Artist Rights Institute
where artists speak

By email

February 25, 2025

UK Intellectual Property Office
Concept House
Cardiff Road
Newport
South Wales NP10 8QQ

Re: Consultation on Copyright and Artificial Intelligence

Gentlepersons:

We appreciate the opportunity to comment on the Intellectual Property Office's consultation on the grave topic of copyright and artificial intelligence. The Artist Rights Institute is based in Austin, Texas and was founded in 2023 by Dr. David Lowery of the University of Georgia at Athens and Austin music attorney Christian L. Castle to further the study and discussion of artist rights. We sponsor the annual Artist Rights Symposium, produce the ArtistRightsWatch.com blog and are frequent participants in the artist rights public policy debate.

The Intellectual Property Office's consultation on copyright and artificial intelligence is relevant to creators outside the United Kingdom for a simple reason: Any one country's artificial intelligence policy will not stay in that country. This is particularly true when it comes to both the massive copyright infringement that has occurred already with AI training materials as described by Baroness Kidron in the House of Lords and the influence of American technology behemoths on the UK's copyright policy.

It must also be said that despite some recovery in recent years, on balance creators have largely been severely economically damaged by the manipulation of "safe harbor" legislation such as the Government's proposed opt-out mechanism. The threat of renewed economic damage from leveraging a new safe harbor by largely the same cast of characters accelerated by AI *is entirely believable*. The path dependence of safe harbor abuse by Big Tech established during the last twenty-odd years would almost guarantee it.

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This apprehension is fueled by the thinly veiled threats against the UK by Google[1] and others regarding AI policy. Google's threats must be taken in context of other lobbying by the company and its confederates. Speaking at the *Axios AI+ Summit* conference in Washington DC[2] on November 28, 2023, Google's former Executive Chairman Eric Schmidt said:

> **The tech people along with myself** have been meeting for about a year [2022-2023]. The narrative goes something like this: We are moving well past regulatory or government understanding of what is possible, **we accept that**.
>
> Strangely...this is the first time that the senior leaders who are engineers have basically said that they **want** regulation, but we want it in the following ways...which as you know never works in Washington [unless you can write an Executive Order and get the President to sign it]….
> So far we are on a win, the taste of winning is there. If you look at the UK event which I was part of [the AI Safety Summit held at Bletchley Park on 1 Nov. 2023], **the UK government took the bait**, took the ideas, decided to lead, they're very good at this, and they came out with very sensible guidelines.
>
> Because the US and UK have worked really well together—there's a group within the National Security Council here that is particularly good at this, and they got it right, and that produced [Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence[3]] which is I think is the longest EO in history, that says all

[1] Debbie Weinstein, *Unlocking the UK's AI Potential*, Google (Sept. 2024) available at https://static.googleusercontent.com/media/publicpolicy.google/en//resources/uk_ai_opportunity_agenda_en.pdf ("AI's transformative potential means that we are at an early but critical juncture of policymaking. AI-powered innovation could create over £400 billion in economic value for the UK by 2030, deliver enormous productivity gains across all sectors of the UK economy, help to solve pressing societal issues and advance progress in fundamental sciences. But these benefits will not come automatically. To realise AI's full potential, a comprehensive AI opportunity agenda will be required" at 3.)

[2] Axios AI+ Summit, available at https://www.youtube.com/watch?v=8w-betyOjxU

[3] President Joseph R. Biden, Executive Order 14110 *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (October 30, 2023) available at https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence

> aspects of our government are to be organized around [concessions to Mr. Schmidt's confederates among the unnamed "tech people"].

In other words, Eric Schmidt and his confederates colluded to draft an executive order they got signed by the President of the United States through their blatant political influence that would make Rupert Murdoch blush. But to our point, it doesn't stop there. If past is prologue, it is almost a certainty that Mr. Schmidt's dedicated group of likeminded people included no one resident outside of the US, no UK companies and certainly no artists. Yet Mr. Schmidt then used President Biden's Executive Order as what he called "bait" to deceive the Prime Minister of the United Kingdom. And then he had the brass to publicly brag about it smugly to the press at the Axios conference. Why so smug? He bragged because he knew no one would stop him and that he'd get away with it. And so far he was correct. That is certainly the tone of Google's near-ultimatum delivered to the Government by Ms. Weinstein.

Those of us who have dealt with Big Tech for decades are not surprised. When it comes to companies like Google, Meta, Microsoft, and others in the "Magnificent 7" stocks there are no national boundaries because these companies are as rich as some countries and richer than many. In fact, we would only be surprised if Mr. Schmidt did *not* engage in these shenanigans and then treat the former Prime Minister (and current Prime Minister for that matter) as a lesser mortal who can be baited. He will no doubt move on to use the US policy to influence the UK and then the US and UK policy to influence Europe, and the US, UK and Europe policy to influence Australia, South Africa, and so on.

Silicon Valley is not particularly interested in "licensing" as we would imagine it in the world of artists. As one Silicon Valley lawyer told me, we decide what we think is fair and then we shove it down your throat. That has certainly been the process for twenty years and that very much feels like the path these the biggest of these big companies are taking with AI training, except now they do it with countries, not just artists whether they are trying to convince you to abandon green policies to finance private power plants or to abandon creators to establish yet another safe harbor that will retroactively legalize their copyright land grab.

It was very likely all part of the plan that began decades ago with Google Books and similar maneuvers devoted to expanding copyright exceptions in particular and weakening artist rights in general. This dedicated group of likeminded people seek to turn unimaginable wealth into even greater personal riches.

This is an important reason, among many others, why American creators are as interested in what happens in the UK as are the American AI platforms. Each are very interested for opposing reasons and each are directly affected by the outcome of this consultation.

The Next Safe Harbor "Hallucination"

Text and data mining exceptions are the next in line to be distorted by Big Tech through lobbying and litigation. For example, we recently joined in a submission by the Digital Creators Coalition to the U.S. Trade Representative on the USTR's Special 301 review that highlighted the distortion of TDM exceptions outside of the US. That submission includes language relevant to this consultation:

> The borderless nature of digital exploitation means that negative impacts of one nation's TDM exception would be global as AI models trained in one country on creative content without consent from, or compensation to, rights holders would be exploited around the world. Such global copyright arbitrage would deny the creative community the opportunity to license their content for training and **would contravene international copyright treaties, including the three-step test contained in the Berne Convention, TRIPS Agreement, WIPO Internet Treaties, and other international agreements**.
>
> In this context, we stress that so called "opt-out" provisions for rightsholders to reserve their rights are wholly inadequate to remedy the critical flaws inherent in TDM exceptions for a variety of practical reasons. Such schemes would create a fundamentally asymmetrical obligation, imposing the onus entirely on copyright holders and forcing them to rely on unproven means and nonexistent jurisprudence that will create legal uncertainty, chill licensing negotiations, and make enforcement highly challenging.[4]

The outcome of this consultation will have a direct bearing on how we view U.S. trade policy particularly the inadequacy of any opt-out regime.

