

**MONOTYPE IMAGING INC. COMMENTS ON USCO NOTICE OF INQUIRY**

**Submitted by: Philip Carey-Bergren, VP, AGC and Chief IP Counsel.**

**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?**

Generative AI is a tool—a tool that can be used by humans to, *inter alia*, create content. Fundamentally, GenAI is not so different from the tools used by artists and other creators to realize a fixed digital manifestation of their creative visions. Nonetheless, there are clear benefits and risks associated with the use of GenAI technology. Some of the benefits include the ability to produce content quickly and test ideas without a substantial outlay of resources. The risks involved are largely related to deception and confusion among the consuming public as to the source of the content being consumed.

The use of GenAI technology is likely to affect creators, copyright owners, technology developers, researchers, and the general public. For creators, GenAI is another tool at their disposal to aid in taking their ideas from conception to creation of the work; all parties involved may be impacted by how copyright-protected works are ingested to train AI models and how those ingested works are used in the output resulting from the generative process.

The font industry (in which Monotype operates) relies on software tools to assist in the process of creating font software from static typeface designs. Some of these tools could generate functioning font software without human authorship and/or creativity; however, the use of tools that are *capable* of producing content does not disallow human authorship or negate human creativity.

**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.**

New legislation may be helpful but is not necessary. The same longstanding principles that apply to copyright rights generally should apply to the use of GenAI. GenAI is a tool

that can be used by creators but its use does not negate the human creativity involved. Copyright protection should subsist as long as there is creative human input that becomes fixed in a tangible medium of expression. The breadth and depth of that protection on a case-by-case basis is appropriately addressed through the judicial process.

**8. Under what circumstances would the unauthorized use of copyrighted works to train AI models constitute fair use? Please discuss any case law you believe relevant to this question.**

As with other fair use analyses, the purpose and character of the use, the nature of the work, the amount/substantiality of the work used, and the market impact of the use should be weighed. Additionally, unauthorized use of copyrighted works to train AI models may constitute fair use if: (i) the use is not prohibited (whether by the copyright owner or otherwise); (ii) the works and/or copies ingested were acquired, accessed, and used legitimately (e.g., not procured or accessed through an infringing act); and (iii) the ingested works are not directly accessed or referenced by a GenAI system to generate content.

**8.2. How should the analysis apply to entities that collect and distribute copyrighted material for training but may not themselves engage in the training?**

Distributors of copyrighted material should be liable for all downstream permitted use of such materials including use by AI models.

**9.1. Should consent of the copyright owner be required for all uses of copyrighted works to train AI models or only commercial uses?**

Consent or a valid fair use defense should be required for all uses of copyrighted works to train AI models.

**9.4. If an objection is not honored, what remedies should be available? Are existing remedies for infringement appropriate or should there be a separate cause of action?**

If an objection is not honored, use of the work (including for training purposes) should constitute copyright infringement and thus avail all remedies applicable to copyright owners generally.

**9.5. In cases where the human creator does not own the copyright—for example, because they have assigned it or because the work was made for hire—should they have a right to object to an AI model being trained on their work? If so, how would such a system work?**

The use or existence of GenAI should not impact moral rights imparted to human authors.

**11. What legal, technical or practical issues might there be with respect to obtaining appropriate licenses for training? Who, if anyone, should be responsible for securing them (for example when the curator of a training dataset, the developer who trains an AI model, and the company employing that model in an AI system are different entities and may have different commercial or noncommercial roles)?**

There is an analogy here between AI training and mechanical licenses applicable to compositions. The USCO could implement a similar model for AI training. The volume of material ingested to train AI models is (or can be) massive, which makes recordkeeping and licensing more complicated; however, the volume of ingested works should not negate the responsibility of developers of AI models to respect the copyrights of others. Just because it's a big job doesn't mean it shouldn't be done.

**15. In order to allow copyright owners to determine whether their works have been used, should developers of AI models be required to collect, retain, and disclose records regarding the materials used to train their models? Should creators of training datasets have a similar obligation?**

**15.1. What level of specificity should be required?**

All copyright-protected works ingested into AI models should be identified including the source of the work. The onus should be on the owners of the AI models to maintain records documenting the works used and the basis for the right to use the work.

A similar scenario exists in the music industry. While compulsory licenses are available with respect to musical compositions, what constitutes a protectable element of a composition is a fluid and judgment-based determination. One way the music industry has dealt with this is by documenting all contributions (and, in some cases, potential contributions) to the final work (regardless of whether a license was required to use the contribution(s)). See e.g., writing and production credits for Beyonce's recording of the song BREAK MY SOUL. The credits read as follows:

WRITTEN BY BEYONCÉ, TERIUS "THE-DREAM" GESTEELDE-DIAMANT, CHRISTOPHER A. STEWART, S. CARTER, GEORGE ALLEN, FRED CRAIG MCFARLANE, ADAM JAMES PIGOTT, FREDDIE ROSS/ PUBLISHED BY OAKLAND 13 MUSIC (ASCAP), ALL RIGHTS ADMINISTERED BY SONY/ATV. OBO ITSELF AND OAKLAND 13 MUSIC, 2082 MUSIC PUBLISHING (ASCAP) / WB MUSIC CORP. ADMINISTERED BY WB MUSIC CORP, LEVELS TO THIS MUSIC (ASCAP), SPIRIT TWO MUSIC INC (ASCAP), CARTER BOYS MUSIC INC (ASCAP), ALL RIGHTS ADMINISTERED BY SONY/ATV. OBO ITSELF AND CARTER BOYS MUSIC INC, EMI BLACKWOOD MUSIC INC (BMI), SONG A TRON MUSIC (BMI), ADAM JAMES PIGOTT PUBLISHING DESIGNEE (BMI), GIRL DOWN/SONGS OF KOBALT MUSIC PUBLISHING (BMI) / PRODUCED BY BEYONCÉ, TERIUS "THE-DREAM" GESTEELDE-DIAMANT FOR RADIOKILLA RECORDS, C "TRICKY" STEWART FOR TRICKY STEWART MUSIC / CO-PRODUCED BY JENS CHRISTIAN ISAKEN / VOCAL PRODUCTION BY BEYONCÉ / ADDITIONAL VOCALS BY BIG FREEDIA / CHOIR : THE SAMPLES / CHOIR CONDUCTOR: JASON WHITE / VOCAL ARRANGEMENT BY BEYONCÉ, NIKKI GRIER, JAWAN MCEASTLAND / MIXED BY STUART WHITE / BEYONCÉ VOCALS RECORDED BY STUART WHITE / CHOIR RECORDED BY CHRIS MCLAUGHLIN / RECORDING ENGINEER: BRANDON HARDING / ASSISTANT ENGINEER: MATHEUS BRAZ / CHOIR VOCALS BY ALEXANDRIA GRIFFIN, ANTHONY MCEASTLAND, ASHLEY WASHINGTON, ASHLY WILLIAMS, CALEB CURRY, CHELSEA MILLER, CHRIS MCLAUGHLIN, DANIELLE WITHERS, DEANNA DIXON, ERIK BROOKS, FALLYNN RIAN, HERMAN BRYANT, JAMAL MOORE, JASMINE PATTON, JAVONTÉ POLLARD, JONATHAN COLEMAN, JOREL QUINN, KIM JOHNSON, KRISTEN LOWE, NAARAI JACOBS, PORCHA CLAY / PROTOOLS ENGINEER(S): ANDREA ROBERTS, JOHN CRANFIELD / RECORDED AT THE TRAILER EAST HAMPTON, NY, THE JUICY JUICY LOS ANGELES, CA, PARKWOOD WEST LOS ANGELES, CA, HENSON RECORDING STUDIOS LOS ANGELES, CA / MIXED AT AVENUE A STUDIO WEST LOS ANGELES, CA, THE JUICY JUICY LOS ANGELES, CA AND PARKWOOD WEST LOS ANGELES, CA / MASTERED BY COLIN LEONARD AT SING MASTERING IN ATLANTA, GA USING SING TECHNOLOGY® CONTAINS ELEMENTS OF "SHOW ME LOVE"

WRITTEN BY GEORGE ALLEN, FRED CRAIG MCFARLANE AND PERFORMED BY ROBIN S. PUBLISHED BY EMI BLACKWOOD MUSIC INC (BMI) AND SONG A TRON MUSIC (BMI). CONTAINS A SAMPLE OF "EXPLODE" WRITTEN BY ADAM JAMES PIGOTT, FREEDIE ROSS AND PERFORMED BY BIG FREEDIA. PUBLISHED BY ADAM JAMES PIGOTT PUBLISHING DESIGNEE (BMI) AND GIRL DOWN (BMI)"

### **15.2. To whom should disclosures be made?**

Disclosures should be made available to the general public; failing that, owners of AI models should be obligated to disclose to copyright owners whether their works have been used for AI training.

### **15.3. What obligations, if any, should be placed on developers of AI systems that incorporate models from third parties?**

Copyright infringement is a strict liability offense that does not require malice or negligence on the part of the infringer. Owners of AI systems that incorporate models from third parties should be directly liable for any infringement of copyright resulting from those AI systems.

### **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?**

Yes. GenAI is a tool that can be used by human authors. In the same manner that the characteristics of a paintbrush used by a visual artist impact the resulting work, the use of GenAI will impact the resulting work. However, as with other tools, the fact that some tools are better, perform more functions than others, or enable better output does not negate the existence of human creativity or the decision by a human to fix that creativity tangibly through the use of GenAI. The focus should be on the human creativity and not the tools or systems used to output that creativity.

**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?**

Yes, non-humans can infringe copyright rights.

**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?**

Developers should be obligated to maintain records of ingested training material. There should not be a loophole that permits unlicensed use of copyright-protected works only for the purpose of training AI models.

**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?**

All parties in the chain should be liable for their acts and omissions. Developers of GenAI models and systems incorporating AI models should be liable for the infringing output permitted to be generated through use of their models. End users should be liable for the results of their actions that result in copyright infringement.

AI model and systems developers already have the necessary framework to protect themselves against infringement. For example, they could (i) choose to only train on works with the consent of the copyright owners, (ii) contractually prohibit use of AI systems to generate infringing content, or (iii) require indemnification by end users in the event of a copyright infringement claim.

**26. If a generative AI system is trained on copyrighted works containing copyright management information, how does 17 U.S.C. 1202(b) apply to the treatment of that information in outputs of the system?**

17 USC 1202(b) should apply strictly; GenAI shouldn't be excluded just because it's more complicated to respect copyright management systems.