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Feedback of

ACT | The App Association

5-11 Mortimer Street,

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to

the Intellectual Property Office, the Department for Science, Innovation and Technology, and the Department for Culture, Media and Sport

on

Copyright and Artificial Intelligence

I. Introduction and Statement of Interest

ACT | The App Association is a trade association representing small business technology companies from across the United Kingdom (UK), European Union (EU), and the United States (U.S.). Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology.

Small and Medium-Sized Enterprises (SMEs) are a key engine of the UK technology economy

The UK has the third largest tech sector in the world, valued at more than $1 trillion. In 2021, 56 per cent of the digital sector's £182.1 billion contribution to the UK economy came from SMEs. SMEs account for more than 50 per cent of all private sector jobs in the UK.[1]

The app economy is important to UK prosperity

A huge amount of economic activity involves apps, much of which we do every day without a second thought. A few examples include shopping, booking travel, gaming, banking, watching media, working, communicating, teaching kids in school, monitoring our health, learning new languages, etc. The list goes on and on. Apps are also used to control our homes, cars, factories, and medical devices, plus countless more activities, via the internet of things (IoT). These activities don't just generate money, they increase sustainability, boost productivity, and provide genuine support to people with specific health needs.

The term for this broad ecosystem of economic benefit is 'the app economy', and it is a significant contributor to the country's economy. The direct revenues of the UK app economy in 2021 amounted to £33 billion. Including direct and indirect contributions, the app economy generated £74.8 billion in revenue throughout all sectors of the UK's economy in 2021, creating more than 400,000 jobs in the process.[2]

We support the United Kingdom's leadership in uplifting creative industries and artificial intelligence (AI) developers through strong, transparent and practical copyright and AI guidance that promotes innovation and job growth. Alongside the world's rapid embrace of mobile technology, our members have been developing innovative AI solutions while also playing a critical role in developing entertainment products such as streaming video platforms, video games, and other content portals that rely on intellectual property protections. App Association members power the growth of the internet of things (IoT) across modalities and segments of the economy.

The App Association generally supports aligning the UK's current Text and Data Mining (TDM) exception to meet the modern realities of generative artificial intelligence (GAI) whilst allowing rights holders to maintain strong copyright protections. To support both UK creative and AI-based industries, we encourage an emphasis on standardised, accessible machine-readable formats for rights reservation that small and medium-sized enterprises (SMEs) can easily implement and an interdisciplinary approach that provides solutions addressing where copyright concerns intersect with security and privacy concerns.

II. The App Association Comments on How the Government Can Ensure the UK's Legal Framework for AI and Copyright Supports the UK Creative Industries and AI Sector Together

The App Association appreciates the UK government's policy considerations to enable copyright law to support the objectives of AI innovators and the creative industries alike

[1] Tech UK - UK Tech SMEs: A Global Force to Be Reckoned With | #techUKDigitalTrade - 2023
[2] Deloitte – The App Economy in Europe – 2022

through three policy avenues. While we do not explicitly support any one of the options explored in the Consultation, we provide our insights from our SME community to further inform the UK government's decision-making process.

App Association members both benefit from copyright protections and the use and deployment of AI systems. AI is an evolving constellation of technologies that enable computers to simulate elements of human thinking, such as learning and reasoning. An encompassing term, AI entails a range of approaches and technologies, such as machine learning (ML), where algorithms use data, learn from it, and apply their newly-learned lessons to make informed decisions, and deep learning, where an algorithm based on the way neurons and synapses in the brain change as they are exposed to new inputs allows for independent or assisted decision-making. Already, AI-driven algorithmic decision tools and predictive analytics have substantial direct and indirect effects on the British economy and show no signs of slowing in the future.

Across use cases and sectors, AI has incredible potential to improve UK consumers' lives through faster and better-informed decision-making, enabled by cutting-edge distributed cloud computing. Even now, the UK is encountering AI incrementally through the improvements seen in computer-based services they use, typically in the form of streamlined processes, image analysis, and voice recognition, all forms of what we consider narrow' AI. These narrow applications of AI already provide great societal benefit. As AI systems, powered by streams of data and advanced algorithms, continue to improve services and generate new business models, the fundamental transformation of economies across the United Kingdom will only accelerate.

For software developers, including App Association members, generative AI platforms are advanced technical tools that are invaluable to creative and innovative processes by reducing wasted resources (i.e. cost and time), streamlining repeatable tasks, and optimising solutions. Generative AI tools reduce the need for human instruction by training on large data sets (e.g., code, audio, and images), identifying patterns, and creating new outputs. AI tools generally improve the software coding process and further help train a new generation of strong software developers. ML AI systems can complete repeatable tasks and detect common mistakes, issues, and risks in the software development process that would otherwise require manual interventions. Software developers use AI to run quality assurance checks that reduce the chance of human bias and error and the potential for disrupting production timelines because a critical mistake was not diagnosed early enough.