[4] Digital Creators Coalition, *DCC Written Comments in Response to USTR's Request for Comments Regarding the 2025 Special 301 Review (Docket No. USTR-2024-0023 89 Fed. Reg. 97161)* (January 27, 2025) available at https://artistrightswatch.com/wp-content/uploads/2025/02/ustr-2024-0023-0024_attachment_1.pdf

Mass Digitization Foreshadowed the Current Crisis

The lobbying effort that relates to this consultation is the most recent in a long history. At the outset of the Google Books mass digitization project, it was apparent that they were up to something. Google Books was only the first step on a long journey toward the digitization of mankind and ultimately the epistemology of what George Dyson called the "invisible architect," a secularized digital God.

Back in 2005, only rarely did the movers and shakers of Silicon Valley say the quiet part out loud outside of the founding of Singularity University[5] and a few other clues for the observant. In 2025, the end game, or perhaps the end of the beginning of the game, is more readily apparent. Silicon Valley's AI public policy lobbying efforts in the UK are quite tangible.

We appreciate the opportunity to comment on the Intellectual Property Office's consultation on Copyright and AI. At the outset, we ask the IPO to entertain, if not embrace, a simple concept: Copyright is not a "regulation" any more than human rights are a "regulation." We do not speak of war criminals as violating regulations; we speak of them as committing crimes against humanity.

Protecting human expression is not mere "regulation." Such protections are fundamental and not just a line of code that keeps the humans quiet while commerce is done by the machines such as "robots.txt". Human expression is enshrined and protected in human rights documents that have rarely been as important to humanity as they are today.

For example, the Universal Declaration of Human Rights recognizes the fundamental truth of the human rights of creators: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary

[5] Financed in part by Google and founded by Google's executive Ray Kurzweil. *Google backs Singularity Uni to allow students outside US to study for free*, CIO (Jan. 29, 2015) available at https://www.cio.com/article/213866/google-backs-singularity-uni-to-allow-students-outside-us-to-study-for-free.html.

or artistic production of which he is the author."[6] This basic principle of authorship in the Declaration resonates in a host of other human rights documents.[7]

In the rush to embrace AI, restrictions placed on mass digitization and ingestion of works of human expression into AI data factories is often viewed negatively as juxtaposed to "innovation." Big Tech militates against "regulations" as blocking the proliferation of "innovation."

This is particularly true if a restriction slows down the mad rush to stand entire economies upside down solely for the benefit of the massively financed artificial intelligence cabal. Requiring AI companies to respect copyright and related rights is often viewed as such a "regulation." We wish to emphasize to the IPO that the

[6] United Nations, Universal Declaration of Human Rights (General Assembly Resolution 217 A) Art. 27, par. 2 (Dec. 10, 1948) (emphasis added). See also generally Christian Castle, Artist Rights are Human Rights, Medium (Sept. 27, 2015) available at https://medium.com/@MusicTechPolicy/artist-rights-are-human-rights-dddb0fe194c8 ("The human rights of artists is a different concept from intellectual property rights, such as copyright. Intellectual property rights are created by national laws, and the human rights of artists are recognized as the fundamental rights of all persons by all of the central human rights documents to which hundreds of countries have agreed….It is important to remember that human rights are fundamental, inalienable, and universal entitlements belonging to individuals, individual artists [and performers] in our case. As a legal matter, human rights can be distinguished from intellectual property rights. Intellectual property rights are arguably subordinate to human rights and actually implement at the national level the very human rights recognized as transcending international and national intellectual property laws.").

[7] See, e.g., United Nations, *International Covenant on Economic, Social and Cultural Rights* (General Assembly resolution 2200A (XXI)) (Dec. 16, 1966) Article 15, par. 1 (c) ("The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.")(emphasis added); *American Declaration of the Rights and Duties of Man* (Inter-American Commission on Human Rights) (1948) Article 13, par. 2 ("Every person has the right…to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author"); Department of International Law (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* "Protocol of San Salvador", Article 14, par. 1 (c) ("The States Parties to this Protocol recognize the right of everyone…[t]o benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author"); and Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (Treaty ETS 5), Article 1 Protocol No. 1 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law").

mass failure to respect human expression, including copyright, in obeisance to an ill-defined and idealized "innovation" is simply a facile gloss. That gloss would have mankind excuse a data-starved beast promoted by the beneficiaries of the Internet bubble, one of the largest generational wealth transfers in human history.

The AI Bubble

Crucially, the artificial intelligence frenzy is starkly reminiscent of the Internet bubble of 1995-2000 that preceded the Dot Bomb Crash. The widespread adoption of the Internet led to a speculative investment frenzy in the late 1990s fueled by an overheated initial public offering market. Many venture capital firms and their investors poured money into Internet-based companies with valuations that were sometimes wildly inconsistent with their business models. From 1995 to 2000, the Nasdaq Composite Index rose by over 400% as firms with ".com" in their names saw stock prices soar, even if they had no profits, positive cash flow, or even much or any top-line revenue. Venture capitalists and underwriting syndicates hyped these shares to cash in on the wave of IPOs. By the time governments began to understand that something needed to be done, the wealth accumulated by Internet companies like Google was being translated into political power.

The entire Dot Com episode is an important reminder of the destructive nature of herd behavior among investors chasing the new-new-thing and widespread market speculation. We are concerned that AI may be Dot Com 2.0.[8] Just as creators were largely road kill on the Information Superhighway, we are concerned that it will happen again except this time they may come for all of us. We cannot rely on what Tennessee Williams called "the kindness of strangers."

[8] See, e.g., Jennifer Sor, *Why top tech analyst Gene Munster says investors have 2 years before the tech bubble bursts*, MARKETS INSIDER (Jan. 12, 2025) available at https://markets.businessinsider.com/news/stocks/stock-market-crash-ai-tech-bubble-nvidia-outlook-gene-munster-2025-1; Kolawole Samuel Adebayo, *Experts Predict The Bubble May Burst For AI In 2025*, FORBES (Jan. 20, 2025) available at https://www.forbes.com/sites/kolawolesamueladebayo/2025/01/20/experts-predict-the-bubble-may-burst-for-ai-in-2025/.

We were pleased to hear Culture Secretary Lisa Nandy crystalize the key issue:

> We have reservations about this idea that you can simply just say I want to opt out and then find that you have been completely erased from the internet.[9]

Of course, it is not just the creative community that is potentially fatally compromised by the rush to the AI bubble due to the prioritization of radical changes to national economies required, unlike a cure for cancer or other national priorities, that are vehicles for the very rich American companies to grow even richer.

Oregon Taxpayers' Experience with Crowding Out by Data Centres is a Cautionary Tale for UK

We call the IPO's attention to the real-world example of the U.S. State of Oregon, a state that is roughly the geographical size of the UK. Google built the first Oregon data centre in The Dalles, Oregon in 2006. *Oregon now has **125** of the very data centres* that Big Tech will necessarily need to build in the UK to implement AI. In other words, Oregon was sold much the same story that Big Tech is selling you today.

