies to AI training because AI training does not meet some of the requirements of the section namely it is not a transmission of a work in a network between third parties by an intermediary and it does have independent economic significance. This legal issue is also before the Courts in the *Getty Images v Stability AI* case.

Question 27: If so, how could this be done in a way that does not undermine the intended purpose of this exception?

46. We refer you to our answer to Question 26.

Question 28: Does the existing data mining exception for non-commercial research remain fit for purpose?

47. We consider that it does remain fit for purpose. If the government adopts Option 3, then the exception will need to be amended to incorporate AI use (whether 'commercial' or 'non-commercial'). The government could also consider a narrower change, restricted to certain AI models with particular purposes, being those that do not conflict with a normal exploitation of the copyright work and do not unreasonably prejudice the legitimate interests of the copyright owner (Article 9(2) of the Berne Convention).

Question 29: Should copyright rules relating to AI consider factors such as the purpose of an AI model, or the size of an AI firm?

48. We do not see how copyright law can be modelled by reference to the size of the AI firm as a point of principle or practice. As a point of principle, the size of an AI firm or model should be irrelevant to the enforcement of copyright law. As a point of practice, it is difficult to determine the size of any firm (especially cross-border) or what the threshold for size would be. It is possible the government could consider framing the data mining exception in terms of the purpose of the AI models, but we note that an AI model may have multiple applications.

Question 30: Are you in favour of maintaining the current protection for computer-generated works? If yes, please explain whether and how you currently rely on this provision.

49. We consider that it would be helpful for the government to take a view on whether or not it is consistent with its objectives for AI output to be protected as a copyright work and in what circumstances.

50. If computer-generated works are to have meaningful value, it is suggested that copyright continue to subsist in them. If computer-generated works have value, this may encourage data miners and AI developers to operate in the UK and/or users to exploit AI. To that end, it appears sensible to retain the current protection. If it is retained, then the government should consider making the following statutory clarifications:

50.1 Clarifying who is the person by whom the arrangements necessary for the creation of the work have been taken and is therefore the author (the AI developer or the person making the inputs);

50.2 Clarifying who is the first owner (the AI developer or the person making the inputs);

50.3 Clarifying what happens if the same content is generated by separate users (perhaps using the same inputs into the same generative AI, it being noted that it is currently legally possible for

two or more authors to independently create identical copyright protected works albeit very unlikely in practice);

50.4 Whether the generated content should enjoy a further reduced duration of protection;

50.5 How the provision is to be reconciled with the Court of Justice of the EU's decision in *Cofemel v G-Star Raw* (C-683/17) (which remains binding in the UK) that copyright may only subsist where it is the "author's own intellectual creation". If it cannot be reconciled, there needs to be legislation to address the discrepancy; and

50.6 How the provision interacts with the literary, artistic, musical and dramatic copyright works provisions of the Copyright, Designs and Patents Act 1988 which may in themselves confer on users of AI models a copyright work. Such a work might then be inconsistent (in terms for example of exclusive rights, authorship and ownership) with the computer generated work.

Question 31: Do you have views on how the provision should be interpreted?

51. See above answer to Question 30.

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?

52. With regard to originality, it is submitted that the test for originality in *Cofemel v G-Star Raw* (C-683/17) and the originality test/fixed list of works in the Copyright, Designs & Patents Act 1988 are, at least in part, irreconcilable. This issue is summarised in the decision *WaterRower v Liking* 2024 EWHC 2806 (albeit in the context of s. 4(1)(c) of the Copyright, Designs & Patents Act 1988).

53. We encourage the government to engage in a wider consultation on this issue. If the test in *Cofemel v G-Star Raw* (C-683/17) is reaffirmed, then either s. 9(3) of the Copyright, Designs & Patents Act 1988 falls away or it needs to be expressly re-adopted. If the test in *Cofemel v G-Star Raw* (C-683/17) is not reaffirmed, s. 9(3) of the Copyright, Designs & Patents Act 1988 may remain.

