



Association of Illustrators: ICO consultation series on generative AI and data protection

The Association of Illustrators (AOI) which has 3000+ members, including freelance individuals, illustrators' agents, and universities, was established in 1973 to advance and protect illustrators' rights and is a non-profit making trade association dedicated to its members' professional interests and the promotion of contemporary illustration.

As the only body to represent illustrators and campaign for their rights in the UK, the AOI has successfully increased the standing of illustration as a profession and improved the commercial and ethical conditions of employment for illustrators. The AOI offers professional and business advice to members, as well as representing the interests of thousands more illustrators across the UK.

The major concern for illustrators, who along with photographers create most of the images that we all see in our day-to-day life, is how their own works have been used to train AI without permission, and how use of AI generated images may undermine their own work practices and be used instead of human made artworks.

Illustrators support progress in technology but also recognise the need for protections and safeguards where technology is applied. As such, transparency over how creative works can be ingested and adapted throughout this process will be increasingly important and IP licensing safeguards will remain vital to protect against the unfair use and devaluation of copyright protected work. This can be accomplished by respecting existing UK copyright and data protection laws.

We believe the Information Commissioner's Office (ICO) is in a strong position as a regulator to scrutinise the training practices of generative AI application developers. This statement is in line with the government's outlined strategy articulated in the AI White Paper, which delineates substantial roles for specific regulators. From our perspective, the ICO assumes the responsibility of upholding data protection standards which is extremely important to the creative industry particularly in the absence of a dedicated regulator safeguarding the interests of the creative sectors.

(a) Copyright Law

It is a welcome acknowledgement that the ICO analysis includes a note that a lawful basis will not be met if the data infringes other legislation outside of data protection such as intellectual property or contract law.

However, controllers/developers are already regularly using data without prior permission or agreement. Companies are taking and using data for AI development without permission, and this is a major issue for UK intellectual property. For many AOI members, the potential reach of 'legitimate interest' is adding additional concern to an already worrying new reality.

The House of Lords Communications and Digital Committee explicitly recognised in its report on large language models and generative AI published on 02 February 2024 that it was not fair for tech firms to economically benefit from their commercial use of rights holders works without permission or compensation and called for the UK copyright regime to be respected and upheld.

Income generation from the UK copyright system powers the Creative Industries. The Creative Industries sector contributed £109bn to the UK economy in 2021, equivalent to 5.6% of the UK economy that year.

(b) Lawful Basis under UK GDPR

Furthermore, AI developers risk failing to meet the three cumulative tests essential for establishing "legitimate interests" under UK GDPR rules.

Purpose Test: Is There a Valid Interest?

While there is a clear commercial interest for the developers, it's not reasonable to make a blanket assumption that there will be *'a wider societal interests related to the applications that the models could potentially power'*. It is not in the interest of creators and copyright holders for their data to be used by the AI platforms who they are competing with for work.

In most cases, Model Developers will not be aware of how their models will be utilised by third parties in future. We cannot realistically ensure that users will *'respect data protection and people's rights and freedoms'*, in our opinion, making it impossible to claim valid interest. Notably, there is also a societal need to protect against the misuse of personal data, especially concerning deep fakes.

Necessity Test: Is Web Scraping Necessary Given the Purpose?

Web scraping, absent of permission, fails the necessity test. The assumption that *'most generative AI training is only possible using the volume of data obtained through large-scale scraping'* is incorrect. Several platforms have demonstrated that it is possible to legally licence sufficient datasets to develop successful AI tools (such as Adobe for instance). Web scraping is not a necessity for these technologies to progress.

In a recent AOI survey, 43% of illustrators said that they would be open to licensing their work to AI developers for an appropriate fee. Suggesting that there would be sufficient interest



from the illustration community if more developers chose to pursue legally licensing work from creators.

Balancing Test: Do Individuals' Rights Override the Interest of the Generative AI Developer?

We believe that Individuals' Rights do override the interest of the Generative AI Developer. Whilst AI can clearly be used for wider societal benefit in fields such as medicine, there are also numerous applications of AI where the benefits do not outweigh the costs to individuals.

In terms of AI generated illustrations, AI platforms are not offering a vital improvement to society by producing artwork that could have otherwise been created by an illustrator. In many cases, they are simply redirecting opportunities and revenue from individual creators.

In conclusion, we believe that web scraping data for the purpose of AI training does not successfully pass the 'three-part' test, and therefore should not have a valid lawful basis under UK GDPR. Data protection aims to protect the rights of individual data subjects against potential abuses of their personality, intellectual property, and contractual freedoms. It is imperative that these rights be preserved. We are looking forward to working with the ICO as the relevant regulator protecting the personal data of UK creators and artists.

Please note that as members of the British Copyright Council and the Creators Rights Alliance, we also fully support their responses and echo the points that they have articulated in their submission.