Law Society of Scotland

Consultation Response

Copyright and AI

February 2025

Photo: Falkirk Wheel

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Law Society of Scotland's Intellectual Property Sub-Committee welcomes the opportunity to consider and respond to the UK Government Consultation (**Consultation**) on Copyright and Artificial Intelligence (**AI**). We represent Scottish input into the law and legal developments of IP law in Scotland and recognise that that the law in this area is nuanced in many ways to that of other jurisdictions.

In doing this, we look to represent the Scottish legal profession in IP in the broadest sense taking views taken from a range of individuals including trademark and patent attorneys, from academia, from business and from those solicitors working in private practice and in-house. These broad ranging views are made clear in our response to this Consultation and the impact this has from a legal, commercial and operational perspective.

Furthermore, we wish to recognise the strengths that the economy of Scotland has in terms of its rights holders in copyright work (**Rights Holders**) or rights users including those developing AI (**AI Developers**). These actors all have a hand to play in the creative economies in Scotland which we consider to be strong and whom produce high quality output. We therefore welcome that there are questions in this Consultation that are directly relevant to this contextual landscape and which are hugely important to the Scottish economy as a whole. We also welcome those questions that are important to the more technical aspects of IP and the development of AI law in the UK and Scotland.

General Remarks

From the outset, we note the difficulties in responding to this Consultation objectively given that it is not necessarily a question of *what* is happening or permitted as AI evolves within Scotland but *who* is actually doing this. The rapid growth of AI Developers has raised significant issues on how the large language models and associated generative AI products have been developed and the respect that has been paid to Rights Holders who own underlying IP.

It is important that this point is recognised, however, we believe that a balance must be struck between these two participants who both now operate in the creative industry. On the one hand we see a need to recognise that AI Developers must have access to creative content for the purposes of AI training so that the wider benefits of this rapidly evolving technology can be realised. Alongside this, we also see a need to acknowledge that Rights Holders (who are represented by smaller artists at a local level right up to creative institutions on a global scale) need to operate in a sector where they have confidence that their work can be adequately protected and renumerated. A balance in approach must be struck between the two to ensure that both can operate effectively within the creative industry space.

Specific Remarks

Government's Overarching Policy Objectives – The Four Options and Associated Technical Considerations

In terms of the first proposed model of *"Doing nothing: copyright law remains as they are"* (**Option 0**) or second model of *"Strengthening copyright requiring licensing in all cases"* **(Option 1)** we have no comments to make.

We would, however, support further clarification surrounding the two further models that have been proposed, namely; *"A broad data mining exception"* (**Option 2**) and *"Exception with rights reservation, underpinned by supporting measures on transparency"* (**Option 3**).

In terms of **Option 2**, we do see certain strengths in this approach. However, we point to the difficulties that would arise in determining what a trigger point would be for the "commercial use" of a work and where it transitions from, for example, academic or research purposes to developing a product for commercial use. Therefore, further clarity would be required to assist both Rights Holders and AI Developers to better understand what this trigger point would look like. Whilst we appreciate that this could be conceptualised through the development of a body of case law, we have concerns as to the costs and time that it would take to arrive at this point.

In terms of **Option 3,** we believe that this approach could strike a valuable balance between AI developers and Rights Holders. However, we point to the difficulties that the EU have faced in terms of what constitutes a valid rights reservation. We also note the difficulties that they have faced in finding a way for the "opting-out" exception to work in a transparent way. We return to transparency later in our response.

We consider that the difficulties that the EU have faced lie in the technology that underpins AI. We note that there are a number of useful tools and rights reservation protocols that exist to enable Rights Holders to reserve their rights and signal to an AI Developer that their works are not available for training. However, at present these tools have significant technical limitations and their use is insufficiently standardized across the industry. Often these tools are not easily accessible, or are extremely technical in nature, and therefore Rights Holders find them difficult to use. In view of this, we believe that if Option 3 is to be a success then the technology underpinning rights reservation will need to be improved and developed further.

It is the need for the improvement and development in technology which we see as being an inherent difficulty with Option 3. We believe that proceeding on a basis of relying on (as yet) unknown technology without having a clear understanding of what this might look like,

and how this will improve rights reservation, ultimately creates significant legal uncertainty, both for the Rights Holder and AI Developers themselves. Therefore, there are no guarantees that the approach will achieve what it sets out to do.

For example, we point to the risk of future litigation and the issues created from a business accounting perspective. Future technology may well throw up issues for AI developed content which utilizes content which, at the time, could not be identified as subject to an "opt-out". Therefore, businesses using AI may consider it necessary to make provision year on year to set aside funds to protect them from a possible future copyright claim. Such provision is likely to significantly disincentivize business from being located within a jurisdiction that lacks such legal certainty. We believe that this should be avoided if we are to continue to build our economy in the UK and Scotland for the benefit of all.

