Policy Brief:

AI, COPYRIGHT, AND PRODUCTIVITY IN THE CREATIVE INDUSTRIES

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February 2025

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DOI: **doi.org/10.17863/CAM.115766**

CONTENTS

FOREWORD

The UK Government has placed Artificial Intelligence at the centre of its economic growth plans. However, the future of tech in the UK economy demands careful policy consideration at every turn, balancing the winners and losers that come with transformative changes, challenging vested interests to ensure benefits are shared across society, and vigorously assessing whether our legal and regulatory systems are fit for purpose when faced with new tests.

Nowhere is this more evident than in the debates surrounding copyright and AI, where the UK's unique – and economically significant – creative sector is crying foul over what it sees as the unfair exploitation of their work by AI companies.

Debates about the future of human creativity, a copyright regime being tested to its limits by the implications of Generative AI, and the uncertain impact of AI on the sector's workforce and revenue models, leave the UK with an urgent question: how can the UK support its nascent AI industries without harming its world-leading creative sector?

This policy brief from our three research centres at the University of Cambridge gets to the heart of this question. An exploration of the future of creative sector productivity is underpinned by an accessible but comprehensive analysis of the legal questions facing the UK and US copyright regimes and brought to bear in six clear policy recommendations for the UK Government.

With the Government's consultation on Copyright and Artificial Intelligence open at the time of writing, the issues explored in this brief are timely. Building a copyright regime that respects creative workers and engenders the confidence that AI can be fairly deployed to the benefit of all is an imperative, and we hope this brief will make a useful contribution to this endeavour.

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EXECUTIVE SUMMARY

The unregulated use of Generative AI in the UK economy will not necessarily lead to economic growth, and risks damaging the UK's thriving creative sector.

Unresolved questions concerning copyright and AI are creating uncertainty for the future of several creative professions, and risk harming the productivity of the creative sector as a whole. In a lose-lose situation, the same uncertainty is also acting as a barrier to the development and uptake of Generative AI in the UK.

Both the UK creative sector and UK AI sector are valuable for growth and productivity in the UK economy, both are focus sectors of the Government's Industrial Strategy, and their future is interlinked.

With this in mind, this report:

- Examines the impacts Generative AI may have on the creative sector's workforce and productivity;
- Explores the current copyright landscape in the UK and US as it relates to AI;
- Examines the challenges surrounding licencing agreements, performers' rights, transparency provisions on AI systems, copyright in AI outputs, and false attribution;
- Considers the challenges posed by a Text Data Mining exemption.

RECOMMENDATIONS

1. Government should holistically examine the impact that Generative AI is having on the workforce in the creative industries, including by commissioning research on AI adoption across the sector, and use it to inform robust policies for supporting the sector's workforce.
2. Government should encourage the uptake of licensing agreements to ensure that copyright holders are compensated for use of their work by AI systems, but it should also ensure that these licensing agreements fully acknowledge the rights of copyright holders and fairly compensate them for the use of their works.
3. Government should independently ratify and adopt the Beijing Treaty on Audiovisual Performances as a first step in ensuring greater protections on performers' rights and from false attribution by AI systems.
4. Government should adopt transparency requirements on the training of AI systems which include the mandatory disclosure of data provenance.
5. Government should clarify that only a human author will be afforded copyright in the outputs generated by AI models and produce guidance on:

   a: The threshold for 'creative intellectual effort' in achieving copyright in AI outputs;

   b: The need for recognition and compensation to artists whose name and canon are used in prompts to AI models that generate outputs;

   c: Measures required to avoid false attribution in AI outputs.
6. We urge caution against embarking on the path of a Text and Data Mining (TDM) exemption, regardless of an 'opt-out' mechanism, without a robust economic analysis of the impact that it will have on the creative industries.

INTRODUCTION

The creative industries contributed an estimated £124.6 billion (about 6% of total output) to the UK economy in 2022. Through world-famous brands and production capabilities, the impact of these industries on Britain's cultural reach and soft power is immeasurable.[1]

The Government's industrial strategy white paper, Invest 2035, emphasises how the British creative industries are world-leading and expected to grow worldwide.[2]

But despite recognition of their value and potential, the creative industries are facing new and far-reaching threats to their revenue models and productivity from unregulated Generative AI models.

The British creative industries could benefit hugely from the efficiency and productivity gains offered by Generative AI, but challenges lie in managing the transition from old technologies to the new, and in building workforce capacity to create a strong and vibrant creative sector with a workforce ready to use AI models, and where the benefits they bring are shared broadly throughout the sector.

Furthermore, unresolved questions concerning copyright create uncertainty regarding the future of several professions, including actors, writers, visual artists, composers and musicians.

In a lose-lose situation, the same uncertainty is also acting as a barrier to the development and uptake of Generative AI in the UK.

The UK is at a crossroads as it pursues AI-driven growth and innovation: how can we encourage the use of Generative AI to stimulate and grow the creative industries without threatening their future?

The UK's AI Opportunities Action Plan suggests one approach to this question, recommending the creation of 'a copyright-cleared British media asset training data set' that would promote the use of cultural data for commercial purposes.[3]

Without robust policy intervention, however, Generative AI will worsen many of the structural economic challenges that the British creative industries already face. We contend that the way forward is through purposeful, responsible, and informed regulation that protects our creative industries and encourages responsible AI uptake.

1. 'Sectors: Creative Industries', *Great.gov.uk* <www.great.gov.uk/international/investment/sectors/creative-industries> [accessed 14 Jan 2025].

2. UK Government, Invest 2035: *The UK's Modern Industrial Strategy* (October 2024), <https://www.gov.uk/government/consultations/invest-2035-the-uks-modern-industrial-strategy/invest-2035-the-uks-modern-industrial-strategy> [accessed 03 February 2025] pp. 22–23.

3. Department for Science, Innovation & Technology, 'AI Opportunities Action Plan', *Gov.uk* (13 January 2025) <https://www.gov.uk/government/publications/ai-opportunities-action-plan/ai-opportunities-action-plan> [accessed 30 Jan 2025].

1. THE UK CREATIVE AND TECHNOLOGY INDUSTRIES

The UK has an absolute strength (not just relative to its size) in both the tech and creative sectors.

The creative industries contribute approximately £124.6 billion or 5.7% to the UK's economy.[4] Between 2010 and 2022, the creative sectors grew faster than the UK economy as a whole.[5]

As of the end of 2023, there were an estimated 3,000 AI companies in the UK, contributing just £3.7 billion to the economy, but it is a key and growing sector.[6]

There is also a strong intersection between creative and tech industries.

This includes technologies such as VR, 5G, and AI that enable the creative industries to produce new experiences, services, products, and other forms of cultural activity.[7] The UK video games industry illustrates this. The UK industry is the largest in Europe.[8]

According to the BFI's 2021 'Screen Business' report, video games developed, published, and sold in the UK were estimated to contribute £5.12 billion to the UK economy in 2019.[9]

The UK also has a global strength in the application of AI to creative industries. Research by the Creative Industries Policy and Research Centre has shown that the UK has one of the highest levels of AI publications in areas that are directly relevant to the creative industries – including image, text, and sound – behind the US and China.

The UK has the second highest number of companies and projects working on direct applications of AI in creative industries.[10]

4. 'Sectors: Creative Industries', *Great.gov.uk* <https://www.great.gov.uk/international/investment/sectors/creative-industries/> [accessed 14 Jan 2025].

5. As defined by the DCMS, the creative industries comprise nine subsectors including IT, software, and computer services; publishing; and film, TV, radio and photography. DCMS, 'DCMS Sectors Economic Estimates Gross Value Added 2022 (provisional)', *Gov.uk* (27 November 2024) <https://www.gov.uk/government/statistics/dcms-and-digital-sector-gva-2022-provisional/dcms-sectors-economic-estimates-gross-value-added-2022-provisional> [accessed 30 Jan 2025].

