

Follow-Up Response to the Announcement of the proposed Commercial Text & Data Mining Exception to Copyright: *Supplemental response to the IPO with additional empirical evidence*

About the AOP

The Association of Photographers (AOP) exists to protect, promote and inspire, championing the rights of all photographers and campaigning tirelessly on issues of copyright, best practice, and professionalism. Our 3,500 members include photographers, photographic assistants, students, affiliated colleges, affiliated businesses, photography agents, and those working in support services for the Creative Industries. We are part of a network under the umbrella of the British Photographic Council that represents around 15,000 creative professional image-makers.

The AOP membership has always been formed of some of the most influential, trailblazing photographers in the history of the art form. Past and present members include the likes of Terence Donovan, Rankin, Tim Flach, Nadav Kander, Tessa Traeger, David Bailey, Julia Fullerton-Batten and Jillian Edelstein. For over 50 years, members' work has appeared in global advertising campaigns, books, newspapers, magazines, exhibitions and cultural events the world over.

Today - whilst our members explore and contribute to the development of the new realms of image technology at their disposal - the Association continues its mission to promote and protect the rights of individuals, which includes working closely with a range of All-Party Parliamentary Groups and creative industry representative organisations, such as the British Copyright Council and Creators Rights Alliance, and importantly provides support to the next generations of photographers and image-makers through our close relationship with a growing number of universities.

Summary of key points:

- **UK creators are significant net exporters of creative content - our members make photographs and videos across a whole range of industries and contribute almost 6% GVA¹ to the UK economy.** They also exhibit, publish books, and sell prints of their works across the globe. Working with advertising agencies, brands, corporate, editorial, and cultural clients, the still and moving images they produce have had a profound effect on the way products and services are advertised, marketed, and sold online – hence the dominance of the types of social media platforms that we see today which display still and moving images.
- **We have, and will always, advocate the progression of technology and creativity in unison, rather than as an either/or scenario;** the two forms have been synonymous since photography was invented, and our members use AI as an assistive technology to produce extraordinary images, rather than experience it as being in competition.
- **Our members' (intellectual) property is fundamentally valuable to tech companies looking to amass and exploit significant datasets of images and accompanying metadata (image-text pairs) in order to train their own AI platforms and commercialise them - those tech companies are happy to agree licencing terms with creators;** it is the Government's responsibility to **protect the interests of human creative endeavour such as our members make, to ensure their economic viability and longevity and not simply give away their property (copyright works) and displace their commercial professions.**

¹ DCMS Sectors Economic Estimates 2019 GVA - The Creative Industries contributed £115.9bn in 2019, accounting for 5.9% of UK GVA <https://www.gov.uk/government/statistics/dcms-economic-estimates-2019-gross-value-added/dcms-economic-estimates-2019-provisional-gross-value-added>

- To support the growth of the UK economy through an inclusive policy, **the Government must ensure that there is a fair, equitable and legitimate opportunity for human creator rights-holders to benefit financially from the developments in AI technology**, and to ensure the continued sustainability of our sector.
- We have conducted a time-limited survey (September, 2022) to gather responses from professional photographers to demonstrate the value of our business. **Based on those results, we can ascertain the average turnover for approximately 30,000 photographers equates to £2.44 billion (avg. £81,500 per photographer, per annum)**, and whilst photographers work with AI-assisted tools, to pit them head-to-head with AI-generated platforms will necessarily cause the demise of the photographer because their cost base is substantially higher than that of an AI platform.
- Our members' copyright works form the basis of mammoth text/image datasets, which can be accessed and commercially exploited globally by third party entities that offshore profits, or otherwise do not contribute to the UK's GVA. **Consequently, the introduction of a commercial Text and Data-Mining (TDM) exception to copyright would ultimately cause a catastrophic collapse of this sector and the subsequent loss of that contribution to the UK economy.**
- Importantly, **no photographer, image-maker, let alone our members, should be forced into a zero-sum option as presented by Option 4**, where copyright protection is eschewed in favour of the development of a new and unproven industry sector for which proof of value is palpably absent for creators' (intellectual) property.
- We categorically believe the proposed commercial exception to copyright protection would **unreasonably prejudice our members rights and prevent our members from undertaking the normal commercial exploitation of their (intellectual) property - it offers no protection, no form of remuneration, no contract override, or option to opt out for creators.**

