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in his individual capacity

Introduction

This submission is addressed to the questions posed by the Copyright Office concerning Copyrightability of AI-generated content, questions 18 through 21.[1] It proposes that the US Copyright Act be amended to include a *sui generis* regime for protection of AI-generated content. I first set forth the proposal below and then provide a more detailed discussion regarding the rational basis for it.

Proposal

As has been done in the United Kingdom, Copyright law provisions specific to computer-generated works can be made coherent with those for human generated work. The following outlines what aspects of the UK Copyright Act of 1988 ("U.K. Act") permitting protection for computer-generated works make sense for adoption in the US as is, and which aspects can be clarified or modified.

1. Shorter Duration of Copy Protection

The U.K. Act provides for a much shorter duration of protection for computer-generated works. Instead of life of the author plus 70 years, the Act provides that "copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made."[2]

This approach should be adopted for a U.S. *sui generis* regime. Providing a meaningful but significantly shorter duration of protection preserves the privileging of human-created work. This at least partially addresses the concerns of creators and others that AI will supplant human creativity or devalue human-created works. For projects intended to generate valuable market properties, there would still be sufficient incentive to produce such works using human creators or using software applications and AI platforms only for creative assistance as tools.

2. Copyright Office Registration Required

Under U.S. Copyright Law, copyright inheres in an eligible work from the moment of its creation. Registration simply enhances certain rights of the copyright owner, such as the ability to collect statutory damages in cases of infringement.

For the proposed *sui generis* regime, copyright protection would only be available for works registered with the Copyright Office. Why? First, if, as has been anticipated, there will be a flood of AI-generated works in the months and years to come, only those works rising to a threshold level of

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[1] *See* Notice - Artificial Intelligence and Copyright (August, 29, 2023) (https://www.regulations.gov/document/COLC-2023-0006-0001)

[2] *See* U.K. Copyright Act of 1988, Section 12(7) (https://www.legislation.gov.uk/ukpga/1988/48/section/12)

anticipated distinction and value to its owner should warrant *sui generis* protection. Most AI-generated works will have only fleeting utility and market value as a work of creative expression. Only works likely to drive cross-market value or a longer duration of value-creation in their primary markets are susceptible to illicit copying and stand to benefit from formal legal protection. The incremental effort of preparing and submitting an application for protection to the Copyright Office requires that owners be thoughtful about the prospective value of an AI-generated work before seeking formal legal copy protection for it. Such incremental effort would deter frivolous efforts to claim protection for or asset infringement claims with respect to more commonplace works with fleeting or *de minimus* value.

Second, for works more likely to drive significant or durable market value (and therefore more likely to be the subject of illicit copying and infringement litigation), a registration requirement serves to create a discoverable permanent record of the works' status as having been AI-generated. Additionally, such registrations communicate the different metes and bounds of the sui generis right, such as the shorter duration of protection.

3. The Person Holding Copyright

The U.K. Act provides that, "[i]n the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."[3]

The phrasing in the UK Act is susceptible to interpretation as to whom should be regarded as "the person by whom the arrangements necessary for the creation of the work are undertaken." The proposal here is that such person ought to be designated as either (A) the user of a software application or hosted AI platform responsible for prompting and generating the actual work, or (B) the person or entity in a "work made for hire" relationship with such user. While the developer or provider of a software application or AI platform makes the creation of new works possible, they are removed from the specific acts and imaginative initiative leading to the actual generation of particular works. Additionally, the persons using software or AI platforms towards a specific purpose are best situated to benefit from copy protection of the works they caused to be created.

4. Constitutionality of Permitting Protection for AI-Generated Work

Article I, Section 8, Clause 8 of the U.S. Constitution provides: "The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

[3] U.K. Copyright Act of 1988, Section 9(3) (https://www.legislation.gov.uk/ukpga/1988/48/section/9)

There are two basic reasons why amending the Copyright Act would not violate the Copyright clause of the U.S. Constitution.

First, the clause reserves for Congress the power to determine how best to promote the progress of science and the useful arts. It is not prescriptive regarding the specifics Congress may or may not set forth in laws governing the allowances and limitations of Copyright law.[4]

Second, many misconstrue the clause's references to "authors" and "inventors" to mean only natural persons. Certainly, the authors of the Constitution may not have imagined that entities other than natural persons would ever qualify as authors or inventors. Such was the world in the mid-Eighteenth century. This doesn't mean that new types or persons or entities cannot be made eligible as authors or owners of copyrights if Congress sees fit to deem them such. Ever since at least the Copyright Act of 1909, the "work made for hire" doctrine provides that copyrights may be held by corporations, and, moreover, that such corporate entities may be deemed authors of the protected works.[5]

Background and Reasoning in Support of Proposal

Generative AI models are remarkable in that they can produce textual, visual, audial and audio-visual works of authorship at high levels of quality. Generative AI outputs are so convincing in many instances, that they have won art contests[6,7] and incurred the ire of human authors who perceive such AI-generated works as either "cheating," "stealing" or both.[8,9] The fact that Generative AIs can create new works on par with skilled human beings is not just a source of wonderment and unease.

