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COMMENTS TO THE USCO – AI'S COPYRIGHTABILITY

The United States Copyright Office (the "USCO" or the "Office") was created in order "to promote" the value of "the Progress of Science and useful Arts," and it achieves this value through the criterion of the "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (*United States Constitution, Article I, Section 8, Clause 8*). For this material security, the Office creates, facilitates, and assigns copyrights.

It is because of the Office's dedication to material security that we find concern with Artificial Intelligence ("AI," plurally "AIs"). On August 30, 2023, The United States Copyright Office and the Library of Congress submitted a Notice of Inquiry and Request for Comment in the Federal Register, **Vol. 8, No. 182, Pg. 65205, FR 2023-18624**. In this document, the Office submitted a series of questions it wished answered by either citizens or groups of citizens. This brief is to comment on, and attempt to, answer a select number of those questions.

GENERAL COMMENTS

<u>AIs are generative creations.</u> But they are not creative in the way humans are. AI is generative, but only to the degree of the magnitude of materials it can reference or derive work/style from. It is also limited by the parameters set by the human creator/inputter.

We assert that "[c]omputers do not create art, people using computers create art" (Hertzmann). An AI may create a unique piece of artwork, but this work is not itself innovative; rather, that work is the culmination of the AI's analysis of datasets, which comprise hundreds to thousands of previous works, as well as the style(s) and theme(s) used in those works (Koteluk, et al., *Chabon, et al. ¶ 7*).

QUESTION 22: CAN AI-GENERATED OUTPUTS IMPLICATE THE EXCLUSIVE RIGHTS OF PREEXISTING COPYRIGHTED WORKS, SUCH AS THE RIGHT OF REPRODUCTION OR THE DERIVATIVE WORK RIGHT? IF SO, IN WHAT CIRCUMSTANCES?

When we look back to the *Thaler* decision, the Copyright Act of 1976's (the "Copyright Act" or "Act") "authorship" requirement is "presumptively… human." The Act's "now known or later developed" clause may be referenced by those who wish for AI-generated works to be copyrightable (See the *Copyright Act of 1976 §101¶11)*, but this fails to account for the ramifications of such an interpretation. If AI is classified as one of the mediums by which a work is fixed, then an AI is summarily determined to be a mode of storage, not a tool or mechanical/digital capturer of an artist's "mental conception" of a work (See *Thaler* pg. 8).

At first glance, one might believe the script writing used to create AI generations qualifies as "human authorship", but this claim fails to recognize the distinct separation between the script and the final product. Although the script itself is innately human, the generated result is the culmination of AI process beyond human control, equating the final product as lacking the required "human authorship" copyrightable work requires based on the Thaler decision.

Additionally, an AI's output cannot directly reflect an artist's "mental conception" of a work. Looking back to *Sarony*, the copyrightability of photographs was made available to photographers only insofar "as the photograph is a representation of original intellectual conceptions," and it would seem that any technology by which a work may be conferred in a copyrightable manner, "now known or later developed," ought to pass the test of whether or not the proposed technology can, in both fact and art, carry a verifiable and repeatable representation of an author's "original intellectual conceptions." Writings, illustrations, photographs, musical composition, and videos all pass this test.

However, when AI is put to this "original intellectual conceptions" test, it fails. Take ChatGPT for example. When one directs the program to create "a three-paragraphs-long story about an ice cream cone on an adventure" two times, the program will output two different stories each time – complete with different characters and narratives. The human inputter could have a verifiable and original intellectual conception of what he wants the AI's output to be, but the AI will not confer that reality. Moreover, AI generations will commonly include many aspects the human inputter did not expect, further eliminating it from being an "original intellectual conception". Compare this to a copyrightable practice such as photography. When a

photographer takes two pictures of a stream running down a mountain, the two pictures will be the same. This is because a human's "mental conception" of the desired art or outcome is able to be repeatedly transferred by the camera. All other historically accepted forms of copyrightable work mirror this as they can effectively and repetitively capture the human's "mental conception", but An AI cannot consistently confer such realities, no matter how many times repeated.

"[N]ow known or later developed" could not refer to an additional type of author, as there was no implication of any innovation or development of the nature of the author. This "Human Authorship" doctrine lies "on centuries of settled understanding" because it is only humans who can develop such an "original intellectual conception."

Therefore, we deduce that AI cannot create distinct and copyrightable works. However, we do conclude that AI can both implicate and infringe upon the exclusive rights of copyrighted material. The following reasons provide warrant:

22a. THE DERIVATIVE WORK RIGHT

The Copyright Act's §106(2) provides for the holder of a copyright to "prepare derivative works based upon the copyrighted work." The Act's definition of a "derivative work" refers to a work which is "based upon one or more preexisting works;" however, this only applies to works which:

1. Derive their value from their enhancing or building on previous works,
2. Provide explicit reference to the work, either within the work itself or in the description of the work, and
3. Are explicitly authorized by the copyright holder.