Overview of the Image-making Industry

The image-making industry incorporates both still and moving images - traditionally otherwise known as photography and short-form film which fall under the description of artistic works. **Our members attract work by heavily marketing their services, showcasing their artistic works as digital images on public-facing websites and platforms, complete with data-rich text, to facilitate better search engine optimisation (SEO) and in order to be found by commissioners and art buyers.** Our members continually invest a significant proportion of their income to optimise their visibility online, with a proportion having done so for many years, which makes it difficult to quantify the level of investment. Their websites and platforms need to be open and cannot be placed behind log-ins, entry pages or paywalls, as no commissioner or art buyer would entertain this approach to be able to view photographers' works - we cannot expect our members to insist their clients register to access a website in that way. **Without any form of contract override, or other technical protection measure, there is no technical way to limit lawful access without impacting normal business conduct.**

Applying different business models

Predominantly, our members are commissioned to make new images - they charge both creative fees (on the basis of their skill sets) and license usage fees to cover client requirements, with average shoot/production costs ranging from £29k to £40k upwards. Furthermore, they employ the support of

other creatives, often from between 2 and 10 people per shoot, such as make-up artists, props stylists, photo-assistants, lighting assistants, wardrobe, retouchers, art directors, etc (See diagrams 1 and 2 below).

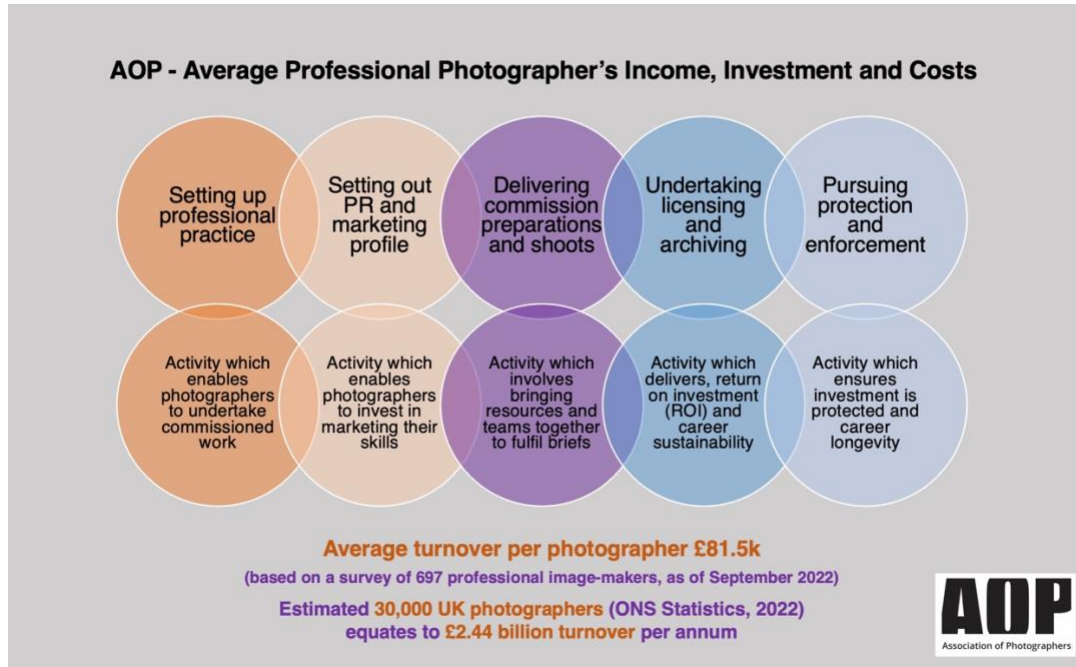


Diagram 1 – Professional photographer's income, investment, and costs



Diagram 2 – Creative Professionals regularly working with photographers

Our members are mostly commissioned by the Business-to-Business (B2B) sector which includes advertising and brands, crossing all industries including telecom and tech. Of note as a secondary market, our members also work Business-to-Consumer (B2C) for print sales, books, and other merchandise.

All of our members work with licensing, which for the most part tends to be rights-managed, on a case-by-case permission-based approach. Some members also choose to work with picture libraries (see *BAPLA's submission*) to expand their market reach, and subsequently an additional range of licensing models are offered to accommodate clients' needs in that marketplace. **These types of businesses are in the nascent stage of licensing works to AI developers for machine learning, with several larger picture libraries having provided substantial volumes of licensing to a range of technology clients. There is no evidence of market failure here.**

Additionally, with published products, such as books, magazines, and websites, there are secondary-rights licences issued by collective management organisations (CMOs), or collecting societies (see *DACS and PICSEL submissions*), who grant rights on behalf of multiple rights-holders in a single ('blanket') licence for a single payment. These work well on the basis of charging minimal incremental fees for copying material. Increasingly, with new artistic works such as digital images, and new formats for selling artistic works (NFTs) are using '**smart contracts**' which are seen as a progressively useful way to provide permission, and generate revenue, using machine-readable technology.