For software developers, generative AI platforms not only seamlessly predict and complete lines of code, but they produce outcomes by training on public-facing data that was not initially provided by the platform owner. While generative AI platforms bring new efficiencies to software development, the use of such technology comes with growing pains. This area of law and policy is being contemplated and litigated and has invoked fear around how AI might infringe IP-protected data and expose proprietary information.

The ability for generative AI platforms to train on copyright protected data creates concerns for all IP rights holders and platform users that are developing new works that might include IP-protected data. As a prime example, a platform's use of open-source software and the use of open-source AI platforms has copyright implications. While copyright law generally provides an author the exclusive rights to make, sell, or otherwise use their work, unless contractually assigned to another entity, the creator of open-source software dedicates their work to the public under licensing terms, that, when not complied with, constitutes as copyright infringement. A tenant of open-source licensing is that the source code is available to the public. This collaborative approach to software innovation has accelerated efficiencies in developing secure, cost-efficient, and advanced solutions for businesses and their

consumers. Notably, the Open Software Initiative (OSI) has developed the Open-Source Definition (OSD), which contains rules defining the boundaries of open-source licensing.

While some companies are developing open-source large language models (LLMs), there are widely used platforms, like OpenAI and GitHub, that use closed-source LLMs. These closed source LLMs have been accused of scraping and training on open-source software without adhering to licensing terms, implicating their owners in copyright and contract law. Similarly, open-source AI models are being accused of training on and implementing open-source code, facing similar implications due to the attached license. This issue raises more concerns about liability for platform users as well as the erosion of the open-source model.

An Updated Text and Data Mining Exception

Because App Association members operate with minimal resources and are most acutely harmed by unpredictable copyright outcomes related to liability, the App Association agrees with the IPO that GAI platforms and their users require clear policy guidance on how the UK will evaluate liability associated with text and data mining (TDM) practices to train GAI platforms. We agree that the UK's TDM exception for non-commercial research does not clearly cover large-scale AI training by commercial entities. As App Association members engaged in commercial activities value copyright protections as well as develop and leverage AI, clear, reliable, and strong guidance for AI training scenarios that advance an understanding of the legal bounds of TDM activity will be imperative to protecting IP, as well as supporting investment and innovation. We therefore generally support the UK government's exploration of aligning the current TDM exception to meet the modern realities of GAI while allowing rights holders to reserve their rights and thereby prevent their content being used for AI training.

We recognise, however, that the primary challenges in realising the benefits of the proposed expanded TDM exception will be on the operational front, particularly for rights holders. While some concepts are clear today, such as scraping data for AI training, they do not broadly or categorically satisfy fair dealing exceptions; and that bad faith scraping practices, for which the burden should rest on the accused infringer to refute, constitute infringement, implementation barriers, some known and others unknown, are likely to create issues. For example, as noted in the consultation, it is not always clear what constitutes a valid rights reservation. While using standardised machine-readable formats is advisable, we urge further study and consultation into the maturity of standardisation and how a rights holder can effectively reserve their rights and adequately detect and address infringement; and a focus on how small businesses can easily reserve their rights using effective and accessible machine-readable formats. We agree with the UK government's assessment stating that further standardisation in this area is needed so that publishers of content on the internet can easily reserve their rights and AI developers can easily respect these decisions; and that engagement with and deference to standards initiatives being taken forward by industry and by other international partners is advisable.

We support UK government having a collaborative role in creating a standardised means for rights reservation that is cost-effective and easily implemented by SMEs. Our small business community welcomes the opportunity to explore use cases and work flows to identify where theory and practice may not align, and to help UK government adjust their proposed TDM exception expansion appropriately.

As it considers practical/implementation challenges, we also urge the UK government to maintain a priority to ensure that policy changes are based on well-demonstrated systemic problems (and not edge use cases or hypotheticals that exemplify possible uses and capabilities of AI outside what we presently understand). We urge the IPO to seek input on

an ongoing basis to inform the development of detailed guidance, and potential changes in policy, related to AI copyright issues over time.

Contracts and licensing

The consultation accurately notes the complexity of copyright contracts and licensing generally. We believe it is important that the UK government, in this proceeding and more broadly, reinforce that rights holders are free to contract their exclusive rights. Each rights holder must determine the best option for them in a licensing scenario based on their circumstances (e.g. when it may be better to directly license versus when it may be more advantageous to license through a third party, such as a publisher or collective management organisation). Some issues described in the consultation (such as the UK government describing how some right holders 'feel they do not always have sufficient control' in copyright licensing relationships) are not specific to AI, and we question whether an AI copyright-specific policy development process is the most appropriate vehicle for effecting broader copyright policy changes. We caution the UK government against altering or restricting the ability of any party to freely contract or license absent a much broader consideration of the purpose and effect of UK copyright law. For purposes of its AI-specific considerations, we simply ask the UK government to maintain that rights holders are free to contract their exclusive rights. Existing SME-focused resources offered by the IPO, for example, are helpful in explaining this foundation.

