Reply to the Notice of Inquiry of Artificial Intelligence and Copyright

I'm replying as a “civilian”, from my perspective as an originator of copyrights, trademarks and patents. While I'm not representing any organization here, I'm in a “kitchen cabinet” of an AI institute of a world-class university. As well as having spent decades in originating works and in media and in technology, I'm an intellectual property (IP) strategist, with an MSc from the world-class graduate business school of another top-rank international university. I'm not a lawyer, while in domains in which I've worked I've had exposure over the years to issues of copyright, commerce of works and equity in the body of law governing intellectual property.

I refer to AI as that is the jargon au courant, regardless of lack of conclusive definition of AI.

A principle running through this reply is that, where relevant law (case / statutory / customary) doesn't explicitly pertain to human beings only, AI should receive the same treatment, whether permissive or restrictive, ***pari passu*** with the treatment of human beings in a like situation.

Infringement [with reference especially to questions 8-9 regarding training “generative AI”]

Summary

This section of the reply addresses approximations, trading on names and means of access:

- When AI, upon having reviewed / studied / apprehended precedent proprietary work(s), merely approximates pre-existing the respective content or style (even to the extent of story line) or idiom of a creator *short of illicit substantial similarity to a precedent proprietary work*, that approximation from AI shouldn't be infringement of a copyright unless that approximation by a human creator would be infringement. (Discussion of using precedent proprietary works in training AI should avoid the word “unauthorized”, as in question 8. That word connotes illicit. If the use of material is fair use, then the issue of authorization vs lack of authorization isn't pertinent. The question is: when is a use of content without license from the holder of the respective copyright fair use or not. The U.S. copyright regime already addresses that issue.

- Whether a purveyor of an approximation purports – eg by falsely attributing it to another creator (usually of good repute) - to be a work of another creator without their license or the approximation is so substantially similar to a preceding work that reasonable consumers are highly likely to mistake the approximation to be a product of that other creator in an absence of attribution otherwise or disclaimer or other evidence that the approximation isn't a work of that third party or the situation in which the proffer of the approximation appears is misleading that it is the work of another creator, then that infraction is a matter that either is addressable through *applying trade law*, regarding eg passing off or trademark or knock-off, or is to be addressable upon trade law after relevant legislators update trade law, which has lagged

- Any review or study or apprehension of a precedent proprietary work in *training AI should have the same extent of liberty of fair use as does any like review, study or apprehension of*

that work in training human beings (with regard to case law, statutory law and customary law). AI trainers shouldn't have to pay any more than either an instructor of a human creator who is learning upon precedent proprietary works or that creator should have to pay to access such work(s) subject to copyright. Assessing whether access to work(s) in AI may have - or not - infringed copyright should allow the same fair use granted by law to training human beings.

Approximations *(not an illicit substantial similarity to a preceding third-party copyright work)*

Copyright law already provides for addressing the question of use of works in training AI.

Without examining how an AI process got access to the work(s) (whether properly or illicitly), a complaint that an approximation of work(s) subject to copyright is an infringement by that AI process merely due to review or study or apprehension of the work(s) is specious unless a like approximation by a human being would be an infringement. An approximation of work(s) usually isn't a substantial similarity to the work(s). Treatment of artificial process should be pari passu with human process where relevant law doesn't explicitly relegate the artificial (and the artificial doesn't misappropriate eg face, voice or body beyond fair use). "If I, as a person, listen to a whole bunch of Drake music and write my own song, having been inspired by him, but I don’t use the same lyrics or the same music, everybody would agree that’s not a copy. Why wouldn’t the same standard apply to an AI?" - https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law/

So, deferring to below the question of whether the creator – whether human or artificial – of an approximation resonant of a precedent proprietary work obtained it properly or illicitly, ***the mere process of reviewing, studying or apprehending a precedent proprietary work shouldn't be infringement of copyright***. Traditionally, for thousands of years, in schools, academies and studios, training of creators has included having them approximate styles - eg tones or structures (even story lines) or subjects - of precedent works, especially works by masters, as each new generation has apprehended those works. That process of instruction calls for absorbing a work as is - verbatim of text, note by note of music, pixel by pixel of picture. Some creators proceed to produce works in the same idiom - even approximations of precedent proprietary works, short of substantial similarities - rather than innovate an idiom.