6. Perspective Economics, & DSIT, *Artificial Intelligence Sector Study* (2023). This includes only producers, not users, of AI.

7. Culture, Media and Sport Committee, *Connected tech: AI and creative technology—Culture, Media and Sport Committee* (30 August 2023), p. 7. <https://publications.parliament.uk/pa/cm5803/cmselect/cmcumeds/1643/report.html> [accessed 30 Jan 2025].

8. See for example: 'Sectors: Creative Industries', *Great.gov.uk* <https://www.great.gov.uk/international/investment/sectors/creative-industries/> [accessed 14 Jan 2025].

9. BFI, *Screen Business: How screen sector tax reliefs power economic growth across the UK 2017–2019* (December 2021), p. 14. <https://www.bfi.org.uk/industry-data-insights/reports/uk-screen-sector-economy> [accessed 30 Jan 2025].

10. J. Davies, *The art in the artificial* (London: Creative Industries Policy and Evidence Centre and Nesta, 2020). <https://pec.ac.uk/research-reports/the-art-in-the-artificial> [accessed 30 Jan 2025].

Generative AI Applications in Content Creation

Generative AI's performance on creative tasks such as image and video generation has improved dramatically over the last decade. Taken together with other broad-use AI tools, the creative industries stand to benefit as users of tools that augment productivity.[11]

For example, AI tools can enable people with limited coding experience to produce software applications (the so-called 'no-code' phenomenon), dramatically lowering the barriers to producing creative work. Marketers can use image generators like DALL-E and Midjourney to create graphics, logos, thumbnails and accompanying images.

Video generators such as Synthesia and HeyGen enable people to create product demos and animate avatars that 'speak' in sync with voiceovers. Video game developers are applying Generative AI in new ways. For instance, Ubisoft's 'Watch Dogs: Legion' created a 'Play-As-Anyone' AI system that generates unique backstories for characters.[12] Many of these tools require little to no specialised artistic or technical skills.

AI could enable productivity improvements in content creation by augmenting the work of content creators and automating parts of content creation in ways that benefit existing industries.

Or, a more disruptive model might be AI enabling other users to create content themselves, which would displace existing companies and creators.

In the first scenario, augmentation would enable content creators to create more complex, higher-quality, or more varied content for the same price as existing work. This is not without precedent in the creative industries.

Consider for instance the improvement in video games graphics enabled by better hardware, or the use of graphic design software that contains more functionality. AI could automate administrative tasks such as taking meeting notes and writing emails or routine tasks specific to creative work, such as writing image captions or making 'between-frames' in animation. AI could also lead to the creation of new tasks or new jobs within the sector.

The second scenario, in contrast, involves new users creating content independently using AI models – especially off-the-shelf Generative AI products such as DALL-E, Midjourney and Sora. This could pave the way for a new generation of companies and products, but it diminishes the role of existing companies and creators.[13]

11. For an overview of current use cases, see Bertelsmann, Arthur D Little and Enders Analysis, *State of Play: Exploring Generative AI's Transformative Effects on the Media & Entertainment Industry* (2024). <https://www.bertelsmann.com/media/news-und-media/downloads/bertelsmann-stateofplay-genai.pdf> [accessed 30 Jan 2025]. See also: M. Roser, 'The brief history of artificial intelligence: The world has changed fast – what might be next?', *Our World in Data* (6 December 2022). <https://ourworldindata.org/brief-history-of-ai> [accessed 30 Jan 2025]; R. Ngo, 'Visualizing the deep learning revolution', Medium (5 January 2023) <https://medium.com/@richardcngo/visualizing-the-deep-learning-revolution-722098eb9c5> [accessed 30 Jan 2025].

12. T. Tommy, 'How Watch Dogs: Legion's 'Play as Anyone' Simulation Works', *Game Developer* (9 December 2020) <https://www.gamedeveloper.com/design/how-watch-dogs-legion-s-play-as-anyone-simulation-works> [accessed 30 Jan 2025].

13. In some ways this parallels the disruption of the late 1990s–early 2000s as digital platforms became dominant. In particular, the rise of MP3s and digital sharing networks such as Napster disrupted traditional modes of music distribution and their associated revenue streams. Similar disruption occurred in the book publishing industry due to the rise of digital markets like Amazon, in film due to the rise of streaming services like Netflix and the fall of traditional cinema, and in news as social media disrupts print. Creatives are still grappling with the long-term impacts of this transformation as both the source and the scale of their compensation has been affected.

This raises questions regarding the skills that will be needed of content creators in the future, access to technology, and emerging revenue models. These questions are not unique to the creative sector, and the uncertainty as to the impact of AI on job markets is being grappled with across the economy.[14]

However, data on the adoption of AI within the creative industries in the UK and its impact on productivity is lacking. While there are already significant job losses in the market, both the extent of these losses and how they may be offset by the creation of new jobs is still unclear.[15]

According to a 2023 Deloitte survey of US companies, 55% of surveyed brands working with content creators were currently using Generative AI. There is evidence to suggest that adoption varies widely both across and within the creative industries.

Frequent users of AI in the creative industries include digital artists (74% surveyed reported using AI) and film and motion creatives (67%). However, 54% of animators, 53% of illustrators and 33% of those working in film report having never used AI.[16]

Studies in the UK suggest AI adoption is concentrated in large companies, 67% of which have adopted some form of AI tool, compared to 33% of medium-sized companies and 15% of small companies.[17]

In related industries, McKinsey estimates that Generative AI will increase productivity in marketing by 10% globally, and a Deloitte survey of marketing companies currently using Generative AI reported that employees say the technologies saves them an average of 11.4 hours a week.[18]

A Google survey reports 72% of media and entertainment organisations using Generative AI see a positive ROI on at least one use case.[19]

14. See for example: C. Jung and B. Srinivasa Desikan, 'Transformed by AI: How generative artificial intelligence could affect work in the UK – and how to manage it', *Institute for Public Policy Research* (27 March 2024). <https://www.ippr.org/articles/transformed-by-ai> [accessed 30 Jan 2025].

15. On job losses in the sector, see for example: Z. Ye, 'AI Is Starting to Replace Humans in China's Creative Sector', *Sixth Tone* (20 April 2023) <https://www.sixthtone.com/news/1012752> [accessed 30 Jan 2025]; M. Mayne, 'Businesses are increasingly reducing headcounts in favour of AI – how can they do so responsibly?', *People Management* (September 2024) <https://www.peoplemanagement.co.uk/article/1886820?utm_source=website&utm_medium=social> [accessed 03 Feb 2025].

16. Note: the survey does not explicitly define 'AI'. L. Bourton, 'Shades of Intelligence: 83% of creatives are already using machine learning tools – is now the time to get on side with AI?', *It's Nice That* (15 November 2023) <https://www.itsnicethat.com/features/shades-of-intelligence-insights-launch-creative-industry-ai-151123> [accessed 30 Jan 2025].

17. DCMS, 'AI activity in UK businesses: Executive Summary', *Gov.uk* (12 January 2022) <https://www.gov.uk/government/publications/ai-activity-in-uk-businesses/ai-activity-in-uk-businesses-executive-summary> [accessed 30 Jan 2025].

18. Deloitte Digital, GenAI Powers content marketing advantage for early adopters (October 2023) <https://www.deloittedigital.com/content/dam/digital/global/legacy/documents/offerings/offering-20231009-genai-research-charticle.pdf> [accessed 30 Jan 2025].

19. A. Lai, 'Tuning in to AI: More than a dozen reasons media and entertainment is already seeing ROI on gen AI', *Google Cloud Blog* (13 September 2024) <https://cloud.google.com/transform/media-entertainment-gen-ai-roi-report-dozen-reasons-ai-value> [accessed 30 Jan 2025].