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[4] *See*, *e.g.*,Goldstein v. California, 412 U.S.546, 561-62 (1973) (Describing Congress' "broad" powers to interpret the language of Clause 8, including the terms "writings" and "author" and reflecting that "[a]s our technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated.")

[5] 17 U.S.C. Section 201(b)("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright")

[6] "Artist Refuses Photography Prize After Admitting His Image Was AI-Generated" https://singularityhub.com/2023/04/19/artist-refuses-photography-prize-after-admitting-his-image-was-ai-generated/

[7] "AI-Generated Art Won a Prize. Artists Aren't Happy" https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html

[8] https://artisticinquiry.org/AI-Open-Letter

[9] "The Luddites of Hollywood" https://www.theatlantic.com/ideas/archive/2023/05/writers-strike-hollywood-wga-union-streaming-platforms/674056/

It also creates a legal void as far as intellectual property rights for such AI-generated works are concerned.

If one believes that only the intellectual products of the human mind or those resulting from human effort should enjoy the protection of the law, then this result is not bothersome. Moreover, for those who are concerned about an adverse impact on human creators and authors of the coming onslaught of AI-created works, depriving such works of legal protection may appear a fair or just approach. However, in an essay published earlier this year, I provided a detailed analysis of both the current status quo regarding how AI-generated works are likely to be treated (no copyright protection) and a basis for why affording them some form of copy protection is likely justified.[10] Depriving AI-generated works of legal protection will neither help human creators nor support a suitable economic framework for value sharing around AI-created works. No legal protection for AI-created works will mean degradation in the value of all works of a similar nature. Without more, only those operators providing AI creation capabilities will likely capture the vast majority of the market value of the works coming off their platforms. Depriving AI-created works of copyright protection may bias certain sponsors of creative works to preference human authors and creators for work they commission. This approach, however, won't benefit the vast majority of works that do not have fiscal sponsors or works that won't drive more than fleeting utility. Moreover, many small creators who leverage AI tools to generate new works will be left unable to protect the value of their works that do have cross-market or more durable appeal and market value.

US Copyright law assumes and requires that works eligible for legal Copyright protection must be created by a human being. The Supreme Court has ruled that to be original and deserving of copyright protection, a work requires only "independent creation plus a modicum of creativity."[11] While this sets a low threshold for meeting copyright eligibility, current law still requires that a creator be human in order to obtain copy protection in a new work.[12] In a decision concerning a photographic self-portrait taken by a macaque monkey, the 9th Circuit Court of Appeals ruled that only humans are eligible authors for purposes of the U.S. Copyright Act.[13] Even before this decision, the US Copyright Office proactively opined that, where a monkey actually triggers a photo taking mechanism, the resulting photo cannot be copyright protected.[14] The Office has recently ruled, using

[10] Valz, Duane, *"A monkey and a Generative AI walk into a bar ..."* (https://www.linkedin.com/pulse/monkey-generative-ai-walk-bar-duane-valz/)

[11] *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 346 (1991)

[12] *See*, *e.g.*, *Goldstein v. California*, 412 U.S. 564, 561 (1973) (originator of work of authorship is understood under the Copyright Act to be human); *Urantia Found v. Kristen Maaherra*, 114 F.3rd 955, 957-59 (9th Cir. 1997) (human, not divine beings, are the authors to whom the Copyright Act affords protection); *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (a living garden cannot be an author under the Copyright Act)

[13] *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018)

[14] https://www.copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf (See Sec. 313.2)

the same logic, that images generated by AI software cannot be eligible for Copyright Protection.[15] One of those decisions was recently upheld on summary judgment in a U.S. District Court.[16] The US position reflects a near uniform global consensus.[17]

A vast majority of works generated by AI platforms are likely to have fleeting or *de minimis* value. Notably, this is true of the vast majority of human created work. The question concerning intellectual property protection attaches to works that may command significant market value, either on their own or as parts of collections of works. In the case of digital works, market value typically means widespread distribution online, accomplished through basic replication of an electronic file containing the work. Mechanisms exist to denote copyright ownership and expectations for any reuse of digital works made available online.[18] Enforcement of copyright online can be very difficult, but mechanisms exist to facilitate such enforcement.[19]

Without copyright protection available, all AI-created digital works will be treated as free-for-all public domain works. This means that only the initial creation and use of the work – by the AI-generator platform and an initial use by the human creator who prompted creation of the work – is likely to carry any market value. Neither the human who prompted creation of the work nor any entity having "work for hire" rights will be able, legally at least, to control further use and distribution of the work by others as they would if the works were copyright protected. This creates a number of problems, as described below.