Reviewing, studying and apprehending works, even works of which the copyrights haven't expired, to instigate approximations by human beings have been fair uses, ie beyond prosecution of copyright law, which serves the ultimate aim *not* of protecting creators but of protecting them *only to enrich the intellectual table* so that each new generation can partake of it to produce additional works, even only incrementally, and whether value-adding or not.

AI is such a new generation. Leaving aside the question of whether or not copyright should protect non-human creators, some questions are: Does existing law distinguish whether or not *a fair user of works* has to be human or may it be cyber? Legally, today, (how far) does fair use of a precedent proprietary work to train a creator who is human restrict that person from approximating the style (even the story line) of that work commercially, so that the law should

– *pari passu with treatment of human beings* - likewise restrict monetizing certain type(s) of approximations ensuing from AI? If the law *doesn't* characterize fair use in training a creator by any outcome (so allowing monetization of approximations - short of substantial similarities – of a precedent proprietary work upon which the creator trained), then: Should legislators modify law to *narrow* fair use in training by type(s) of outcome(s) – eg, continuing to allow for parodies, excerpts in journalism and other customary outputs, yet excluding other commercial approximations? Should legislators narrow traditional fair use in training AI while preserving the status quo nunc in training human beings, who have wide latitude in fair use? Should legislators restrict fair use in training of *human beings and AI alike* by type(s) of outcome(s)?

If existing law hasn't required that any fair user be a human being and not artificial, then: upon absorption of precedent proprietary work(s) in training AI, any ensuing approximation per se out of an AI creator doesn't infringe copyright whenever a like approximation out of a human creator wouldn't be infringement. An approximation per se out of AI shouldn't be subject to any recourse to law, so long as that none of the following occur: (a) violating a trade law by passing off an approximation of a precedent proprietary work as a product by the respective precedent creator (customary in pre-modern times) without relevant consent or (b) fiddling with provenance – eg a paper trail - to imply that an approximation is from the creator of the precedent proprietary work, or trespassing a right by perpetrating an illicit substantial similarity to a precedent proprietary work. Those types of offenses aren't new, while AI finesses them.

Waves of approximations by human beings have popped up in various domains - eg doo wop, movies, young adult fiction, self-improvement books, tv series, graffiti – without violating law, except when an approximation trespassed into illicit substantial similarity to a preceding work (whether juries decided so correctly or not). ***AI - pari passu with human intellect - should have latitude in fair use of precedent proprietary works to review / study / apprehend any such work*** to produce an approximation of a precedent style, eg any of tone or structure or subject (even to the extent of story line) - whether that style is the style of that work per se or the style of the creator of that work or the style of a genre of which that work is an epitome.

Short of illicit (ie not fair use) substantial similarities to preceding works, approximations by AI should have the same latitude as approximations by human beings do. Approximation, even of story line or pattern or elements, shouldn't be, per se, infringement. Nevertheless, in the AI era as in the pre-AI era, a substantial - emphasis on substantial - similarity to the totality of a preceding third-party work without permission of the holder of the right(s) pertaining to that work should remain improper, whether a human being or an AI machine is trespassing. *In any case, **the threshold of what is illicit substantial similarity beyond mere approximation of any of tone or structure (even to the extent of story line) or subject should be high***. To instruct courts, especially juries, to construe that high threshold strictly, narrowly and consistently, copyright law needs refining by the Congress to avoid ambiguity now spreading.

Trade *(wherein passing off or misdirection or knock-off infringes on a right protected by law)*

While AI is affecting commerce of works, not just producing works, the U.S. copyright regime shouldn't encroach on trade law addressing passing off, misdirection and knock-offs, whether the products are material or intellectual. The copyright regime should complement trade law. **The onus is on trade law to police any passing off, misdirection or knock-off of IP:**

- When an approximation doesn't violate a strict threshold of similarity infringing a copyright, trading abusing the name of another creator or publisher or title as a brand without permission from the name holder may still occur. E-tail platforms, notably Amazon, have been subjects of complaints of passing off, eg proffering an approximation substantially simulating a creator's product as being by that creator, whether using their name or otherwise misrepresenting. In such a case, recourse to enjoin passing off may be an option when a platform hasn't policed the incident. Passing off using the name of someone else illicitly may be fraud. Passing off isn't, per se, a copyright law issue. Passing off is a trade law issue. It may need extending by legislators to encompass passing off utilizing digital means, eg AI, beyond human means.

- Fraud through misdirection, eg misrepresenting the provenance of an approximation even without falsely attributing it, is addressable through recourse to trade law, especially when the approximation isn't infringing. Fraud through misdirection is more likely in collectibles than in pedestrian works. Collectibles include new “pop” works, eg comic books, not only classics.

