Dr Paula Westenberger's Response to IPO Public Consultation on Copyright and AI

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Dr Paula Westenberger[1] is a BRAID Research Fellow, Senior Lecturer in Intellectual Property Law at Brunel University of London, and member of the Brunel Centre for AI: Social and Digital Innovation. Her BRAID project 'Responsible AI for Heritage: copyright and human rights perspectives',[2] in partnership with RBG Kew, focuses on how intellectual property law, particularly copyright, can responsibly advance the use of AI in heritage research. In 2023, Dr Westenberger led the workshop 'Mapping out the interface between Cultural Heritage, Artificial Intelligence and Copyright Law in the UK'.[3]

Views are my own and do not intend to reflect those of any institutions, colleagues, research participants or project partners.

The response below summarises some of the arguments made in the forthcoming paper Westenberger, P. and Farmaki, D. (2025) 'Artificial Intelligence for Cultural Heritage Research: the Challenges in UK Copyright Law and Policy',[4] the abstract for which I include below:

> *"Artificial intelligence (AI) is revolutionising our relationship with cultural heritage, enhancing access to, engagement with and preservation of collections and heritage sites. AI is also being used as a valuable research tool in the context of heritage collections. However, as materials protected by copyright may be used in AI development, training and use, copyright law can become an obstacle to important AI deployments in the heritage sector, an area which is currently understudied from the United Kingdom (UK) perspective. This article explores the intricate interplay between cultural heritage, AI and copyright law, demonstrating the main copyright law and policy challenges facing cultural heritage professionals and researchers in using AI in the UK for heritage research. It highlights the complexity and uncertainties as regards the current Text and Data Mining exception in the UK Copyright Designs and Patents Act, emphasising the need for an improved legal framework that balances copyright protection with the benefits of AI for cultural heritage research and management. It also reveals the underrepresentation of the heritage sector in AI regulation and copyright policy discussions in the UK. This exploration underscores the imperative for an inclusive policy dialogue that considers the perspectives and evidence of the cultural heritage sector in its full breadth and diversity (including related researchers) in shaping copyright law reform and AI regulation, and for further research to be carried out in this field."*

I will be addressing Questions 5, 16, 28 and 29 in this response.

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[1] https://www.brunel.ac.uk/people/paula-westenberger

[2] https://braiduk.org/responsible-ai-for-heritage-copyright-and-human-rights-perspectives

[3] https://livingwithmachines.ac.uk/event/mapping-out-the-interface-between-cultural-heritage-artificial-intelligence-and-copyright-law-in-the-uk/

[4] Westenberger, Paula and Farmaki, Despoina, Artificial Intelligence for Cultural Heritage Research: the Challenges in UK Copyright Law and Policy (February 23, 2025). Available at SSRN: https://ssrn.com/abstract=5153757 or http://dx.doi.org/10.2139/ssrn.5153757

Question 5. What influence, positive or negative, would the introduction of an exception along these lines have on you or your organisation? Please provide quantitative information where possible.

I am concerned about the potential impact of the proposed exception in relation to TDM research, in view of the current issues with s29A CDPA (TDM for non-commercial research), which are discussed in Question 28 and in my forthcoming paper above.

We should avoid the situation that research uses (that should be covered by the non-commercial research exception, which cannot be overridden by contract) end up being regulated under a commercial TDM exception with opt-out, as this could have the possible result of biasing and affecting the quality of research as a result of incomplete datasets.

The boundaries between any new commercial TDM exception and the non-commercial research exception must be carefully and clearly delineated. S. 29A must be clarified and expanded before any new TDM exception is included in legislation, as discussed in Question 28 below.

Question 16. Are you aware of any individuals or bodies with specific licensing needs that should be taken into account?

My research highlights that the heritage sector (in its full breadth and diversity) and researchers in such contexts should be taken into further consideration in AI and copyright policy, as further developed in my paper above and Questions 28 and 29 below.

The heritage sector is diverse, formed not only by libraries, archives, galleries and museums, but also natural heritage institutions, heritage sites, historic houses, intangible heritage stakeholders, and others, from different sizes and regions. Different institutions house different materials, and each kind of collection bears special characteristics that can have different and complex copyright implications. It is thus important to engage with the sector in its full diversity to understand the different copyright issues facing these stakeholders.

Bespoke and non-commercial AI models used as tools for research or collections management in heritage contexts present different copyright law implications - particularly regarding “non-commercial research” - compared to commercial generative AI tools. The current policy focus on commercial generative AI presents a missed opportunity to infuse crucial considerations on ethics, bias and cultural impact into AI and copyright regulation, that heritage practitioners are well equipped to reflect on. Heritage stakeholders (including researchers) can thus provide important insights to shape better policies and regulation.

Understanding the risk-averse nature of the heritage sector is also an important consideration, as this reflects on attitudes towards legal uncertainties, which I explore further below (and in my forthcoming paper).

Question 28. Does the existing data mining exception for non-commercial research remain fit for purpose?

The current TDM exception in s 29A is not fit for purpose for non-commercial research, particularly in heritage contexts. This exception should be clarified and expanded.