The rapid growth of Oregon data centres driven by the same tech giants like Amazon, Apple, Google, Oracle, and Meta, has significantly increased Oregon's demand for electricity. This surge in demand has led to higher power costs, which are often passed on to local rate payers while data centre owners receive tax benefits. This increase in price foreshadows the market effect of crowding out local rate payers in the rush for electricity to run AI—demand will only increase and increase substantially as we enter what the International Energy Agency has called "the age of electricity".[10]

Portland General Electric, a local power operator, has faced increasing criticism for raising rates to accommodate the encroaching electrical power needs of

[9] Robert Booth, *Paul McCartney Warns that "AI Could Take Over" as UK Debates Copyright Laws*, THE GUARDIAN (Dec. 10, 2024) available at https://www.theguardian.com/technology/2024/dec/10/paul-mccartney-ai-warning-uk-debates-copyright-laws.

[10] International Energy Agency, *Electricity 2025* (Revised Edition Feb. 2025) available at https://iea.blob.core.windows.net/assets/0f028d5f-26b1-47ca-ad2a-5ca3103d070a/Electricity2025.pdf.

these data centers. Local residents argue that they unfairly bear the increased electrical costs while data centers benefit from tax incentives and other advantages granted by government.[11]

This is particularly galling in that the hydroelectric power in Oregon is largely produced by massive taxpayer-funded hydroelectric and other power projects built long ago.[12] The relatively recent 125 Oregon data centres received significant tax incentives during their construction to be offset by a promise of future jobs. While there were new temporary jobs created during the construction phase of the data centres, there are relatively few permanent jobs required to operate them long term *as one would expect* from digitized assets owned by AI platforms.

Of course, the UK has approximately 16 times the *population* of Oregon. Given this disparity, it seems plausible that whatever problems that Oregon has with the concentration of data centers, the UK will have those same problems many times over due to the concentration of populations.

The main goal of any bubble profiteer is to prevent people who control the money from thinking too much about the black box they are trying to sell you. They would have you believe that their goal is to save mankind or at least to better humanity, whether humanity likes it or not. Not that they are motivated by getting even richer still from selling ivory, rubber, Internet advertising, personal data, AI, or autonomous weapon systems. One can imagine a King Leopold II feeling right at home in the board rooms of Silicon Valley.

The Internet is its own kind of colony where the inhabitants' digital labor is often uncompensated. An opt-out regime just locks in this inequity.
We wish to emphasize to the IPO that this effort by AI platforms from Silicon Valley has been a long time coming, is well thought out and is extremely well funded. It is the last stand of UK's creators, if not the world's creative community. Withstanding this assault will require courage and resolve. It is no

[11] Jamie Parfitt, *As PGE closes in on another rate increase, are the costs of growing demand for power being borne fairly?* KGW8 NEWS (Dec. 13, 2024) available at https://www.kgw.com/article/news/local/the-story/pge-rate-increase-data-centers-power-cost-demand-growth/283-399b079b-cbf5-41cf-8190-4c5f204d2d90 ("Like utilities nationwide, PGE is experiencing a surge in requests for new, substantial amounts of electricity load, including from advanced manufacturing, data centers and AI-related companies.")

[12] See, e.g., State of Oregon, Facilities Under Energy Facility Siting Council available at https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Facilities-Under-EFSC.aspx

time to go wobbly.[13]

Answers to Relevant Consultation Questions

While we appreciate the opportunity to comment and the thoroughness of the questions raised by the IPO, we are limiting our comments to the most relevant questions to our expertise and experience.

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

No. It must be said that the "reservation of rights" concept is fraught with administrative costs for government, rights owners, and AI platforms. A reservation system places a burden on any copyright owner but also anyone who posts on social media. It places the burden in exactly the wrong place—not the AI platform that almost by definition has already raised millions if not billions[14] and profits through the exploitation of millions of works, but rather on the person whose work is being consumed by the platform's data aggregation crawlers. Even if we entertain the concept of a reservation of rights system, there currently is no identification system that can inform an AI of what works are being reserved much less what rights are reserved.

Prohibitions on Formalities

It must also be said that a reservation of rights system simply adds formalities to the current copyright system. The Berne Convention's prohibition on formalities[15] is a key principle that ensures the protection of copyright without requiring any formal procedures. According to Article 5(2) of the Berne Convention, the "enjoyment and the exercise" of copyright shall not be subject to any formality. This means that authors do not need to register their works, provide copyright notices, or comply with any other formalities to enjoy

[13] The Right Honourable The Baroness Thatcher, *The Downing Street Years* (1993) at 823.

[14] By some estimates, AI startups received nearly half of all venture capital investments in 2024. See, e.g., Sherin Shibu, *Almost Half of VC Funding Raised Last Year Went to Startups in One Category*, ENTREPRENEUR (Jan. 7, 2025) available at https://www.entrepreneur.com/business-news/ai-startups-raised-almost-half-of-all-funding-in-2024/485250.

[15] See *Berne Convention for the Protection of Literary and Artistic Works* art. 5(2), Sept. 28, 1979, S. Treaty Doc. No. 99-27.

copyright protection. Similar prohibitions are included in other international treaties to which the UK is a party.[16]

Moreover, a national opt-out exception in the UK places a significant burden on both UK and foreign authors to ascertain the existence and scope of such a UK-specific exception as well as how to avoid its application. The downside for artists is losing control of the artist's life's work; the downside for an AI platform will no doubt be minimal, if any. *This is the point* for AI platforms and certainly has been the point for the notice and takedown system. It is at the heart of the resounding criticism that the reservation of rights scheme has received both in the House of Lords as well as in public commentary.[17]

In fact, we suggest that this entire concept is very similar to the current notice and takedown system for copyright infringement online that requires creators to police the internet with no assistance from government whatsoever. The fact that the result of a violation is that the violator would infringe copyright means that individual rights owners would be required to police AI companies, too, with no assistance from the government.

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[16] See, e.g., *Agreement on Trade-Related Aspects of Intellectual Property* art. 9(1), Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS] ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto."); *WIPO Copyright Treaty* art. 1(4), Dec. 20, 1996, 2186 U.N.T.S. 121 (extending protection to computer programs and databases: "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention."); *WIPO Performances and Phonograms Treaty* art. 20, Dec. 20, 1996, 2186 U.N.T.S. 203 (extending protection to sound recordings and certain performances: "The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality."); see also *Beijing Treaty on Audiovisual Performances* art. 17, June 24, 2012, 51 I.L.M. 1214 (extending protection to audiovisual fixations of performances and certain unfixed performances: "The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.").

[17] See, e.g., Michael Savage, *'An existential threat': anger over UK government plans to allow AI firms to scrape content*, THE OBSERVER (OCT. 28, 2024) available at https://www.theguardian.com/technology/2024/oct/26/an-existential-threat-anger-over-uk-government-plans-to-allow-ai-firms-to-scrape-content;
Virginie Berger, *What The U.K.'s AI Copyright Reform Means For 2025 And Beyond*, FORBES (Dec. 17, 2024) available at https://www.forbes.com/sites/virginieberger/2024/12/17/what-the-uks-ai-copyright-reform-means-for-2025-and-beyond/; Owen Meredith, *New Media Association Responds to Government Consultation on AI and Copyright,* NEWS MEDIA UK (Dec. 17, 2024) available at https://newsmediauk.org/blog/2024/12/17/nma-responds-to-government-consultation-on-ai-copyright/.

Why Can't Creators Call 999?

