



BPI Submission to WIPO on draft Issues Paper on Intellectual Property Policy and Artificial Intelligence

About the BPI

The BPI champions the UK's recorded music industry. Our membership comprises over 450 independent labels and the UK's three major music companies (Universal Music, Sony Music and Warner Music), which together account for 85 per cent of legitimate domestic music consumption. BPI promotes British music overseas through its trade missions and running the Music Exports Growth Scheme. It provides insights, training and networking with its free masterclasses, Innovation Hub, Insight Sessions, and reports and provides digital and physical content protection services to all its members. The BPI administers the BRIT Certified Gold & Platinum Awards, co-owns the Official Charts, organises The BRIT Awards and is the home to the Mercury Music Prize.

Introduction

The consultation starts from the premise that "*AI is already having ... a significant impact on the creation, production and distribution of economic and cultural goods and services*".

While artificial intelligence and machine learning (referred to hereafter collectively as "AI") are in use in the music industry in certain specific contexts, until now their impact in the industry has been quite limited. Some examples of current applications are:

- streaming music services employing AI to analyse data and personalise a user's experience of their service by creating playlists or recommendations;
- artists using tools based on AI in their creative processes (for example, tools that can "master" or remix a recording automatically using algorithms derived from data on previous recordings; or to find suitable samples for use in a piece of music);
- labels or start-ups using AI to analyse streaming and social data, or recordings themselves, to identify potentially successful artists (A&R), or to plan marketing campaigns or tours;
- music production companies attempting to use AI to generate music that can be used as background music online, or in advertisements.

However, all of these applications are in their infancy, and until now they appear to have had only a relatively marginal impact on the supply and demand of recorded music. What is clear is that the nature, extent and future impact of the uses of AI in the music industry remain unclear and it would be imprudent in our view to consider imposing new rules until these developments are better understood.



Copyright and Related Rights

We respectfully submit that the opening assertion that “AI applications are capable of producing literary and artistic works autonomously” is misconceived, or at least too broad in scope. First, AI applications generally produce outputs of value only if they have been “trained” with good quality input materials. The production of literary and artistic works of value is likely to depend therefore on an AI being trained using works that will in many cases themselves be protected by copyright, as the creations of human authors. The works created by AI’s are therefore not created “autonomously”, they will generally depend upon and derive from human creativity. It is important that the copyright framework fully respects and protects the fundamental value of input materials in AI processes. Second, to our knowledge, most AI processes will require *some* degree of human involvement at some stage and the literary or artistic works will therefore not be generated entirely “autonomously”.

The paper goes on to assert that policy on AI will go to the heart of the social purpose of copyright, favouring either the protection of human creativity or the availability of the largest number of creative works. In our view, this is a mistaken dichotomy: ensuring that human creativity is not undermined is essential to create the conditions from which AI innovation can flourish.

Finally, there is a danger when talking about new technologies and the use of creative works that there is an assumption that existing principles around copyright and other associated rights will not be able to cope with the changing use of works. We do not believe this is necessarily the case. As a broad principle we believe that the use of AI can work alongside existing copyright laws and therefore it would be wrong at this stage to look for solutions to a series of theoretical difficulties.

We would rather see WIPO first develop a more detailed and sophisticated understanding of the multitude of ways that AI may be used in the creation of content, including the use of existing works in that process, then consider how the existing framework would address those scenarios. Only then might we understand whether there are any issues with the existing framework and assess whether changes to that framework should be considered.

Despite the heading “Copyright and Related Rights”, the paper appears to focus on copyright and it would be very helpful to clarify whether the observations and questions in the paper also relate to sound recordings, films, broadcasts and other works. Our answers below assume that the questions below relate to copyright in musical works, rather than rights in sound recordings.

Question 12 (i) Should copyright be attributed to original literary and artistic works that are autonomously generated by AI or should a human creator be required?

WIPO is making assumptions here that autonomously generated AI works do not have a human input or creator. That is a significant assumption which may not be correct (see above). In light of this and the fact that most national laws on authors’ rights generally require human authorship, it might be more appropriate to ask “what degree of human involvement” would be required for copyright protection to obtain. In this case, we believe that national courts may be best placed to undertake the fact-based assessment necessary to determine in a given scenario whether copyright protection should apply.

Question 12 (ii) In the event copyright can be attributed to AI-generated works, in whom should the copyright vest? Should consideration be given to according a legal personality to an AI application where it creates original works autonomously, so that the copyright would vest in the personality and the personality could be governed and sold in a manner similar to a corporation?