Transparency

The App Association agrees that the success of any new approach to copyright and AI in the UK will hinge on earning user trust and ensuring practical implementation. Generally, transparency can best be improved through AI developers providing information that those further down the value chain can assess the quality, performance, and utility of AI/ML tools; these disclosures may not require voluminous amounts of information on training content. To improve transparency for AI copyright purposes, we appreciate the UK government's exploration of various potential solutions, and support UK government research and development efforts to contribute to the development of new technical tools supporting transparency. It is vital that UK policies (1) support the ability of rights holders to police the use of their copyrighted materials and (2) permit appropriate restrictions on trade secrets to support investment and innovation in AI moving forward.

We caution the UK against mirroring requirements in Article 53(1)(d) of the EU's AI Act and the U.S. State of California's Assembly Bill 2013. Both laws have not been fully implemented, and the UK government should consider the impact of their requirements on innovation, and whether they effectively improve transparency, before adopting them in the UK. The EU's AI Act should be viewed with skepticism given consistent reductions in EU competitiveness due to regulatory interventions into emerging markets like AI.

Wider clarification of copyright law

We support the UK government's efforts to harmonise its approach with other key trading partners to support UK competitiveness and innovation in AI markets. The App Association supports the UK's engagement with international partners, including the EU and United States, and across international fora including the G7 and G20, to work together and align approaches, where appropriate.

The App Association does not believe that the 'temporary copies' exception (which permits temporary copies to be made during technological processes) applies to the training of generative AI models and urges for the UK government to clarify as much.

AI outputs: Computer-generated works

In terms of copyrightability, the ability for copyright to vest in the user of a generative AI platform should depend on the amount of human authorship contributed to the work. As human authorship is a crucial requirement for a valid copyright claim, AI-generated output should not by protected by copyright law when it is solely generated by an AI and the IPO should have the authority to deny copyright registration for AI-generated works that lack human authorship. At the same time, the use of AI to assist in the process of creation or the inclusion of AI-generated material in a larger human-generated work should not bar copyrightability. It is important that the IPO continues to recognise that generative AI systems, when used as a tool to output its user's original intellectual conception, should not diminish the ability to secure copyright protection over the conceived output. As technology evolves, it is important for copyright law to continue to balance the incentive for intellectual and creative expression in humans with the efficiency provided by tools that can perform tasks more autonomously.

Infringement and liability relating to AI-generated content

The App Association notes its agreement that the UK's copyright framework in relation to infringing outputs is reasonably clear and appears to be adequate.

AI output labelling

Even assuming good faith behaviour, there are many practical challenges for AI developers to ensure consistent AI output labelling, including the threshold for such labelling, the best format for such labelling, scalability for content provenance initiatives, ensuring labels are resilient to manipulation either by editing the label itself or removing the label entirely from a piece of content, and other issues. We support UK government having a collaborative role in creating a standardised means for the detection of AI outputs that is cost-effective and easily implemented by SMEs. Our small business community welcomes the opportunity to explore use cases and work flows to identify where theory and practice may not align, and to help the UK government adjust their proposed solutions appropriately.

We recognise that, as the UK government notes, the EU AI Act establishes transparency rules for content produced by generative AI, requiring AI outputs to be machine readable and detectable as AI generated or manipulated; and that the EU's AI Office has been tasked with issuing guidelines and encouraging codes of practice to ensure effective implementation of these obligations. However, these guidelines and the codes of practice have not been released (and their development has been recently paused), with no implementation on the effectiveness of these provisions having been accomplished. These provisions should not be mirrored in UK law until there is careful study of the practical impacts of this requirement on innovation and competitiveness by the EU.

III. ACT | The App Association AI Policy Recommendations to Support a Whole-of-Government Approach

To develop a balanced approach that mitigates the dissonance between copyright and AI to supporting UK's AI and creative economies, the UK IPO must consider how all other areas of the law impact copyright-related solutions for transparency. To understand and shape rules for this complex and evolving technology, the App Association voice, representing small businesses, is critical.

