International Trademark Association

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Re: International Trademark Association Comments on US Copyright Office Notice of Inquiry and Request for Comments on Artificial Intelligence. (Docket No. 2023–6)

Submitted via copyright.gov/policy/artificial-intelligence

The International Trademark Association (INTA) would like to thank the United States Copyright Office (USCO) for the opportunity to provide comments to the 34 questions regarding AI and Copyrights. The following comments were prepared by INTA's Copyright Committee.

The International Trademark Association is a global association of brand owners and professionals dedicated to supporting trademarks and complementary intellectual property (IP) to foster consumer trust, economic growth, and innovation, and committed to building a better society through brands. Members include nearly 6,500 organizations, representing more than 34,350 individuals (trademark owners, professionals, and academics) from 185 countries, who benefit from the Association's global trademark resources, policy development, education and training, and international network. Founded in 1878, INTA, a not-for-profit organization, is headquartered in New York City, with offices in Beijing, Brussels, Santiago, Singapore, and Washington, D.C., and a representative in New Delhi. For more information, visit inta.org.

Question 1. As described above, generative AI systems have the ability to produce material that would be copyrightable if it were created by a human author. What are your views on the potential benefits and risks of this technology? How is the use of this technology currently affecting or likely to affect creators, copyright owners, technology developers, researchers, and the public?

A: Generative AI technologies are widely used in software development, creation of literary and artistic content, journalism, screenwriting, scientific research, translation, product design and customer service, among other fields. ChatGPT, Copilot, DALL-E, Midjourney, and Stable Diffusion are just a few of the best-known examples.

These technologies have many potential benefits. They can rapidly accelerate the analysis of vast amount of data and the creation of many types of content, increasing productivity and efficiency. For artists, designers and researchers, they can generate new ideas based on elements from countless numbers of existing works, which can then be further developed by human creativity. The public benefits from the availability of new discoveries, products, and creative works enabled by generative AI.

As the uses of generative AI have proliferated, it has also become apparent that these technologies have risks, including:

- Works created using generative AI may infringe the copyrights in existing works on which the AI models were trained. This issue is currently being litigated in multiple cases filed against generative AI developers.

- Copyright protection may not be available for works created with the assistance of generative AI, even if they involve some amount of human creativity. Authors of such works may have no remedy for infringement, and may have less incentive to use these technologies to enhance their own creativity.

- Generative AI may supplant many human creators, from software and game developers to graphic designers to marketing copywriters to journalists and screenwriters. In addition to the loss of employment for many individuals, the result could be an overall decrease in the creation of genuinely original content over time.

- Not all content created by generative AI is beneficial. The technology can be used to create and spread misinformation far more rapidly and effectively than human efforts alone. See https://www.technologyreview.com/2023/10/04/1080801/generative-ai-boosting-disinformation-and-propaganda-freedom-house/.

Question 4: Are there any statutory or regulatory approaches that have been adopted or are under consideration in other countries that relate to copyright and AI that should be considered or avoided in the United States? How important a factor is international consistency in this area across borders?

INTA would like to address the second part of the question by stating that- international consistency is important. Given the worldwide availability of generative AI technology and the potential for international disputes, copyright owners, creators and the public would benefit from harmonization across jurisdictions.

With respect to the first part of the question, there are several approaches to copyright protection for AI generated works or contents in other countries that are worth considering in the United States, including neighboring rights and sui generis protection for these works.

Neighboring rights

Introduction

The concept of "Neighboring Rights" provides a possible framework for the protection of AI-generated contents. According to the *"WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights"*, the term "neighboring rights" (and its synonym "related rights") means "the rights of performers in respect of their performances, the rights of producers of phonograms in respect of their phonograms, and the rights of broadcasting organizations in respect of their broadcasts". According to the Glossary, the broader meaning of the expression extends to the rights of publishers in the typographical arrangements of their published editions, and of the *sui generis* rights of makers of databases.

According to the law of some jurisdictions, the term "neighboring rights" also includes additional rights, such as the related right for press publishers in their publications and the related right for photographers to their non-original photographic pictures.

Typically, the law of related rights deems that certain objects (Phonograms) or contents (performances, sounds) merit legal protection although the objects are not copyrightable "works" in the strict sense, hence, their neighboring to the copyright.

The term "neighboring rights", as used in this report, should be understood in the broadest possible way.

General conclusions

To the extent AI-generated outputs are not copyrightable, such outputs could potentially be protected under "neighboring rights," also sometimes referred to as "rights neighboring to copyright." Certain neighboring rights are sometimes also referred to as *sui generis* rights, to clarify that the rights are different from copyrights.