If these conditions are met, then the work is rightfully derivative and is subsequently protected under copyright law. Many AIs reference various and different works in their learning phases, often without the authors' permission (*Chabon, et al.)* These referenced works are used to learn styles and what the human inputter would find appealing in their requests to the software. However, these works are scarcely, if ever, referenced or attributed to either the referenced work or its author(s). While the referenced works are simply training material for the AIs, they are the livelihoods of the authors and artists who created them. For many authors and

artists, their creative output is not only a reflection of their passions and talents, but also a source of income in which they depend on.

22b. THE RIGHT OF REPRODUCTION

The Copyright Act's §106(1) provides for the holder of a copyright to "reproduce the copyrighted work in copies or phonorecords." The Act's definition of "copies" pertains to "material objects… in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

Through this provision, the Act gives copyright holders exclusive rights to copy their own copyrighted work. The definition implies the necessity of an exclusive right which allows the copyright holder the power to authorize who uses the holder's copyrighted work.

If AIs (or, more pertinently, the creators of AIs) use either original copyrighted work or the copies of such to train AI without the holder's consent, and the creator of that AI uses the knowledge the AI has gained to profit off that AI, then infringement has occurred.

22c. OTHER OBSERVATIONS AND COMMENTS

i. SHOULD WE RULE ON AI FEDERALLY OR STATE-BY-STATE?

When looking at current state regulations regarding Artificial Intelligence, we find that 16 states currently have laws that *may* affect either the commercial or copyright AI spheres. These laws span from restricting AI's role in data processing (California, Colorado, Connecticut and Virginia) to noting that AI is not a person (North Dakota).
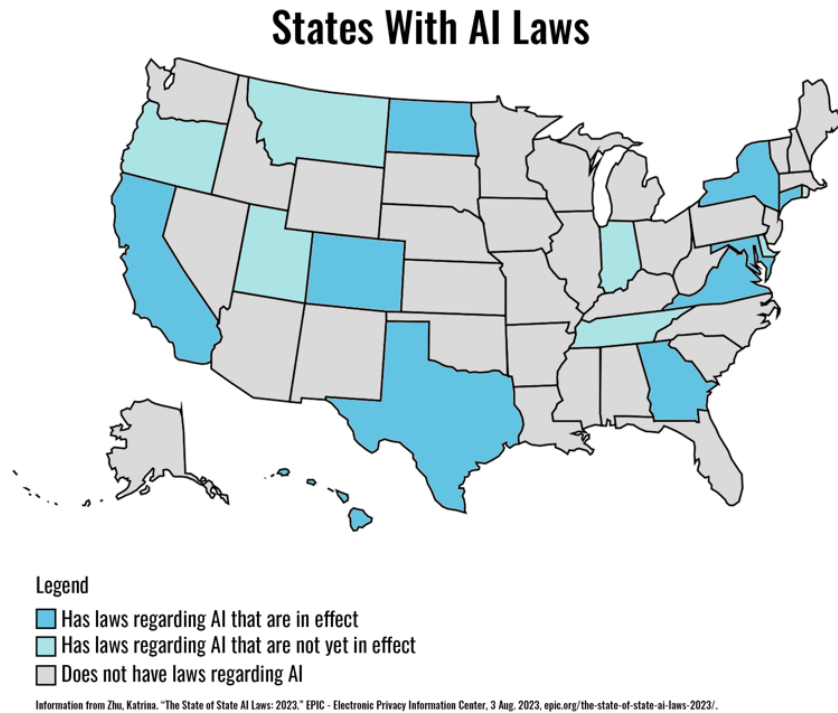
States With AI Laws

Legend
- ■ Has laws regarding AI that are in effect
- ■ Has laws regarding AI that are not yet in effect
- ■ Does not have laws regarding AI

Information from Zhu, Katrina. "The State of State AI Laws: 2023." EPIC - Electronic Privacy Information Center, 3 Aug. 2023, epic.org/the-state-of-state-ai-laws-2023/.

Figure 1: States with AI Laws (as of October 5, 2023)

None of these states have taken measures to regulate AI's infringement of copyrights, as that is a federal issue. It is of our opinion for the USCO to regulate AI in its infringement of copyrighted work, and time is of the essence as new technologies are consistently and constantly entering the playing field.