As noted in the *Living With Machines* project book, the exception has proved difficult to use in innovative research involving diverse datasets, limiting its effectiveness in supporting national priority research in the intersection of technology and culture.[5]

The main issues, as we argue in the forthcoming paper 'Artificial Intelligence for Cultural Heritage Research: the Challenges in UK Copyright Law and Policy'[6] are:

- Definition of lawful access is unclear;
- Lawful access requirements may restrict the enjoyment of the exception and may represent contractual override in practice (which is not permitted by the exception);
- Prohibition to transfer copies in CDPA, s 29(A)(2)(a) is unclear and unsuitable for current collaborative forms of AI research: organisations holding relevant data often partner with those possessing computational resources/expertise needed for AI projects. The TDM research exception should support this practice by allowing transfer of datasets between research partners in such cases;
- Web mining: it is unclear the extent to which content placed online falls under lawful access;
- Risk-averse attitudes and lack of resources in the sector: this can essentially deter organisations from engaging in important AI research, especially in view of the lack of clarity of the exception;
- Issues of bias: relying on copyright permissions, or the copyright status of materials, to select research datasets may compromise AI research quality;
- "Non-commercial" research: boundaries between commercial and non-commercial can become blurred (including in the heritage sector, where public-private partnerships can occur in digitisation projects). Focusing on non-profit organisations/uses may be an alternative solution.

The issues above need to be clarified and resolved before any new commercial TDM exception with opt out as proposed in section C.1 is introduced. In summary, we argue in our forthcoming paper that:

> "Notably, the consultation proposes a new exception for commercial TDM including an opt-out provision for rights holders, allowing them to exclude their works from AI training datasets. While this aims to protect copyright interests, the possibility of opt-outs raises concerns about potential biases, omissions, and incomplete datasets that could skew and compromise AI research. This is particularly problematic if this provision was to apply in research and heritage contexts, which could become the case in light of the uncertainties regarding the current non-commercial research TDM exception and risk-averse attitudes of heritage stakeholders ... It is unclear how the proposed new exception will impact the existing TDM exception for non-commercial research, which we believe is not fit for purpose for heritage research, and should be clarified and expanded … before the introduction of any new exception. The boundaries between any new commercial TDM exception and the non-commercial research exception must be carefully and clearly delineated, to resolve existing issues and protect and promote AI research in heritage contexts." [7]

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[5] Ahnert R, Griffin E, Ridge M, and Tolfo G. Collaborative Historical Research in the age of big data. Cambridge University Press (2023) p. 28: https://www.cambridge.org/core/elements/collaborative-historical-research-in-the-age-of-big-data/839C422CCAA6C1699DE8D353B3A1960D

[6] Westenberger, Paula and Farmaki, Despoina, Artificial Intelligence for Cultural Heritage Research: the Challenges in UK Copyright Law and Policy (February 23, 2025). Available at SSRN: https://ssrn.com/abstract=5153757 or http://dx.doi.org/10.2139/ssrn.5153757

[7] Ibid.

Question 29. Should copyright rules relating to AI consider factors such as the purpose of an AI model, or the size of an AI firm?

Yes, I believe the purpose of an AI model should be considered. It is important to note, however, that looking at purpose alone might not provide enough clarity depending on how the purpose is framed: see the discussion above and in our paper on the blurred boundaries between commercial versus non-commercial purposes. It might be important to also look at the beneficiary of the provision. In my view, heritage and research uses that are in the public interest, and public heritage and research institutions, deserve particular consideration.

Other exceptions are specifically tailored to the needs and characteristics of the heritage and research sectors, so it is not something unfamiliar to copyright law to look at specific purposes or beneficiaries, particularly when discussing exceptions. What seems important is that those rules are clearly crafted, and in close consultation with the relevant stakeholders, considering the practical issues facing the relevant sector. Suggesting "a more rigorous and empirically focused framework through which to assess … the drafting of copyright exceptions", and focusing specifically on cultural institutions.[8]

It is problematic that this question is framed as enquiring on the size of the "AI firm". In a discussion on s 29A, aimed at TDM for non-commercial research, the question should, importantly, in my view, enquire on the size of the research or heritage organisation. Consultation documents tend to overemphasize AI firms and creative industries, failing to address important public sector organisations and stakeholders such as those in heritage.

More proactive and substantial engagement with the heritage and research sectors is required in copyright and AI policy making. Public consultations such as this, albeit a great opportunity to contribute to discussions, may not necessarily be accessible/feasible to many such stakeholders. Consultations so far are being drafted in a manner that in my view does not appropriately invite heritage sector contributions (for example the "AI firms" emphasis in this question), and provide too short of a response timeframe (including over the festive period). As such, it does not allow sufficient time for stakeholder engagement events and research to be carried out that could reveal important evidence to the questions posed. Therefore, I believe that post-consultation engagement strategies, including targeted events such as roundtables with appropriate and diverse representation, would be important to try and capture the views and evidence of the heritage sector in its full breadth and diversity.

See also my response to Question 16 above.

I remain available should you require any further information or clarification.

Best wishes,

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[8] Hudson E. *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (Cambridge University Press 2020) p.13