25 YEARS gettyimages® | iStock™

101 Bayham St, Camden Town, London NW1 0AG, United Kingdom

June 12, 2020

European Commission

Rue de la Loi 200

1049 Bruxelles, Belgium

Via: Webmission

Re: Consultation on the White Paper on Artificial Intelligence – A European Approach – Supplemental Documentation to Getty Images' EUSurvey Responses

Submitted on behalf of Getty Images (UK) Ltd (Transparency Register No. 994509831613-80)

Getty Images greatly appreciates the opportunity to submit the following in response to the open consultation on the Commission's White Paper on Artificial Intelligence. We commend the Commission for being proactive on the issue and agree that an approach to AI based on trust and excellence will encourage innovation in an ethical manner while also protecting third party rights. At Getty Images we understand the potential value of the collection of technologies identified as "AI" in the White Paper. We embrace the change that the development of such technologies will bring and recognize the potential benefit to all of humanity.

Getty Images' Interest in AI

Getty Images is a leading source for visual content across the world, in that no other organization has the exact combination of creative imagery, vectors and video footage, combined with the comprehensive nature of our editorial imagery and video footage. We have a long history of managing high quality content, and our business model encourages the creation of artistic work by providing a system for lawful licensing and the monetization of content. Over the last few years, we have expanded our customer base to include technology companies wishing to use our content in the development of AI tools and services. We therefore already have a proven track record of licensing large volumes of visual content, delivered dynamically via our APIs, to customers throughout all the main continents.

AI and the Creative Industries – Need for IP Protection

As technology such as AI and ML enable the visual arts to evolve, we remain committed to protecting the intellectual property rights of our community of over 320,000 contributors as well as respecting the privacy and property rights of third parties. While the White Paper addresses many critical issues related to AI and Machine Learning (ML), we are concerned that it fails to adequately identify the impact of AL and ML on the creative industries. The risks that outputs such as artificially created synthetic content poses to third party intellectual property and privacy rights are significant and need to be further considered by the Commission prior to enacting legislation related to AI and ML. We recognize that historically AI and intellectual property issues have been treated as different clusters by the Commission and we understand the logic behind this. However, rapid developments in AI technologies and the demonstrated misuse of IP as a data source have made it important to include/recognize IP rights as a subsection of AI legislation. We welcome the initial steps taken by the Commission in this regard and recommend that the Commission consider these two issues together.

Synthetic Content and Generative Adversarial Networks

Although the potential applications of AI and ML are limitless and it is impossible to accurately predict what the future will hold, it is important to recognize that mature technologies available today, such as generative adversarial networks (GANs), require us to rethink the interaction between technology and the creative process. In the context of the visual arts, GANs have made possible AI tools that are capable of creating high-quality synthetic content for a low cost and at scale. As amazing as this is, such tools are not capable of true independent creativity equivalent to human creative endeavours. In order for AI tools to create new work, prior creative work must be used as training data. It is essential that any such work used as training data be tracked in an auditable record to ensure that it is handled in a lawful and respectful manner.

Time for Action is Now

At Getty Images, we believe that now is the time to define a legal framework for AI and ML. An effective legal framework can give all interested parties clarity and guidance creating commercial opportunities for human creators and enabling the responsible development of groundbreaking AI tools.

We are impressed by the Commission's commitment to engaging with these issues and are committed to participating in the process of developing effective AI policy. We hope that our answers to the questions raised in the survey help raise awareness of the issues that we believe are key and that our comments contribute to construction of the path forward. We feel strongly that solving the outstanding problems posed by these issues is key to the future of the creative industries and the humans who fuel it. We would like to underline our support for urgent action as opposed to taking a "wait and see" approach.

It is important that rules of the road are established as early as possible if the international creative industries and business at large are to have a sufficient level of legal certainty in order to, respectively, continue creating and investing in areas where AI has the potential to transform whole industries.

Additional Comments to Survey

Section 1 – An Ecosystem of Excellence

Section 4 of the White Paper and the Actions proposed effectively lay out the most important issues in trying to build an ecosystem of excellence. As a private company that represents the interests of many third-party rights holders, our greatest interest is helping to foster an ecosystem that respects the value of creative work and enables its use in AI in an ethical, responsible and legal manner.

Q1: Other Actions that should be considered.

