

TKWW's Submission for the Artificial Intelligence Study

18. Under copyright law, are there circumstances when a human using a generative AI system should be considered the “author” of material produced by the system? If so, what factors are relevant to that determination? For example, is selecting what material an AI model is trained on and/or providing an iterative series of text commands or prompts sufficient to claim authorship of the resulting output?

Under the U.S. Constitution, Congress is empowered to grant authors exclusive rights to their creations in order to promote the progress of science and useful arts. Over the past 233 years with this bedrock requirement of copyright in mind, Congress, the U.S. Copyright Office, the federal courts, and the Supreme Court have interpreted the legal precedent to address new advances in science and the arts, and at times, expanded the case law to uphold the foundational requirement.

The Knot Worldwide (“TKWW”) believes generative AI has presented the next opportunity for the Copyright Office and the courts to interpret the precedent to promote the progress of science and useful arts. In particular, TKWW advocates for human authorship for materials produced by generative AI so long as the human involvement was so meaningful the material would not have been created but for the human involvement. TKWW suggests the following factors are considered when determining the level of human involvement:

- How detailed was the prompt for the generative AI tool?
- How novel was the prompt for the generative AI Tool?
- How involved was the selection process for the generative AI tool?
- Did the human modify the prompt after the initial output from the generative AI tool?
- Did the human use multiple generative AI tools to create the final material?
- Is it likely that the generative AI tool can replicate the exact final material with a different prompt?
- Is the prompt copyrightable material?

The suggested list of factors is non-exhaustive and one factor should not be dispositive.

TKWW supports human authorship for material produced by generative AI because it is aligned with the seminal case on authorship, *Burrow-Giles v. Sarony* (US 1884). Specifically, a generative AI tool is akin to the camera used by Sarony to capture his subject, the prompt is analogous to the creative steps Sarony took to achieve his artistic vision, and the material produced by the tool is like the photo produced by the camera. Similar to the camera, current generative AI tools are merely the tools used to create the creative or scientific material and need a human author to create the said material.

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Further, TKWW believes supporting human authorship for materials produced by generative AI will promote meaningful progress within the scientific and creative communities by removing the loss of the economic gain that is typically afforded to those communities under the U.S. copyright regime that is currently present with the use of generative AI. It will also support transparency within those communities on their use of generative AI, which in turn will advance the public welfare.

20. Is legal protection for AI-generated material desirable as a policy matter? Is legal protection for AI-generated material necessary to encourage development of generative AI technologies and systems? Does existing copyright protection for computer code that operates a generative AI system provide sufficient incentives?

Is legal protection for AI-generated material desirable as a policy matter?: Yes.

Is legal protection for AI-generated material necessary to encourage development of generative AI technologies and systems?: Yes. Without the ability to gain the exclusive rights to the materials generated by generative AI, the scientific and creative communities will not be able to exploit the economic value of said materials. Consequently, the scientific and creative communities will not embrace generative AI to its fullest and may contribute to the U.S. lagging in the development of generative AI technologies and systems.

Does existing copyright protection for computer code that operates a generative AI system provide sufficient incentives?: No. Providing copyright protection to generative AI systems is one part of the puzzle and will only incentivize the creation of generative AI systems and not the use thereof. Accordingly, the current myopic approach of protection will promote progression for the creation of new generative AI systems, but those new systems will be shaped by the lack of engagement from users, thereby potentially altering the course of generative AI which may mitigate the potential benefits for the users.

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?

Similarly to other tech products that are licensed to others for use to generate an output, the liability for infringing AI-generated material should be contractually distributed between the parties according to the party's contribution to the infringement. For example, if the AI-generated material infringes a copyrighted work solely because the generative AI was trained on illegally sourced copyrighted work, the developer of the generative AI should be directly and wholly liable for the infringement. On the other hand, if the AI-generated material infringes a copyrighted work solely because the user, including the developer of the system incorporating the generative AI model, provided illegally sourced copyrighted work in its prompt, the user should be directly liable for the AI-generated material.

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While TKWW believes negotiating the distribution of liability is best left to the contracting parties in accordance with the freedom to contract principle, the leading generative AI developers have a disproportionate amount of bargaining power compared to the AI users. This unbalanced power dynamic will most likely increase in favor of the generative AI developers as the developers become further concentrated due to the growing barriers of entry in the generative AI market.

With this in mind, if Congress were to enact a federal AI law identifying the generative AI developers as the liable party for copyright infringement the unbalanced power dynamic would shift in favor of the user. Additionally, if the developers were limited in their ability to reallocate the current inherent risk in offering a generative AI tool to their users, i.e. offering a tool that infringes third party copyrights, the providers would most likely address the current infringement issues systematically within their tools.