The Urgent Need for Research

To understand the future, questions remain. Which creative tasks are being automated by AI? How many jobs will be created in a new world of AI-generated content, and what kind of skills will these jobs demand? How much of the market will continue to exist for non-AI generated content? And will there be differences between and within professions?[20]

To support the creative and technology sectors, the UK Government should examine the impact that Generative AI is having on the workforce in the creative industries. The Government's new Creative Industries Taskforce and the skills body, Skills England, could play a central role in this, as could appropriate authorities in the devolved nations.

The work of such bodies should include preparing the workforce with future skills training, and co-operating with the creative industries to provide support for the transition to new AI technologies. Having the involvement of industry and union leaders in co-creating and co-designing solutions would help pave the way for successful AI adoption that fits with the needs of the sector.

More research is needed to fully understand the impact of Generative AI on productivity in the creative industries and in the economy more broadly. Future research could include how specific types of workers in the creative industries are using Generative AI tools and how their work is changing. Research should also work to bring the voices of creative professionals into decisions about Generative AI, to ensure that their needs are met.

Government has a role to play in encouraging and funding this research, through funding bodies such as UKRI or through more novel programmes such as 'challenges' or initiatives similar to the AI Safety Institute's on systemic risk. Rapid industry change is a sociotechnical risk that government can play a role in helping to mitigate.

Recommendation 1: Government should holistically examine the impact that Generative AI is having on the workforce in the creative industries, including by commissioning research on AI adoption across the sector, and use it to inform robust policies for supporting the sector's workforce.

20. S. A. Yang, and A. H. Zhang, 'Generative AI and Copyright: A Dynamic Perspective', *arXiv*: 2402.17801 [econ. TH] <http://arxiv.org/abs/2402.17801> [accessed 30 Jan 2025].

Making AI Work for the UK Creative Industries

Realising positive productivity gains from Generative AI in the UK creative industries will require good policy choices. Despite the potential for Generative AI, the lack of clarity around copyright poses a fundamental challenge to the established revenue models and overall stability in the creative industries.[21]

One argument is that allowing Generative AI developers to use a broad array of content scraped from the Internet will drive productivity by enabling creative companies to create more instantaneous content for a fraction of the cost. However, this efficiency gain would also be experienced by content creators globally. This means that it may undermine the UK creative industries' competitive edge.

Many creatives also express concerns surrounding the quality of AI-generated or AI-augmented work, and the loss of human expression in creative outputs.[22] Even if we accept that Generative AI will boost productivity in the British creative industries, the question remains, at what cost?

Many in the UK creative industries have expressed serious concerns. In October 2024, thousands of creators, artists, and performers warned that lack of licensing regimes for the use of creative works threatened their livelihoods and should not be permitted.[23]

A few days later, the BBC issued a statement opposing alleged government plans to allow AI companies freely to scrape the Internet for content to use to train their models unless copyright owners have 'opted out'.[24]

In December 2024, a broad collection of creative organisations came together under the 'Creative Rights in AI Coalition', calling for dynamic licensing markets, robust protections for copyright, and control and transparency for content creators.[25]

While Generative AI has thus far mostly impacted the creative content workforce, it will likely also change markets and revenue models as producers, studios, record labels and distributors experience disruptive impacts.

21. US Federal Trade Commission, *Generative Artificial Intelligence and the Creative Economy Staff Report: Perspectives and Takeaways* (December 2023) <https://www.ftc.gov/reports/generative-artificial-intelligence-creative-economy-staff-report-perspectives-takeaways> [accessed 03 February 2025]. O. Bracha, T*he Work of Copyright in the Age of Machine Production* (January 2025), pp. 9 and 37 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4581738> [accessed 03 February 2025].

22. See, for example, the Human Artistry Campaign: <https://www.humanartistrycampaign.com/> [accessed 30 January 2025]. J. L. Gillotte, *Copyright Infringement in AI-Generated Artworks*, U of Cal, Davies (2020), p. 2659 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3657423> [accessed 03 February 2025]. L. Bently, B. Sherman, D. Gangjee and P. Johnson, *Intellectual Property Law*, 5th edn (Oxford University Press, 2018), p. 55; D. Lim, 'AI, Equity, and the IP Gap', *SMU Law Review* 75.4 (2022), 815–60, at p. 830; A. Levendowski, 'How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem', *Washington Law Review* 93.2 (2018) p. 592.

23. 'Statement on AI Training', <https://www.aitrainingstatement.org/> [accessed 30 January 2025]; D. Milmo, 'Thom Yorke and Julianne Moore join thousands of creatives in AI warning', *The Guardian* (22 October 2024) <https://www.theguardian.com/film/2024/oct/22/thom-yorke-and-julianne-moore-join-thousands-of-creatives-in-ai-warning> [accessed 30 January 2025].

24. M. Savage, '"An existential threat": anger over UK government plans to allow AI firms to scrape content', *The Observer* (26 October 2024) <https://www.theguardian.com/technology/2024/oct/26/an-existential-threat-anger-over-uk-government-plans-to-allow-ai-firms-to-scrape-content> [accessed 30 January 2025].

25. Creative Rights in AI Coalition, 'Statement on Creative Rights in AI' <https://www.creativerightsinai.co.uk> [accessed 30 January 2025]. See also: L. Kuenssberg, 'Paul McCartney: Don't let AI rip off artists', BBC News (26 January 2025) <https://www.bbc.co.uk/news/articles/c8xqv9g8442o> [accessed 30 January 2025].

The lack of clarity on how productivity gains from Generative AI should be monetised and distributed across the supply chain in the creative industries makes it hard to plan and invest for the future.

Central to the issue is how copyright can be effectively and fairly enforced in the context of Generative AI. Given the huge potential impact Generative AI may have on the creative industries, numerous artists, companies and trade organisations have urged the UK Government to clarify and bolster the domestic copyright regime.[27]

Part of the challenge for policymakers is the rapid nature of advancements in Generative AI, especially since the public release of ChatGPT in November 2022. There is mounting evidence that the speed by which AI, especially Generative AI, restructures and overtakes markets is so fast that workers, industrialists, and rightsholders are not able to catch up.

While some professions are under threat from the use of AI on the data input side (e.g., voice artists, actors, musicians); other professions are likely to emerge or be enhanced via use of Generative AI in their arts.Thus, some commentators argue that the use of Generative AI is nothing more than the latest technological development in the creation of the arts.[28]

For our purposes, the question this poses concerns whether the productivity gains from users working with Generative AI outputs will replace the productivity losses from the professions that are under threat from AI, and how such losses and gains will be distributed. Given the low uptake of AI in the creative industries, there is still work to be done to encourage adoption.[29]

This is not just a British concern. American news publishers and content creators are pursuing several cases against AI companies for copyright infringement for the unauthorised use of their copyrighted works in Generative AI models. US trade unions have also weighed in on the threat of Generative AI to the livelihood and reputations of performers.[30]

These issues become even more critical considering the flood of Generative AI content that is entering both the domestic UK and international marketplaces, and which is not necessarily generated in the UK.

The need to protect the national creative content industries' reputational advantage is evident when considering that 'British content' can be generated anywhere in the world with a click of a button and a few prompts fed into a Generative AI model.

26. R. Booth, 'UK arts and media reject plan to let AI firms use copyrighted materials', *The Guardian* (19 December 2024) <https://www.theguardian.com/technology/2024/dec/19/uk-arts-and-media-reject-plan-to-let-ai-firms-use-copyrighted-material> [accessed 30 January 2025].

27. D. Acemoglu and S. Johnson, *Power and Progress: One Thousand-Year Struggle Over Technology and Prosperity* (Basic Books, 2024).