Since 2021, the App Association has worked with its members to develop AI principles that would support the imminent future where data driving ever more powerful computers could exist alongside strong intellectual property protections. We knew that if policymakers were to enact an overwhelming regulatory framework governing the use or development of AI based on what we know about it today, it would likely be fundamentally out of date in the next five to 10 years. With the direct exposure to consumers of generative AI tools like ChatGPT, AI in general jumped to the forefront of the global consciousness. To guide policymakers on a coordinated whole-of-government approach to addressing the risks and benefits of AI, including those related to copyright, privacy and data security, we recommend the following principles for action:

1. Quality Assurance and Oversight: Policy frameworks should utilise risk-based approaches to ensure that the use of AI aligns with the recognised standards of safety, efficiency, and equity. Providers, technology developers and vendors, and other stakeholders all benefit from understanding the distribution of risk and liability in building, testing, and using AI tools. Policy frameworks addressing liability should ensure the appropriate distribution and mitigation of risk and liability. Specifically, those in the value chain with the ability to minimise risks based on their knowledge and ability to mitigate should have appropriate incentives to do so. Some recommended guidelines include:

    - Ensuring AI is safe, efficacious, and equitable.
    - Supporting that algorithms, datasets, and decisions are auditable.
    - Encouraging AI developers to consistently utilise rigorous procedures and enabling them to document their methods and results.
    - Requiring those developing, offering, or testing AI systems to provide truthful and easy to understand representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the AI solution.
    - Ensuring that adverse events are timely reported to relevant oversight bodies for appropriate investigation and action.

2. Thoughtful Design: Policy frameworks should require design of AI systems that are informed by real-world workflows, human-cantered design and usability principles, and end-user needs. AI systems solutions should facilitate a transition to changes in the delivery of goods and services that benefit consumers and businesses. The design, development, and success of AI should leverage collaboration and dialogue among users, AI technology developers, and other stakeholders to have all perspectives reflected in AI solutions.

3. Access and Affordability: Policy frameworks should ensure AI systems are accessible and affordable. Significant resources may be required to scale systems. Policymakers should take steps to remedy the uneven distribution of resources and access and put policies in place that incentivise investment inbuilding infrastructure, preparing personnel and training, as well as developing, validating, and maintaining AI systems with an eye toward ensuring value.

4. Research: Policy frameworks should support and facilitate research and development of AI by prioritising and providing sufficient funding while also ensuring adequate incentives (e.g. streamlined availability of data to developers, tax credits) are in place to encourage private and non-profit sector research. Transparency research should be a priority and

involve collaboration among all affected stakeholders who must responsibly address the ethical, social, economic, and legal implications that may result from AI applications.

5. Modernised Privacy and Security Frameworks: While the types of data items analysed by AI and other technologies are not new, this analysis will provide greater potential utility of those data items to other individuals, entities, and machines. Thus, there are many new uses for, and ways to analyse, the collected data. This raises privacy issues and questions surrounding consent to use data in a particular way (e.g. research, commercial product/service development). It also offers the potential for more powerful and granular access controls for consumers. Accordingly, any policy framework should address the topics of privacy, consent, and modern technological capabilities as a part of the policy development process. Policy frameworks must be scalable and assure that an individual's data is properly protected, while also allowing the flow of information and responsible evolution of AI. This information is necessary to provide and promote high-quality AI applications. Finally, with proper protections in place, policy frameworks should also promote data access, including open access to appropriate machine-readable public data, development of a culture of securely sharing data with external partners, and explicit communication of allowable use with periodic review of informed consent.

6. Bias: The bias inherent in all data, as well as errors, will remain one of the more pressing issues with AI systems that utilise machine learning techniques. Any regulatory action should address data provenance and bias issues present in the development and uses of AI solutions. Policy frameworks should:
   - Require the identification, disclosure, and mitigation of bias while encouraging access to databases and promoting inclusion and diversity.
   - Ensure that data bias does not cause harm to users or consumers.

7. Ethics: The success of AI depends on ethical use. A policy framework will need to promote many of the existing and emerging ethical norms for broader adherence by AI technologists, innovators, computer scientists, and those who use such systems. Policy frameworks should:
   - Ensure that AI solutions align with all relevant ethical obligations, from design to development to use.
   - Encourage the development of new ethical guidelines to address emerging issues with the use of AI, as needed.
   - Maintain consistency with international conventions on human rights.
   - Ensure that AI is inclusive such that AI solutions beneficial to consumers are developed across socioeconomic, age, gender, geographic origin, and other groupings.
   - Reflect that AI tools may reveal extremely sensitive and private information about a user and ensure that laws protect such information from being used to discriminate against certain consumers.

8. Collaboration and Portability/Interoperability: Policy frameworks should enable eased data access and use through creating a culture of cooperation, trust, and openness among policymakers, AI technology developers and users, and the public.

9. Education: Policy frameworks should support education for the advancement of AI, promote examples that demonstrate the success of AI, and encourage stakeholder engagements to keep frameworks responsive to emerging opportunities and challenges.
    - Consumers should be educated as to the use of AI in the service they are using.
    - Academic education should include curriculum that will advance the understanding of and ability to use AI solutions.

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