We suggest a very simple policy guideline—if an artist is more likely to be able to get the police to stop their car from being stolen off the street than to get the police to stop the artist's life's work from being stolen online by a heavily capitalized AI platform, the policy will fail. Alternatively, if an artist can call the police and file a criminal complaint against a Sam Altman or a Sergei Brin for criminal copyright infringement, now we are getting somewhere.

As a threshold matter, it is clear that AI platforms intend to continue scraping all the world's culture for their purposes without obtaining consent or notifying rightsholders. It is likely that the bigger platforms *already have*. For example, we have found our own writings included in CoPilot outputs. Not only did we not consent to that use, but we were also never asked. Moreover, CoPilot's use of these works clearly violates our terms of service. This level of content scraping is hardly what was contemplated with the "data mining" exceptions.

Faux "Data Mining" is the Key that Picks the Lock of Human Expression

We strongly disagree that all the world's culture can be squeezed through the keyhole of "data" to be "mined" as a matter of legal definitions. In fact, a recent study by leading European scholars have found that data mining exceptions were never intended to excuse copyright infringement:

> Generative AI is transforming creative fields by rapidly producing texts, images, music, and videos. These AI creations often seem as impressive as human-made works but require extensive training on vast amounts of data, much of which are copyright protected. This dependency on copyrighted material has sparked legal debates, as AI training involves "copying" and "reproducing" these works, actions that could potentially infringe on copyrights. In defense, AI proponents in the United States invoke "fair use" under Section 107 of the [US] Copyright Act [a losing

> argument in the one reported case on point[18]], while in Europe, they cite Article 4(1) of the 2019 DSM Directive, which allows certain uses of copyrighted works for "text and data mining."
>
> This study challenges the prevailing European legal stance, presenting several arguments:
>
> 1. The exception for text and data mining ***should not apply to generative AI training because the technologies differ fundamentally - one processes semantic information only, while the other also extracts syntactic information***.
>
> 2. ***There is no suitable copyright exception or limitation to justify the massive infringements occurring during the training of generative AI***. This concerns the copying of protected works during data collection, the full or partial replication inside the AI model, and the reproduction of works from the training data initiated by the end-users of AI systems like ChatGPT….[19]

Moreover, the existing text and data mining exception in European law was never intended to address AI scraping and training:

> Axel Voss, a German centre-right member of the European parliament, who played a key role in writing the EU's 2019 copyright directive, said

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[18] *Thomson-Reuters Enterprise Centre GMBH v. Ross Intelligence, Inc.*, (Case No. 1:20-cv-00613 U.S.D.C. Del. Feb. 11, 2025) (Memorandum Opinion, Doc. 770 rejecting fair use asserted by defendant AI platform) available at https://storage.courtlistener.com/recap/gov.uscourts.ded.72109/gov.uscourts.ded.72109.770.0.pdf ("[The AI platform]'s use is not transformative because it does not have a 'further purpose or different character' from [the copyright owner]'s [citations omitted]…I consider the "likely effect [of the AI platform's copying]"….The original market is obvious: legal-research platforms. And at least one potential derivative market is also obvious: data to train legal AIs…..Copyrights encourage people to develop things that help society, like [the copyright owner's] good legal-research tools. Their builders earn the right to be paid accordingly." Id. at 19-23). See also Kevin Madigan, *First of Its Kind Decision Finds AI Training Is Not Fair Use*, COPYRIGHT ALLIANCE (Feb. 12, 2025) available at https://copyrightalliance.org/ai-training-not-fair-use/ (discussion of AI platform's landmark loss on fair use defense).

[19] Professor Tim W. Dornis and Professor Sebastian Stober, *Copyright Law and Generative AI Training - Technological and Legal Foundations*, RECHT UND DIGITALISIERUNG/DIGITIZATION AND THE LAW (Dec. 20, 2024)(Abstract) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4946214.

> that law was not conceived to deal with generative AI models: systems that can generate text, images or music with a simple text prompt.[20]

Confounding culture with data to confuse both the public and lawmakers requires a vulpine lust that we haven't seen since the breathless Dot Bomb assault on both copyright and the public financial markets. This lust for data, control and money will drive lobbyists and Big Tech's amen corner to seek copyright exceptions under the banner of "innovation." Any country that appeases AI platforms in the hope of cashing in on tech at the expense of culture will be appeasing their way towards an inevitable race to the bottom. More countries can be predictably expected to offer ever more accommodating terms in the face of Silicon Valley's army of lobbyists who mean to engage in a lightning strike across the world. The fight for the survival of culture is on. The fight for survival of humanity may literally be the next one up.

We are far beyond any reasonable definition of "text and data mining." What we can expect is for Big Tech to seek to distract both creators and lawmakers with inapt legal diversions such as trying to pretend that snarfing down all with world's creations is mere "text and data mining". The ensuing delay will allow AI platforms to enlarge their training databases, raise more money, and further the AI narrative as they profit from the delay and capital formation.

The Delay's the Thing

However antithetical, copyright and AI must be discussed together for a very specific reason: Artificial intelligence platforms operated by Google, Microsoft/OpenAI, Meta and the like have scraped and ingested works of authorship from baby pictures to Sir Paul McCartney as fast and as secretly as possible. And the AI platforms know that the longer they can delay accountability, the more of the world's culture they will have devoured—or as they might say, the more data they will have ingested. For the good of humanity, of course.

[20] Jennifer Rankin, *EU accused of leaving 'devastating' copyright loophole in AI Act*, THE GUARDIAN (Feb. 19, 2025) available at https://www.theguardian.com/technology/2025/feb/19/eu-accused-of-leaving-devastating-copyright-loophole-in-ai-act

As the Hon. Alison Hume, MP recently told Parliament, this theft is massive *and has already happened*, another example of why any "opt out" scheme has failed before it starts:

> This week, I discovered that the subtitles from one of my episodes of *New Tricks* have been scraped and are being used to create learning materials for artificial intelligence. Along with thousands of other films and television shows, my original work is being used by generative AI to write scripts which one day may replace versions produced by mere humans like me.
>
> This is theft, and it's happening on an industrial scale. As the law stands, artificial intelligence companies don't have to be transparent about what they are stealing.[21]

Any delay[22] in prosecuting AI platforms simply increases their *de facto* TDM safe harbor while they scrape ever more of world culture. As Ms. Hume states, this massive "training" has transferred value to these data-hungry mechanical beasts to a degree that confounds human understanding of its industrial scale infringement. This theft dwarfs even the Internet piracy that drove broadband penetration, Internet advertising and search platforms in the 1999-2010 period. It must be said that for Big Tech, commerce and copyright are once again inherently linked for even greater profit.

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[21] Paul Revoir, *AI companies are committing 'theft' on an 'industrial scale', claims Labour MP - who has written for TV series including New Tricks*, DAILY MAIL (Feb. 12, 2025) available at https://www.dailymail.co.uk/news/article-14391519/AI-companies-committing-theft-industrial-scale-claims-Labour-MP-wrote-TV-shows-including-New-Tricks.html

[22] See, e.g., Kerry Muzzey, [YouTube Delay Tactics with DMCA Notices], Twitter (Feb. 13, 2020) available at https://twitter.com/kerrymuzzey/status/1228128311181578240 (Film composer with Content ID account notes "I have a takedown pending against a heavily-monetized YouTube channel w/a music asset that's been fine & in use for 7 yrs & 6 days. Suddenly today, in making this takedown, YT decides "there's a problem w/my metadata on this piece." There's no problem w/my metadata tho. This is the exact same delay tactic they threw in my way every single time I applied takedowns against broadcast networks w/monetized YT channels….And I attached a copy of my copyright registration as proof that it's just fine."); Zoë Keating, [Content ID secret rules], Twitter (Feb. 6. 2020) available at https://twitter.com/zoecello/status/1225497449269284864 (Independent artist with Content ID account states "[YouTube's Content ID] doesn't find every video, or maybe it does but then it has selective, secret rules about what it ultimately claims for me.").