- Knock-offs, too, while they may be infringe copyright in a domain to which it applies, are addressable through recourse to trade law, whether a perpetrator employed AI or humans.

While recourse to law, even in cases of prima facie offenses, is a challenge for subsistence originators (among them, women, minorities, young people, un/deremployed people and retirees), also independent publishers and other organizations without deep pockets, the hurdles may be no greater in cases of abuses of digital means than the hurdles have been in abuses of traditional goods. Not only should legislators extend trade law to cyberspace to complement update of copyright law in the AI era, lawmakers need to expedite recourse to law by plaintiffs who don't have deep pockets. Intellectual property rights in the 21st century are what oil rights were in the 20th century and land rights in the 19th – predicates of wealth.

Access *(whereby a work is available to review, study and apprehend in training a producer)*

An issue is how the user, whether human or machine, obtains a precedent proprietary work. At some point a copy is necessary to instruct the content into the AI. The copy may not be traditional, even a scan, when a machine obtains the content reposing in another machine. While the U.S. copyright regime is as sufficient to determine whether access to a work subject to copyright was fair use or compliant or illicit in training AI as in training human beings, the issue of specifying how the AI process had access to – e.g. “copying” - that work may be more technically challenging than pre-AI (as question 24 wonders). The insinuation of AI into digital means of creation is becoming pervasive that it may require (by updating copyright law) generative AI solutions to include logs of what works were accessed by AI via what mode when, just as standard (template) reports of logs of training generative AI may be requisite to

append to the attestations by copyright registrants that human involvement in originating works was sufficient to comply with the copyright threshold, whether that is “more than minimal” or “basic” or “substantial”. The log(s) should be complimentary with the AI solution.

This issue goes back to the old question of whether photocopies to a class of students are fair use, thus not subject to any transaction, or a school has to pay: whether a fee to license the work in bulk or buying publications piecemeal containing the work for each student or having sufficient copies of the publication in the library. A photo of a work of visual art or sketching it in a museum or studying it in a book should be fair use, even to approximate it. Listening to a recording of a musical composition likewise should be fair use, even to approximate it.

The issue isn't whether or not training AI should have access to precedent proprietary works, unless the stance is that machines shouldn't have perquisites of human beings. An owner of a copyright should have no more right(s) – eg opting in/out (question 10.3 et al) – in restricting use(s) of the respective work in training AI than the status quo nunc provides that owner in restricting use(s) of the work in training human beings in schools, academies or studios. Training AI should have the same access to precedent proprietary works that training human beings does. On that basis, ie pari passu with what training human beings pays, a question is: ***to what extent should use in training (AI) be free or when a use is beyond fair use how much should that use cost?*** A pari passu principle, treating training AI and training human beings equivalently, renders most of the sub-questions of question 9-17 matters to which to apply the existing protocols of access of precedent proprietary works to be studied, reviewed and apprehended by human beings, either in fair use or for pay, *unless discrimination against AI is the consensus policy*. In reply to question 15, law shouldn't require an AI trainer to pay, disclose and specify more in respect of use of a work in training AI than a trainer (e.g. any of school, academy or studio) of human beings has to. None of the argument that law should treat training AI and training human beings equivalently precludes any private contractual or collective arrangements (e.g. allowing opting in/out), so long as they aren't required by law.

If either a part of a precedent proprietary work or the entire work is reviewed or studied or apprehended by AI to train it, even to produce approximation – short of substantial similarity – of the work, then a question is: Was the acquisition of that content just as how an organization training a human being would acquire that content within fair use? To the extent that practices exist to compensate holders of copyrights beyond fair use, even in instruction, those practices should apply to training AI, so the facilitator of training AI should pay accordingly to use works.

“If there will be no reduction in sales because of copying or distribution, the fair use exemption is likely to apply” - https://marymount.libguides.com/c.php?g=271976&p=1815238. So long as the use of a precedent proprietary work in training AI doesn't have a purpose of producing a substantial similarity of that work (and that outcome is likely to be evident only after the fact, difficult to impossible to forecast from mere use of the work in training AI), the use is fair use. While creators of works moan that approximations that aren't substantial similarities to their works deprive them of sales, that argument is usually unsuccessful in court and pressing that argument even against a substantial similarity to the precedent work may be challenging.

