December 6, 2023

The Honorable Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office
101 Independence Ave., S.E.
Washington, District of Columbia 20559

**RE: Reply Comments of ACT | The App Association to the Notice of Inquiry (Docket No. 2023-6) on Artificial Intelligence and Copyright**

Dear Register Perlmutter:

ACT | The App Association (the App Association) provides reply comments to the United States Copyright Office (USCO or the Office) Notice of Inquiry (NOI) on artificial intelligence (AI) and copyright.[1]

The App Association is a policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. App developers like our members also play a critical role in developing entertainment products such as streaming video platforms, video games, and other content portals that rely on intellectual property (IP) protections. The value of the ecosystem the App Association represents—which we call the app ecosystem—is approximately $1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the $8 trillion internet of things (IoT) revolution.[2]

The small business community that the App Association represents relies on IP to grow and create jobs, and the App Association urges the USCO to recognize that its approach to AI should prioritize both providing reasonable and technology-neutral protections and enabling AI tools to prevent and address IP infringement. App Association members are at the forefront of the development of AI across consumer and enterprise use cases and have a strong interest in the policies that impact the development of AI solutions, including those in the context of IP. We recognize that the rise of AI holds great promise, yet also generates many legal and policy questions, and those around IP are no exception.

The App Association reiterates and provides additional detail to our initial comments on the fair use doctrine and copyright authorship requirements. As noted in our initial comments, established copyright laws in the United States are appropriate to answer concerns surrounding the use of generative artificial intelligence (GAI) in the development of a work. Unlike other countries that provide AI-specific or training and data mining (TDM) exclusions to copyright protections, the United States invokes a flexible and factor-based balancing test to determine if a limited use of a copyrighted work should be permitted under copyright law. These diverging legal frameworks accomplish similar goals, yet we submit that the U.S. fair use doctrine is

[1] 88 FR 59942.
[2] ACT | The App Association, State of the App Economy (2022), https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf.

particularly sound. As new and emerging technologies call the "fair use" analysis into question, the courts have delineated when the use of a copyrighted work is fair use on a fact-specific, case-by-case basis. Unlike AI or TDM exclusions, judicial analysis is evolving and narrow to ensure that copyright rights holders maintain strong IP rights, while ensuring that limited use exceptions enable further creation.

Whether developing copies of training datasets for AI is fair use will depend on the type of AI and its training process. In our initial comments, we explained that GAI is different from its predecessors in the way it gathers, stores, and processes data. However, federal courts have provided significant guidance to show that the extraction and use of large datasets, including copyrighted material, for learning purposes leans towards a finding of fair use in many circumstances. Still, the different conclusions amongst the Federal Circuit courts indicate the importance of the fact-sensitive component for a fair use analysis. While not conclusory, federal courts do provide significant evidence that training AI is likely transformative, and, therefore, fair use. For example, the Ninth Circuit has held that there are instances where training an algorithm involves necessary reverse engineering of a copyrighted computer program to yield a transformative work.[3] Where copyrighted works are copied to discover "uncopyrightable ideas," this analysis leans more towards a finding of fair use.[4] The Second Circuit parses the issue even further by holding that in some circumstances making copies of large amounts of data and storing it in a database for public use may be considered fair use,[5] while other circumstances may depend on the amount and substantiality of the data made public.[6] While the courts have yet to provide a clear rule on if training AI systems is fair use, precedent suggests that the federal courts are likely to find this process to be fair use. We appreciate that the Office maintains a flexible guidance on a fair use analysis and believe it should make further clarifications to the fair use analysis as it relates to the training process for AI systems.

The App Association provides additional details to our comments regarding authorship concerns of a work developed with the assistance of AI. As opposed to a work entirely generated by AI, a work developed by a human, even when using AI as a tool, may be copyrightable. As is consistent across U.S. intellectual property laws, the U.S. Copyright Office requires evidence that a work was developed with the "input or intervention from a human author…" to be registered with the Office.[7] What is unclear is the measure of human input necessary to determine that a work developed with the use of AI output is copyrightable. We urge the Office to ensure that the framework for determining authorship of a copyrightable work remains workable and contemplates all forms of expression and their uses of AI in the creation process.

App Association members are small and medium-sized businesses (SMBs) that provide critical solutions across a wide range of industries. For example, one App Association member, Epic Reach, provides services for digital innovation, strategic branding, and consumer interactions. Another App Association member, AIZED, provides a range of risk assessment technologies, including one for airplanes to detect collision risks with objects (e.g., birds). These inventive

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[3] *See MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993).
[4] See Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).
[5] *See* Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014)
[6] *See* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
[7] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, United States Copyright Office (March 16, 2023), available at: https://www.copyright.gov/ai/docs/Federal-Register-Document-Artificial-Intelligence-and-Copyright-NOI.pdf.

services have become more efficient through the application of GAI tools in the development of their foundational software. AI has been a long-standing tool in the software development process, allowing our members to code faster and more resourcefully. Software developers rely on the copyright system to protect their works either in the traditional form or through the open-source model. For SMB software developers, the copyright system is particularly attractive as opposed to seeking patent protection that could cost them substantial time and financial resources.

It is the App Association's perspective that the Office's current registration system for works developed with the assistance of AI is unworkable. As it stands, the Office requires applicants to disclaim AI-generated content that is more than *de minimis*.[8] This standard for registration does not consider the various uses of AI across different forms of expression, nor does it ask the more important question of whether and how much "human authorship" was applied in the development of a work seeking copyright registration.

The modified registration requirement has caused the Office to make a series of misguided judgements on whether a work should be properly registered with the Office based on its determination of what constitutes AI-generated content. Based on recent registration decisions, the Office is unconvinced that an individual prompting GAI to produce an output amounts to human input.[9] We caution the Office on drawing such rigid conclusions. The Office's recent registration decisions mischaracterize the role of AI as a creator rather than a tool for creation requiring human intervention to operate. The Office states that "when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the 'traditional elements of authorship' are determined and executed by the technology—not the human user."[10] This inflexible standard does not account for the technological advancements that have already taken place and will take place in the future nor does it inquire into the narrowness of the prompts and resulting AI-generated outputs. As AI advances to undertake more complex analysis, it will still never fully operate without human intervention. Therefore, the Office should be considering the amount and level of "human authorship" rather than the amount of content generated by GAI when making registration determinations. We urge the Copyright Office to avoid broad tests that do not adapt with the onset of advanced and emerging technologies. Human authorship is the threshold issue when determining copyright registration and should be determined on a case-by-case basis. The current copyright registration system disregards the importance of allowing U.S. stakeholders to utilize advanced tools, like GAI, to incent copyrightable intellectual and creative human expressions. We urge the U.S. Copyright Office to reconsider their current AI registration guidance based on our deep concerns of its bearing on copyrightability and the future of advanced expressive works.

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[8] *Id*.

[9] *See* Letter from U.S. Copyright Office to Van Lindberg, Esq., (Feb. 21, 2023), Cancellation Decision re: Zarya of the Dawn (VAu001480196), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf; Letter from U.S. Copyright Office Review Board, (Sept. 5, 2023), Decision re: Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581), https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf.

[10] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, United States Copyright Office (March 16, 2023), available at: https://www.copyright.gov/ai/docs/Federal-Register-Document-Artificial-Intelligence-and-Copyright-NOI.pdf.

The App Association appreciates the opportunity to provide additional perspectives from our community of software developers on the copyright implications of artificial intelligence. We look forward to continuing to work with the Office to develop a workable legal and policy framework for using generative artificial intelligence to enhance creative and innovative expression.

Sincerely,

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Intellectual Property Policy Counsel

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