Question 33: Should other changes be made to the scope of computer-generated protection?

54. This is ultimately a policy matter for the government.

Question 35: Are you in favour of removing copyright protection for computer-generated works without a human author?

55. See our answer to Question 30 above.

Question 38: Does the current approach to liability in AI-generated outputs allow effective enforcement of copyright?

56. We have yet to see a relevant case on AI-generated outputs proceed to trial (let alone to appeal) in this jurisdiction, but we do not envisage any problems as regards effective enforcement. However, an issue arises in the monitoring and identification of any copyright infringing outputs by the AI models. Infringing works are likely only to be identified (and therefore able to be enforced against) once the outputs have been reproduced by the user of the AI model.

Question 39: What steps should AI providers take to avoid copyright infringing outputs?

57. They should comply with the law in particular at the training stage and in the way their AI models are configured to search the internet whilst in operation, meaning they should avoid copyright protected material, check copyright notices and obtain any necessary licences. AI providers could also implement safeguards to mitigate the risk of producing copyright infringing outputs which identify prompts and/or prevent prompts from being inputted which may result in copyright infringement. For example, a safeguard could be put in place to prevent users of generative AI models from uploading content and making arrangements for an AI system to produce a substantially similar copy.

Question 40: Do you agree that generative AI outputs should be labelled as AI generated? If so, what is a proportionate approach, and is regulation required?

58. We suggest that the principle of labelling the output of AI as being AI generated is sensible. This would assist transparency, which in turn may assist the creative industries (as a point of difference) and AI developers (as a badge of origin). It may also enable people to make informed decisions when using content, guarding against 'hallucination', fake news and deep fakes. Unlabelled AI output may also give rise to issues of defamation, trade libel, misinformation, breach of regulations or other laws.

Question 42: What are your views on the EU's approach to AI output labelling?

59. It is noted that the EU's approach is part of a wider regulatory framework, which is supported by an enforcement regime (absent in the UK). To that end, the government should consider:

59.1 Who is responsible for labelling the content (the AI developer only or any user of the content which has knowledge that it is AI generated or both of them)?

59.2 When a label is required (for example, on wholly AI-generated content only)?

59.3 Who is responsible for enforcing said labelling (an existing or new regulator and/or a civil remedy for those adversely affected by said non-labelled AI generation)?

59.4 What are the sanctions for non-labelling?

Question 43: To what extent would the approach(es) outlined in the first part of this consultation, in relation to transparency and text and data mining, provide individuals with sufficient control over the use of their image and voice in AI outputs?

60. There are significant limits on the control people have over their image and voice in the UK. To the extent image (or personality) rights are protected at all, it is via a mix of privacy law, data protection, contract law, moral rights and the common law tort of 'passing off'.

61. The approaches outlined in the first part of the consultation do not materially improve individuals' position in relation to use of their image and voice in AI outputs. It is directed to the use of copyright works. It does not follow that a copyright work is directly probative of a person's image and/or voice. Further, it does not follow that the owner of that copyright work is the person in question.

62. For example, a data miner may need to disclose (as part of the transparency requirements) that it has mined all of the copyright in films available via a popular streaming platform, identifying the films. This data could be used to recreate the image and/or voice of an actor in one or more of the films. However, the individual would not know this from the disclosure. Further, the individual may not have any rights to enforce against the data miner.

63. There have also been examples of deepfake videos of politicians in recent times in the UK- for example of Sadiq Khan and Sir Keir Starmer. There have also been examples, internationally of a person's voice being used for commercial exploitation (Scarlett Johanssen) and of their image being used to cause harm and distress (Taylor Swift). A change in the law to explicitly cover acts like these whether in relation to public figures or not, rather than leaving recourse only to adjacent rights such as defamation or passing off would, in our view, be advisable.

64. Consequently, in light of the developments in AI, the government should consult further on the creation of a standalone image (or personality) right as exists in other jurisdictions, to help with image/reputation protection, control of deepfakes and commercial use in the context of digital replicas.

END