As entire works are important in training AI, a question is: What should training AI have to pay for access to an entire precedent proprietary work? This issue is pertinent especially to long forms of textual works, long graphical narratives and musical works. They need copying into the AI, even from machine to machine. Pictures, sculptures and short textual works, eg verse, may be comprehensible at a glance. Unless the AI is imprinting pictures, sculptures and short textual works via remote visual means, not needing copying, then a copy has to intermediate the introduction of those works to the AI, so a question is whether that copy is fair use or not?

The existing model of what "schooling" pays to provide students works subject to copyright is the model for what generative AI trainers should pay when use of works is beyond fair use. If a organization, eg a school, training human beings has to pay to get access to a work, then the facilitator of training AI should have to pay likewise. The AI is only one "student", so should the facilitator of training that AI have to pay only once per copyright? The argument that the facilitator of training AI should have to pay many times over per precedent proprietary work according to how many incidents of approximations ensue from reviewing, studying and apprehending that work is specious. A horror writer who learned the craft in a writing school upon scrutinizing Stephen King, Anne Rice and Clive Barker may sell many books that are approximations of the style of works of any one of them, even to the extent of adapting a story line, without having to pay any royalty to that master upon whose works that writer trained.

Congress may be swayed by incumbent copyright holders that every AI trainer should pay beyond just once per precedent proprietary work that training the AI uses. Paying prevailing copyright royalties for each of possibly prolific incidents of approximations ensuing from that AI would be prohibitive logistically as well as financial in the same way that copyright fees inhibited grassroots internet radio, cf eg https://iowastatedaily.com/179087/opinion/van-scoy-copyright-killed-the-internet-radio-star/ et al. Paying once per copyright is logically sound, while, in practice, most AI training can achieve competitive outcomes upon only public domain inputs, possibly enhanced selectively with proprietary inputs, while much of AI is going to be intramural, adapting to a particular organization, eg a medical center or a company or school.

If some way(s) in which training AI obtains content of precedent proprietary works (eg from machine to machine) elude traditional practices of monetizing copyrights in the marketplace, then that is an issue of improving policing technique(s), likely leveraging AI. Prohibiting uses of precedent proprietary works in training AI until the AI ecosystem has sufficiently improved policing of fees for using precedent proprietary works in training AI to be equivalent to policing of fees for using precedent proprietary works to train human beings is a draconian option, leaving aside the apocalypse in the event that Congress legislates payments on the basis of incidents of approximations ensuing from AI that trained on precedent proprietary works rather than just once per precedent proprietary work on the same basis as schools and other training organizations pay. In that event, an alternative to the draconian winter is to require the organization training the AI to respect copyrights by remunerating uses beyond fair use by paying agents of copyright holders a percentage of the rolling revenue of the respective AI platform to allocate among the holders in proportion to their prevailing shares of royalties, until

such time as the AI trainer proves compliance with the requirement, whether in law or in a pact with copyright agents, to track uses of precedent proprietary works to pay once per work. The onus of itemizing such works would likely leave paying “vigorish” from revenue as the modus vivendi indefinitely, especially for most to all of the AI platforms other than behemoths. Subject to negotiation, possibly bloc to bloc, that “vig” may comprise prevailing royalty rates among the categories of copyright, eg textual, visual, cinematic, music, lyric, performing et al.

AI quotient [with reference especially to questions 1 and 9 regarding role(s) of AI in creation]

Consideration of how to treat roles of AI in creating works remains bounded by precedents in copyright law that it protects only creators who are human. U.S. code – while not the U.S. Constitution, arguably - implies that a creator must be human to gain protection of copyright of work by that creator. Rulings in courts upheld that relegation of non-human creations, most recently outputs from AI. Law may evolve. The Citizens United case overturned a century of practice to enlarge the right of free speech of *non-human* entities, eg corporations and other organizations, to such an extent that organizations are pari passu with individual human beings. *The Constitution doesn't exclude AI, subject to definition of AI, to be an author.* The U.S. copyright regime already allows such non-human-entities as corporations to originate (as author instructing works for hire), register and own copyrights. Ownership is where the rubber meets the road. Just as land was a predominant source of wealth in the 9th century and oil and other minerals in the 20th century, ownership of IPR is far more beneficial, especially monetarily, than merely creating. Allowing works resulting from generative AI with minimal human involvement could open up ownership of copyrights to subsistence authors to try to keep up with big corporations, in the spirit as well as the letter of the copyright clause of the U.S. constitution, just as digital means have widened who can originate copyright works.