Neighboring rights are those rights that grant protection to a non-author third party involved in the work, or to a creator of otherwise non-copyrightable works, such as in the following examples:

- To producers of films and/or sound recordings to control the reproduction of those creations;
- To broadcasters to control the use of their programs;

- To performers (actors, singers, musicians, dancers, etc.) to control the exploitation of their performances.
- To the creators of databases, which databases do not meet the requirement of originality to qualify for copyright protection.

Without the human-authorship requirement of copyrightability, neighboring rights could exist where the work is not eligible for copyright protection. Indeed, protecting uncopyrightable works is one of the purposes of recognizing such neighboring rights.

To the extent human authorship is a prerequisite for copyrightability, neighboring rights could provide protection to those qualifying third parties.

Sui generis rights in computer-generated output

Of the countries that we have surveyed, Ukraine is the only country that has introduced in its laws explicit rules on *sui generis* rights in computer-generated works. Hence, Ukraine recognizes exclusive rights in AI-generated output seemingly without the requirement of human intervention. Ukrainian law offers a *sui generis* right to protect non-original subject matters created by software (including AI), i.e., outputs which differ from other works of a similar type and are created without the participation of humans. Rights to such works arise at the moment of their creation.

While tangible *sui generis* rights to such output include the right to use and the right to authorize or prohibit third-party use of the output, there are no intangible (moral) rights to such output.

Objects generated by computer programs are protected by *sui generis* rights for 25 years, and such rights belong to the owner or licensee (legitimate user) of the corresponding software that provided such generated work.

Ukrainian law specifies that works created by individuals using computer technologies are considered original objects generated by a computer program.

Term

The terms of protection of neighboring rights and moral rights do not necessarily track the term of copyright protection and vary from one right to the other and from jurisdiction to jurisdiction. The term for such rights should not exceed the analogous term for copyright. As noted and for example, Ukrainian law sets the term at 25 years – shorter than the 70+-year copyright term.

Question 5. Is new legislation warranted to address copyright or related issues with generative AI? If so, what should it entail? Specific proposals and legislative text are not necessary, but the Office welcomes any proposals or text for review.

A: New legislation to clarify the nature and degree of human authorship necessary for copyright protection would be helpful. Under current law, a work created entirely by generative AI technology is not copyrightable. Many real-world uses of generative AI likely involve significant human involvement, but there is little guidance available as to when the resulting works are eligible for copyright. Legislation addressing this issue would

provide certainty to the software development, publishing, music, design and other industries.

Question 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?

A: While the Copyright Act does not define "author," Section 102 says that copyright subsists in "original works of authorship fixed in any tangible medium of expression… either directly or with the aid of a machine or device." That necessarily implies that a machine or device can provide aid to an author but cannot be an author.

At the same time, when a human creates a work with the aid of an AI system, the resulting work should be protected by copyright so long the human exercises sufficient control, and that control has sufficient originality, for the output to reflect human authorship.

It is easiest to illustrate the standard by considering extremes: works that clearly should or should not qualify as copyrightable. If software was designed that, when it was launched, generated an image that simply populated each pixel with a randomly-selected color, it seems obvious that the resulting work should not be considered a work of authorship, because it would not reflect human originality (which, as the Supreme Court said in *Feist*, requires at least some minimal degree of creativity). The mere fact that a human clicked an on-screen button that initiated the software process would not be authorship, even if the resulting work turned out by chance to be aesthetically pleasing and desirable.

At the other extreme, if a human used photo editing software to craft the appearance of every aspect of an image, that image (assuming sufficient originality and creativity) should be considered a work of authorship by the human, and that should remain true even if, instead of using traditional editing tools, the human used an AI interface that parsed plain language instructions ("make the bottom third of the image green," "bend that line 40 degrees," etc.). In between those extremes is a wide spectrum that requires difficult line-drawing.

That line-drawing—the decision about whether a work is copyrightable—should be based not only on the output (but on the human input, and whether that input is sufficiently original and creative to be copyrightable. Factors to be considered in drawing these lines may include the human author's role in selecting material used in training the AI model, the original concepts, ideas and elements contributed by the human author, the extent to which the human author revised the generative AI output (whether by a series of iterative prompts or otherwise) and the creativity and judgment reflected in those revisions. To the extent it is possible to segregate the human and AI-generated aspects of a work, copyright protection may be limited to the human aspects.

Question 19. Are any revisions to the Copyright Act necessary to clarify the human authorship requirement or to provide additional standards to determine when content including AI-generated material is subject to copyright protection?