This question appears to assume that there would be insufficient human involvement for copyright to vest in a human author involved in the AI process. For the reasons given above, we do not believe that assumption is necessarily correct. It would be useful for WIPO to start by assessing how different scenarios would be treated under existing copyright law, and only then to consider whether any new rules might be necessary.

*Question 12 (iii) Should a separate *sui generis* system of protection (for example, one offering a reduced term of protection and other limitations, or one treating AI-generated works as performances) be envisaged for original literary and artistic works autonomously generated by AI?*

This question appears premature before WIPO has completed a full factual study into the various potential applications of AI technology in the creation of artistic works, and then considered the application of existing copyright law to the scenarios identified.

Question 13

Question 13 (i) Should the use of the data subsisting in copyright works without authorization for machine learning constitute an infringement of copyright? If not, should an explicit exception be made under copyright law or other relevant laws for the use of such data to train AI applications?

The question refers to “data” in a way that suggests it is somehow separate from the copyright works themselves. This is misleading. The term “data” here appears actually to refer to copyright works, and the existing principles of copyright can govern whether use of all or part of a copyright work represents an infringement. It is premature for WIPO to ask whether a new exception from copyright would be required, before it has demonstrated that the existing copyright framework and existing or potential market solutions are not sufficient to address this issue. Moreover, any such new exception would be likely to conflict directly with the three step test, not least if such an exception were as broadly framed as that suggested in the question.

Question 13 (ii) If the use of the data subsisting in copyright works without authorization for machine learning is considered to constitute an infringement of copyright, what would be the impact on the development of AI and on the free flow of data to improve innovation in AI?

This question concerns itself with the potential impact of copyright infringement on the development of AI, without considering what the impact of any change to the copyright framework that weakened copyright protection might have on the creative sector. As we have suggested above, there is no reason to assume that innovation in AI cannot take place alongside robust protection of copyright and no evidence put forward to demonstrate that copyright inhibits innovation in AI or that such innovation should be prioritised ahead of the protection of creators. Indeed, we believe that a strong



copyright framework will encourage innovative partnerships between the creative and tech sectors that will allow both to flourish.

Question 13 (iii) If the use of the data subsisting in copyright works without authorization for machine learning is considered to constitute an infringement of copyright, should an exception be made for at least certain acts for limited purposes, such as the use in non-commercial user-generated works or the use for research?

WIPO is suggesting new exceptions might be required without having demonstrated why the existing framework is not sufficient to manage the development of AI. Such evidence should be a precondition for consideration of any possible new exception, which also must comply with the three step test.

Question 13 (iv) If the use of the data subsisting of copyright works without authorization for machine learning is considered to constitute an infringement of copyright, how would existing exceptions for text and data mining interact with such infringement?

This question should form part of the analysis that we suggest WIPO undertakes, looking at how current copyright law would apply to the use of AI.

Question 13 (v) Would any policy intervention be necessary to facilitate licensing if the unauthorized use of data subsisting in copyright works for machine learning were to be considered an infringement of copyright?

The music industry has developed a broad range of licensing solutions in the last decade and works continually with technology companies to facilitate licensed innovation. There is no evidence provided of the need for policy intervention and a careful assessment of such evidence should be required before any proposals are made for new interventions. There is therefore no basis for posing this question at this stage of the discussion.

Question 13 (vi) How would the unauthorized use of data subsisting in copyright works for machine learning be detected and enforced, in particular when a large number of copyright works are created by AI?

We would ask WIPO again to remove the confusing reference to "data subsisting in copyright works" when it means copyright works (or parts thereof) in digital form. We would also note that AI can be used as a tool for the detection and prevention of copyright infringement, and the question should be widened to look at the opportunities AI offers as a technology for enforcement. Moreover, we would suggest that WIPO also consider the potential need for record-keeping obligations on those using AI to create literary or artistic works, to ensure that information is available to allow rights holders to establish whether copyright has been infringed in the training of an AI.

Question 15 (i) Since deep fakes are created on the basis of data that may be the subject of copyright, to whom should the copyright in a deep fake belong? Should there be a system of equitable remuneration for persons whose likeness and "performances" are used in a deep fake?



There are a number of different existing rights that might be applied to deal with deep fakes, including passing off, defamation and data protection. We would like WIPO to undertake deeper analysis of why these existing frameworks would not deal with the issue of deep fakes.

Having said that, this is also an area where challenges may arise over detecting unauthorized uses of copyright works. It may therefore be appropriate to consider record-keeping obligations when copyright works are used in processes relating to “deep fakes”.

We thank WIPO for the opportunity to contribute to the debate on this subject and look forward to the opportunity to engage further.