Additionally, the potential harm to the Name, Image or Likeness ("NIL") of individuals, public figures or private individuals, due to the proliferation of deepfake technology is also a significant concern.[1] As deepfake technologies continue to grow and infringe on the NIL of public figures, athletes, actors/actresses, singer song writers, and other artists and private individuals and the potential for copyright infringement we again would argue that the following minimum standards should be set again including but not limited to, clearly defined standards, require AI creators, especially of deepfake technology to provide transparency in their processes, obtain consent of an individual's likeness of AI-generated content regardless of their public or private status, and create and enforce rules and penalties to ensure that if deepfake creators violate copyright and intellectual property rights that legal action will be instigated against the offender and include civil and criminal penalties.

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[1] Deepfake content is "a form of synthetic media in which artificial intelligence is utilized to create a digital copy of a person's likeness or voice." (Quirk)

QUESTION 24: HOW CAN COPYRIGHT OWNERS PROVE THE ELEMENT OF COPYING (SUCH AS BY DEMONSTRATING ACCESS TO A COPYRIGHTED WORK) IF THE DEVELOPER OF THE AI MODEL DOES NOT MAINTAIN OR MAKE AVAILABLE RECORDS OF WHAT TRAINING MATERIAL IT USED? ARE EXISTING CIVIL DISCOVERY RULES SUFFICIENT TO ADDRESS THIS SITUATION?

One could prove that the AI – the creator of the AI – utilized infringed works by looking through responses given to certain queries, as well as delving into the datasets that the AIs use to train and learn. It is known that many AI creators "[cast] a wide net across the internet to capture the most comprehensive set of content available" in order to "better train [AI] models" (*Chabon, et al. ¶ 34).* In fact, companies such as OpenAI have admitted that it uses "written works, plays and articles" in its training of its ChatGPT AI models (*Chabon, et al. ¶ 32).*

In the interest of copyright security and the security of public interest in the face of a new technology, it seems reasonable to develop the following:

1) a discovery test based on query responses of AIs including;

   a. transparency standards to develop clear standards for how AI systems must respond to discovery queries. This ensures test results are consistent and provide useful information, and/or

   b. define objective criteria for what constitutes a 'discovery test' query to help prevent misuse of the system and ensure that tests are relevant in assessing potential copyright infringement and/or

   c. develop fair use guidelines to handle queries involving copyrighted material

2) a requirement, to which AI creators (both corporate and individual) would need to list the resources that they use in their training datasets; and/or

3) encourage AI creators to maintain records of data provenance showing the origin and history of the data, and/or

4) establish legal accountability for AI creators who fail to provide accurate and complete resources lists especially if this leads to copyright infringement or other legal issues.

This hangs on the supposition that current civil discovery rules are insufficient to tackle such a technology on its own, and, as such, new tools and rules must be developed.

Implementing these types of measures or those similar to, can help strike the right balance between copyright protection and the continued advancement of AI technologies.

Finally, and critically, international cooperation is essential to the collaboration of standards that will allow for protections of all copyrightable materials. This collaboration will be essential to provide support, compliance, and cross-border legal cooperation.

QUESTION 25: IF AI-GENERATED MATERIAL IS FOUND TO INFRINGE A COPYRIGHTED WORK, WHO SHOULD BE DIRECTLY OR SECONDARILY LIABLE—THE DEVELOPER OF A GENERATIVE AI MODEL, THE DEVELOPER OF THE SYSTEM INCORPORATING THAT MODEL, END USERS OF THE SYSTEM, OR OTHER PARTIES?

While AIs may learn from infringed works, AIs are not responsible for the infringement of such works. If we are to be consistent with both *Thaler* and North Dakotan AI Law (see ND HB1361), then we cannot attribute responsibility to nonhuman actors – if we can indeed call them actors. Instead, we must look to the creators of the AIs, and we would not be the first to do this. *Chabon, et al. v. OpenAI* notes that OpenAI's ChatGPT 3 product was "was trained using [the] Plaintiffs' works" and that "the Class [of Plaintiffs] did not consent to the use of their copyrighted works as training material."

Chabon, et al.'s complaint shows us that work derived for AI training violates both the reproduction and derivative rights the Copyright Act allows for. Consent was neither purveyed nor given to OpenAI while it still used copyrighted works to train its ChatGPT AIs.

Fair Use Doctrine, as outlined in §107 of the Act, provides for use of copyrighted material "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" and provides the user immunity to infringement under such use cases. The use of copyrighted material leaves Fair Use when the copyrighted works that make up an AI's training dataset are then referenced for commercial purposes in which the developers of AI profit from consumers using their creation and the end user monetizing results of the AI generation. Once this occurs, the creator of the AI (corporate or individual) should be liable for the infringement which its creation is facilitating.

With respect to the end user of AI, end users should not be free from liability for infringing material created by AI, but their degree of liability could be limited based on several factors. If the end user prompts the AI to use specific copyrighted work for its outputs, that situation should be treated differently than an end user that uses AI to generate infringing material unknowingly. Since end users are usually unaware that training materials are used to inform Ais generations, their culpability should be limited.

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