See answer to question 5 above.

Question 30: What legal rights, if any, currently apply to AI-generated material that features the name or likeness, including vocal likeness, of a particular person?

A: Currently, the protection that directly applies to AI-generated material featuring the name or likeness, including vocal likeness, of a particular person is right of publicity laws, which are state-specific. Some states do not protect rights of publicity at all. In those that do, each state will have its own right of publicity laws with its own standards establishing when there is a violation or not. The wide variety of states approaches to right of publicity laws and resulting disuniformity is expanded on in the comments under question 31.

On a federal level, the two primary sources of legal rights that may be relevant to AI-generated uses of names and likenesses are the Lanham Act and the Copyright Act.

Lanham Act

There are two primary Lanham Act theories that could provide relief in some circumstances for AI-generated material featuring the name of an individual or their likeness without their permission: trademark infringement, and false endorsement.

Trademark infringement: The name or image of an individual may be registered as a trademark, but only if the individual consents to registration. The Lanham Act, codified at 15 USC § 1052 (a), prohibits granting a federal trademark registration for "matter which may disparage or falsely suggest a connection with persons, living or dead" or § 1052 (c) for matter that "[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent." The policy behind this prohibition is laid out by the United States Patent & Trademark Office in the agency's Trademark Manual of Examining Procedure § 1206, which states that the "purpose of requiring the consent of a living individual to the registration of his or her name" under Section 2(c) "is to protect rights of privacy and publicity that living persons have in the designations that identify them."

Unregistered trademark rights are recognized and protected by Lanham Act § 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A), which provides a cause of action against anyone who uses in commerce any word, term, name, symbol, or device on goods, services, or commercial activities that is likely to cause confusion as to the origin, sponsorship, or approval of those goods, services, or activites.

There are a number of limitations on the trademark remedy as it might apply to AI-generated uses of an individual's name or likeness:

- Trademark protection is tied only to those situations where an individual's name or image is used in a specific form as a symbol of source for particular goods or services sold in commerce. *See, e.g., ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 922 (6th Cir. 2003) ("[A]s a general rule, a person's image or likeness cannot function as a trademark," unless "a particular photograph was consistently used on specific goods"). An additional caveat is that if the name or likeness of the individual is being used to identify the author of a written work or an artist on a sound recording, it is not protected as a mark unless the work is a series of works and there is evidence that the name or image identifies the source of the series of works.

- To be protected, a trademark must be either inherently distinctive or must have acquired distinctiveness as a symbol of source for the goods or services on which it appears. Not all aspects of names, images, or likenesses will meet that standard, depending on how they may be used in commerce.

- Once trademark rights are established, infringement arises only if there is a likelihood of confusion as to the source of the goods or services involved. While that may often be the case, in many instances AI-generated material may be deployed on goods very different from those of the trademark owner, or may not be used on specific goods or services at all.

False endorsement: Lanham Act § 43(a)(1)(B), 15 U.S.C. § 1125(a)(1)(B)i, creates a civil claim for use of a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which… in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities."

The section has been interpreted to provide a remedy for the unauthorized use of an individual's persona. *See, e.g., Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1068 (9th Cir. 2015) ("[A] celebrity whose endorsement of a product is implied through the imitation of a distinctive attribute of the celebrity's identity, has standing to sue for false endorsement under section 43(a) of the Lanham Act," *quoting Waits v. Frito-Lay, Inc.,* 978 F.2d 1093, 1110 (9th Cir. 1992)).

This cause of action overcomes some of the obstacles faced by a trademark theory, in that there is no requirement that claimants have used their names or images in a specific form or format. *See Fifty-Six Hope Rd. Music*, 778 F.3d at 1068 (rejecting argument that "a celebrity's 'persona' is too 'amorphous'" for protection under § 1125(a)). Nor must the claimant have used on goods or services in order to established rights. Instead, the plaintiff simply needs to show that consumers are likely to be confused as to the sponsorship or approval of the goods or services involved. *Id.*

Material limitations on the remedy remain, however. The plaintiff need not necessarily have made any trademark use, but the accused use must still be "on or in connection with any goods or services… in commercial advertising or promotion…" 15 U.S.C. § 1125(a)(1)(B). AI-generated revenge porn posted on the internet would likely not qualify. And while inherent or acquired distinctiveness are not required as such, the courts have held that a certain level of public recognition of the plaintiff is necessary for there to be confusion about endorsement. *See, e.g., Passelaigue v. Getty Images (US), Inc.,* No. 16-CV-1362 (VSB), 2018 U.S. Dist. LEXIS 34004, at *23 (S.D.N.Y. Mar. 1, 2018) ("While celebrity is not necessarily required for consumer confusion, 'the misappropriation of a completely anonymous face could not form the basis for a false endorsement claim…'"). *See also Albert v. Apex Fitness, Inc.,* No. 97 CIV. 1151(LAK), 1997 U.S. Dist. LEXIS 8535, 1997 WL 323899, at *1 (S.D.N.Y. June 12, 1997) (dismissing a professional model's false endorsement claim because use of his picture in an advertisement did not imply that he personally endorsed the product).