Quantitative evidence

The AOP **conducted a short time-limited survey** on the basis that quantitative data is required for the purposes of using the information provided **as part of the impact assessment** presented to the IP Minister, and subsequently to Parliament, as such there has been little time to gather responses from a wider cohort of photographers. The survey data should be considered in the context of income both generated and reinvested by a sizable number of image industry sole traders and SMEs.

The survey was completed by 697 professional photographers, representing 4.6% of the British Photographic Council organisation members (BPC) - approximately 15,000 photographers are represented by BPC member trade associations. We conservatively estimate there to be approximately 30,000 professional individual photographers based in the UK².

From the survey, the **average individual turnover to be approx. £81,500**, per professional photographer, which measured by the estimated number of 30,000 UK professional photographers equates to **£2.44 billion total turnover per annum**. The figures extrapolated show the net income image creators generate on average, much of this is reinvested to facilitate purchasing photographic equipment, hardware and software, assisting staff, marketing, image archives, and copyright enforcement services.

The **average individual annual value of copyright infringement is £13,437**, which measured by the same estimated number of UK professional photographers, **equates to £403 million lost income per year**.

² ONS Statistics 2022 shows no. of photographers, audio-visual & broadcasting equipment operators is 73,300, therefore approx. 30,000 professional photographers is a fair assumption.. <https://www.statista.com/statistics/319286/number-of-photographers-audio-visual-and-broadcasting-equipment-operators-in-the-uk/>

In addition, we can estimate the **approx. no. of images online displayed by UK professional photographers on their websites to be 362.76 million** (avg. 12,092, which may vary per photographer or image-maker, such as those with larger image archives accumulated over years), and **no. of images licensed by professional photographers each year, to be approx. 114.76 million** (avg. 3,825 p.a.). [Survey data available on request].

We are already witnessing rapid expansion in competing commercial AI-generated image production³, using unpermitted images and text research datasets. On this basis **we estimate that text-to-image generators** (machine endeavour - using significant amounts of artistic copyright-protected works) **will directly compete with, and displace, photographers and image-makers' commercial businesses** (human endeavour) and **consequently their professional livelihoods would be at significant risk of being put out of business** by introducing a 'free-for-all' commercial TDM exception, particularly with the exclusion to opt out or earn any income for the underlying copyright works (which form the basis of these massive datasets).

As a result of introducing an exception that would conflict with the normal exploitation of photographer rights holders' (intellectual) property, **we would expect to see in the short-term a catastrophic collapse in earnings for all those working in the image industry, and in the longer term the effect would likely cause widespread business insolvency as a result of increasing machine-generated images flooding the marketplace.** Providing prospective figures is not feasible.

Our survey also asked whether photographers would be interested in licensing for AI use – the results strongly indicate that a **larger proportion of photographers (64%) would not want to licence their image works for AI use in datasets**, which suggests that their experience with entities such as social media platforms, particularly in relation to the constant challenges with enforcing their copyright, means **photographers have significant concerns about how their (intellectual) property will be exploited by such entities, and that they would have no control over how their images will be used.** None of our members want to see their livelihoods disappear; all have chosen this profession as they excel in this field of artistic works, and to date have managed to make a career from it.

Legislation and enforcement

The **framework for UK copyright legislation up to this point has often been heralded as a 'gold standard', being flexible enough to support innovation and drive the growth of incredible creative content to the extent that we are significant global net exporters.** Investment and economic growth in the UK creative industries is arguably a direct result of this framework, which has a long history in recognising and supporting our creators. Even our framework for 'fair dealing' is a recognition of the skill, labour and judgement afforded to UK copyright works.