28. See, for example, the work of artist Lex Fefegha: <https://lexfefegha.com/> [accessed 30 January 2025].

29. See the section above on Generative AI in Content Application.

30. *Kadrey, Silverman, and Golden v. Meta Platforms, Inc.*, United States District Court, Northern District of California, San Francisco Division, filed 7 July 2023; Case No. 3:23-cv-03417-VC, filed 18 Sept 2023, United States District Court, Northern District of California; *Andersen v. Stability AI Ltd*, Case No. 23-cv-00201-WHO, filed 30 October 2023, United States District Court, Northern District of California; *Zhang, Andersen, Larson, and Fink v. Google LLC*, and Alphabet, Inc., Case 3:24-cv-02531, filed 26 April 2024 United States District Court, Northern District of California, San Fransisco Division; *Daily News, LP, Chicago Tribune Company, LLC, Orlando Sentinel Communications Company, LLC, Sun-Sentinel Company LLC, San Jose Mercury-News LLC, DP Media Network LLC, ORB Publishing, LLC, and Northwest Publications, LLC v. Microsoft Corp. and Open AI*, civil action no. 24-3285, filed 30 April 2023, United District Court, Southern District of New York; *New York Times v. Microsoft and OpenAI*, case 1:23-cv-11195, filed 27 December 2023, United States District Court, Southern District of New York.

2. COPYRIGHT: PROBLEMS POSED BY GENERATIVE AI

Use of Copyrighted Works to Train AI Models

Copyright is protected in the UK under the **Copyright, Design and Patent Act 1988 (CDPA)**.

For a work to obtain automatic protection under the CDPA it must be recorded in material form, be connected to the United Kingdom, and not be excluded from protection on public policy grounds.[31] Copyright arises automatically and does not depend on the quality of the work.[32]

The rationale behind copyright is to incentivise authors to produce new works by ensuring that they can monetise their copyrighted products. It could be argued that copyright, at least in part, is designed to stimulate economic growth and productivity.

Copyright is not absolute. It is carefully balanced to ensure that copyright holders are not able to monopolise information to the detriment of the public good.[34] This matters to the development of Generative AI as it raises questions regarding how far the exceptions and limitations of copyright law should apply.

Copyright holders claim that they should be compensated for all uses of their copyrighted works, while AI companies argue that some of the uses of copyrighted works – for example to train AI models – fall under the fair dealing (or in the US, fair use) exceptions in copyright law.

In the UK, the CDPA includes specific **fair dealing** provisions that set out when it is permissible to use a copyrighted work without the permission from (and compensation to) the copyright holder.[35]

Fair dealing specifies that the only permissible uses of copyrighted works without permission are for purposes of research and private study; criticism and review; quotations; reporting of current events; parody, caricature or pastiche; or illustration for instructions.

None of these purposes cover the use of copyrighted works to train Generative AI models. In other words, from a plain reading of the statute, scraped copyrighted works from the Internet without permission from the copyright holder would be prohibited under UK law.

While UK law may appear clear, the reality may be different when taking account of legal developments elsewhere. The UK creative industries do not exist in a vacuum. **The outcome of US litigation is likely to influence the situation in the UK.** Many creative industries are US-dominated, and the most dominant AI companies are American.

31. Bently et al., *Intellectual Property Law*, pp. 91 and 119.

32. Bently et al., *Intellectual Property Law*, pp. 35 and 62.

33. W. M. Landes and R. A. Posner, 'An Economic Analysis of Copyright Law', *Journal of Legal Studies* 18.2 (1989), 325–63; R. Towse, 'Copyright, Risk and the Artist: An Economic Approach to Policy for Artists', *Cultural Policy* 6.1 (1999), pp. 91 and 107.

34. Some legal scholars are concerned that fortifying copyright would continue to trend of expanding the global intellectual protection regime to the detriment of the informational commons. For some of the historic debates, see P. Baldwin, *The Copyright Wars* (Princeton University Press, 2014).

35. *CDPA 1988* Part I, c. III.

The legal situation in the US is different to the UK in that the US **fair use** concept is broader than the UK's fair dealing exemptions. AI companies and commentators have presented numerous arguments relying on fair use for why collecting and using copyright works in Generative AI models is, in their view, legal. These include:

- That the collection ('ingestion') of copyrighted works to be used in training data is not actually copying;
- That there is no direct causal link between training data and the output of Generative AI models;
- That Generative AI models do not rival or diminish the core market of the copyright holder;
- That AI companies do not directly monetise the copyrighted works by selling direct and infringing 'copies';
- That it is in the public interest to develop Generative AI models, and therefore using copyrighted works to do so is fair.

In the US, fair use is interpreted according to a judicial four-factors test, set out by the US Supreme Court.[36]

It allows for uses that are 'transformational' and 'non-expressive', which could be interpreted as allowing the use of copyrighted works to train AI models.

Of the four factors that determine whether copying falls under fair use, one is whether the copy will threaten the commercial exploitation of the original copyrighted work in its primary market. In short, the US judicial test of whether the copy will infringe copyright protection is primarily whether the copy will act as a market substitution.[37]

Writing about *Authors Guild v. Google* (2015), which concerned the creation of digital copies of books, Kate Crawford and Jason Schultz predicted that AI systems would be allowed to be trained on copyrighted data taken from the web based on fair exception grounds, including serving in the public interest.[38]

The implied idea is that the use of copyrighted works to build new digital services and products would be in the public interest, as these would act as a springboard for further innovation, which could result in productivity and growth.

American jurisprudence therefore does not bode well for copyright holders in their ongoing lawsuits for compensation and unauthorised use of their copyrighted works in AI models.[39]

However, the notion that AI companies build their AI models from a purely altruistic motive to serve the public interest has been dismantled in court. For example, in *New York Times v. OpenAI*, the claimant described how OpenAI's altruistic non-profit motives were quickly jettisoned, to establish the real motive for using copyright works to train AI models as that of profit.[40]

36. *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994). The four factors are: '(1) the purpose and character of the use, (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.'

37. Bracha, *The Work of Copyright in the Age of Machine Production*, p. 33; Levendowski, 'How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem', pp. 622–3 and 629; Gillotte, 'Copyright Infringement in AI-Generated Artworks', pp. 2685–6; B. W. Sobel, 'Artificial Intelligence's Fair Use Crisis', *Columbia Journal of Law & Arts* 41 (2017), 45–97 at p. 55.

38. K. Crawford and J. Schultz, 'The Work of Copyright Law in the Age of Generative AI', *Grey Room* 94 (Winter 2024), pp 56–62, citing *Authors Guild v. Google*, 804 F. 3d 202 (2nd Cir. 2015).

39. See, for example, J. Ball 'Copyright (probably) won't save anyone from AI', *Techtris* [blog] (13 January 2025) <https://www.techtris.co.uk/p/copyright-probably-wont-save-anyone> [accessed 31 January 2025].

40. *New York Times v. Microsoft and OpenAI*, case 1:23-cv-11195, filed 27 December 2023, United States District Court, Southern District of New York.

This has left copyright holders arguing that the use of their copyrighted works to train AI, and the deployment of AI models, cannot fall under the fair use exceptions as they are built for commercial purposes without compensating the copyright holders for their investment.

In short, copyright holders argue that they invest to create copyrighted assets which are then used by AI companies without fair compensation to build commercial products and services, for which the original asset creators do not see a return.

To illustrate this point, in the latter half of 2023 several newspapers, and the *New York Times* separately, filed lawsuits against OpenAI/Microsoft's Copilot and ChatGPT in the US. Copyright holders claim that the AI companies have been 'free riding' on newspapers' costs by unfairly amassing huge fortunes.

The lawsuits highlighted that at the time, OpenAI was estimated to be worth 90 billion USD with revenues expected to reach 4 billion USD in 2025.[41]

Thus, the discourse is no longer about whether AI companies use copyrighted material to train their AI models, but whether this is an infringement of copyright which could or should be displaced on policy grounds.

Indeed, AI companies have de facto acknowledged that they use copyrighted works by entering into numerous licensing agreements ('partnership agreements') with several large copyright holders.[42]

As such, licensing agreements could be the way forward for the creative industries to be compensated for the use of their copyrighted works in AI models.

However, two caveats must be made. First, these licensing agreements are on the AI companies' terms, and UK copyright holders will have limited influence over their terms and conditions. They also displace legal entitlements by private contractual arrangements, which would make it harder for British copyright holders to enforce their rights through domestic courts.