Copyright Law

US federal copyright law currently does not allow registration of AI-generated material. Copyright laws protect "original works of authorship" that are fixed in a tangible form of expression. 17 U.S.C. § 102 (a). Under the current federal copyright laws, purely AI-generated material is not registrable because it does not have human authorship. *See Thaler v.* Perlmutter, No. 1:22-cv-01564 (D.D.C. August 18, 2023) (*appeal filed* October 11, 2023); Tony Analla, Zarya of the Dawn: How AI is Changing the Landscape of Copyright Protection, Harvard Law JOLT Digest (Mar. 6, 2023) https://jolt.law.harvard.edu/digest/zarya-of-the-dawn-how-ai-is-changing-the-landscape-of-copyright-protection (the Copyright Office granted protection to human-written text, but not AI generated accompanying illustrations). However, copyright law may provide protection against infringers who generated their copyright infringing material using generative AI since that would likely be "reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner." 17 U.S.C. § 102 (a).

Copyright law may provide protection against infringers who created their infringing material using generative AI if it was "reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner." 17 U.S.C. § 102 (a). But there is substantial doubt whether an AI-generated work that simply emulates a style, voice, or image if an individual without copying a specific registered work would be an infringement.

Question 31: Should Congress establish a new federal right, similar to state law rights of publicity, that would apply to AI- generated material? If so, should it preempt state laws or set a ceiling or floor for state law protections? What should be the contours of such a right?

A: Congress should establish a new federal right of publicity with basic principles that would apply regardless of the means used to generate potentially infringing content is generated. Uniformity in the right of publicity laws via a federal right is now even more important in light of generative AI and its ease of access. Once on the internet, the use is not limited necessarily to just one state but is available nationwide. INTA has taken the position that there should be a federal right of publicity law. A federal right of publicity law should preempt all state right of publicity laws.

Current state protections for the right of publicity vary, ranging from statutory protections to common law. For example, California has strong statutory and common law protection for publicity rights, while New York only protects publicity rights via statute. Within each state, the extent of the protection, inclusion of post-mortem rights, and other variables all differ. Remedies for right of publicity violations are state specific, meaning that violations in multiple states for a right of publicity claim can result in varying remedies. *See* International Trademark Association, Right of Publicity State of the Law Survey, Right of Publicity Committee, (2019) https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf. State law on publicity rights is fractured and a uniform federal publicity right is the only solution.

A Federal right of publicity law would need to preempt state law to achieve uniformity of publicity protection laws among the states. Right now, states vary in the amount of protection they are willing to grant to name, image, and likeness. Thus, a party whose persona has been misappropriated faces a myriad of different legal structures in place to vindicate their rights and in some states might not have a remedy at all. With the internet, the spread of misleading content has never been easier, and generative AI lowers the barrier for the creation of new misleading content which can easily be circulated nationwide, in commerce. The current legal recourses for a violation of publicity rights are impractical considering the scope of the problem. History supports the federalization of "right of publicity" laws. A person's name and likeness if used as a symbol of source for goods or services, can be protected by the common law as an unregistered form of a trademark. Historically, unregistered trademarks were litigated in state courts until the Lanham Act established a federal cause of action. Federalization does away with the need for diversity jurisdiction, removes the need to consider artificial state boundaries in assessing the geographic scope of infringement, and allows for nationwide reach in injunctions (*see* https://thettablog.blogspot.com/2023/09/recommended-reading-fifty-years-of.html)

The rise of generative AI makes the creation of content that infringes on a person's name, image or likeness easy. As the technology continues to progress, the realism of AI generated content is expected to also increase. *See* Andrew Chow & Billy Perrigo, The AI Arms Race is Changing Everything, TIME (February 17, 2023 1:47 PM EST),

https://time.com/6255952/ai-impact-chatgpt-microsoft-google/. The potential for consumers to be misled by images, sounds, or other content that impersonates celebrities or other is high. Even now, deepfakes are proliferating, leading the public to believe whatever message, endorsement, or falsehood a bad-faith actor chooses. Even good-faith actors could spread content unknowingly that is a violation of a person's publicity rights. Furthermore, the typical nature of generative AI content is produced and distributed to the public through the internet, meaning that the generative AI content can use people's names, images, and likeness from all over the country, or world, and be distributed throughout the country, or world. The vast breadth of generative AI users can be in any state, thus multiple right of publicity laws could be violated with a single AI generated material. Uniformity in right of publicity laws on a federal level is required based on the continuing advancement of the internet and internet-related technology that utilizes AI. The potential harm of AI generated content is great given that any digital content can spread quickly and irrevocably across the internet.