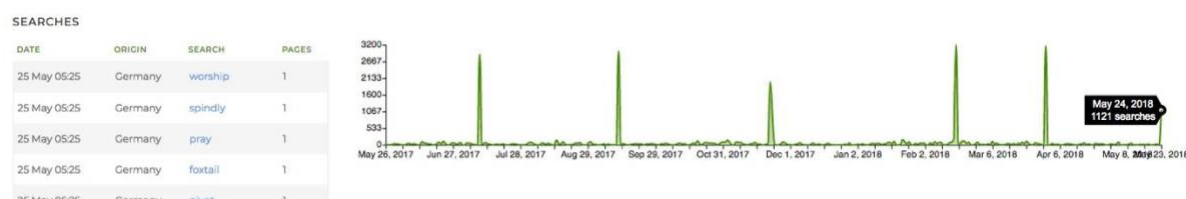
The UK is also a signatory of four International Treaties, including the Berne Convention, TRIPS Agreement, and the WIPO Copyright Treaty, which confines any limitations of, or exceptions to, rights to certain special cases that do not conflict with a normal exploitation of the work and *do not unreasonably prejudice the legitimate interests of rightsholders*, and that this extends to the digital environment⁴. In addition, there is a positive obligation to protect the right to property and provide adequate remedies to address violations of (intellectual) property rights.

³ DALL-E2 (65 million image/text datasets), Stable Diffusion (5.85 billion image/text datasets), Craiyon.ai (15 million image datasets) - with combined images and English language text being the most valuable.

⁴ WIPO Copyright Treaty, administered by WIPO and counting approx. 60 contracting parties;

We cannot stress enough the issue with data scraping any and all public facing websites, such as those that our members use in their everyday business practice – every digital image and accompanying text displayed is vulnerable to copyright infringement. These artistic works (which are heavily invested in, both in terms of making the works and protecting them) are in today’s world *digital data files*, which arguably makes them more vulnerable to exploitation by others without permission. Whilst some of our members use image identification and enforcement services (who utilise AI-assisting programmes to improve their service) to try to manage the significant level of online copyright infringements, these are based on fingerprinting (identical) matches of whole images; they are not capable of detecting the source of AI-generated works, as these could be either a few or many images, nor find the existence of large datasets.

Additionally, we are aware of image-based websites being bombarded with server hacking to scrape images and text (see *TDM scraping diagram examples below*), but as there is little understanding of how to deal with this on a practical or legal basis, the incidents are vastly underreported.



TDM Scraping Diagram: Text & Data Mining surges recorded on an image archive website of 50k images over a period of a year in 2017-18. The smaller green data shows the normal traffic (number of searches) conducted during weekly human-to-website interactions, the larger green data spikes show the website being swamped with machine-to-website interactions at a significantly larger scale, extracting text & images at intervals.

For over a decade our industry has been advocating and significantly investing in keywording their images in order to increase market visibility and attract customers, now this same resource is being sought to harvest their assets, ready to exploit with impunity and unfairly compete with our photographers using their own works, prejudicing the legitimate interests of our members (and

<https://wipolex.wipo.int/en/text/295166> Article 10 - Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. [8]

[8]. Agreed statement concerning Article 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.]

agreed third party rights – models, brands, trademarks, dignitaries, etc). **At present there are no expeditious enforcement procedures that would permit prompt and effective action against any unlawful act of infringement of our members' (intellectual) property rights in a situation such as the digital network environment where large image/text datasets of unpermitted works are exploited commercially by autonomous machines who are not physically bound by territory.**

The importance of traceable records of images used in datasets, and the provenance of that data, becomes paramount in detecting whether access has been lawfully obtained. It is concerning that creators' public facing websites could be data mined with impunity across the internet and without being able to carry out feasible protection measures against third party exploitation. Fundamentally, the responsibility of Government, as a minimum standard, is to protect the interests of copyright owners and not introduce legislation that deprives them of their right to earn an income from their works independently, particularly in a direct commercial context.

Our industry is already at the point of a nascent market opportunity, and one of the principal tenets of copyright law enables copyright holders to be incentivised to create works that benefit the public, the contrary act of taking that prospective market away undermines this tenet. As leading US academic, Jane C. Ginsburg writes in her editorial piece on 'transformative fair use', she states: **"Where licensing markets exist for the contested expression, no exemption should be needed"**.⁵ As far as other territories are concerned, such as Singapore and Japan, where consideration for a wider TDM exception has been introduced or interpreted, they are expressly caveated by the requirement not to prejudice copyright holders, and notably are not net-exporters of creative content. We uphold that the proposal for introducing a UK commercial Text and Data Mining exception will contravene the International Treaty Berne Three-Step Test for which the UK is a signatory.

Business case for licensing AI datasets

We strongly believe it is essential to support a viable photographic industry by ensuring fair and equitable remuneration through the form of licensing for any commercial use.