For now, in that prevailing legal context, the pivotal question in whether or not to affirm the copyright of a work that benefited from AI to some extent is the extent of the human role in creation of a work in a category of copyright law. The roles that AI may play in creations in the cyber era encompasses a continuum ranging from entirely human without AI to arguably autonomous AI at the other end. Reliance by creators on non-human, especially digital electronic means, has been accelerating even before the buzz around AI, even as artisanal works – created by humans without AI – is a diminishing minority of new works. Soon, AI will reside in every digital means available to creators. That pivotal question has rapidly become not whether or not AI disqualifies a work from copyright but: j*ust how much AI in creation to permit, so long as prevailing law refuses to grant copyright protection to AI as a creator?*

Update of the U.S. copyright regime to address how much AI in a process of creating a work disqualifies it from copyright should be careful to *avoid aggravating the already inequitable subjectivity in the U.S. copyright regime*. Copyright registration, a big plus in protecting a work, is usually subject to the discretion either of a sole examiner or at most a few examiners in the U.S. Copyright Office. While examiners are well-meaning, any discretion inherently invites subjectivity. however inadvertent, so subjectivity pervades the U.S. copyright regime. Subjectivity is unfavorable to subsistence creators especially (just as subsistence inventors in

the U.S. patent system and subsistence businesspeople in the U.S. trademark regime are relegated by inherent subjectivity pervading those regimes). A subsistence creator lacks deep pockets to hire a savvy copyright attorney, fund appeal(s) and go to court to overcome discretion of an examiner, so the copyright regime has increasingly favored deep pockets, especially big corporations. As many subsistence creators are women, minorities or retirees, subjectivity, which the issue of AI could aggravate, affects equitability -not just the coherence - of the copyright ecosystem. Weighing AI in works shouldn't be at the discretion of examiners.

Ultimately the U.S. copyright system should tolerate generative AI short of autonomous AI, while, at least for now, U.S. law requires that a role of a human being in originating copyright-eligible content is more than “minimal”. In the U.S. Copyright Office, how it determines the threshold distinguishing, on the one hand, copyright-eligibility of works involving human creators using AI only to facilitate creation and, on the other hand, copyright-ineligibility of works involving AI that insufficiently involves humans should be: practical and resistant to use of discretion - especially to try to pre-empt inequitability from subjectivity of examiners / judges / juries – and measurable to allow for audit. While a simple resolution comparable to eg thresholds of parts per million of elements in food safety would be welcome, the reality is complex: Generative AI soon will pervade digital means increasingly used by human creators, generative AI will be insinuating into creations and AI will no longer be a distinguishable bolt-on (eg https://www.yahoo.com/entertainment/marvels-loki-season-2-poster-181500177.html). Thus generative AI usually won't distinguishable by a human examiner. (Also, the insinuation of AI into digital means of creation is likely to make distinguishing part(s) of a work that resulted from the use of AI unfeasible, rendering the requirement in an application to register copyright to disclose which part(s) of a work resulted from AI beyond “de minimis” an unreasonable burden on the applicant. Without a standard report of a log in each generative AI solution, an attestation of the human involvement should replace the requirement to disclose which part(s) resulted from AI, especially as coping with the requirements of time, money and manpower to distinguish each such part as AI has insinuated into digital means of creation advantages deep-pocket originators, namely big companies, over resources-poor subsistence originators.

While waiting for a future resolution, the U.S. copyright regime has to address the question of how far to tolerate generative AI in an interim within the scope bounded by law.

If the tolerance of the quotient of AI in works is too low in the U.S. copyright regime, starting in the registration funnel in the Copyright Office, then the predominance of big companies in the copyright ecosystem will increase and the relegation of subsistence creators worsen. Big companies have deep pockets to finesse whatever protocols are set by the Copyright Office, Congress and courts, unless those protocols are unambiguous and free from discretion and measurable accessibly by any party, even a lay holder / applicant / creator. Until deployment of agents to determine AI quotients in works, the copyright regime, especially the Copyright Office as the front-end funnel, should set the tolerance low by accepting an **attestation from each applicant that “human involvement in creating the work was active not passive, attentive not casual, conscientious not minimal”** (that wording is illustrative; whatever the

wording, it should avoid the term “artificial intelligence”; no conclusive definition of AI exists, even as AI, whatever it is, is rapidly insinuation into digital means of creation). If some current formulation of attestation is sufficient to that effect, then rely on the status quo nunc, while attestation of human involvement should either replace, an attestation of the role of AI.