Second, these licensing agreements fail to acknowledge that the use of copyrighted works to train AI models without permission is an infringement of copyright. Thus, the adoption of licensing agreements, while a practical industry-led solution, does not fully address the losses of the creative industries from the use of their copyrighted works in AI.

Recommendation 2: Government should encourage the uptake of licensing agreements to ensure that copyright holders are compensated for use of their work by AI systems, but it should also ensure that these licensing agreements fully acknowledge the rights of copyright holders and fairly compensate them for the use of their works.

41. Caselaw (*supra* note 30).

42. See for example: K. Knibbs, 'Journalists Had "No Idea" About OpenAI's Deal to Use Their Stories', *Wired* (21 December 2023) <https://www.wired.com/story/openai-axel-springer-news-licensing-deal-whats-in-it-for-writers/> [accessed 31 January 2025].

Performers' Rights

Performers are particularly vulnerable to the adoption of Generative AI. The reproduction of 'performances', digital replicas ('deepfakes') and voice cloning are posing a considerable threat to these professions. **Currently, the law does meet these challenges.**

Issues arise when human performers' likenesses and images are ingested into Generative AI models to generate synthetic performances without any direct control by or compensation to the performers themselves. Actor Scarlett Johansson is just one of many who have had their voices cloned without permission.[43]

Equity, the union for performing arts and entertainment professionals, has argued that applications such as AI- and computer-generated performance pose 'particular issues for performers'.[44] Still, it must be recognised that the industry is split in its view, as seen with the divergent approach taken for example in The Brutalist, where actors agreed to have AI enhance their vocal performances.[45]

Legal rights aside, one consequence of this **could be a sharp drop in employment of voice artists, extras, and actors.** Generative AI threatens to replace human creators and artists at an unprecedented scale.

While Generative AI undoubtedly proffers productivity and efficiency gains for the creation of outputs which can be monetised by the creative industries, it threatens the productivity of large groups of professionals.

Unless policy, industry practices, or legislation adapts to the contrary, Generative AI is likely to cause the size of these professions to shrink. The potential knock-on effect on UK productivity is currently unknown.

Some might find this development puzzling. In theory, performers have a right to control the use of their performances. The CDPA affords performers the right to control the recording of live performances (and other related rights).

43. N. Robins-Early, 'ChatGPT suspends Scarlett Johansson-like voice as actor speaks out against OpenAI', *The Guardian* (21 May 2024) <https://www.theguardian.com/technology/article/2024/may/20/chatgpt-scarlett-johansson-voice> [accessed 31 January 2025]. See also: B. Donahue, 'Tupac Shakur's Estate Threatens to Sue Drake Over Diss Track Featuring AI-Generated Tupac Voice', *Billboard Pro* (24 April 2024) <https://www.billboard.com/pro/tupac-shakur-estate-drake-diss-track-ai-generated-voice/> [accessed 31 January 2025].

44. House of Commons Culture, Media and Sport Committee, *Connected tech: AI and creative technology*, Eleventh Report of Session 2022–23, 18 July 2023, p. 25.

45. See, for example, A. Ritman, '"The Brutalist" Sparks Backlash After Editor Reveals Use of AI in Dialogue and Buildings, but Says It's "Nothing That Hasn't Been Done Before"', *Variety* (20 January 2025) <https://variety.com/2025/film/global/the-brutalist-ai-dialogue-drawings-backlash-1236279361/> [accessed 31 January 2025].

Performers have a right against recordings and broadcasts of their live performances without their permission, including streaming and uploading to the Internet, and a right to payment for authorised works.[46]

However, performers' rights fall short when it comes to Generative AI because Generative AI models do not copy a specific performance, but instead **construct composite performances from characteristics, voices and behaviours.**[47]

This is problematic because the various composite elements may have been harvested from specific performances and public appearances, yet as these are not direct copies, the performers' rights are unlikely to apply. The performer has provided the 'raw' data for the AI model and yet, unlike in the case of copyrighted works, they cannot claim any legal right to control how this data is used. It is unclear how far the law could go to protect a synthetic 'performance' in Generative AI outputs which reproduce someone's likeness.

This is not only an issue of AI companies crawling the web for performers' data to train AI systems. There is also an issue with creative content producers subjecting performers to a new interpretation of their contracts.

In some cases, contracts that were entered into before Generative AI models were popularised are being interpreted to have already authorised the use of recorded images and voices to generate outputs using AI.[48]

Anecdotal evidence suggests that performers are finding that old contractual clauses are being read as their having given consent for their data to be ingested and used for technologies that did not exist at the time the agreements were signed. In some cases, employers are also capturing more data than agreed, for example by filming the facial expressions of a voice artist, without including the larger scope in existing contracts.[49]

One positive step would be for the UK Government to independently ratify and implement the Beijing Treaty on Audio Visual Performances. The Beijing Treaty affords performers four kinds of economic rights related to their performances fixed in audiovisual works: (1) the right of reproduction; (2) the right of distribution; (3) the right of rental; and (4) the right of making the performances available to the public.[50]

46. *CDPA 1988*, Part II.

47. House of Commons Culture, Media and Sports Committee report (*supra* note 51), p. 26. Still, 'there are ambiguities raised by the definition as to whether the work performed must exist before the performance takes place […] unscripted and improvised musical and dramatic performances are almost certainly covered […]. A person who gives a spontaneous speech or an interview will not obtain protection as a performer.'

48. ibid, p. 26.

49. FTC (*supra* note 21), p. 11.

50. World Intellectual Property Organization, 'Summary of the Beijing Treaty on Audiovisual Performances (2012)', *WIPO* <https://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html> [accessed 31 January 2025].

The UK became a signatory of the Treaty in 2013. However, despite the previous UK Government's stated ambition, the Treaty has still not been implemented in the UK.[51]

The Government ran a further consultation on implementation from September to November 2023, including on changes to UK law which may be required surrounding performers' rights to control 'audiovisual fixations' of their performances (e.g., to control or receive remuneration from the broadcast of a performance after they already agreed to it being recorded). At time of writing, the Government's response to this consultation has not been published.[52]

Further elucidation of the current Government's position on this matter and the implementation of the Treaty would help clarify some of the current questions around use of performances by AI.

Other areas of law, such as the tort of passing off, personal data protection, or a bolstered right to personality could offer some solutions to these issues. However, an examination of these avenues for redress falls outside the scope of this report.

Recommendation 3: Government should independently ratify and adopt the Beijing Treaty on Audiovisual Performances as a first step in ensuring greater protections on performers rights and from false attribution by AI systems.

51. Intellectual Property Office, 'Beijing Treaty on Audiovisual Performances: Call for views', *Gov.uk* (23 April 2021) <https://www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances-call-for-views/beijing-treaty-on-audiovisual-performances-call-for-views> [accessed 31 January 2025].

52. Intellectual Property Office, 'Closed Consultation: Beijing Treaty on Audiovisual Performances', *Gov.uk* (14 September 2023) <https://www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances> [accessed 31 January 2025].

The Need for Transparency and Data Provenance Disclosure

There is a widespread recognition of the need for greater transparency of the use of copyrighted works in Generative AI. The legal requirement that there can only be a copyright violation if the copyrighted work has been '*copied*' presents a challenge.

The opacity, size, and constant reiterative development of AI models means copying can be surprisingly hard to prove, and AI companies are under no explicit obligation to disclose what data they collect to train their AI models.[53]

One way to determine that copying has occurred is to look for replication or similarity in the outputs generated by an AI model. Here, ongoing US caselaw may be instructive to understand how AI models may or not be considered by the courts to have copied copyrighted works.