We also point to a further issue with Option 3 in that many of the practices and technology being used by AI developers is very much entrenched in their business models. We believe there will be resistance from such developers to roll back their systems to enable a standardization in approach in the use of rights reservation technology (as this is developed further). Therefore, we have concerns that the opportunity for a more standardized approach could well have worked a number of years ago when technology was in its infancy. However, with the entrenchment and reliance that now exists on the technology that already in exists, we question whether such an approach is now achievable.

In view of the foregoing, we consider that the primary objective needs to be legal certainty at this point in time. We see this as being the primary difficulty with Option 3. That is not to say that an approach that this difficult should not be adopted, however, careful consideration should be given as to the wider implications that new technology will bring. We would therefore welcome a careful analysis of all existing technology that facilitates rights reservation (and those which is currently in development) to help determine the likelihood of Option 3's success. This may require further targeted consultation with those from within the technology industry before a decision is made to proceed down this route.

In the absence of this, our preferred approach would be Option 2 (albeit with certain modifications).

Contracts and Licencing

We recognize the benefits that collective licensing and the increased use of Collective Management Organisations (**CMO's**) could bring in helping to renumerate Rights Holders for their works. However, we are uncertain as to how this would work in practice. We would therefore welcome further clarity on the proposals surrounding this.

Alongside this, we have a number of concerns as to the legal implications that will arise from technicalities associated with collective licensing. For example, we are aware of instances where CMO's have had a Rights Holders work assigned to them, in turn licensing these works and then taking enforcement action in their members names. Difficulties have arisen when it comes to enforcement of an infringement of these rights, primarily surrounding who precisely has standing and title to sue. In view of this, we believe that careful consideration must be given to the contracts that underpin collective licensing arrangements. Complexity here will dilute protections for Rights Holders if successfully "opting out" becomes time consuming or challenging. There is a significant difference in context between Rights Holders who will wish to avoid their work being used by AI Developers and the more commercial works traditionally managed by CMOs.

On the point of enforcement of these contractual agreements in the Courts, we also point to further complexities that we are aware of surrounding how an award of damages is calculated in collective licensing arrangements. Other issues have also been seen in terms of how to evidence an infringement without the use of certifiable technology to demonstrate that certain works are being used.

In view of the foregoing, we believe that careful consideration needs to be given to the difficulties around enforcement, damages, evidence and title to sue in the increased use of collective licensing. In particular, clarity must be provided as to whether content creators

are assigning their works or licensing its use and how any underlying contract will effectively capture any such arrangement. In view of these concerns, we would welcome further clarity on how collective licensing model would work.

In the event that the use of collective licensing is to increase (and de facto the use of CMO's in representing the rights of Rights Holders), we believe that the UK Government should expressly disapply any competition restrictions on these CMO's so as to improve choice and make such provision more readily available to those seeking renumeration.

Transparency

We recognize that one of the key problems that has arisen in the development of AI and Copyright is transparency. This stems from a lack of knowledge about *whose* works are being used to train AI services, in what *way* they are being used and *where* the intellectual property is actually being taken from. We note that concerns can arise in terms of transparency when considering even simple website scraping and the general internet trawling of AI tools. This is before we even consider the more questionable practice of training AI models through the use of unauthorized databases searches and whether the use of this content is an infringement. In view of this, we consider that transparency is of the upmost importance in the development of AI. Without a coherent approach to ensure the trust of its users, it is unlikely that the development of AI and Copyright will easily sit amongst each other.

We see the issue of proportionality and enforcement as being inextricably linked to this, along with the practical reality this creates. We believe that the development of the law surrounding Copyright and AI is long overdue given that there are a variety of uses, models and companies that operate within the AI space. We believe that this has created significant challenges in stopping malpractice and so the need for greater transparency cannot be understated. However, trying to reverse certain behaviors that are already entrenched in practice is likely to be an extremely difficult task.

That being said, we believe that a balance needs to be struck between enforcement action against the unauthorized use of certain works and keeping this proportionate to the harm that is caused. We therefore consider that actions to protect IP rights should not be overly excessive or unfairly burdensome on an alleged infringer so as to discourage their investment into the further development for AI and the benefits this will bring.

On the point of the Government's role in transparency and future regulation of the AI sector, we believe there is likely to be difficulties in any such approach. Whilst we recognise many of the big-tech providers have regional offices at a local level such as that found in the UK, often much of the technology underpinning AI is developed within these organizations whose global headquarters are located in overseas jurisdictions. We believe that this will likely mean that the Government will need to work with its foreign counterparts in such jurisdictions and so we would welcome further detail surrounding this point.