In addition to the six actions proposed in Section 4 of the White Paper, Getty Images recommends that the Commission consider the following:

- B. Research and Innovation Community: As Identified in the Survey, Getty Images believes that focusing the efforts of the research and innovation community is a very important Action. These communities are key to the AI ecosystem and they play an important role in the creation of standards and norms. In addition to the Action proposed, the excellence and testing centers should be explicitly tasked with **developing record keeping standards** and be encouraged to

actively promote and enable the adoption of such standards in the private and public sectors. The communities should also be encouraged to be respectful of 3rd party rights and employ processes that license such rights where required.

- E. Partnership with the Private Sector: We applaud the establishment of a new public private partnership in AI and ML and are eager to participate. In order to effectively facilitate the partnership, we suggest that Commission consider the following issues in more depth and develop an Action that will guide stakeholders in the partnership:

    o Respect for intellectual property (IP) and privacy rights should be mandated. The Commission should work with private rights holders to promote the development of mechanisms for licensing IP and obtaining consent to use sensitive data that is used as data in AI and ML.
    o The Commission should work with the private sector to develop reporting standards that are reasonable and non-onerous but effectively preserve evidence.

- F. Adoption by the Public Sector: The Commission may want to consider recommending the establishment of an EU wide public registry where developers of AI tools could register a description of the type and source of specific data sets that they have used in building their tools. This would help legitimize and build trust in the resulting tools and might also stimulate trade in data sets, acting as a hub where developers can see what data sets other developers have used and be a place where the owners of data sets could promote their availability for licensing.

- G. Adoption by the Public Sector: As suggested above, the establishment of an EU wide public registry of data sets would also help provide visibility to best practices and encourage further innovation.

- H. International Aspects: Getty Images believes that Europe can and should be a world leader in promoting the ethical development and use of AI. As demonstrated by the reach of GDPR, well designed and implemented EU law can have a positive impact globally. The Commission should take the opportunity to craft a specific Action that would encourage public sector cooperation with multinational corporations with the goal of developing ethical standards for the handling of data focusing on high-risk AI applications like the use of protected IP and privacy rights. For such standards to succeed, adoption must be global, and the Commission should investigate techniques that would incentivize non-EU entities to participate. In addition, adoption of AI standards such as an obligation to maintain auditable records should be a requirement for any foreign entity that wants to participate in the EU markets for AI and ML products.

Q2: Other areas that should be considered in to working with member states

In addition to the areas highlighted in section 4.A of the White Paper, Getty Images believes that the development of standard record keeping practices is key to the alignment of policies and strengthened coordination. If standards for record keeping vary between member stakes there is a significant risk that development across the EU will not be on a level playing field. Member states that devalue standards may unfairly attract investment and encourage unethical behavior.

Q3: Other actions to strengthen the research and innovation community

In addition to the actions proposed, the research and innovation community should be explicitly tasked with developing record keeping standards and be encouraged to actively promote and enable the adoption of such standards in the private and public sectors. The community should investigate opportunities for working with the private sector to create and deploy technologies that facilitate accurate record keeping and develop standards for audit related disclosure. While the development of such standards may not be easy, such record keeping obligations are not novel. For example, standards for record keeping associated with financial accounting have been in place since ancient times. If we view data used in connection with AI and ML as a type of currency, independent records that track its flow can be an essential tool as the AI ecosystem continues to evolve.

Q4: Other tasks important to specialized Digital Innovation Hubs

Although SMEs play a crucial role in developing an ecosystem of excellence, often the lack of resources or experience in an industry leads SMEs to take considerable risk. In the context of AI and ML such risk can lead to catastrophic results when SMEs mature and scale. For example, early SMEs developing AI facial recognition systems that have played fast and loose with IP and privacy rights have clearly demonstrated how small upfront data management and sourcing decisions can have profound and negative impacts on third parties. To avoid such risks, it is essential that ethical standards be disseminated broadly and in a way that can be implemented by SMEs. Among other support, the Commission should consider having public resources made available that can help SMEs to understand obligations to third party rights holders. In addition, facilities should be made available that can enable SME to produce and preserve auditable records as applicable.

Section 2 – An Ecosystem of Trust

Getty Images strongly agrees with the Commission that it is an essential policy objective to build an ecosystem of trust. With such trust, society can uniformly benefit from AI without unfairly prejudicing human rights. In order to create a marketplace for AI where developers, distributors and users of AI tools can confidently interact, it is essential that clear and adaptable rules of the road are established, making it possible to evaluate risk and understand liability. While the White Paper effectively identifies many of the potential harms that can be caused by AI and advocates for rules designed to protect fundamental rights, it does not go far enough with explaining which fundamental rights should be protected.