INTA passed a 2019 Board Resolution calling for certain minimum standards that any protection of rights of publicity should meet. International Trademark Association, Right of Publicity Minimum Standards, Minimum Standards Subcommittee of the Right of Publicity Committee, (Mar. 27, 2019) ,

A federal right of publicity law meeting those standards should protect against infringement of the right by any means, and should not specifically carve out AI generated content. AI is a new type of technology, but we do not know if there are other types of technology that will arise in the future that would not be considered AI. Technology is ever advancing, so a right of publicity should protect an individual's name, image, and likeness from future technologies, including that of AI. A federal right of publicity should encompass the right overall, regardless of whether AI generated. Yet the rise of generative artificial intelligence only makes the need for strong and uniform federal standards more pressing. INTA's basic standards are set out below:

1. The right of publicity is reserved to natural persons and not companies, animals or objects.

2. The right of publicity would prohibit others from making an unauthorized use of a person's name, likeness, voice or other personal characteristic that identifies that individual to an ordinary and reasonable viewer or listener.

3. To be actionable, the use at issue should be for commercial purposes, and a direct connection between the use and the commercial purpose must exist. The claimant must establish that the use of his or her persona results in injury or damage to the claimant and/or unjust enrichment to the defendant.

4. An individual claimant need not make commercial use of his or her persona to have a
right of publicity. The commercial value of a persona may have an impact on any damage amount claimed in a dispute.

5. An individual should have post-mortem rights for a defined term. The rights should be
freely transferable, licensable and descendible property rights.

6. Where practicable, a non-mandatory post-mortem registration system would assist an
individual's heirs, descendants, survivors, agents or other rights holders in providing
public notice that such rights are being claimed, and provide contact information for the
use of such rights. There could be incentives to register the claim of rights, such as
reserving the ability to obtain monetary relief to only those valid rights holders who registered their claim prior to the commencement of the unauthorized use.

7. There should be general exceptions to publicity rights so as to permit fair use of an
individual’s persona in protected speech or expression. These exceptions may include
uses in:

a. News, public affairs and sports reporting or commentary;
b. Dramatic, literary, artistic, or musical works, so long as the use has artistic relevance to the work and does not explicitly mislead as to endorsement or approval by the individual;
c. Works that parody, criticize, satirize or comment upon the individual;
d. Advertising and promotion for (a)-(c); and
e. Any other noncommercial use, including, but not limited to, education and research.

31. Should Congress establish a new federal right, similar to state law rights of publicity, that would apply to AIgenerated material? If so, should it preempt state laws or set a ceiling or floor for state law protections? What should be the contours of such a right?

A: Answered above.

Question 33: With respect to sound recordings, how does section 114(b) of the Copyright Act relate to state law, such as state right of publicity laws? Does this issue require legislative attention in the context of generative AI?

Section 114(b) does apply, but in a limited scope. Section 114(b) explicitly limits the scope of protection of sound recordings to the actual sound recording, prohibiting copying that directly or indirectly recaptures the actual sounds fixed in the recording. The owner is limited to the right to prepare a derivative work in which the actual sounds are fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. Section 114(b) thus does not protect the copyright holder against the use of AI to imitate or simulate the sounds in the recording, without actually reproducing or altering them. For these reasons, generative AI material requires legislative attention. For example, "Heart on My Sleeve," a song created using AI, and featuring voices, mimicking those of Drake and the Weeknd, briefly went viral on music streaming services before being taken down. *See* Joe Coscarelli, An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World, New York Times (Apr. 24, 20203) https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html. If the AI generated material merely imitated or simulated the sounds in actual recordings by Drake and the Weeknd, it likely does not violate Section 114(b), though it may violate their rights of publicity under some states' law.

INTA is available to discuss our comments in more detail. Please contact Jenny Simmons (jsimmons@inta.org) for any additional information you might like. Thank you in advance for considering the views of INTA.

Sincerely yours,

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