First, this suggests that only the AI-generator platform operators can expect to secure a guaranteed market value from the work's creation, through user subscription fees and other costs of platform

[15] *See In re Thaler*, Opinion Letter (2022) (https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf) (a visual work generated by a computer program is ineligible for copyright protection); *In re Kashtanova*, Opinion Letter (2023) (https://www.copyright.gov/docs/zarya-of-the-dawn.pdf) (images from the art generator platform Midjourney used by the human author of a graphic novel cannot themselves be copy protected, even if aspects of the story and arrangement of the images in the graphic novel are subject to copyright)

[16] *Thaler v. Perlmutter*, 1:22-cv-01564-BAH (ECF #24), D.D.C. (Aug. 18, 2023) (https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_22-cv-01564/pdf/USCOURTS-dcd-1_22-cv-01564-0.pdf) (works generated autonomously by a computer do not fall under the protection of the Copyright Act)

[17] But note that some jurisdictions such as the United Kingdom have created special dispensation for computer-created works to be copyright eligible, which creates interesting issues for international harmonization of treatment for AI-created works. *See UK Copyright Law of 1988*, Secs. 9(3), 12(2) and 12(7) (protection for computer generated works can last for 50 years, though the author of record must be "the person by whom the arrangements necessary for the creation of the work are undertaken")

[18] Creative Commons, for instance, has created standard licenses and abbreviated ways of denoting their terms to suit digital distribution in a range of formats and form factors (https://creativecommons.org/)

[19] See, e.g., the Digital Millennium Copyright Act of 1998 (https://www.gpo.gov/fdsys/pkg/PLAW-105publ304/pdf/PLAW-105publ304.pdf); https://www.copyright.gov/dmca/

access. Works created by AI generators are now of a threshold quality such that one cannot necessarily tell they were not created by a human. To the extent such "made-for-public-domain-only" works are creatively on par with (or superior to) human-created works, the downstream markets for such human-created works will be degraded. In a world of bountiful visual works created by machines that come with no restrictions, why engage with works that come with restrictions and higher costs of usage?

Second, if works created by humans are privileged for protection over works of similar quality and aesthetic/artistic/creative appeal as those created by AI generators, there is a built-in incentive for many people to misrepresent authorship. That is, if faced with a choice between no copyright protection for a potentially valuable work and protection against exploitation of the work by others, many creators will choose protection, even if this means passing off an AI generated work as human created. We would thereby permit a system where individuals with integrity and virtue would be shut out from realizing downstream value from works they created using an AI generator while those who are unscrupulous will capture that value (to the extent the market for the work is not degraded by a glut of AI-created works of similar character without legal copy protection).

Third, a significant imbalance is created in the copyright system for digital works if an operator may be found liable for copyright infringement for training its AI generator platform on human-created copyrighted images,[20] or for outputting generated works similar to those by known human creators,[21] but cannot claim, license or assign copyright in works arising from those platforms.

Fourth, there is a confusing divergence in how providers of generative AI platforms are treating rights in and to the outputs of their models based on their terms of service. Such operators currently assert via their user terms of service some ownership over works created by their platforms.[22] This would appear to be in conflict with current law. Moreover, the manner in which each provider asserts rights and purports to license or grant rights to their users is mutually inconsistent.[23] Making clear that copy protection is available for certain works to users of software

[20] *See Complaint, Andersen et al. vs. Stability AI Ltd. et al.* (3:23-cv-00201) (N.D. Cal. Jan. 13, 2023)

[21] *See Complaint, Getty Images vs. Stability AI Ltd.* (1:23-cv-00135) (Dist. Del. Feb. 3, 2023)

[22] The three leading platforms for generative image creation are OpenAI's DALL-E, Stability AI's Stable Diffusion and Midjourney. OpenAI's terms of service purport to assign to users all rights in and to outputs from its platforms, but that assignment is made conditional on user compliance with the other terms of service. *See* https://openai.com/policies/terms-of-use. Stability AI does not provide specific terms of use around outputs, beyond noting that they are provided free to users and that copyright is complex globally. *See* https://stablediffusionweb.com/#faq. Midjourney provides that its paid users own content they generate subject to a license back to Midjourney; free users get only a limited non-commercial license to content they create using the platform, with Midjourney presuming ownership of that content. *See* https://docs.midjourney.com/docs/terms-of-service.

[23] *See Id.*

and AI platforms (or their sponsors) would force AI platform and software application providers to be more consistent in how they guide the expectations of their users.

Conclusion

Many Copyright scholars interpret the purpose of Copyright law as concerning only incentives to create new works of authorship. With that precept, many resist the idea that Copyright, like Patent law, can serve the goals of economic ordering, preserving fair competition and preventing free riding and other forms of misappropriation. AI platforms are anticipated to created trillions of dollars of economic value over the next ten years alone. Much of that value will arise from the outputs rendered by such platforms by their users, outputs having market value akin to copy protected works created by human beings. Without any legal scaffolding for protecting outputs that do drive significant value in various markets, much economic value will be lost or misappropriated from those with the initiative to leverage AI platforms to create particularly compelling works of great utility. The proposal outlined above for providing qualified *sui generis* protection for AI-generated works that are registered with the Copyright Office offers a measured approach that balances the interests of all stakeholders.