As the Right Honourable Baroness Kidron said in her successful opposition to the UK Government's AI legislation in the House of Lords:

> The Government are doing this not because the current law does not protect intellectual property rights, nor because they do not understand the devastation it will cause, but because *they are hooked on the delusion that the UK's best interests and economic future align with those of Silicon Valley*.[23]

Baroness Kidron identifies a question of central importance that mankind is forced to consider by the sheer political brute force of the AI lobbying steamroller: What if AI is another bubble like the Dot Com bubble? AI is, to a large extent, a black box utterly lacking in transparency much less recordkeeping or performance metrics. As Baroness Kidron suggests, governments and the people who elect them are making a very big bet that AI is not pursuing an ephemeral bubble like the last time.

Indeed, the AI hype has the earmarks of a bubble, just as the Dot Com bubble did. Baroness Kidron also reminds us of these fallacious economic arguments surrounding AI:

> The Prime Minister cited an IMF report that claimed that, if fully realised, the gains from AI could be worth up to an average of £47 billion to the UK each year over a decade. He did not say that the very same report suggested that unemployment would increase by 5.5% over the same period. This is a big number—a lot of jobs and a very significant cost to the taxpayer. *Nor does that £47 billion account for the transfer of funds from one sector to another. The creative industries contribute £126 billion per year to the economy. I do not understand the excitement about £47 billion when you are giving up £126 billion.*[24]

[23] The Rt. Hon. Baroness Kidron, *Speech regarding Data (Use and Access) Bill [HL] Amendment 44A*, HOUSE OF LORDS (Jan. 28, 2025) available at https://hansard.parliament.uk/Lords%E2%80%8F/2025-01-28/debates/9BEB4E59-CAB1-4AD3-BF66-FE32173F971D/Data(UseAndAccess)Bill(HL)#contribution-9A4614F3-3860-4E8E-BA1E-53E932589CBF

[24] Id.

As Hon. Chris Kane, MP said in Parliament, the Government runs the risk of enabling a wealth transfer that itself is not producing new value:

> Copyright protections are not a barrier to AI innovation and competition, but they are a safeguard for the work of an industry worth £125 billion per year, employing over two million people. We can enable a world where much of this value is transferred to a handful of big tech firms or we can enable a win-win situation for the creative industries and AI developers, one where they work together based on licensed relationships with remuneration and transparency at its heart.

Socializing Costs of AI and Privatizing Gains from AI

Many of the same players in the current AI bubble also cashed in on the Internet bubble. This would include companies like Amazon, Google, and Microsoft but also financiers like Sequoia, Andreessen-Horowitz, and Softbank. These are experienced bubble riders.

No doubt they would like to cash in again, perhaps even more so than before the Dot Bomb Crash. This requires stoking the bubble machine to sustain not only investment by venture capital firms, but especially the investment *into* venture capital firms by pension funds and high net worth individuals. Because AI will require massive retooling of national infrastructure including electricity generation and transmission, these firms will expect taxpayers around the world to provide the corporate welfare necessary to redirect national energy policy and intellectual property such as this consultation.

As these AI platforms breathlessly move through the traditional trail ride to public market riches, they will need to convince underwriting syndicates and governments to allow them into both the public stock markets, municipal bonds, and tax revenues. Because why use your own money when other people's money is so readily available? Particularly OPM from the taxpayer. And not just the taxpayers in the US—*all* the taxpayers. Taxpayers may not invest in the AI platforms themselves but will be asked to "invest" in the national infrastructure spend for the build-out necessary to provide the electrification and data processing centers to support AI. Net zero carbon emissions will just have to wait while AI platforms socialize their costs and privatize their returns.

5. Which option do you prefer and why?

Option 1: Strengthen copyright requiring licensing in all cases.

There is No Opting Out for Canaries in the Data Mine

This consultation by the Intellectual Property Office largely frames in economic and commercial terms the public policy questions inherent in any discussion of the collision between commercial development of artificial intelligence and the rights of human expression including copyright. It must be said at the outset that commercial development of artificial intelligence and copyright are not inherently linked. In our view, these objectives inherently conflict.

Not only are these objectives theoretically in conflict, when creators who survived Internet piracy look across another bargaining table they can't afford, they see many of the same faces from Silicon Valley promoting AI that artists saw during the Dot Com era. These same entities are attacking them again, but this time with artificial intelligence and a lot more wealth and the political firepower that comes with great wealth. But this cast of characters still want to party like it's 1999.

Predictably, these old adversaries are taking the same well-rehearsed attack strategy. First, grab our copyrights while chanting mantras about "permissionless innovation" or other excuses. Then dip into the deep academic bench[25] from leading institutions they have been funding[26] for decades[27] and propagandize theories about how this new colonialism is good for humanity.

[25] *Google Academics, Inc.*, TECH TRANSPARENCY PROJECT available at https://www.techtransparencyproject.org/articles/google-academics-inc

[26] See Matthew Moore, *Google Funds Website the Spams for its Causes*, THE TIMES OF LONDON (August 6, 2018) ("Google is helping to fund a website that encourages people to spam politicians and newspapers with automated messages backing its policy goals[,] intended to amplify the extent of public support for policies that benefit Silicon Valley[.]"); Former Member of the European Parliament Helga Truepel tweeted about her experience in the European Copyright Directive that "[c]opyright lawyers of @Facebook and @Google told me last September in #SiliconValley that they will interfere in European lawmaking. And they did." TWITTER (Feb. 19, 2019) available at https://twitter.com/HelgaTruepel/status/1098071632273301505

[27] *Mission Creep-y,* PUBLIC CITIZEN (Nov. 2014) available at https://www.citizen.org/wp-content/uploads/google-political-spending-mission-creepy.pdf

Somewhere right about this point in the timeline they enlist the aid of the World Economic Forum[28] and other nonprofits.[29]

Next comes the litigation as sure as the navy followed the missionaries. Now they cash in on the deep bench of lawyers trained through the law schools they fund[30] and the decades of copyright litigation[31] they have inflicted on the creators who cannot afford to fight back. They will then run to their allies in the political class and point to this "inefficient litigation" as bootstrapping evidence that the law is so "unclear" that it requires a legislative fix under the cloak of "modernization".

And not just any modernizing legislative fix, but a brand-new set of safe harbors all shiny and chrome that they can hang on the trophy wall next to the many other safe harbors they have created under the sanitized name of "exceptions" to "clarify" the "unclear" laws. All of which is designed to justify the land grab that started the process under the guise of permissionless innovation.