In order to maintain consistency with the Charter of Fundamental Rights of the European Union which states that the right to property is fundamental and intellectual property shall be protected, like personal data and privacy, IP should be considered fundamental in the context of developing AI policy.[1] Accordingly, the ecosystem of trust should promote mechanisms that respect the rights of property owners and ensure that that IP is protected.

---

[1] See Charter of Fundamental Rights of the European Union (2016) Official Journal C202, 7 June, pp. 389-405. Title 2 Article 17 states, *"1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected."*

Q1: Additional concerns about AI not mentioned

As Identified in the Survey, Getty Images believes that the concern that AI may breach fundamental rights is very important. It is imperative that this concern is adequately addressed and that IP rights be classified as "fundamental" rights that receive explicit protection in the context of AI and ML.

In the creative industries, AI generated outputs like synthetic content have the potential to enable new artistic genres and spur a variety of commercial possibilities. However, it must also be recognized that these technologies also raise novel intellectual property questions and can lead to significant harm in the context of disinformation and unauthorized use. As industry surges forward with developing AI tools, it is crucial that the rights of content creators be considered. While we cannot predict exactly what tomorrow's tools will look like, to ensure that IP rights are respected, we must act now to preserve evidence of how such tools are created and deployed.

The Commission should look to enshrine the following principles in any forthcoming legislative initiatives and guidance. Doing so will serve to create legal certainty for content creators and the users of AI technology and will help to create a solid foundation upon which AI technologies may be advanced and exploited.

- **Data sets of that include protected IP to be regarded as "high-risk".** AI applications that use data containing protected IP pose significant risk of causing irreparable harm to fundamental rights and should therefore be considered "high-risk" applications that are subject to a higher level or scrutiny. As such, The EU's legal framework should explicitly recognise visual copyright protected work as a category of input data.

- **Fair remuneration for human creators whose work is used to power AI technologies.** The EU's legal framework should include an express requirement for authorization prior to using copyrighted protected work in AI and ML development, except where a specific use is permitted under a statutory exception to copyright infringement. In this regard, the application of existing exceptions to copyright for text and data mining should be clarified as they relate to development and deployment of AI technologies, including that they should never apply when a possible output is synthetic content capable of competing with the content being mined.

- **Maintenance of auditable records.** In order to facilitate the above two principles, the EU's legal framework should include rules regarding maintenance and transparency of data used in developing, training and deploying AI technologies.

Q2: Specific new rules for AI systems

While current legislation may be mostly sufficient to address the concerns expressed, the novel nature of many AI applications often makes it difficult to understand how existing law will be applied. In order to avoid legal uncertainty, the EU can offer guidance on how AI applications should be treated under existing legislation such as the Copyright Directive. Such guidance should include recognition that AI-generated content is derivative of the underlying data, and if such data is protected by copyright, authorization of the copyright holders is therefore required unless permitted by an exception to the law. It could also clarify certain circumstances in which exceptions to copyright infringement would and would not apply. In addition, while it may be premature at this juncture, eventually new legislation may be necessary to establish the criteria necessary for granting IP protection to artistic creations generated by AI.

Critically, in order to create a legal framework that encourages non-discriminatory and trustworthy outputs of AI technologies, a legal requirement should be imposed upon a developer or user of AI technology to maintain an auditable record of all data used in AI/ML development to ensure that, where this data contains or is derived from images/video protected by copyright and/or contains biometric data of any individuals depicted, it will be possible to enable subsequent forensic analysis to determine whether third party rights of privacy and copyright have been respected.

Q3: Should compulsory requirement be limited to high-risk applications

Although Getty Images agree that high-risk applications should be subject to a higher level of compulsory requirements, in many instances such requirements should also be considered in connection with low-risk applications. Rather than give low-risk applications free reign, the Commission should consider way to incentivize the voluntary compliance with standards. For example, encourage the developers of low-risk applications to maintain auditable records by ensuring that only those businesses that comply are able to enjoy the full range of economic incentives. This type of approach can help maintain the careful balance between creating an ecosystem of trust and imposing disproportion burdens.

Q4: Approach to determining "high-risk" applications

Getty Images supports the approach to determine "high-risk" applications outlined in Section 5.C of the White Paper and agree that such determination should be clear and easily understandable. However, the initial discussion of the sectors that should be covered seems overly limited and underestimates the areas where AI can cause irreparable harm.