Research and Innovation

We recognize the opportunities that AI brings and the host of other applications it has including important research. We therefore welcome the provisions contained under s29 Copyrights, Designs and Patents Act 1988 which provides for fair dealing with copyrighted works for the purposes of non-commercial or academic research. We see a need to strengthen the development of AI for the purposes of such research.

We consider that broadening the scope of the Temporary Technical Measures (**TTM**) exception enshrined under s28A Copyright, Designs and Patents Act 1988 could assist with this aim. This would further extend the provisions allowing for temporary acts of reproduction that are transient or incidental but are an integral and essential part of technological process, such as caching and buffering, do not infringe copyright laws. We believe that this would allow broader access for other research institutions in the UK and allow for this up until the point of market entry, at which point this could trigger transparency and renumeration obligations to be paid. In view of this, we believe that this provides a good point to revisit what constitutes "fair renumeration". In order to assist with

this, we would suggest an examination of other jurisdictions that operate fair renumeration rates for creators.

Alongside this, we would also call for further guidance as to at what point a line is drawn as to what constitutes "research" before its moves into commercial use. We are aware from those operating in practice that significant uncertainty exists thereby rendering it difficult to provide succinct and clear advise on this point. We are therefore looking for further guidance from both the UK and Scottish Governments given our belief that certain AI Developers are simply ignoring this distinction nor seeking clarity from within the legal profession. We are keen to avoid a situation whereby AI developers are asking for forgiveness when copyright is infringed rather than asking for permission for its use. We believe that such reactionary practice (rather than taking a proactive approach) only serves to undermine legal certainty in this area.

AI Outputs and Labelling

We recognise the rapid development of generative AI and the issues that are growing from material that mirrors human created content. We note the concerns that have been raised by the creative industries, including copyright infringement in outputs and the need for appropriate labelling in this area.

We believe that if current protection for computer generated works is to be maintained under copyright law, the contradiction that has been noted in the Consultation under s9 (3) CDPA needs to be clarified in order to ensure that the provision will work in practice. However, we also note concerns surrounding this provision conflicting with the principles that have been developed through case law relating to the "originality" of a works. This requires that a work must be the result of the authors own skill, labour, judgment and effort to qualify for copyright protection. We also note that in *Thaler (Appellant) v Comptroller-General of Patents, Designs and Trademarks, the Supreme Court [UKSC/2021/0201]*[1] decided that an investor must be human. In consideration of this, we believe that

[1] Thaler (Appellant) v Comptroller-General of Patents, Designs and Trade Marks (Respondent)

Copyright law should follow suit and that AI developed content should not be entitled to the benefits of having IP protection.

On the point of labelling, we acknowledge the value in this and communicating that creative output is human authored and not Generative AI as this will help to provide clarity to individuals precisely where the information has come from. However from a commercial and trade perspective, the labelling of content can create problems in a jurisdictional sense. Labelling in such a way could quickly become a barrier to trade if a business labels their creative output for the UK and Scottish Markets, but in another way for overseas jurisdictions. This also raises issues in terms of enforcement when consistency in approach isn't seen across multiple jurisdictions.

Other Emerging Issues

On this point of personality rights, although clearly a issue which this technology brings to the fore, we believe that this question goes well beyond AI and Copyright considerations and has far reaching questions in the need to protect publicity and image rights. We therefore do not feel that this Consultation is the appropriate forum for this discussion to take place and so would welcome further consultation on this issue.

Concluding Points

We believe that the rapid rise of AI and the associated impact it is having on Copyright (and IP law more generally) means that urgent attempts should be made to provide legal certainty in this area. This will likely render a need for the introduction of primary legislation. The need for this is amplified by the fact that there is a lack of well established or developed case law in the UK, and in Scotland, to keep help resolve the new and emerging issues that are now being seen on the point of Copyright and AI. However any new legislation (or reforms to existing statute), along with the policy that underpins this, must be fair to both Rights Holders and AI Developers.

In concluding, we point to a final example where answers to the many questions being asked in this Consultation might be found. The music industry suffered greatly through the early 2000's through the use of unauthorized website services that allowed users to download and listen to their choice of music for free. This led to the development of digital music service providers which now stream music and which pay royalties to content creators and Rights Holders to recognize that they should be renumerated for their works. Whilst we accept that this change was brought about in an era where the music industry was commercially very strong and the relevant disruptive tech industry relatively small, today AI Developers yield far greater strength than has been previously seen. For this reason, we believe that the Government need to legislate in this area so that an acceptable commercial model can be found to strike a much needed balance and strengthen the position of creative Rights Holders so that they are fairly renumerated for their works.

For further information, please contact:

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