Those working within the image-making industry advance and sustain their careers under flexible licensing models, as income is generated and reinvested into purchasing new equipment, hiring supporting creative services, financing multi-formatted projects to include exhibitions, prints, books and NFTs, and expensing copyright enforcement measures to mitigate risks of online infringement.

Our members are less likely to have large archives as individuals (compared with photo libraries and agencies) but all invest in keywording images with accompanying English-language text (captions and metadata) in order that they can be discovered by commissioners and image buyers. During Covid, when photographers were unable to shoot new works, many turned to licensing from their archives, with some faring better than others. **With the UK having one of the largest sectors of image-makers, images and their accompanying English-language text are an extremely valuable (intellectual) property – it is essential to see how this may be an economic opportunity for both rights holders and the Treasury, if set out properly.**

⁵ *Journal of Intellectual Property Law & Practice, 2022, Vol. 17, No. 9 - Editorial: Does 'transformative' fair use eviscerate the author's exclusive right to 'transform' her work? Jane C. Ginsburg, Columbia University School of Law, New York, USA.*

Licensing for AI use is seen as a burgeoning business within the creative industries and image sector, but with the proposed legislation, it is challenging to see the benefits when we observe the wholesale consumption of everyone's creative works being handed over as large datasets to third party commercial entities, such as marketing and design platforms, without remuneration of any kind. We have a single opportunity at this very moment to rethink how licensing AI datasets can be provided that satisfy both copyright holders and AI developers.

We have also seen the emergence of smart contracts within blockchain technologies and increasingly embedded into NFTs, and vice versa, which are machine readable. **Smart contracts for AI Developers** could provide a simple way to add a royalty payment request for each dataset scraped and reused, offering a smart way to provide both a licence and a payment back to the rightsholder for their creative (intellectual) property, it could also hold third party rights permissions for models, brands, trademarks, and design rights. We need to further explore these opportunities to reassure creators of their investment and viable careers, as well as offer opportunities for both rights holders and AI developers in unison. **Our members must be given the choice to permit the use of their (intellectual) property, rather than be faced with a zero sum outcome, otherwise this would prejudice our members legitimate interests in protecting their copyright works.**

We also note the ambitious strategic delivery plan set out by the Arts and Humanities Research Council. Whilst supporting the recommendations of the National AI Strategy, the AHRC recognise and advocate *"the critical role of arts and humanities in the innovation system,"* together with supporting activities that connect policy and practice through collaborative research to *"incentivise responsible and ethical innovation"* - these comments would suggest that researchers and tech developers should be working equitably in collaboration with the arts, which would include the image-making industry, not against them.

The Future of the Image-making Industry for Photographers

Our members are not only individual taxpayers, annually contributing to the Treasury, but create digital images that are rich data sources. Ordinarily UK Plc would not hand over its economic assets - in this case UK copyright owners valuable (intellectual) property - to a third party without recompense, therefore we advocate that UK Plc should instead set a clear path to ensure both image rights-holders and tech developers can work together to innovate and safeguard a prospective future for both.

As a result of providing quantitative evidence of the turnover and investment that will be lost as a result of transferring the value from image rights-holders to AI developers, and other data mining entities, we advocate that the Government revisit the options provided and select a less harmful approach, such as Option 1 for licensing. Licensing affords the market to adapt and keep pace, whilst both protecting legitimate interests of rights-holders and offering fair and equitable competition.

Understanding the basis of AI and its intention with each consecutive generation of learning at neural speeds means that whilst there are elementary text/image generators that are seen as crude at this stage, within a very short space of time, the machines will come to dominate the human market it is intended to operate within. For example, if text/image generators can output food and portrait images relatively well, within a few years the market won't need food and portrait photographers and filmmakers. We need to recognise and augment human creative endeavour above machine endeavour to ensure the current and next generation of human creators are able to contribute to the UK's economic growth.

The enhancing and collaborative potential that we envision using licensing models with tech solutions, like smart contracts, stands in stark contrast to the zero-sum predictions we estimate AI will do to our sector and the wider creative industries. Instead, we believe that greater productivity would be achieved if we have both the creative industries working together with technology developers to future proof our net worth and double up on our (intellectual) property net exports.

We request that the IP Minister considers the serious harm facing creators who will see their livelihoods displaced by the proposal, and moves to reverse the proposed commercial TDM exception, setting a new agenda with a new Government in place; one that forges forward with creators and the tech sector side by side in order for both parties to prosper.

Isabelle Doran
CEO

On behalf of The Association of Photographers
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