And of course, add in the fuel of the mother's milk of intellectual property land grabs, venture capital investment. What was once hundreds of millions under the Dot Bomb wealth transfer regime is now hundreds of billions in the case of Stargate—dare we say trillions—in the artificial intelligence bubble. And quantity of money has a lobbying quality all its own, like a new law of thermodynamics.

Is this sequence of events sounding familiar yet? There is a difference this time around, though. That difference is that the wealth is concentrated in a handful

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[28] *How the 'Blueprint for Intelligent Economies' can help drive growth through inclusive AI,* WORLD ECONOMIC FORUM (Jan. 24, 2025) available at https://www.weforum.org/stories/2025/01/blueprint-for-intelligent-economies-growth-through-inclusive-ai/

[29] See, e.g., Partnership on AI, https://partnershiponai.org/funding/ ; see also *Mission Creep-y* Appendix B.

[30] See e.g., Harvard Berkman Center, Samuelson-Glushko policy schools, Stanford Internet & Society.

[31] See, e.g., *Ten Times Tech Giants Were Hit With Copyright Lawsuits*, BARINGS LAW, (Nov. 2024) available at https://baringslaw.com/news-insight/ten-times-tech-giants-were-hit-with-copyright-lawsuits/

of AI platforms at least one of which was already an adjudicated monopolist in America[32] and the rest of which are at least dominant, and all of which want to get in on the action.

One big difference is that this time they require so much electricity that there's even talk of one of them re-opening the old Three Mile Island nuclear plant[33] that will be remembered as inspiring *The China Syndrome* movie. The only question is whether the proud owner of a formerly-shuttered nuclear power plant intends to share that electricity with the public. We think not.[34] The whole point of reopening that nuclear plant is to feed AI.

This feeding of the data-devouring mechanical beast is the principal difference between the Internet era of 1999 and the AI era of the rest of the 21st Century. During the Internet era, there was always an analog possibility to the digital reality that could produce an analog John Galt.[35] It is increasingly obvious that there will soon be no sheltering from AI. As usual, the canaries in the data mine are musicians, artists, authors, and culture, followed closely by the work product of the free labor on social media platforms, family websites, Wikipedia and Creative Commons that have already been press-ganged into training their AI replacements.

Respectfully, we are trying to understand why the IPO wants to *encourage* these people to come to the UK. Maybe Microsoft's purchase of Three Mile Island will inspire Google Energy to buy Sellafield.[36] Take it from our own experiences with Silicon Valley and the DMCA notice and takedown regime, Big Tech has already

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[32] *United States v. Google LLC*, No. 20-cv-3010, 2024 WL 3647498 (D.D.C. Aug. 5, 2024); see also Comment, *United States v. Google LLC*, 138 HARV. L. REV. 891 (2025) available at https://harvardlawreview.org/print/vol-138/united-states-v-google-llc/#footnote-7

[33] Casey Crownhart, *Why Microsoft Made a Deal to Help Restart Three Mile Island*, MIT TECH. REV. (Sept. 26, 2024) available at https://www.technologyreview.com/2024/09/26/1104516/three-mile-island-microsoft/ ("The site's owner announced last week that it has plans to reopen the plant and signed a deal with Microsoft. The company will purchase the plant's entire electric generating capacity over the next 20 years.")

[34] Id.

[35] John Galt, Ayn Rand character from Atlas Shrugged, WIKIPEDIA available at https://en.wikipedia.org/wiki/John_Galt ("…[John Galt] believes in the power and glory of the human mind, and the rights of individuals to use their minds solely for themselves.")

[36] Sellafield, WIKIPEDIA available at https://en.wikipedia.org/wiki/Sellafield (article on Sellafield former nuclear power plant in Cumbria, England).

come to extract uncompensated value from the world's copyrights and there is no turning back. AI platforms have *already* consumed massive numbers of copyrights and there is no opting out of the problem that they have already created.

6. Do you support the introduction of an exception along the lines outlined in section C of the consultation?

Please give us further comments.

No. Given the history of how Big Tech platforms have treated creators in the Internet piracy era as well as how these platforms have disrespected creator rights in the development of AI databases, they lack the credibility to be trusted with yet another copyright exception or a "safe harbor."

AI Does Not Require the Magic Wand of Another Safe Harbor

Discussing AI commerce may be necessary, but commercial analysis alone without a discussion of AI's cost to human expression is not sufficient. Given that the data hungry AI is hoovering up all the world's content from Hockney to baby pictures, the theft that Ms. Hume speaks of is way beyond copyright.

In any discussion about copyright and artificial intelligence, the credibility of the witnesses is crucial. There are increasing reports in credible sources that a relative handful of the richest companies with the most powerful lobbyists and lawyers have engaged in an organized and massive copyright infringement on a scale that we have never seen in the history of mankind.

We can deduce by asking those experts with actual knowledge, such as Mr. Elon Musk. Mr. Musk was interviewed in 2023 by the well-known business reporter Andrew Ross Sorkin for Mr. Sorkin's New York Times Deal Book Summit.[37] Mr. Sorkin asked Mr. Musk a question about copyright and AI which drew a reply relevant to today's proceedings—a reply which no one has denied that we are aware of.

[37] New York Times Events, Deal Book Summit (Nov. 29, 2023) at 56 available at https://youtu.be/2BfMuHDfGJI?t=3337

SORKIN

Can I ask you an interesting IP issue...one of the things about training on data is the idea that these things are not being trained on peoples copyrighted information historically, that's been the concept.

MUSK

That's a huge lie.

SORKIN

Say that again?

MUSK

These AIs are all trained on copyrighted data, obviously.

SORKIN

So you think it's a lie when OpenAI says...none of these guys say they are training on copyrighted data?

MUSK

That's a lie.

SORKIN

A straight up lie.

MUSK

A straight up lie. 100%. Obviously it's been trained on copyrighted data.

The solution? The AI platforms would have you believe that "regulation" like copyright or privacy rights will stymie innovation, so you must not "regulate" them by requiring that they respect these human rights. But there's only one certain way to get away with massive copyright infringement—convince the

government to make legal that which was previously illegal.[38] Which brings us to the idea of yet another copyright exception.

Like the Dot Com Bubble required the benighted safe harbor legislation in America known as "Section 230" and the "DMCA" and known in the UK as the Electronic Commerce Regulations, the IPO is proposing yet another safe harbor for many of the same companies. This time the safe harbor will take the form of a new safe harbor that ignores the massive infringement that has *already* occurred and about which Mr. Musk tells us these companies lie to your face.

We would also ask the IPO to embrace another pressing aspect of the current crisis with AI which is the issue of timing. It must be said that massive infringement *has already occurred*. The longer AI companies can make governments chase their tails with the "regulation vs. innovation" football match, the more infringement can occur. The more infringement occurs, the harder it will be to undo it—and *this is the whole point*. We have seen this movie before and we know how it ends. It is essentially the story of Internet piracy which followed the same playbook.

This is not a guess—many publications have reported the mass infringement and litigation has demonstrated through discovery and cross-examination that intentional and carefully planned mass infringement has been underway for years.[39] AI platforms know they are infringing and they are doing so intentionally. Like massive Internet piracy which involved some of the same players for years, the platforms have two hopes which are not mutually exclusive: Steal so much that only the biggest plaintiffs can afford to sue, and then hope that they can lobby their way to a retroactive safe harbor. The current consultation by the IPO is just such an exercise. It is the same old song: Big Tech would far rather seek forgiveness than permission.