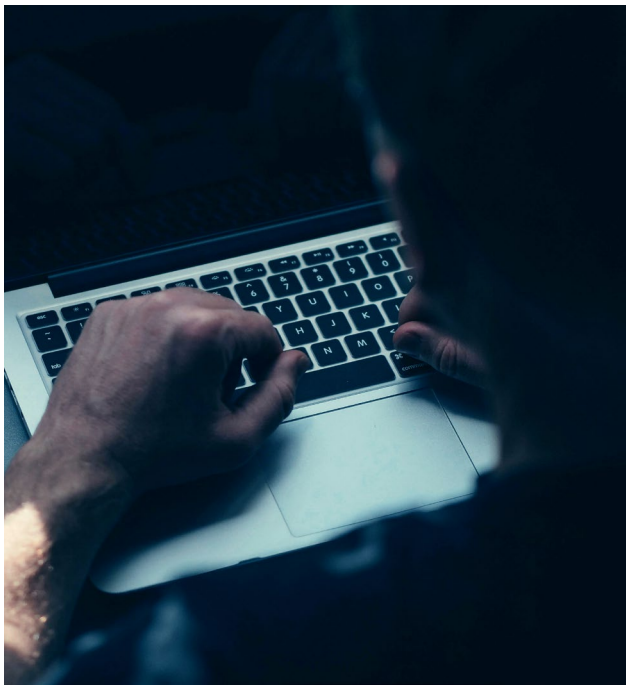
For example, in October 2023, several visual artists sued Stability AI in the US for copyright infringement for having trained its Stable Diffusion model on web-scraped images that Stability AI had licensed from Large Scale Artificial Intelligence Open Network (LAION), but which had not been licenced to LAION by the copyright holders.[54]

Judge Orrick dismissed the case because he was not convinced that the AI-generated outputs were substantially similar to the copyrighted works to qualify as 'derivative works.' In other words, he did not see that the outputs were sufficiently similar to the original to constitute an infringement of copyright.

Some claimants have tried to prove copying by referring to the process of **'memorisation'** (when the AI model retains and reproduces its training data). For example, after Open AI revealed it frequently trained its model on high-quality data, several US newspapers sued for copyrighted infringement because the distinction of data quality made it more likely that the outputs would recall their specific works due to 'memorisation'. [55]

These issues are also being examined in a UK High Court case brought by Getty Images against Stability AI.[56] The outcome of these cases is still pending.

Some have called for a legal requirement for AI companies to respect do-not-index metadata (of the sort that would already prevent information appearing on search engines).



53. A. Guadamuz, 'A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs', *GRUR International 2* (26 February 2023), <https://ssrn.com/abstract=4371204> 31 pp. at p. 24.

54. *Anderson v. Stability AI Ltd.*, Case No. 23-cv-00210-WHO, filed 30 October 2023, United States District Court, Northern District of California.

55. *Daily News et al. v. Microsoft Corp. and Open AI*, civil action no. 24-3285.

56. *Getty Images (US) Inc, Getty Images International (UK) Ltd, Getty Images Devco (UK) Ltd, Istockphoto LP, and Thomas M. Barwick Inc v Stability AI Ltd* [2025] EWCH 38 (ch).

The UK Government's consultation on Copyright and Artificial Intelligence calls for greater transparency, and suggests that one avenue for this may be metadata labelling of works as part of a 'rights reservation' framework.[57]

Such requirements would bolster the existing legal requirement to not remove any copyright management information (CMI) from copyrighted works or could even go so far as to prohibit copyrighted works from being scraped from the Internet.[58]

However, there are still no robust technical solutions to ensure that copyrighted works would not be scraped, especially in cases where the copyright holders do not have control over the website where the work is made available.

Regardless of developing caselaw on copying or frameworks on metadata labelling, transparency requirements will be important for effective enforcement mechanisms. The UK Government's consultation recognises that 'increased transparency by AI developers will be crucial to ensuring copyright law is complied with and can be enforced'.[59]

Sufficiently rigorous transparency requirements would give creators clarity on how their works are being used and aid pathways to redress where copyright law is violated.

Recommendation 4: Government should adopt transparency requirements on the training of AI system which include the mandatory disclosure of data provenance.

57. UK Government Copyright and Artificial Intelligence Consultation (C.2.) <https://www.gov.uk/government/consultations/copyright-and-artificial-intelligence/copyright-and-artificial-intelligence#c-our-proposed-approach> [accessed 31 January 2025].

58. CDPA 1988, Section 296ZG(7); US Digital Copyright Millennium Act (DCMA) 1998, Section 1202(b). See also. Kadrey v. Meta and Andersen v. Stability AI Ltd. (supra note 30).

59. UK Government Copyright and Artificial Intelligence Consultation (C.4., para. 107.) <https://www.gov.uk/government/consultations/copyright-and-artificial-intelligence/copyright-and-artificial-intelligence#c-our-proposed-approach> [accessed 31 January 2025].

Who Has Copyright in Generative AI Outputs?

There is also the issue of who is afforded copyright in Generative AI outputs. Key questions are whether the copyright holder of works used to train the AI models have a claim to the outputs. There are also questions regarding whether the user of the AI models will be vested with copyright in the works simply from instructing the AI models through prompts.

While there has been some debate as to whether copyright could be vested in an AI model itself, those concerns seemed to have been resolved as the law and academic scholarship has confirmed that copyright can only be vested in human creators.[60]

While some suggest that no human involvement is needed for the protection of so-called 'computer-generated works'. Section 9(3) of the CDPA clearly states that, 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' (emphasis added).

Imagining copyright as a 'permitted privilege—rather than a property right—' along with a robust participatory infrastructure would be one path forward for a 'socially sustainable data ecosystem'.[61]

Prompts

Questions regarding copyright in AI-generated outputs have turned to the amount of creative labour required to meet the threshold of 'creative intellectual effort' in law, and whether writing a prompt would suffice to meet the threshold of an 'author's own intellectual creation'.[62]

It should be noted that in this case, the uncertainty sowed by Section 9(3) of the CDPA is not an issue in other jurisdictions which do not have protection for computer-generated works.

American legal scholar Pamela Samuelson has speculated that writing prompts (especially as these can be elaborate) can meet the originality and intellectual creativity threshold that would justify the user of the AI model having copyright in the output (notwithstanding any underlying copyright in works used in the training of the model).[63] However, not everyone shares this view.

Technology and law scholars Kate Crawford and Jason Schultz reject the notion that users using prompts can claim copyright in outputs because the 'algorithms and neural net architectures behind Generative AI algorithms produce outputs that are inherently unpredictable, and any human prompter has less control over a creation than the model does'.[64]

60. See also US Copyright Office, 'Copyright registration Guidance: Works Containing Material Generated by Artificial Intelligence', *Federal Register* 88 (16 March 2023). For US caselaw on non-human authorship, see *Naruto v. Slater*, 888 F. 3rd 418, 426 (9th Cir. 2018). Nevertheless, debates over whether machines could be considered creators for copyright purposes have been ongoing for decades. For example, in 1986, Pamela Samuelson authoritatively asserted that computers could not be authors of copyrighted works (P. Samuelson, 'Allocating Ownership Rights in Computer-Generated Works', *University of Pittsburgh Law Review* 47 (1986), 1185–1228, at p. 1992). More than twenty years later, in 2019, Jane Ginsburg and Luke Ali Budiardjo stated that computers could not be authors, because machines could not be 'a source of creativity' (Ginsburg and Budiardjo, 'Authors and Machines', *Berkeley Tech Law Journal* 34 (2019), 343–456, at pp. 397–400 and 408).

61. Delacroix, 'Sustainable Data Rivers? Rebalancing the Data Ecosystem That Underlies Generative AI'. Critical AI 2 (2024).

62. *THJ Systems Ltd v. Sheridan* [2023] EWCA Civ 1354. See also *SAS Institute v. World Programming* [2013] ECHC 69 (Ch). For the definition in the EU, see *Infopaq Int. v. Danske Dagbladets Forening*, Case C-5/08 [2009] ECR I-6569 (ECJ).

63. P. Samuelson and C. D. Asay, 'Saving Software's Fair Use Future', *Harvard Journal of Law and Technology* 31 (2018), 1–28, at p. 1.

