AI & IP | 7 QUESTIONS ON OUR MIND

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1 Does training generative AI using unlicensed third party material infringe UK copyright?

This is the question that is on everyone's lips across the world and, as of today, we don't have a clear answer.

What we do know is that training a generative AI system often requires huge amounts of data to be inputted into it. The data and information used is often protected by copyright. Whilst the exact training process may vary from AI system to AI system, the expectation is that at least some will involve the creation of a copy (whether transient or permanent) of the underlying data at some stage of the process. If that's right, and if the data used is unlicensed and contains copyright protected works, there is necessarily a risk of infringement by copying, unless an exception applies.

The most obvious exception that might apply in the UK is that for text and data mining ("TDM"). But it is very narrow - being limited to TDM for non-commercial research purposes and only covering copyright (not database rights). So it is of little use to commercial providers of generative AI.

Proposals to introduce a broader UK TDM exception and to broker a voluntary Code of Practice on Copyright and AI between AI developers and rightsholders have both failed. Responsibility is now back with government ministers who are to re-engage with AI developers and rights holders in search of a solution (see our latest commentary here).

2 Are there any live IP infringement claims against generative AI providers in the UK?

Yes. There is currently one live IP infringement claim in the UK, between Getty Images and Stability AI (the provider of the popular "Stable Diffusion" image generator). Getty allege that Stability AI has unlawfully copied and processed millions of images which they own IP rights in without a licence. Slightly unusually, the data set Stability AI used to train its system was open source (rather than the more common "black box") so Getty Images can see that its images were used to train Stable Diffusion. Getty Images' watermark also appeared on several outputs from Stable Diffusion. As a result, Getty has sued Stability AI in the UK for copyright infringement and database right infringement (from both an input and output perspective), as well as trade mark infringement and passing off (in relation to those outputs bearing Getty Images' watermarks).

The main part of the claim is still at the early stages (with trial not expected until June/July 2025). But, on 1 December 2023, the High Court handed down its first decision in this dispute, refusing to strike out some of Getty Images' claims (see our summary here). Whilst the focus wasn't directly on questions of whether use of IP protected works in training generative AI can infringe IP rights, the decision does highlight some of the potential battlegrounds we can expect to see if this case progresses all the way to trial.

3 Is the position in the EU the same as that in the UK?

No. In contrast to the UK, the EU has two separate TDM exceptions which apply to both copyright and database right infringement – one for TDM for the purposes of scientific research; and a broader exception which allows TDM for any purpose, including commercial purposes. Rights holders are able to reserve their rights and opt their content out of the second exception, but not the first. Perhaps surprisingly, however, in the first and only EU case to date that has considered the implications of using copyright protected works in a dataset used to train generative AI tools (a decision of the District Court of Hamburg relating to the LAION-5B dataset), it was the narrower exception that was found to apply and which rendered the copying of an unlicensed photograph non-infringing.

In most cases, however, the debate will be around whether the broader exception applies. Whilst the opt-out provision in that exception is aimed at striking a fair balance between AI developers and rights holders, it is not yet settled how rights holders should best express their opt out (obiter comments in the LAION case suggest that written terms and conditions will suffice, but ultimately the court did not have to determine the point). Even if the opt out is done correctly, however, the black box nature of many AI systems can make it difficult for copyright owners to identify where their works may have been used as training data in breach of their opt-out. This

latter concern, in particular, seems to have resonated with EU legislators, who, prompted by the ChatGPT phenomenon, ultimately included in the EU AI Act various transparency related obligations targeted at general purpose AI ("GPAI") providers.

4 What does the EU AI Act say about copyright?

The EU AI Act (which came into effect on 1 August 2024) contains two key copyright-related obligations. These require GPAI providers to:

- put in place a policy to comply with EU copyright law, including any rights holder TDM opt-outs; and
- make publicly available a "sufficiently detailed" summary of the training data used to train their model, using a template to be provided by the EU AI Office.

See here for our high level review and analysis of what these obligations will mean in practice for AI providers.

Further guidance is expected to be provided on each of these obligations through a GPAI code of practice, which is due to be published by April 2025.

5 Can AI-generated outputs be protected by copyright?

As might be expected, the answer is not settled in many countries. Of those countries which have considered the point, there are differing views, with the US finding that generative AI outputs will not attract copyright protection; and China finding that they can. The position remains unclear in the EU and the UK, having been largely untested.

The UK is one of the few countries that provides copyright protection for computer generated works ("CGWs") – that is, a work which does not have a human author – but there are questions around how those rules currently apply. For example, it isn't entirely clear whether an output produced by a generative AI tool would fall within the definition of a "computer generated work". Arguably there is some human authorship involved, in the form of user provided prompts.

If generative AI outputs are CGWs, there are then questions as to whether the usual originality requirements apply and, if so, whether such a work could meet them (and in what circumstances). So far, there haven't been any cases considering this point in the UK, so it's not possible to form any definitive conclusions.

The EU, in contrast, does not have any specific legislation dealing with copyright protection for CGWs. So, the main question there is whether an AI output could meet the EU test for originality ("author's own intellectual creation"). Whilst largely untested in the courts, the general consensus seems to be that outputs from generative AI tools are likely not eligible for copyright protection in the EU where simple prompts are involved as they are unlikely to satisfy the human-centric originality requirement – a view that aligns with the outcome of the only case within the EU that has considered this point to date (a decision of the Municipal Court of Prague). But a question mark remains where more sophisticated or iterative prompts are used.

6 Can AI be an inventor for UK patent purposes?

No. The UK Supreme Court has unanimously confirmed that AI cannot be an inventor for UK patent purposes (see our blog). Any change to this position will require the UK Patents Act to be amended.

A similar conclusion has also been reached by the European Patent Office, based on the provisions of the European Patent Convention.

7 Are AI inventions patentable in the UK?

Yes, but... By their nature, AI inventions are computer-implemented and usually rely on computer programs to some extent. They may also involve mathematical methods or methods of doing business. Computer programs, mathematical methods and methods of doing business "as such" are all excluded from patentability in the UK. This has led some to mistakenly believe that AI inventions are not patentable. That is incorrect. As the UKIPO has confirmed

in its guidelines (see our summary), they may be patentable if they provide a "technical contribution".

How these exceptions will be applied in practice, however, and determining whether there is a technical contribution is not always easy to assess – as we've seen with the recent Emotional Perception line of decisions, which considered the patentability of an invention implemented via an artificial neural network (see our summary of the latest decision here).

As is evident, a number of questions remain unanswered but, with a developing body of case law and new guidance from the likes of the EU AI Office on the horizon, the picture should become clearer. In the meantime, we regularly advise clients on how best to manage these uncertainties and frequently discuss the latest UK and EU developments in the world of AI and IP on our digital blog, The Lens.

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