The Google Books saga is a good example of the extremes to which Big Tech will go all under the guise of a holier-than-thou moral smokescreen. As George Dyson

[38] See, e.g., *The Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551*, Public Law 115–264, 132 Stat. 3676 (2018).

[39] Cade Metz, Cecilia Kang, Sheera Frenkel, Stuart A. Thompson and Nico Grant, "How Tech Giants Cut Corners to Harvest Data for AI," *New York Times* (April 8, 2024) available at https://www.nytimes.com/2024/04/06/technology/tech-giants-harvest-data-artificial-intelligence.html ("Google transcribed YouTube videos to harvest text for its A.I. models, five people with knowledge of the company's practices said. That potentially violated the copyrights to the videos, which belong to their creators….Google said that its A.I. models "are trained on some YouTube content," **which was allowed under agreements with YouTube creators,** and that **the company did not use data from office apps outside of an experimental program.**")

the tech historian observed in 2005 after a trip to the Googleplex during the Google Books digitization craze:

> My visit to Google [during the Google Books mass digitization]? *Despite the whimsical furniture and other toys, I felt I was entering a 14th-century cathedral—not in the 14th century but in the 12th century, while it was being built. Everyone was busy carving one stone here and another stone there, with some invisible architect getting everything to fit. T*he mood was playful, yet there was a palpable reverence in the air. ***"We are not scanning all those books to be read by people," explained one of my hosts after my talk. "We are scanning them to be read by an AI."***
> George Dyson, *Turing's Cathedral* (October 23, 2005)[40]

Scanning all the world's literature was the beginning of Google's LLM including the holdings of the British Library, as well as the libraries of Oxford and Cambridge.[41]

The UK government and the IPO have proposed an AI program that is a substantial regulatory freebie concession to the richest corporations in commercial history. According to credible media reports,[42] these beneficiaries of the proposed concessions have already demonstrated a blatant and wholesale disregard for copyright, trademark, data ownership, and privacy—if not their own terms of service.

Artists and songwriters have had a truly awful experience with these very companies. The companies' lack of compliance with existing laws such as the Digital Millennium Copyright Act in the US or the European Copyright Directive demonstrates that they have a harsh and smug disregard for artist rights and human expression.

What guarantees has the IPO obtained from any of these platforms that incent them to behave differently with an AI safe harbor than they have with the

[40] George Dyson, Conversation: Technology (Oct. 23, 2005) available at https://www.edge.org/conversation/george_dyson-turings-cathedral

[41] Google also took a rather unusual interest in orphan works that now seems much more understandable. "I would encourage the Copyright Office to consider not just the very, very small scale, the one user who wants to make use of the work, but also the very, very large scale and talking in the millions of works." U.S. Copyright Office, Orphan Works Roundtable, at 21 (July 26, 2005) (statement of Alexander Macgillivray of Google) (emphasis added), available at https://www.copyright.gov/orphan/transcript/0726LOC.PDF.

[42] See supra n. 39.

Internet safe harbors they already enjoy? Bearing in mind that Google, which is just one player, proudly announces that they have received billions of take down notices for search alone.[43] When someone tells you a billion times that your product is defective, would a normal person say proudly, my product isn't defective, it's working as planned? Why think anything would be different with an AI opt out?

8. If not, what other approach do you propose and how would that achieve the intended balance of objectives?

Please give us further comments.

A Right Without a Remedy is No Right At All[44]

Whatever the UK government decides upon as a solution really must have some tangible punishment for AI platforms that violate the rules. Given the vast wealth of these AI companies, at least three of which have a market capitalization over $1 trillion, leaving it up to artists to pursue a private right of action for copyright infringement plays directly into the hands of Silicon Valley.

We say it again—an artist stands a better chance of seeing a thief punished for stealing their car off the street than an AI platform punished for stealing their life's work online. The net effect of this sad situation is that there is essentially no remedy. Because there is no remedy, infringers are incentivized to do more infringement at an even grander scale.

Artist rights are a life raft on a sea of narcissism and greed with its headwaters in Silicon Valley. Yet those rights are only meaningful if the rights are also enforceable at a market clearing cost. When confronted by massive copyright

[43] Content Delistings Due to Copyright, GOOGLE TRANSPARENCY REPORT (2025) ("URLs Requested to be Delisted: 11,618,623,069 [2012-2025]") available at https://transparencyreport.google.com/copyright/overview

[44] See Sir William Blackstone, 3 BLACKSTONE'S COMMENTARIES 109 ("[I]t is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."); see also *Marbury v. Madison*, 5 U.S. 137 (1803)("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury…The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right" Marshall, J. at 163).

infringement such as *has already transpired* in AI training, individual creators have been found to simply give up rather than bear the cost of enforcing their rights.

Respectfully, the IPO surely cannot simply ignore the status quo. For artist rights to be meaningful and enforceable, artists must be able to rely on their respective national governments to provide a meaningful mechanism to bring claims and in egregious cases, for the police and government prosecutors to enforce those rights. This need is acute when confronted with companies like Google, Meta, Spotify, Amazon, and others because they each have, in their own way, flaunted the vested legal rights of artists and songwriters and have the resources to take on creators as we see repeatedly.[45]

Why? The explanation for why these giants are reported to have snarfed down mind-bending quantities of the content uploaded to their platforms solely for the purpose of AI "training" is very simple—because they know they can get away with it. They employ their well-practiced propaganda tactic of "overload" or "flood the zone" with their enablers, the armies of lobbyists, lawyers, nonprofits, and academics in their paid service.

10. What action should a developer take when a reservation has been applied to a copy of a work?

Please give us your views.

We have stated several times in this consultation that the horse has left the barn on training because AI platforms have chosen to ignore the "reservation" that has already been applied at copyright law and likely other bodies of law as well—the AI platform has no right to use the work concerned or else they would not be in this consultation seeking yet another safe harbor to be applied both retroactively and prospectively. While the legion of lawyers and lobbyists are desperately trying to save their clients through obfuscation by dilatory tactics in copyright lawsuits, courts at least in the US are gradually rejecting defenses such as "fair use."[46]

[45] Tim Adams, *Thom Yorke: If I can't enjoy this now, when do I start?* THE GUARDIAN (Feb. 23, 2013) available at https://www.theguardian.com/music/2013/feb/23/thom-yorke-radiohead-interview ("[Apple and Google] have to keep commodifying things to keep the share price up, but in doing so they have made all content, including music and newspapers, worthless, in order to make their billions.")

[46] See supra *Thomson-Reuters Enterprise Centre GMBH v. Ross Intelligence, Inc*.

It must also be said that the current collective licensing regimes for songs struggle to keep up with demand as the IPO is aware. This has resulted in companies like Spotify being sued many times for copyright infringement for failing to take advantage of existing compulsory licenses tailored to their benefit. Spotify's response was to delay and obfuscate before finally capitulating in a series of settlements, even though the compulsory license system in the US afforded the company many rights. Spotify and its fellow compulsory licensees then pursued a new safe harbor in a strategy not that different than the one followed by AI platforms in this consultation. We have no reason to think that the AI platforms will behave differently under a reservation regime.