When developing an explicit list of high-risk applications, the legislators should apply the approach more broadly. In the context of IP rights, if the proposed approach is applied, AI applications where the output is synthetic content meet the two cumulative criteria and should be considered "high-risk". In regard to the first proposed criteria, in the creative industries there is a significant risk that the output of AI applications could devalue or even displace the work of human creators by producing synthetic content for low cost and at scale without due regard to underlying rights. Second, considering that such applications must be trained and tested using underlying data, the output should be considered a derivative of that data. If such data is protected by copyright, respect for which is a fundamental right, authorization of the copyright holders is therefore required unless permitted by an exception to the law. Without clear limits or obligations in place, the creative industries, including the high density of SMEs within, will face irreparable harm.

Q5: Most Concerning "high-risk" application – Synthetic Content

As a proud member of the creative industries, Getty Images is most concerned with AI applications that produce synthetic content and feel strongly that such applications be classified as "high-risk". While we support innovation in this area and believe that the technology can have many positive applications in the context of creative work, irresponsible and unethical development will lead to irreparable harm to IP rights holders as described in our response to Q4 above.

In addition, it is important to recognize that synthetic content is a complex application and any regulation applicable, because it is "high-risk," needs to be flexible enough to accommodate such complexity at scale. For example, the same underlying AI and ML technology—known as "generative adversarial networks" (GANs)—that is used to create synthetic "creative" content that has potentially positive applications is the same technology that is used to manipulate visual content in order to make "editorial" deep fakes.

As policy makers look to limit the harmful applications of synthetic creations, it is important to note that deep fakes pose the biggest threat in the "editorial" context. When synthetic content is used to intentionally spread disinformation, consumers of news can lose trust in the sources used for dissemination and editorial integrity is threatened. The result is a hybrid threat affecting human rights issues such as freedom of speech, defamation and slander, social cohesion, as well as democratic processes and national security. These risks, in addition to the risk of harm to IP rights holders, if protected data is used without authorization, warrants classification of the application as "high-risk".

Q6: Mandatory requirements of a possible future regulatory framework

Looking through the lens of the "high-risk" AI application that we are most concerned about (synthetic content) Getty Images has identified all the mandatory requirements raised as very important. While we agree with the general sentiment, we feel that the White Paper does not adequately address intellectual property rights in its discussion of these requirements and would like to raise the following issue for further consideration:

- In the context of "the quality of training data sets," requirements aimed at ensuring that intellectual property rights are adequately protected during the use of AI-enabled products and services should be explicitly added. Similar to private and personal data, the misuse of data that contains protected IP can lead to the deprivation of fundamental rights. It is essential that proper authorization be obtained when using protected IP as training data and the Commission should encourage dialog between rights holders and AI developers that facilitates fair and non-onerous licensing systems. At Getty Images we already have a track record of licensing large sets of images and accompanying metadata to developers of AI technologies throughout the world. Such licensing is easily achievable, has not proven to be cost prohibitive and creates a level of legal certainty that promotes investment and innovation.

- In the context of "information provision" as described in 5D(c), information that clearly labels synthetic content as AI created could be a low friction solution to the misinformation/deep fake problem. Especially in the editorial context, the ability for consumers to understand that content is synthetic could help fight the erosion of trust caused by synthetically generated deep fakes.

Q7: Other special requirements in addition to those mentioned in the question

In addition to the guidelines and regulations relating to biometric identification systems (facial recognition) mentioned in the question, IP rights such as Copyright should also be considered. Such systems rely on massive amounts of image data in order to be able to perform their functions. Some systems currently on the market have demonstrated a clear lack of respect for intellectual property and other contractual agreements when sourcing such data.[2] Mandatory requirements that ensure that systems obtain the appropriate authorization to use image data for these purposes is essential and should be accompanied by an obligation to maintain detailed records on how such data was sourced and used in the ML process. As noted in our response to Question 6 above, Getty Images has experience showing that this is perfectly feasible.

---

[2] For example, the explosive growth of the startup facial recognition company Clearview AI, has exposed end users to significant liability based on Clearview's cavalier attitude toward using images as training data without obtaining authorization from rights holders.