64. Crawford and Schultz, '*The Work of Copyright Law in the Age of Generative AI*', p. 79.

Crawford and Schultz believe that prompts cannot give rise to copyright because doing so would violate the legal distinction between 'idea' and 'expression', which holds that only the latter can be the subject-matter of copyright.[65] To Crawford and Schultz, most prompts 'are essentially concepts or ideas, with each generated work manifesting as an expression of those ideas'.[66]

As they see it, it is the AI model, not the human user, who is the maker of that expression, and the output (i.e., fixed expressions) would not be covered by copyright law.[67] As only humans can be afforded copyright as authors, the AI model cannot be vested with copyright in the fixed expression it has generated. Thus, copyright must be assigned to the human user of the AI model.

The user of an AI model would have to do something more to the outputs once generated to be vested with copyright, beyond simply generating products from inputting prompts to the application.

Ultimately, whether a prompt suffices to meet the creative intellectual effort threshold may be moot, as the user will still need to 'mix their labour' with the outputs before it becomes a product for the marketplace.[68]

It is unlikely that copyright will be afforded to the user in Generative AI outputs made solely from feeding prompts into the AI model, regardless of whether the user is in the US or the UK, and caselaw suggests this will not be the case.[69]

This leads to the question of what would qualify as sufficient work by a creator or author, in addition to writing prompts, which would give rise to a claim to copyright in AI-generated outputs?

According to Ginsburg and Budiardjo, the 'user of such a machine can claim authorship of the result only if that user *sufficiently controlled* the process through which the work came into being'. If the user does control this process, then the user has both conceived of and executed the resulting work, and is therefore the sole author of the resulting work just like the user of an 'ordinary tool'.[70]

They continue: 'the person claiming authorship must be responsible for controlling the basic steps that will lead to manifestation of the key expressive elements of the work. The executional significance of the users' acts may depend on what exactly is expressive about the resulting work'.[71]

The UK Government should clarify that only a human author will be afforded copyright in the outputs of AI models and give guidance of the threshold for creative intellectual effort in this regard.

65. Crawford and Schultz, 'The Work of Copyright Law in the Age of Generative AI', p. 57. *Baker v. Selden, Nicols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2nd Cir. 1930); *Savatava v. Lowry*, 323 F.3d 805 (9th Cir. 2003); *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 443 (9th Cir. 1991)

66. Crawford and Schultz, 'The Work of Copyright Law in the Age of Generative AI', p. 59.

67. *Ibid*.

68. See, for example, M. Chatterjee, 'Lockean Copyright Versus Lockean Property', *Journal of Legal Analysis* 12 (2020), 136–82, at p. 136.

69. For example, in the US the use of computer software was found not to be enough to meet the threshold of authorship (Ginsburg and Budiardjo, 'Authors and Machines', p. 420, citing *Torah Soft Ltd v. Drosnin*, 136 F. Supp. 276 (S.D.N.Y 2001)).

70. Ginsburg and Budiardjo, 'Authors and Machines', pp. 426 and 431.

71. Ginsburg and Budiardjo, 'Authors and Machines', p. 431.

The Legal Question of Style

There are further problems with the use of AI to generate outputs in the style of a specific artist. **A style is not a copy** and therefore not protected by copyright law.

This leaves content creators and authors (particularly visual artists, composers, and writers) exposed to having their primary market overtaken by similar
(if not identical) content which has been generated using their names and brands in **prompts**, but which may not be copies in the strictest sense of the law. Copyright does not offer protection in these instances.

The issue of style has been raised in several US lawsuits where claimants also demonstrated how their work was reproduced through the processing of '**grounding**' whereby the use of the AI model included a specific name or reference to a style in the prompt that would recall works from that person or source.

Indeed, the *New York Times* produced several examples where the AI model had produced newspaper articles *verbatim*. It is hard to see how this would not qualify as copying under copyright law.

For less extreme examples of grounding, clarity on the need for recognition in AI outputs in the style of a human author would be welcome.

The UK Government should issue guidelines on the need for recognition and compensation for artists whose name and canon are used in prompts that are used to instruct AI models to generate outputs.

False Attribution

There is the related issue of **false attribution**, as Generative AI models may falsely attribute AI-generated outputs to specific artists.[72] False attribution has potential knock-on effects for the market value of the artist's genuine work, and it violates an artist's moral rights under the CDPA.[73]

Nevertheless, it is nearly impossible for an artist to assert these rights for a host of reasons, which has led to call for a strengthened obligation on AI companies to ensure their AI models do not falsely attribute works.

Many share the concerns of artists and performers: according to the US Federal Trade Commission, Generative AI could 'make it more difficult to find human-made work, mimic creative professionals' unique styles causing market confusion and reputational damage, and lead to loss of opportunity and income'.[74] There is a concern that AI-generated outputs falsely attributed to artists may supplant their own genuine work in the marketplace, thereby unfairly reducing their livelihoods.

False attribution also relates to consumer trust in digital products. As deepfakes and Generative AI become commonplace, the faith consumers place in the authenticity and veracity of creative products is severely challenged. Leaving false attribution unaddressed undermines UK creators' ability to demonstrate that their products are genuine, which may have a negative reputational knock-on effect not only on individual creators, but also on the UK's brand as a deliverer of high-quality products to the world.

Again, the implementation of the Beijing Treaty on Audiovisual Performances would be an important step to rectifying this, as it secures performers' moral rights, including the right to attribution and integrity.[75] In addition, the UK Government should issue guidance on attribution, and work with the creative industries and the AI companies to devise mandatory and enforceable attribution mechanisms and tools.

Recommendation 5: Government should clarify that only a human author will be afforded copyright in the outputs generated by AI models and produce guidance on:

a. The threshold for 'creative intellectual effort' in achieving copyright in AI outputs;

b. The need for recognition and compensation to artists whose name and canon are used in prompts to AI models that generate outputs;

c. Measures required to avoid false attribution in AI outputs.

72. FTC (*supra* note 21), pp. 13-14.

73. *CDPA 1988*, S. 84.

74. FTC (*supra* note 21) p. 12. Guadamuz, 'A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs', p. 22. See also Sobel, 'Artificial Intelligence's Fair Use Crisis', p. 57 and Bracha, *The Work of Copyright in the Age of Machine Production*, p. 35.

75. House of Commons Culture, Media and Sport Committee, *Connected tech: AI and creative technology*, p. 26.

3. THE PATH FORWARD

Given the impact of Generative AI on the creative industries, calls for the clarification of the copyright regime continue to be voiced.[75]

Specifically, the creative industries continue to ask for clarification and the strengthening of the copyright regime to address the following problems:

- That AI companies have built Generative AI models on copyrighted works without creators consenting to the inclusion of their works in training data and without giving the copyright holders compensation or attribution;
- That Generative AI outputs are in the style of creators' works, thereby flooding the market and replacing creators' products with machine-generated substitutes, which can be made faster and in greater volume;
- That Generative AI is a threat to creators' reputations as algorithms falsely attribute AI-generated outputs to their names;
- And that questions regarding what copyright protection creators may have in products that include outputs generated by AI remain unresolved.

Policymakers and legislators have recognised the pressing nature of the issue of copyright and AI.[77]

In 2022, the Intellectual Property Office (IPO) convened a working group of AI companies and creative industries' representatives to produce a Voluntary Code on Copyright, but the group was disbanded when it failed to reach a consensus.[78] More recently, the Government opened a new consultation on AI and IP in December 2024.[79]

76. (*supra* notes 22-23).

77. See *inter alia:* House of Commons Culture, Media and Sport Committee, *Connected tech: AI and creative technology* and FTC report (*supra* note 21).

78. See, for example, D. Thomas and C. Criddle, 'UK shelves proposed AI copyright code in blow to creative industries', *Financial Times* (5 February 2024) <https://www.ft.com/content/a10866ec-130d-40a3-b62a-978f1202129e> [accessed 31 January 2025].