This is particularly true if the UK were to adopt a reservation system that essentially forgave retroactively any use of reserved works in existing training databases. If AI platforms get a free pass for bad acts they have already committed, this would create an unfathomable morass.

11. What should be the legal consequences if a reservation is ignored?

Please give us your views.

We fully expect that reservations will be routinely avoided as they are now. If a copyright owner has not licensed for AI inputs or outputs (or even been approached for a license), then they are essentially reserving rights. There should be no additional formalities required, particularly for foreign authors.

Assuming that an AI platform has not complied with whatever reservation process the IPO devises, there should be immediate consequences including swearing out a complaint with the police. This requires that there be a clear "red light/green light" instruction that can easily be understood and applied by a beat copper. This may seem harsh, but in our experience with the trillion-dollar market cap club, the only thing that gets their attention is a legal action that affects behavior rather than damages. Our experience suggests that what gets their attention most quickly is either an injunction or prison. Compensatory damages for violations of a reservation system may best be measured by a statutory damages scheme that a rightsowner could elect, possibly in the form of a three-strikes policy that would introduce punitive damages for repeated violations.

Respectfully, the IPO should anticipate that whatever system you come up with, the AI platforms will violate it at scale. If there is no step beyond which truly bad things happen to them, like they lose the right to do business in the UK, float shares on public markets, and/or their board members are banned from

conducting commerce, experience suggests they will very likely routinely violate the rules as simply a cost of doing business. For a penalty to work the pain must exceed the gain.

It must also be said that wherever the Government ends up on reservation of rights, the tech giants will likely view the Government's position as a starting place, even if they get exactly what they want out of the consultation. This is certainly the position they have taken with other safe harbors such as the "DMCA" safe harbor in the US. As the Copyright Alliance testified to Congress in 2020:

> The primary problem is that section 512 has been so misinterpreted by the courts [in litigation brought by copyright owners trying to use the DMCA for what they thought was its intended purpose] ***that service providers have little risk and need only do the absolute minimum required under the DMCA***. All the while, copyright owners are being devastated by online infringement. This is true for copyright owners both large and small but is especially burdensome for individual creators and small businesses. While copyright owners are struggling with infringement and lost revenue due to the pandemic, internet behemoths — like Google, Facebook, Amazon and Twitter — are reporting record earnings because of the enormous benefits they derive from the current system and their desire to reinforce the status quo. As a result, they have little interest to work with Congress or stakeholders to restore balance to the online ecosystem.[47]

If anything, we think that the AI platforms (many of the same companies that manipulate the DMCA safe harbor) will show even less interest in cooperating with rights owners for a reservation regime given that the stakes are much higher.

[47] Copyright Alliance CEO Keith Kupferschmid, Senate Judiciary Intellectual Property Subcommittee, *The Role of Private Agreements and Existing Technology in Curbing Online Piracy (Dec. 15, 2020) available at* https://files.constantcontact.com/d2e8d4e5501/cfec37f5-261e-4c6d-a19e-335a2d52e258.pdf

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

Please give us your views.

No. The fundamental element of any rights reservation regime is knowing which work is being blocked by which rights owner. This will require creating a metadata identification regime for all works of authorship, a regime that has never existed and must be created from whole cloth. As the IPO is aware, metadata for songs is quite challenging as was demonstrated in the IPO's *UK Industry Agreement on Music Streaming Metadata Working Groups*.

Using machine-readable formats for reservations sounds like would be an easy fix, but it creates an enormous burden on the artist, i.e., the target of the data scraper, and is a major gift to the AI platform delivered by government. We can look to the experience with robots.txt for guidance.

Using a robots.txt file or similar "do not index" file puts far too big a bet on machines getting it right in the silence of the Internet. Big Tech has used this opt-out mantra for years in a somewhat successful attempt to fool lawmakers into believing that blocking is all so easy. If only there was a database, even a machine can do it. And yet there are still massive numbers of webpages copied and those pages that were copied for search (or the Internet Archive) are now being used to train AI.

For example, this robots.txt code will allow reserve a "private-directory" folder but would otherwise allow Google to freely index the site while blocking Bing from indexing images:

User-agent: *

Disallow: /private-directory/

User-agent: Googlebot

Allow: /

User-agent: Bingbot

Disallow: /images/

Theoretically, existing robots.txt files could be configured to block AI crawlers by designating known crawlers as user-agents such as ChatGPT. However, there are

many known defects when robots.txt can fail to block web crawlers or AI data scrapers including:

Malicious or non-compliant crawlers might ignore the rules in a robots.txt file and continue to scrape a website despite the directives.

Incorrect Syntax of a robots.txt file can lead to unintended results, such as not blocking the intended paths or blocking too many paths.

Issues with server configuration can prevent the robots.txt file from being correctly read or accessed by crawlers.

Content generated dynamically through JavaScript or AJAX requests might not be blocked if robots.txt is not properly configured to account for these resources.

Unlisted crawlers or scrapers not known to the user may not adhere to the intended rules.

Crawlers using cached versions of a site may bypass rules in a robots.txt file, particularly updated rules since the cache was created.

Subdomains and Subdirectories limiting the scope of the rules can lead to not blocking all intended subdomains or subdirectories.

While robots.txt and similar techniques theoretically are useful tools for managing crawler access, they are not foolproof. Implementing additional security measures, such as IP blocking, CAPTCHA, rate limiting, and monitoring server logs, can help strengthen a site's defenses against unwanted scraping. However, like the other tools that were supposed to level the playing field for artists against Big Tech, none of these tools are free, all of them require more programming knowledge than can reasonably be expected, all require maintenance, and at scale, all of them can be gamed or will eventually fail. It must be said that all of the headaches and expense of keeping Big Tech out is because Big Tech so desperately wants to get in.

The difference between blocking a search engine crawler and an AI data scraper (which could each be operated by the same company in the case of Meta, Bing or Google) is that failing to block a search engine crawler is inconvenient for artists, but failing to block an AI data scraper is catastrophic for artists.

Even if the crawlers worked seamlessly, should any of these folders change names and the site admin forgets to change the robots.txt file, that is asking a lot of every website on the Internet.

It must also be said pages using machine readable blocking tools may result in pages being downranked, particularly for AI platforms closely associated with search engines. Robots.txt blocking already has problems with crawlers and downranking for several reasons. The TDM safe harbor is too valuable and potentially too dangerous to leave to machines.

Conclusion

Respectfully, the IPO should ask itself whether it, too, is "taking the bait" from Big Tech as Baroness Kidron suggests. Decisive action is required as delay only plays into the hands of Big Tech. Thousands of UK artists—and voters--are protesting Big Tech's attempted exploitation of the TDM loophole with the "silent album" project[48] as well as vocal protests that will no doubt echo in this consultation.

We again thank the IPO for hosting this consultation and allowing our submission.

Yours sincerely,

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CLC/ko

[48] Paul Glynn, *Artists Release Silent Album In Protest Against AI Using Their Work*, BBC (Feb. 25, 2025) available at https://www.bbc.com/news/articles/cwyd3r62kp5o