Q8: Voluntary labelling system

Getty Images is very supportive of a voluntary labelling system for all AI systems, including those that are not considered "high-risk" and, even if there might be some circumstances where mandatory labelling is not possible, it should at least be encouraged as a best practice for all. The concept of awarding a "quality label" to economic operators who comply with the voluntary scheme is a good one and additional resources should be dedicated to developing incentives for compliance. For example, programs geared toward educating consumers about the benefits of selecting AI tools and systems that comply with voluntary labeling should be prioritized.

Q9: Enforcement systems

Of the options offered, Getty Images feels that compliance of high-risk applications with the identified requirements should be self-assessed ex-ante (prior to putting the system on the market). It is important to find an appropriate balance that ensures that compliance is not onerous, and self-assessment can significantly reduce friction. The development of AI applications tends to be fluid, and often commercial use cases are discovered that deviate from initial plans. To maintain needed flexibility, it is key that auditable records be maintained that preserve how the system was created, what data was used and how it was sourced. Similar to rules for financial record keeping, certain entities (presumably with high-risk applications) would have reporting obligations while others would only need to disclose records if legally required at a future date.

Section 3 – Safety and liability implications of AI, IoT and robotics

The Report from the Commission on the safety and liability implications of AI[3] fails to effectively consider the liability implications related to the misuse of intellectual property. This oversight is a significant one since the risk of damage to rights holders in the context of AI is great and it is crucial to understand how the existing liability framework can be adapted. While consumer protection is paramount, we must also recognize that the liability framework established here needs to be designed to protect third party rights incorporated into the data that these technologies are dependent on.

Q1 – Further risks to be expanded on to provide more legal certainty.

It is the general position of Getty Images that the use of copyright protected work as training data requires preauthorization by the copyright owner, except only where an AI developer can demonstrate that its use is covered by an exception to copyright infringement. While we recognize that it is in the public's benefit to permit certain excepted uses of protected work (for example for pure scientific research purposes), most current commercial AI use cases that rely on copyrighted work should require authorization. In the context of generative AI tools that are designed to create synthetic content, the importance of protecting the rights of underlying rights holders is especially high. The synthetic work derived from the copyrighted work used as training data not only depends on such work as the source of its "creativity," it has the potential to directly and unfairly compete with the market for that underlying work. In order to protect intellectual property rights, the law should clearly require prior authorization in the context of using copyrighted content in a ML data set.

With regard to the question of enforceability of copyright, current laws for assigning liability for copyright infringement are generally adequate to address a situation in which an AI process creates a work that infringes a copyrighted work. Liability should generally be assigned to a natural person who

---

[3] https://ec.europa.eu/info/sites/info/files/report-safety-liability-artificial-intelligence-feb2020_en_1.pdf

either has control of the AI or who benefits the infringing work. While in theory such assignment can be consistent with current laws, in practice, this issue again highlights the need for an obligation to preserve auditable records that track the use of data. For example, if a developer uses copyrighted content as training data in a GAN without authorization and markets a resulting tool that enables the creation of synthetic content, liability should be assigned to him or her. In addition, if a user of that unauthorized tool then creates synthetic content with it, such content would also be unauthorized and there should be liability assigned to that user as well.

Q2: Risk Assessment Procedures

It is important to consider that unlike traditional physical products, AI tools are essentially software that can continue to evolve after they are being used by consumers. Accordingly, risk assessment procedures must be designed to be flexible enough to continue to assess risk throughout the lifecycle of the product. In the event that software updates rely on new protected third-party data, the use of that new data must be considered.

Q3: Product Liability Directive

As alluded to above, the Product Liability Directive should not be the only piece of legislation that should be considered in this context. It is also important to consider liability under IP laws and make sure that the legislative framework is consistent with enabling the enforcement of those laws. Without such enforcement, the value of IP will be irreparably harmed.

Q4: Adaption of current national liability rules

Getty Images believes that current national liability rules should be adapted for the operation of AI for all AI applications. However, the adaption process does not need to be extensive nor formal in all cases but, the unique risks associated AI applications should be identified and liability for damages clarified. In the context of intellectual property, it should be clear that all AI applications need to respect IP and any use should be transparent, ethical and legal.

Thank You

Thank you for the opportunity to participate in the consultation. We appreciate the importance that the Commission has placed on this topic and are confident that its efforts will lead to an ecosystem of excellence and trust for AI that will be a model for the rest of the world to emulate. We look forward to continuing the conversation and wish to be a productive partner to the Commission in any way that we can.

Respectfully submitted,

Jonathan Lockwood
VP, Corporate Counsel
Getty Images (UK) Ltd