79. UK Government Copyright and Artificial Intelligence Consultation <https://www.gov.uk/government/consultations/copyright-and-artificial-intelligence/copyright-and-artificial-intelligence#c-our-proposed-approach> [accessed 31 January 2025].

Text and Data Mining (TDM) Exception

The uncertainty of the legal status of AI models acts as a barrier to the uptake of Generative AI in the UK and AI companies have called for the adoption of a broad text and data mining (TDM) exception in the CDPA. The Government's Consultation presents a more nuanced version of 'a data mining exception which allows right holders to reserve their rights, underpinned by supporting measures on transparency'.[80]

UK copyright law already has a TDM exception, which was adopted following the 2011 Hargreaves Review.[81] However, this TDM exception only applies to data mined for research purposes (although it is unclear whether that research can later be used for commercial purposes).[82] The exception does not provide 'carte blanche' for AI companies to scrape the web for data to include in their datasets to train commercial AI models.

Calls for a broad TDM exception have already been considered by previous UK Governments. However, previous proposals, such as the one set forth by the UK Government in 2022, were abandoned after meeting fierce opposition by the creative industries.[83]

Nevertheless, calls for a TDM exception have returned, and the Government's current consultation includes an option for a 'rights reservation' (so-called 'opt out') scheme.[84] This is broadly modelled on the EU's regime and would allow copyright holders to reserve their copyrighted works from being used in AI models.[85]

There is still work to be done to clarify the details of how a scheme would work in practice, although the Government's response to the AI Opportunities Action Plan suggests that Government favours an opt-out approach.

The issue of mandatory opt-out is also being considered in the US. In its survey of the creative industries, the US Federal Trade Commission (FTC) found that some creatives in the content industries wanted a standardised opt-in model. Still, for others, opt-out options such as voluntarily complying with the Robot Exclusion Protocol were considered impractical and as placing a disproportionate burden on companies and individuals.

80. *Ibid*. p. 13

81. *CDPA 1988*, S. 29A. I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011).

82. Guadamuz, 'A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs', p.15.

83. See *inter alia*: House of Commons Culture, Media and Sport Committee, *Connected tech: AI and creative technology*, p 49; Guadamuz, 'A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs', p.16.

84. HM Treasury, 'Collection: Pro-innovation Regulation of Technologies Review', *Gov.uk* (30 March 2023) <https://www.gov.uk/government/collections/pro-innovation-regulation-of-technologies-review> [accessed 31 January 2025].

85. EU AI Act (Regulation (EU) 2024 (1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance) PE/24/2024/REV/1. The exception is set out in Recitals 105–107 and Article 4(3) by referring to the Text and Data Mining Exception in the Digital Single Markets Act (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markers in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance) PE/17/2022/REV/1.

Content creators giving evidence to the FTC also expressed suspicions that AI companies did not respect 'opt-out' instructions and that solutions in any case were too late because the AI models had already been trained on their content.[86]

We urge caution against embarking on the path of a broad TDM exemption without a robust economic analysis of the likely impact that it will have on the creative industries, regardless of an 'opt out' option.

Opt-out options are not fool-proof solutions to these problems.

First, it will be difficult to decide on and enforce a technical measure for opt out. Smaller and less established creators may be left behind as they may not have the skills, knowledge, or resources to issue opt out notifications.

Second, placing the onus on copyright holders to actively assert their rights places an unfair burden on them, especially small copyright holders who may not have the technical expertise or means to do so. Whereby copyright arises automatically, an opt-out requirement could be seen to go against the spirit of copyright law. Additionally, this would be especially difficult in situations where copyrighted works are used downstream and made available on website outside the copyright holders control.

Third, a TDM exception may be seen as giving 'carte blanche' to foreign-owned and managed AI companies to benefit from British copyrighted works without a clear mechanism for their creators to receive fair compensation. It is not clear how such an exception will stimulate innovation in the British creative industries, or in the development of British AI models.

Questions also remain regarding copyright work that has already been ingested into datasets to train AI models. It is not clear how such data can be identified, labelled, and compensated, or even erased should consent not be given.

Last, it must be recognised that the marketplace for AI models is complex and that there are numerous smaller models being trained with licenced datasets. De facto industry licensing and partnership agreements are emerging that may help address some of the issues explored here.

Market-based compensation models may become the industry standard in the near future. It is not clear what impact a broad TDM exemption will have on these commercial arrangements.

This uncertainty could potentially discourage investment at the present time.

Recommendation 6: We urge caution against embarking on the path of a TDM exemption, regardless of an 'opt-out' mechanism, without a robust economic analysis of the likely impact that it will have on the creative industries.

86. FTC report (*supra* note 21), pp. 15-16.


Custom size
Current screen size
New and upcoming features
View
Home
Learn
Discover
FILES
Your files
Shared with you
Deleted
Recent
iphone
2024-04-29, 8:38 PM
Opening...
This takes longer on slower connections and large cloud documents
Cancel
laptopgif
2024-04-26, 12:58 PM
Bendit_etic_Jar
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burrito gringo
2024-04-24, 10:29 AM
Bendit_...Pro-01
Create new

CONCLUSION AND RECOMMENDATIONS

The path forward for Generative AI must not cost the UK its world-leading creative industries.

The UK Government must balance upholding and enforcing the rights of copyright holders and performers with promoting the growth of AI. Generative AI may change how people create content. Therefore, the UK Government should adopt AI regulation that requires transparency, bias mitigation, fair compensation, and workers' rights.

The UK Government should act to balance the needs of copyright rightsholders and tech firms in the UK, rather than wait for decisions in other jurisdictions. The lack of a clear position by the UK Government in relation to either of these developments inadvertently makes the creative industries beholden to offshore policy developments.

The UK Government has a unique opportunity to strengthen the conditions for both the AI and the creative content industries. The debate around a Text and Data Mining Exception illustrates that less regulation is unlikely to be the answer. Ambitions to strengthen the UK's creative sector to bolster the British economy and spark innovation using GenAI in the UK can be achieved.

Going forward, the UK economy will benefit from policies that support existing, economically strong, industries that also encourage the uptake of AI technologies.

Lastly, there are implications for skills training and workforce planning on a sector scale. Without a clear training and industrial policy, employment in the creative content industries may be decimated.

Courses offered to train students for future employment may not be fit-for-purpose, and inequality of economic opportunities may increase as some have access to sophisticated digital AI tools, while others risk being left behind. Thus, understanding how the development of the AI and content creation industries is likely to play out is crucial for the UK's overall growth and innovation strategy.

The UK Government can choose to ensure that AI benefits the UK economy. Strengthening our existing leading sectors and supporting skills transition are two steps that we urge to ensure a strong future.

RECOMMENDATIONS

1. Government should holistically examine the impact that Generative AI is having on the workforce in the creative industries, including by commissioning research on AI adoption across the sector, and use it to inform robust policies for supporting the sector's workforce.

2. Government should encourage the uptake of licensing agreements to ensure that copyright holders are compensated for use of their work by AI systems, but it should also ensure that these licensing agreements fully acknowledge the rights of copyright holders and fairly compensate them for the use of their works.

3. Government should independently ratify and adopt the Beijing Treaty on Audiovisual Performances as a first step in ensuring greater protections on performers' rights and from false attribution by AI systems.

4. Government should adopt transparency requirements on the training of AI systems which include the mandatory disclosure of data provenance.

5. Government should clarify that only a human author will be afforded copyright in the outputs generated by AI models and produce guidance on:

   a: The threshold for 'creative intellectual effort' in achieving copyright in AI outputs;

   b: The need for recognition and compensation to artists whose name and canon are used in prompts to AI models that generate outputs;

   c: Measures required to avoid false attribution in AI outputs.

6. We urge caution against embarking on the path of a Text and Data Mining (TDM) exemption, regardless of an 'opt-out' mechanism, without a robust economic analysis of the impact that it will have on the creative industries.

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