If an applicant shall have lied (ie willfully misrepresented) in that attestation, then law already addresses lying to the Copyright Office, and so apply that law upon discovering the lie. This interim adjustment leaves the burden of disproving the attestation on any challenger, just as challenges to the provenance of copyrights on grounds before AI have had to resort to post-registrations or post-publications actions. A challenger of a copyright will have to resort to digital forensics to establish a preponderance of evidence that the human quotient in a work, just as challengers of copyrights have resorted to forensics - machines as well as human experts alike - in recent cases not involving AI. The race between means of perpetration and means of detection has long predated AI. Use a thief to catch a thief. Use AI to catch AI.

AI in examination to minimize subjectivity [with reference especially to question 15 et al]

While some people may argue that the most suitable agent to make practical and discretion-avoiding and audit-able determinations of quotients of generative AI in works is another, investigative AI process (a digital examiner?), AI like human intelligence can pick up bias(es), whether from input(s) or coder(s) or operation over time, so vigilance against bias is a must in using any AI. Corroboration between species of AI (so, AI solutions from different developers) is a mitigation. Human supervision, providing reality checks of findings, is another mitigation.

An optimal solution would comprise examiners supervising AI tools within protocols to assay AI quotients in works. Examiners would need to be(come) fluent in using dianostic AI. A like transformation of getting ranks of employees up to speed occurred in mass computerization.

An alternative, to avoid adding burden to the resources-poor Copyright Office (and avoid urgent retraining of examiners in supervising AI as it burgeons), is to have each examiner consider in each application an appendix of a standard report of the AI quotient from a self-diagnosis tool that comes with each of the generative-AI means (usually either just one or few) used by the creator of the work; that self-diagnosis tool should be complimentary, not a premium, in each generative AI solution to avoid precluding subsistence creators, especially as digital tools in creation become predominant and AI becomes pervasive in digital tools; the format of the reports should be a comprensible template, required by law after Congress updates copyright law to cope with the AI era. While a free marketplace is generally preferable to a mandate by law, copyright is already subject to the force of U.S. federal law, thus requiring a fix by law. In any event, the applicant to register a copyright should have right to conciliate any difference of opinion between the examiner the applicant with the aim of curing the application without having to pay any additional fee (including resubmission). The current practice of lack of conciliation puts an inequitable burden on subsistence creators.

The progress of AI has an implication for the process of examination of application to register copyright. As AI proliferates the number of works, even those by human creators, facilitated by AI, the workload of the U.S. Copyright Office is going to increase exponentially, swamping the pool of examiners even after expanding their ranks. So the Copyright Office will have to adopt AI in examinations. When uses of AI in the copyright examination process become standard, from self-diagnosis of uses of works in training AI to generate new works … to assess works to assess the quotients of AI in them … to handling applications including the reports of self-diagnosis from generative AI to distinguish human "conception" from autonomous artificial, the examiners will evolve into auditors of the examination process.

Adoption of AI in examination will have another dividend: reducing discretion, thus subjectivity, an inadvertent factor inhibiting subsistence creators. Guidance from the U.S. Copyright Office in considering the role of generative AI in creating a work refers to "conception" by a human being to be a critical criterion without conclusive definition of such conception in an era when digital means are pervasive among creators, as AI as well will soon be. The Office leaves the application of the notion of conception (by a human being) to "case by case". That ad hoc approach means discretion, inviting subjectivity, much more likely than not to be affected by prejudice. Losers in case by case are more often going to be subsistence creators than big corporations, having deep pockets to dicker, appeal and even go to court. Likewise, courts should adopt AI in re-examining approximations for substantial similarities, as adjudication has been inconsistent (cf https://www.dlapiper.com/en/insights/publications/intellectual-property-and-technology-news/2022/ipt-news-q4-2020/substantial-similarity-in-copyright).

CONCLUSION

The principle of treating generative AI and human beings equivalently in creation of works should prevail as far as the bounds of current law allow. In the U.S., copyright law, in tandem with trade law and other law, is largely sufficient to address generative AI. While introducing certain technicalities, eg requiring readily comprehensible logs in generative AI, into the U.S. copyright regime may be apt in the AI era, any revamp of U.S. copyright law should wait until the generative AI ecosystem coalesces. Any premature / reflexive / clumsy mucking about in the copyright regime would be likely to reinforce privileges of big companies to the relegation of subsistence originators, contrary to the intent of the copyright clause of the U.S. Constitution.